

The Notions of the Responsibility to Protect and the Protection of Civilians in Armed Conflict: Detecting Their Association and Its Impact Upon International Law

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Table of Contents

A. Introduction.....	82
B. Recent Trend to Associate R2P with POC	87
C. Common Features.....	92
D. Main Differences.....	96
E. Normative Impacts on International Law?.....	104
F. Conclusion	112

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Abstract

The article focuses on the recent trend evidenced in United Nations and State practice towards associating the responsibility to protect with the protection of civilians in armed conflict. It analyzes whether such a trend is well-founded by shedding light on the common and distinct features of the two notions. In addition, it examines the normative impacts of such association on international law, mainly on international humanitarian law since the protection of civilians in armed conflict is founded upon this law.

The article concludes that, although the responsibility to protect and the protection of civilians in armed conflict share similar features, such as the ultimate objective that they pursue and the general content of their protection, a closer look reveals significant differences between the two notions, mainly due to their specific underlying logic. It observes that their association has precisely led to export the reaction aspects peculiar to the responsibility to protect into the field of the protection of civilians in armed conflict. Such association may have the potential not only to influence the nature of the responsibility to protect by enabling it to evolve from a political to a legal concept, but also and more probably to have an impact on international humanitarian law. This could have the advantage of both clarifying and putting the accent on the possibility and necessity of coercive intervention of the international community in case of violations of the international humanitarian law rules related to the protection of civilians. However, such evolution is not without risk for this law. In particular, it may affect its neutral nature or lead to conflate the primary and collective responsibility that it provides with the ones under the responsibility to protect.

A. Introduction

The notion of Responsibility to Protect (R2P) is well-known by international lawyers. It originates from the 2001 report of the International Commission on Intervention and State Sovereignty (ICISS).¹ The Commission was established under the initiative of Canada in order to meet the serious concerns raised by the United Nations (UN) Secretary-General (SG) after the controversial NATO intervention in Kosovo in 1999. In his 2000 *Millennium Report* to the UN General Assembly (UN GA), the UN SG emphasized the problem of “respond[ing] to a Rwanda, to a Srebrenica — to gross and systematic violations

¹ International Commission on Intervention and State Sovereignty (ICISS), *The Responsibility to Protect* (2001) [ICISS, *The Responsibility to Protect*].

of human rights that offend every precept of [...] [the] humanity” if humanitarian intervention was “an unacceptable assault on sovereignty”.² The Commission proposed to substitute the broader notion of R2P with this controversial concept of humanitarian intervention. This proposition was welcomed by most non-governmental organizations (NGOs).³ As a result of the lobbying activities of those organizations,⁴ the notion of R2P developed significantly. It has been referred to in numerous documents, including binding texts: the first references appeared in the 2004 *Report of the High Level Panel on Threats, Challenges and Change*⁵ as well as in the report delivered the following year by the UN SG and entitled ‘In Larger Freedom: Towards Development, Security and Human Rights for All’.⁶ Those documents propose a very progressive approach to R2P,

² General Assembly (GA), *We the Peoples: The Role of the United Nations in the Twenty-First Century: Report of the Secretary-General*, UN Doc A/54/2000, 27 March 2000, 35, para. 217.

³ See the many roundtable consultations which have been organized with NGOs by the ICISS during the drafting of the report on the responsibility to protect (R2P). Cf. ICISS, *The Responsibility to Protect: Research, Bibliography, Background* (2001). See also roundtables organized with NGOs by the World Federalist Movement-Institute for Global Policy (WFM-IGP) on the ICISS report. WFM-IGP, ‘Civil Society Perspectives on the Responsibility to Protect: Final Report’ (30 April 2003), available at http://responsibilitytoprotect.org/files/WFM_Civil%20Society%20Perspectives%20on%20R2P_30Apr2003.pdf (last visited 15 August 2014); WFM-IGP, ‘Global Consultative Roundtables on the Responsibility to Protect: Civil Society Perspectives and Recommendations for Action’ (February-August 2008), available at <http://responsibilitytoprotect.org/files/Interim%20Report-R2P%20Roundtables%202008.pdf> (last visited 15 August 2014); WFM-IGP, ‘Global Consultative Roundtables on the Responsibility to Protect: Western African Perspectives’ (30-31 July 2008), available at <http://responsibilitytoprotect.org/files/Ghana%20Civil%20Society%20report%20--Discussion%20Draft.pdf> (last visited 15 August 2014); WFM-IGP, ‘Global Consultations on the Responsibility to Protect: Roundtable for SADC NGOs’ (29-30 April 2008), available at <http://responsibilitytoprotect.org/files/South%20Africa%20Draft%20Discussion.pdf> (last visited 15 August 2014); WFM-IGP, ‘Dialogue on the Responsibility to Protect: Latin Americas Perspectives’ (31 March-1 April 2008) (copy on file with author); WFM-IPG, ‘Prospects for an International Coalition on the Responsibility to Protect (R2P): Civil Society Consultation’ (7 March 2008), available at <http://worldfederalistscanada.org/programdocs/program4/R2PCoalCdnMtngRpt.pdf> (last visited 15 August 2014).

⁴ See on this subject R. van Steenberghe, ‘Non-state Actors’, in G. Zyberi (ed.), *An Institutional Approach to the Responsibility to Protect* (2013), 33.

⁵ GA, *A More Secure World: Our Shared Responsibility: Report of the High-Level Panel on Threats, Challenges and Change*, UN Doc A/59/565, 2 December 2004, 56-57, paras 201-203 [GA, Report of the High-Level Panel on Threats, Challenges and Change].

⁶ GA, *In Larger Freedom: Towards Development, Security and Human Rights for All: Report of the Secretary-General*, UN Doc A/59/2005, 21 March 2005, 34-35, para. 132.

the High Level Panel's report acknowledging the existence of an "emerging norm of a collective international responsibility to protect",⁷ while the ICISS report only related to an "emerging guiding principle".⁸ The most significant references, because they were evidence of a preliminary (political) agreement between States on the notion and giving a general definition to it (which clearly limits its scope to genocide, crimes against humanity, war crimes, and ethnic cleansing), are contained in the famous paragraphs 138 and 139 of the 2005 *World Summit Outcome*.⁹ This document also recommends the UN GA "to continue consideration of" the R2P.¹⁰ It is on such basis that (informal) debates are held before the UN GA¹¹ and that reports are delivered each year by the UN SG on the subject.¹² Finally, R2P is referred to in many resolutions adopted at

⁷ GA, *Report of the High-Level Panel on Threats, Challenges and Change*, *supra* note 5, 57, para. 202.

⁸ ICISS, *The Responsibility to Protect*, *supra* note 1, 15, para. 2.24.

⁹ *World Summit Outcome*, GA Res. 60/1, UN Doc A/RES/60/1, 24 October 2005.

¹⁰ *Ibid.*, 30, para. 139.

¹¹ Six informal interactive dialogues have been held before the GA: the first one in 2009 on the 'Implementation of the Responsibility to Protect'; the second one in 2010, entitled 'Early Warning, Assessment, and the Responsibility to Protect'; the third one in 2011 on the 'Role of Regional and Sub-regional Arrangements in Implementing the Responsibility to Protect'; the fourth one in 2012 on 'the Responsibility to Protect: Timely and Decisive Response'; the fifth one in 2013 on 'Responsibility to Protect: State Responsibility and Prevention'; and the sixth one in 2014 on 'Fulfilling Our Collective Responsibility: International Assistance and the Responsibility to Protect'.

¹² Six reports have been delivered on the subject, in particular on the issues addressed at the six informal interactive dialogues before the UN GA (*supra* note 11). See GA, *Implementing the Responsibility to Protect: Report of the Secretary-General*, UN Doc A/63/677, 12 January 2009; GA, *Early Warning, Assessment and the Responsibility to Protect: Report of the Secretary-General*, UN Doc A/64/864, 14 July 2010; GA & SC, *The Role of Regional and Sub-Regional Arrangements in Implementing the Responsibility to Protect: Report of the Secretary-General*, UN Doc A/65/877-S/2011/393, 28 June 2011; GA & SC, *Responsibility to Protect: Timely and Decisive Response: Report of the Secretary-General*, UN Doc A/66/874-S/2012/578, 25 July 2012 [GA & SC, Responsibility to Protect: Timely and Decisive Response]; GA & SC, *Responsibility to Protect: State Responsibility and Prevention: Report of the Secretary-General*, UN Doc A/67/929-S/2013/399, 9 July 2013; and GA & SC, *Fulfilling Our Collective Responsibility: International Assistance and the Responsibility to Protect: Report of the Secretary-General*, UN Doc A/68/947-S/2014/449, 11 July 2014, respectively.

the UN level,¹³ in particular by the UN Security Council (UN SC),¹⁴ on specific crises or general thematic issues such as the Protection of Civilians in Armed Conflict (POC), besides being frequently discussed by States in the UN SC debates on POC.¹⁵

As will be discussed later,¹⁶ such practice actually evidences a clear trend towards associating R2P with POC. Quite unsurprisingly, the POC thematic issue is also the result of a Canadian initiative. When sitting as the UN SC President, every State may propose to the members of the Council a focus on a specific thematic topic. Canada took the occasion of its presidency in February 2009 to propose the issue of POC.¹⁷ This proposal was largely welcomed by the other UN SC members. Therefore, since February 1999, the UN SC has generally met twice a year in order to discuss the protection of civilians in armed conflict. Several resolutions have been adopted by this body on that subject¹⁸ and it has referred to POC in many resolutions dealing with specific crises. In May 2012, the UN SG delivered his ninth report on the subject which refers to five core challenges:

“enhancing compliance by parties to conflict with international law; enhancing compliance by non-state armed groups; enhancing

¹³ See, e.g., in addition to UN SC resolutions (*infra* note 14), GA Res. 66/176, UN Doc A/RES/66/176, 23 February 2011, 2 (operative part 2) and GA Res. 66/253, UN Doc A/RES/66/253, 21 February 2012, 2 (operative part 3) as well as Human Rights Council (HRC) Res. S-16/1, UN Doc A/HRC/RES/S-16/1, 4 May 2011, 2 (operative part 1); HRC Res. S-18/1, UN Doc A/HRC/RES/S-18/1, 5 December 2011, 2 (operative part 3); and HRC Res. S-19/1, UN Doc A/HRC/RES/S-19/1, 4 June 2012, 2 (operative part 5) (on the situation in Syria). See also HRC Res. S-15/1, UN Doc A/HRC/RES/S-15/1, 3 March 2011, 2 (operative part 2) (on the situation in Libya).

¹⁴ See, e.g., in addition to resolutions mentioned below (*infra* section B.), SC Res. 2014, UN Doc S/RES/2014 (2011), 21 October 2011, 2 (Preamble, part 14) (on the situation in Yemen); SC Res. 2016, UN Doc S/RES/2016 (2011), 27 October 2011, 2 (operative part 3); and SC Res. 2040, UN Doc S/RES/2040 (2012), 12 March 2012, 3 (operative part 4) (on the situation in Libya); SC Res. 2085, UN Doc S/RES/2085 (2011), 20 December 2011, 4 (operative part 9 (d)) (on the situation in Mali).

¹⁵ See especially *infra* section B.

¹⁶ *Ibid.*

¹⁷ SC, *Verbatim Record of the 3977th Meeting*, UN Doc S/PV.3977, 12 February 1999, 33 (declaration of Canada).

¹⁸ See, e.g., SC Res. 1265, UN Doc S/RES/1265 (1999), 17 September 1999; SC Res. 1296, UN Doc S/RES/1296 (2000), 19 April 2000; SC Res. 1674, UN Doc S/RES/1674 (2006), 28 April 2006; and SC Res. 1894, UN Doc S/RES/1894 (2009), 11 November 2009 (in addition to the numerous statements of the UN SC President).

protection by United Nations peacekeeping and other relevant missions; improving humanitarian access; and enhancing accountability for violations”.¹⁹

Even if the questions addressed under POC have slightly evolved since 1999,²⁰ international law, in particular international humanitarian law (IHL), remains the central pillar of this thematic issue.²¹

Although the association of R2P with POC is clearly apparent in recent practice, this phenomenon has only been studied by political scientists²² but not by lawyers.²³ Much of the legal scholarship indeed focuses on two main issues regarding R2P: the normative nature of this concept²⁴ and the relationships

¹⁹ SC, *Report of the Secretary-General on the Protection of Civilians in Armed Conflict*, UN Doc S/2012/376, 22 May 2012, 1, para. 3 [Report of the Secretary-General on the Protection of Civilians in Armed Conflict, UN Doc S/2012/376].

²⁰ See in this respect the issues addressed by the UN Secretary-General (SG) in its first report on the subject. SC, *Report of the Secretary-General to the Security Council on the Protection of Civilians in Armed Conflict*, UN Doc S/1999/957, 9 September 1999 [SC, Report of the Secretary-General on the Protection of Civilians in Armed Conflict, UN Doc S/1999/957].

²¹ See *infra* section D.

²² See, e.g., J.-F. Thibault, ‘Protection des civils et responsabilité de protéger: Les enjeux humanitaires d’une séparation du jus in bello et du jus ad bellum’, 94 *Bulletin du Maintien de la Paix* (2009), 1; B. Pouligny, ‘La responsabilité de protéger (r2p): état des débats’, *Humanitaire en mouvement* (2010) 5, 2. See also H. E. Breakey, ‘Protection Norms and Human Rights: A Rights-Based Analysis of the Responsibility to Protect and the Protection of Civilians in Armed Conflict’, 4 *Global Responsibility to Protect* (2012) 3, 309 [Breakey, Protection Norms and Human Rights]; H. E. Breakey & A. Francis, ‘Points of Convergence and Divergence: Normative, Institutional and Operational Relationships Between R2P and PoC’, 7 *Security Challenges* (2011) 4, 39; H. E. Breakey *et al.*, ‘Enhancing Protection Capacity: Policy Guide to the Responsibility to Protect and the Protection of Civilians in Armed Conflicts’, available at http://i.unu.edu/media/unu.edu/publication/31142/R2P_POC_Policy_Guide.pdf (last visited 15 August 2014).

²³ See the only exception of L. Poli, ‘The Responsibility to Protect Within the Security Council’s Open Debates on the Protection of Civilians: A Growing Culture of Protection’, in J. Hoffmann & A. Nollkaemper (eds), *Responsibility to Protect: From Principle to Practice* (2012), 71. However, this study is brief and mainly concerned with the influence of R2P upon the POC discourse in the UN SC debates on POC.

²⁴ See, e.g., L. Boisson de Chazournes & L. Condorelli, ‘De la “Responsabilité de protéger”, ou d’une nouvelle parure pour une notion déjà bien établie’, 110 *Revue générale de droit international public* (2006) 1, 11, 14; D. Warner & G. Giacca, ‘Responsibility to Protect’, in V. Chetail (ed.), *Post-Conflict Peacebuilding: A Lexicon* (2009), 291; J. Sarkin, ‘Is the Responsibility to Protect an Accepted Norm of International Law in the Post-Libya Era?’, 1 *Groningen Journal of International Law* (2012) 0, 11.

between R2P and humanitarian intervention.²⁵ Lawyers have quite neglected examining this recent trend to link R2P to POC, though this may have an impact not only on each of these notions but also on international law, in particular IHL as POC is mainly based on this law. This article intends to address those issues from a legal perspective. It will be first devoted to analyzing UN and State practice – mainly the UN SC resolutions and the State declarations made at the UN SC meetings on POC – which evidences this recent trend to associate R2P with POC (section B.). The following parts will emphasize the common (section C.) and distinct (section D.) features of the two concepts. Finally, the potential normative impacts of this association, mainly on IHL, will be analyzed (section E.).

The article, therefore, differentiates itself from the broad literature on the subject regarding two main aspects. Firstly, the recent trend to associate R2P with POC is studied from the viewpoint of a lawyer, following a legal approach which mainly focuses on UN and State practice and refers to the international instruments and customary law when relevant. Secondly, the article aims at analyzing the direct influence of this recent trend on international law. It emphasizes that this phenomenon may have the potential of not only influencing the nature of the responsibility to protect by enabling it to evolve from a political to a legal concept, but also and more probably to have an impact on IHL. It concludes in this respect that, although such evolution could have the advantage of both clarifying and putting the accent on the necessity of coercive intervention of the international community in case of violations of the IHL rules related to the protection of civilians, it is not without risk for this law, as it may affect its neutral nature or lead to conflate the primary and collective responsibility that it provides with the ones under the responsibility to protect.

B. Recent Trend to Associate R2P with POC

The first time that R2P was mentioned in a UN SC resolution was in a resolution devoted to POC, i.e. *Resolution 1674* (2006), which was adopted not long after the recognition of R2P in the 2005 UN *World Summit Outcome*. This link between the two notions again appeared some months later in

²⁵ See, e.g., O. Corten, *Le droit contre la guerre: L'interdiction du recours à la force en droit international contemporain* (2010), 769; E. Massingham, 'Military Intervention for Humanitarian Purposes: Does the Responsibility to Protect Doctrine Advance the Legality of the Use of Force for Humanitarian Ends?', 91 *International Review of the Red Cross* (2009) 876, 831.

Resolution 1706 (2006), dealing with the situation in Darfur, in which the UN SC recalled, among its relevant previous resolutions, *Resolution 1674* (2006) “on the protection of civilians in armed conflict, which reaffirms inter alia the provisions of paragraphs 138 and 139 of the 2005 United Nations *World Summit Outcome*.”²⁶ The last substantial UN SC resolution adopted on POC after 2005, i.e. *Resolution 1894* (2005), is even more explicit on the link between R2P and POC. *Resolution 1894* (2005) expressly considers paragraphs 138 and 139 of the 2005 UN *World Summit Outcome* as being part of “the relevant provisions of [this document] regarding the protection of civilians in armed conflict”.²⁷ Such a link is also noticeable in recent UN SC resolutions related to specific crises, namely the ones on the situation in Libya, *Resolution 1970* (2011) and *Resolution 1973* (2011), and the one on the situation in the Ivory Coast, *Resolution 1975* (2011). In each of these resolutions R2P is clearly associated with POC. Both notions are reaffirmed in the same paragraph of the preamble, which is formulated in a similar way.

This is actually in line with declarations made by States before the UN SC during the POC debates. Most States associate the two concepts. Some do it implicitly²⁸ while others do so explicitly. Among the latter, States like Sweden

²⁶ SC Res. 1706, UN Doc S/RES/1706 (2006), 31 August 2006, 1 (Preamble, part. 2) (emphasis added).

²⁷ SC Res. 1894, *supra* note 18, 1 (Preamble, part. 7).

²⁸ See, e.g., SC, *Verbatim Record of the 5703rd Meeting*, UN Doc S/PV.5703, 22 June 2007, 8 (declaration of Panama); *ibid.*, 17 (declaration of Congo); *ibid.*, 31 (declaration of Mexico); SC, *Verbatim Record of the 5781st Meeting*, UN Doc S/PV.5781, 20 November 2007, 7 (declaration of Belgium, on behalf of the European Union); SC, *Verbatim Record of the 6216th Meeting*, UN Doc S/PV.6216 (Resumption 1), 11 November 2009, 25-26 (declaration of Belgium); SC, *Verbatim Record of the 6066th Meeting*, UN Doc S/PV.6066 (Resumption 1), 14 January 2009, 17 (declaration of Australia); SC, *Verbatim Record of the 5781st Meeting*, UN Doc S/PV.5781 (Resumption 1), 20 November 2007, 14 (declaration of Australia); SC, *Verbatim Record of the 6066th Meeting*, UN Doc S/PV.6066, 14 January 2009, 28 (declaration of Italy); SC, *Verbatim Record of the 6066th Meeting*, UN Doc S/PV.6066 (Resumption 1), *supra* this note, 14 (declaration of Finland, on behalf of Denmark, Iceland, Norway, Sweden); SC, *Verbatim Record of the 6151st Meeting*, UN Doc S/PV.6151, 26 June 2009, 23 (declaration of the United States); SC, *Verbatim Record of the 6216th Meeting*, UN Doc S/PV.6216, 11 November 2009, 15 (declaration of France); SC, *Verbatim Record of the 6427th Meeting*, UN Doc S/PV.6427 (Resumption 1), 22 November 2009, 20 (declaration of Ghana); and SC, *Verbatim Record of the 6790th Meeting*, UN Doc S/PV.6790, 25 June 2012, 23 (declaration of Germany). For declarations which evidence more clearly that R2P is considered as an element of the POC thematic issue, see, e.g., SC, *Verbatim Record of the 5703rd Meeting*, UN Doc S/PV.5703, *supra* this note, 8 (declaration of Peru); *ibid.*, 20 (declaration of Ghana);

and the United Kingdom expressly consider R2P as one of the key elements of the POC normative framework.²⁹ This position actually coincides with the one supported by the UN SG in his 2007 report on POC. The report indeed indicates, under a section entitled ‘Advances in the normative framework [of POC]’, that

“[o]f particular significance was the acceptance by all Member States at the 2005 World Summit of a fundamental ‘responsibility to protect’ [as this] represents a critically important affirmation of the primary responsibility of each State to protect its citizens and persons within its jurisdiction from genocide, war crimes, ethnic cleansing and crimes against humanity”.³⁰

In fact, the report largely contributed to this recent trend in State declarations associating R2P with POC. Some States also expressly argue in favor of such association. Ireland, for example, stated before the UN SC in 2009 that it viewed R2P “as an extremely important vehicle for advancing the work on the protection of civilians in armed conflict”.³¹ Similarly, Rwanda asserted at the same meeting that it

“view[ed] the responsibility to protect as being integral to the protection of civilians, and welcome[d] the reference to the responsibility to protect in [...] resolution [1894]”.³²

SC, *Verbatim Record of the 5781st Meeting*, UN Doc S/PV.5781, *supra* this note, 10-11 (declaration of Panama); *ibid.*, 14 (declaration of South Africa); SC, *Verbatim Record of the 5781st Meeting*, UN Doc S/PV.5781 (Resumption 1), *supra* this note, 16 (declaration of Liechtenstein); SC, *Verbatim Record of the 6531st Meeting*, UN Doc S/PV.6531, 10 May 2011, 20 (declaration of Nigeria); and SC, *Verbatim Record of the 6531st Meeting*, UN Doc S/PV.6531 (Resumption 1), 10 May 2011, 15 (declaration of Croatia).

²⁹ SC, *Verbatim Record of the 6216th Meeting*, UN Doc S/PV.6216, *supra* note 28, 30 (declaration of Sweden); SC, *Verbatim Record of the 5781st Meeting*, UN Doc S/PV.5781, *supra* note 28, 12 (declaration of the United Kingdom).

³⁰ SC, *Report of the Secretary-General on the Protection of Civilians in Armed Conflict*, UN Doc S/2007/643, 28 October 2007, 4, para. 11.

³¹ SC, *Verbatim Record of the 6216th Meeting*, UN Doc S/PV.6216 (Resumption 1), *supra* note 28, 19 (declaration of Ireland).

³² *Ibid.*, 53 (declaration of Rwanda). See also SC, *Verbatim Record of the 6066th Meeting*, UN Doc S/PV.6066 (Resumption 1), *supra* note 28, 6 (declaration of Belgium); SC, *Verbatim Record of the 6216th Meeting*, UN Doc S/PV.6216, *supra* note 28, 31 (declaration of Italy); SC, *Verbatim Record of the 6427th Meeting*, UN Doc S/PV.6427, 22 November

Finally, some States clearly emphasize the common features of the two notions. The Netherlands' declaration at an UN SC meeting in May 2011 is particularly illustrative in that regard. This declaration is entirely devoted, according to the representative's words, to the "the relationship between the protection of civilians and the responsibility to protect, which is an important relationship that has been acknowledged in various resolutions on the protection of civilians in recent years".³³ After having underlined that "[c]onceptually, the responsibility to protect and the protection of civilians are indeed distinct", the representative nonetheless stated that "the two principles [were] also closely related", before concluding that

"[t]he language of the recent resolutions on Libya acknowledge[d] the very close relationship between the protection of civilians and the responsibility to protect [...], [t]he Netherlands [being] very pleased about that".³⁴

It is true that some States, like China³⁵ and Russia³⁶, argue for a very strict conception of R2P – conforming to the 2005 UN *World Summit Outcome* – when considering it in the framework of the POC debates and warned against any political use of this notion in relation to the protection of civilians in armed conflict.³⁷ However, R2P is still considered by those States as an element – although controversial – of the POC framework.

2009, 29 (declaration of Italy); and SC, *Verbatim Record of the 6650th Meeting*, UN Doc S/PV.6650 (Resumption 1), 9 November 2011, 13 (declaration of Norway) (the latter stating that "protection of civilians cannot be seen in isolation from the principle of the responsibility to protect").

³³ SC, *Verbatim Record of the 6531st Meeting*, UN Doc S/PV.6531 (Resumption 1), *supra* note 28, 23 (declaration of the Netherlands).

³⁴ *Ibid.*, 24 (declaration of the Netherlands).

³⁵ See SC, *Verbatim Record of the 5781st Meeting*, UN Doc S/PV.5781, *supra* note 28, 10 (declaration of China); SC, *Verbatim Record of the 6531st Meeting*, UN Doc S/PV.6531, *supra* note 28, 20 (declaration of China); and SC, *Verbatim Record of the 6650th Meeting*, UN Doc S/PV.6650, 9 November 2011, 24-25 (declaration of China).

³⁶ See SC, *Verbatim Record of the 6790th Meeting*, UN Doc S/PV.6790, *supra* note 28, 21-22 (declaration of Russia).

³⁷ See also SC, *Verbatim Record of the 5703rd Meeting*, UN Doc S/PV.5703, *supra* note 28, 11 (declaration of Qatar); SC, *Verbatim Record of the 5781st Meeting*, UN Doc S/PV.5781, *supra* note 28, 18 (declaration of Qatar); SC, *Verbatim Record of the 6066th Meeting*, UN Doc S/PV.6066 (Resumption 1), *supra* note 28, 34-35 (declaration of Sudan); SC, *Verbatim Record of the 6216th Meeting*, UN Doc S/PV.6216 (Resumption 1), *supra* note

That said, more recently, several States expressly opposed any association of R2P with POC. They argue for a clear distinction between the two notions. Brazil, for example, stated before the UN SC in May 2011 that

“[t]he protection of civilians is a humanitarian imperative [and that it] is a distinct concept [which] must not be confused or conflated with threats to international peace and security, as described in the Charter, or with the responsibility to protect”.³⁸

Interestingly, contrary to his 2007 report on POC,³⁹ the UN SG strongly emphasized the necessity of distinguishing between R2P and POC in his 2012 report on the subject. In this report he asserted that he was “concerned about the continuing and inaccurate conflation of the concepts of the protection of civilians and the responsibility to protect”, arguing that

“[w]hile the two concepts share some common elements, particularly with regard to prevention and support to national authorities in discharging their responsibilities towards civilians, there are fundamental differences, [including the fact that] the protection of civilians is a legal concept based on international humanitarian, human rights and refugee law, while the responsibility to protect is a political concept, set out in the 2005 *World Summit Outcome* [...]”.⁴⁰

28, 42 (declaration of Sudan); SC, *Verbatim Record of the 6427th Meeting*, UN Doc S/PV.6427 (Resumption 1), *supra* note 28, 26 (declaration of Sudan); SC, *Verbatim Record of the 6650th Meeting*, UN Doc S/PV.6650 (Resumption 1), *supra* note 32, 24 (declaration of Sudan). See also SC, *Verbatim Record of the 6790th Meeting*, UN Doc S/PV.6790, *supra* note 28, 10 (declaration of Guatemala).

³⁸ SC, *Verbatim Record of the 6531st Meeting*, UN Doc S/PV.6531, *supra* note 28, 11 (declaration of Brazil). See also SC, *Verbatim Record of the 5781st Meeting*, UN Doc S/PV.5781 (Resumption 1), *supra* note 28, 24 (declaration of Colombia); SC, *Verbatim Record of the 6354th Meeting*, UN Doc S/PV.6354 (Resumption 1), 7 July 2010, 21 (declaration of Venezuela); SC, *Verbatim Record of the 6531st Meeting*, UN Doc S/PV.6531 (Resumption 1), *supra* note 28, 28-29 (declaration of Syria); SC, *Verbatim Record of the 6650th Meeting*, UN Doc S/PV.6650 (Resumption 1), *supra* note 32, 27 (declaration of Syria).

³⁹ Cf. *supra* note 30.

⁴⁰ SC, *Report of the Secretary-General on the Protection of Civilians in Armed Conflict*, UN Doc S/2012/376, *supra* note 19, 5-6, para. 21 (emphasis added).

Such a change is certainly due to the vigorous criticisms by some States of the 2011 military intervention in Libya which was based, as indicated above, on a resolution associating the two concepts and interpreted by some States as an application of R2P⁴¹ while by others as an application of POC.⁴² It is therefore necessary to examine whether the recent trend of associating the two concepts is well-founded by analyzing the common and distinct features of those concepts.

C. Common Features

R2P and POC undoubtedly share several common features. Only the main ones will be discussed in the following paragraphs. The first and most evident common feature is that they both serve the protection of persons. They pursue the same final objective, to avoid civilian populations from being seriously harmed. Actually, they are both related to this trend of protecting individuals, historically rooted in IHL. This does not however mean that R2P is directly founded upon IHL (or *jus in bello*). As will be detailed below,⁴³ R2P is intrinsically linked to the notions of sovereignty and intervention and therefore belongs to *jus ad bellum*, which is classically separated from IHL, while the latter is both the ultimate and direct basis of POC. That said, in addition to the fact that those two branches of international law are somewhat interconnected, particularly regarding the protection of civilians,⁴⁴ and that R2P also includes other aspects than use of force, such as the prevention of armed conflicts, one must acknowledge, as rightly noted by an author, that

“the very starting point of the meaning embodied in the formula ‘responsibility to protect’ is clearly to be found in international humanitarian law, the latter operating as a legal experimentation

⁴¹ For such interpretation see, e.g., SC, *Verbatim Record of the 6650th Meeting*, UN Doc S/PV.6650 (Resumption 1), *supra* note 32, 26 (declaration of Venezuela).

⁴² For such interpretation, see, e.g., SC, *Verbatim Record of the 6650th Meeting*, UN Doc S/PV.6650, *supra* note 35, 19-20 (declaration of France); *ibid.*, 20 (declaration of the United States of America), *ibid.*, 22 (declaration of South Africa); SC, *Verbatim Record of the 6650th Meeting*, UN Doc S/PV.6650 (Resumption 1), *supra* note 32, 7 (declaration of Canada) and *ibid.*, 16 (declaration of Chile).

⁴³ See *infra* section D.

⁴⁴ See, e.g., R. van Steenberghe, ‘L’emploi de la force en Libye: Questions de droit international et de droit interne’, 26 *Journal des tribunaux* (2011), 529, 535-536. See also V. Koutroulis, ‘Jus ad/contra bellum’, in R. van Steenberghe (ed.), *Droit international humanitaire: Un régime spécial de droit international?* (2013) [van Steenberghe, Droit international humanitaire], 157, 183-187.

platform within which several new concepts of contemporary international law have been elaborated and have moved towards other fields of this law, like human rights law or, very recently, international criminal law”.⁴⁵

A second important common feature is that R2P and POC involve a similar continuum of actions. They both include prevention, reaction, and rebuilding aspects. This is manifest with respect to R2P, at least in the 2001 ICISS report. Although it is true that the 2005 UN *World Summit Outcome* and the UN SG reports on the subject no longer insist on the rebuilding aspects, State declarations evidence that those aspects are still considered as an important part of R2P. A similar distinction between prevention, reaction and rebuilding aspects is also a characteristic of POC. This is evidenced by UN SC resolutions⁴⁶ and State declarations⁴⁷ on the matter. As far as prevention is concerned, UN SC resolutions on POC insist on a global approach to the problem, taking into account both the immediate and remote causes of armed conflicts. This is clearly apparent in *Resolution 1674* (2005), adopted in the framework of the POC debates. In operative part 2, the UN SC

“[e]mphasizes the importance of preventing armed conflict and its recurrence, and stresses in this context the need for a comprehensive approach through promoting economic growth, poverty eradication, sustainable development, national reconciliation, good governance, democracy, the rule of law, and respect for, and protection of, human rights [...]”.⁴⁸

The same approach seems to be followed by the ICISS in its 2001 report which emphasizes the need to address the root and direct causes of armed conflicts⁴⁹ and expressly refers in that regard to the 2001 UN SG report on the prevention of armed conflicts.⁵⁰ That prevention is actually one of the main common features of R2P and POC is also evidenced by the recent merger of the Special Advisor on the Prevention of Genocide, whose main activity is related

⁴⁵ Boisson de Chazournes & Condorelli, *supra* note 24, 14 (translation by the author).

⁴⁶ See, e.g., SC Res. 1674, *supra* note 18, 2 (operative part 2).

⁴⁷ See, e.g., *infra* note 52.

⁴⁸ SC Res. 1674, *supra* note 18, 2 (operative part 2).

⁴⁹ ICISS, *The Responsibility to Protect*, *supra* note 1, 22-23, paras 3.18-3.24 & 23 *et seq.* & 3.25 *et seq.*

⁵⁰ *Ibid.*, 19, para. 3.5.

to the prevention of armed conflicts, with the Office of the Special Advisor on the Responsibility to Protect.⁵¹ Finally, this common aspect is emphasized by States in their declarations at UN SC meetings on POC; the representative of the Netherlands, for example, stated in May 2011 that “prevention and early warning [were] key aspects of the protection of civilians and the responsibility to protect”⁵² which constituted one of the four main common characteristics of the two notions.⁵³ However, the reaction and rebuilding aspects are not absent from the POC thematic issue. In each of the UN SC resolutions on this issue, the Council recalls that it may take any appropriate measure under the *UN Charter* when civilians are directly targeted in armed conflict and that such a situation may amount to a threat to international peace and security.⁵⁴ This aspect was already mentioned in the first UN SG report on POC⁵⁵ and discussed by States at the first UN SC meeting on POC.⁵⁶ Similarly, all the UN SC resolutions on that subject contain aspects pertaining to rebuilding. Although they do not establish a general framework regarding such aspects, contrary to what they do concerning the other ones, those resolutions mention several measures in that regard. They regularly insist on the necessity of including provisions regarding disarmament, demobilization, and reinsertion of ex-combatants in

⁵¹ See generally International Coalition for the Responsibility to Protect, ‘Joint Office of the Special Advisor on the Prevention of Genocide and on the Responsibility to Protect’, available at <http://responsibilitytoprotect.org/index.php/component/content/article/3618> (last visited 15 August 2014).

⁵² SC, *Verbatim Record of the 6531st Meeting*, UN Doc S/PV.6531 (Resumption 1), *supra* note 28, 24 (declaration of the Netherlands). See also SC, *Verbatim Record of the 6531st Meeting*, UN Doc S/PV.6531, *supra* note 28, 14 (declaration of Portugal) (stating that “[p]reventive measures are core elements of resolution 1894 (2009) and important pillars of the responsibility to protect”).

⁵³ SC, *Verbatim Record of the 6531st Meeting*, UN Doc S/PV.6531 (Resumption 1), *supra* note 28, 24 (declaration of the Netherlands).

⁵⁴ See, e.g., SC Res. 1265, *supra* note 18, 3 (operative part 10); SC Res. 1296, *supra* note 18, 2 (operative parts 5 & 8); SC Res. 1674, *supra* note 18, 5 (operative part 26); and SC Res. 1894, *supra* note 18, 3 (operative parts 3 & 4).

⁵⁵ SC, *Report of the Secretary-General on the Protection of Civilians in Armed Conflict*, UN Doc S/1999/957, *supra* note 20, 24, para. 72.

⁵⁶ See, e.g., SC, *Verbatim Record of the 3977th Meeting*, UN Doc S/PV.3977, *supra* note 17, 15 (declaration of Russia).

peace agreements.⁵⁷ They always contain international criminal law provisions,⁵⁸ recalling in particular the duty to bring those responsible for international crimes to justice.⁵⁹

Both POC and R2P also involve a similar continuum of responsibilities, which includes the primary responsibility of States to protect their population, the responsibility of the international community *sensu lato* (i.e. the United Nations and other actors) to assist States to protect their population, and, finally, the responsibility of the international community *sensu stricto* (i.e. mainly the UN SC) to react when States do not fulfill their primary responsibility and do not accept any help in that regard. These are the famous three R2P pillars. It is true that this continuum of responsibilities is not so apparent in the POC field. Yet, as discussed in detail below,⁶⁰ State declarations on that matter clearly show that, although the accent was originally put on the primary responsibility of States to protect civilians and the responsibility of the United Nations to assist those States in fulfilling this primary responsibility, the responsibility to react (mainly borne by the UN SC) was asserted later, precisely under the influence of R2P.

Finally, the last common feature concerns the scope of application of the two notions which partially overlap: *ratione personae* firstly, since both notions deal with protection of civilians by the States and the international community; *ratione materiae* secondly, as they protect those persons against violations of IHL and human rights law; and *ratione contextus* thirdly, because they both apply to armed conflicts, R2P being indeed applicable, not only in case of genocide, crimes against humanity, and ethnic cleansing, i.e. crimes which are not legally required to be committed in armed conflict, but also in case of war crimes, which consist of serious violations of the law of armed conflict by individuals.⁶¹

⁵⁷ See, e.g., SC Res. 1265, *supra* note 18, 3-4 (operative part 12); SC Res. 1296, *supra* note 18, 3 (operative part 16); SC Res. 1674, *supra* note 18, 4 (operative part 18); and SC Res. 1894, *supra* note 18, 7 (operative part 29).

⁵⁸ See, e.g., SC Res. 1265, *supra* note 18, 3 (operative part 6); SC Res. 1296, *supra* note 18, 3 (operative part 17); SC Res. 1674, 3, *supra* note 18 (operative part 8); and SC Res. 1894, *supra* note 18, 4 (operative part 10).

⁵⁹ This is actually common to all the notions dealing with rebuilding aspects, such as the notions of transitional justice (see on this subject A.-M. La Rosa & X. Philippe, 'Transitional Justice', in Chetail (ed.), *supra* note 24, 373) or *jus post bellum* (see on this subject C. Stahn, 'Jus post Bellum: Mapping the Discipline(s)', 23 *American University International Law Review* (2008) 2, 311, 336 *et seq.*).

⁶⁰ Cf. *infra* section D.

⁶¹ The UN SC or UN GA resolutions referring to R2P often emphasizes the existence of grave violations of IHL and human rights. See generally *supra* note 13 and, for a clear

D. Main Differences

Although R2P and POC share similar features, a closer look reveals significant differences between the two notions. Firstly, the logic that they follow for achieving their common objective, i.e. the protection of persons, is not the same given their different starting point and nature. It is well-known that the objective of the creation of the R2P concept – clearly acknowledged by the ICISS⁶² – was to find a more acceptable notion than humanitarian intervention by not opposing, as the latter does, intervention to sovereignty. This was done by inverting the relation between these apparently conflicting notions and by rooting the notion of intervention in sovereignty: R2P is considered as primarily borne by States as a corollary of their sovereignty, which makes it possible to support that if a State is unwilling or unable to fulfill this primary responsibility and, therefore, to fully exercise its sovereignty over its territory, the international community can (and even must) legitimately intervene. By doing so, it intends to provide a right (and even impose an obligation) to take action and, if needed, to use force. The international community is moreover led to be one-sided with respect to the situation of violence in which it intervenes as it acts against the actor that it considers as being responsible for the mass atrocities in this situation. Therefore, as intrinsically linked to sovereignty and to the notion of intervention (*jus ad bellum*), as well as requiring to be one-sided in relation to the situation of violence at stake, R2P logically has a more political nature and is subject to controversies.

It is not the case of POC, which is directly founded upon IHL (*jus in bello*) and human rights law. This is clearly evidenced by all the UN SG reports and UN SC resolutions on POC. Many States have also underlined this fundamental link between POC and international law by asserting for example that “[t]he numerous topics of direct relevance to the protection of civilians have one thing in common [,] the central role of international law and its application”⁶³ or that “[w]hen we talk about the protection of civilians, we generally speak about an attachment to legality and respect for international law, in particular international humanitarian law and human rights”⁶⁴ or again

example of the application of R2P in relation to war crimes, GA Res. 67/262, UN Doc. A/RES/67/262, 4 June 2013, 4 (operative part 4) (concerning the situation in Syria).

⁶² See the ICISS, *The Responsibility to Protect*, *supra* note 1, 16-17, paras 2.28 & 2.29.

⁶³ SC, *Verbatim Record of the 5781st Meeting*, UN Doc S/PV.5781 (Resumption 1), *supra* note 28, 16 (declaration of Liechtenstein).

⁶⁴ SC, *Verbatim Record of the 6066th Meeting*, UN Doc S/PV.6066, *supra* note 28, 7 (declaration of Costa Rica).

that “[t]he concept of the protection of civilians is founded on the universally accepted rules of humanitarian and human rights law, which are set down in a range of international legal instruments”.⁶⁵

As firmly founded upon law, mainly legal obligations to abstain from doing something, whose implementation must conform to a principle of neutrality in relation to the situation of violence to which this law applies, POC appears as an objective and neutral notion, or even as being itself a legal concept as expressly asserted by the UN SG in his 2012 report on the subject.⁶⁶

A second significant distinct feature is concerned with the continuum of actions characterizing the two notions. It is undisputed, as already mentioned, that both notions involve prevention, reaction, and rebuilding aspects and similarly focus on prevention while containing fewer developments on rebuilding activities. There is, however, a significant difference between the two notions regarding the reaction aspects. While R2P reaction includes, in accordance with the ICISS report,⁶⁷ any ‘coercive’ military intervention, POC reaction aspects are mainly concerned with peacekeeping operations, originally construed and presented as neutral and impartial operations. In fact, peacekeeping operations are one of the main components of the POC thematic issue. Indeed, since the creation of UNAMSIL (United Nations Mission in Sierra Leone) in 1999, a UN peacekeeping operation which was for the first time mandated to protect civilians under imminent threat of physical violence,⁶⁸ many UN operations have now been given this kind of mandate. UN SC *Resolution 1296* (2000) is the first text to insist in general terms on the necessity to include such a protective mission in the UN operations’ mandates.⁶⁹ This practice therefore clearly existed before the emergence of the R2P concept and, as a result, was not originally related to that concept. Nowadays, UN institutions and States generally take care not to link R2P to the field of peacekeeping operations or at

⁶⁵ SC, *Verbatim Record of the 6427th Meeting*, UN Doc S/PV.6427, *supra* note 32, 22-23 (declaration of Armenia).

⁶⁶ SC, *Report of the Secretary-General on the Protection of Civilians in Armed Conflict*, UN Doc S/2012/376, *supra* note 19, 5-6, para. 21.

⁶⁷ See ICISS, *The Responsibility to Protect*, *supra* note 1, 31-32.

⁶⁸ SC Res. 1270, S/RES/1270, 22 October 1999 (1999), 3 (operative part 14).

⁶⁹ See, e.g., P. d’Argent, ‘Opérations de protection et opérations de maintien de la paix’, in Société Française pour le Droit International (ed.), *La responsabilité de protéger* (2008), 137. See also the numerous resolutions quoted by the author.

least remain particularly cautious in that regard.⁷⁰ The 2012 UN SG report on R2P indicates in this way that

“[w]hile the work of peacekeepers may contribute to the achievement of R2P goals, the two concepts of the responsibility to protect and the protection of civilians have separate and distinct prerequisites and objectives”.⁷¹

Yet it is true that some UN documents evidence an embryonic evolution in that respect, particularly regarding peacekeeping operations authorized by the UN SC to use force under Chapter VII and in having a protective mandate. One of the main documents in that regard is the ‘UN System-Wide Strategy for the Protection of Civilians in the Democratic Republic of the Congo’, which was drafted in order to take “into account the need to reconcile and integrate MONUC’s mandate to protect civilians with its mandate to support the operations of the [DRC armies]”.⁷²

⁷⁰ See for a similar observation H. E. Breakey, ‘The Responsibility to Protect and the Protection of Civilians in Armed Conflict: Overlap and Contrast’, in A. Francis, V. Popovski & Charles Sampford (eds), *Norms of Protection: Responsibility to Protect, Protection of Civilians and Their Interaction* (2012), 62, 74 [Breakey, The Responsibility to Protect].

⁷¹ GA & SC, *Responsibility to Protect: Timely and Decisive Response*, *supra* note 12, 5, para. 16. See also the famous 2009 independent study on the protection of civilians in the context of the UN peacekeeping operations, jointly commissioned by the Department of Peacekeeping Operations and the Office for the Coordination of Humanitarian Affairs (V. Holt & G. Taylor, ‘Protecting Civilians in the Context of UN Peacekeeping Operations: Successes, Setbacks and Remaining Challenges’, available at <http://peacekeepingbestpractices.unlb.org/pbeps/Library/Protecting%20Civilians%20in%20the%20Context%20of%20UN%20PKO.pdf> (last visited 15 August 2014)). This study indicates that “[it] does not aim to define or discuss the related but yet separated concept of a ‘responsibility to protect’ [...]” (*Ibid.*, 21). As emphasized by B. Pouligny (*supra* note 22, 5), “the study takes care of not putting the responsibility to protect as a central point, since most of the actors engaged in the discussions on the field of peacekeeping operations fear that the responsibility to protect brings confusion and calls into question the progress made in that field” (translation by the author).

⁷² United Nations Organization Mission in the Democratic Republic of Congo (MONUC) & UN Office of the High Commissioner for Human Rights, ‘UN System-Wide Strategy for the Protection of Civilians in the Democratic Republic of the Congo’ (January 2010), available at http://globalprotectioncluster.org/_assets/files/field_protection_clusters/Democratic_Republic_Congo/files/UN_Wide_Protection_Strategy_Final_150110_EN.pdf (last visited 15 August 2014), 1, para. 2.

This document expressly refers to R2P and discusses it in three paragraphs under a section entitled 'Rationale and the Responsibility to Protect'.⁷³ Yet, this is the only document to explicitly and elaborately refer to R2P in relation to peacekeeping operations.

It is certainly with respect to the continuum of responsibilities, which characterizes both R2P and POC, that the difference between the two notions appears as the most fundamental. As already indicated, both notions involve similar types of responsibility. However, the interconnection between them was at the origin very different. As far as R2P is concerned, the assertion of a primary responsibility to protect upon States, which constitutes the R2P first pillar, appears as a means to support in an easier and more acceptable way, the existence of a responsibility borne by the international community to intervene on the territory of a State if the latter does not fulfill its primary responsibility, which constitutes the R2P third pillar. In other words, the R2P first pillar, which infers from the sovereignty of States their primary responsibility to protect their population, serves as a judicious means for the assertion of potential collective reactions on their territory in case of massive persecutions.⁷⁴

Contrary to R2P, only two general types of responsibility were originally asserted under POC: the States' primary responsibility and the UN SC responsibility to protect civilians. Unlike the R2P logic, the primary responsibility was generally asserted as coexisting with – and could not be superseded by – the responsibility of the UN SC, and, especially, as not excluding such collective responsibility. The only aim of insisting on a UN SC responsibility was to show that it was relevant to consider the protection of civilians in armed conflict as a thematic issue before the Security Council although such protection primarily fell on States (and any other party to the armed conflict). The declaration of Germany before the UN SC in February 1999 is particularly relevant in that regard. Indeed, the German representative stated:

⁷³ *Ibid.*, 1-2, paras 4-6.

⁷⁴ Actually, making military interventions on the territory of a State dependent upon the failure of this State to act adequately to face the situation urging the intervention is conform to the general and well-known condition in the *jus ad bellum* field, according to which a military action can only be conducted on a foreign territory if it is necessary or, in other words, if it is undertaken as a last resort. This at least implies that the State was unable or unwilling to meet the problematic situation, that is, in the case at stake, to protect its population. See, e.g., with respect to the right of self-defense, R. van Steenberghe, *La légitime défense en droit international public* (2012), 188-190 & 354-355 [van Steenberghe, *La légitime défense*].

“The EU believes that the issue of the protection of civilians in armed conflict deserves to figure high on the international political agenda. While we recognize that the primary responsibility to protect civilians under all circumstances rests with States and parties to a conflict, we must also reinvigorate international efforts to protect civilians in armed conflict. The Security Council has an important responsibility in this context. It is important that it properly coordinate its actions with other relevant bodies.”⁷⁵

Similarly, the Russian representative asserted the next year:

“The primary responsibility for protecting civilians in all circumstances is vested in the States and parties to an armed conflict. However, international efforts undertaken, including those undertaken by the Security Council, can have a powerful, positive impact on the performance of this task.”⁷⁶

It is precisely after the emergence of the R2P concept that things have evolved. The R2P specific logic has been exported to the POC field. The primary responsibility has no longer been conceived as coexisting with the UN responsibility but as the starting point of the assertion of a responsibility borne by the UN SC to intervene in case of failure of the national authorities to protect civilians in armed conflict. This change appeared in the first declaration in which R2P was associated with POC. Unsurprisingly, this association was made by Canada – which is at the origin of both R2P and POC. Indeed, the Canadian representative stated in 2004 at an UN SC meeting on POC:

“Ultimately of course, Member States themselves must take primary responsibility for ensuring the protection of their own people. Indeed, as argued in the recent report of the International Commission on Intervention and State Sovereignty, entitled *The Responsibility to Protect*, this is a responsibility implicit in the very concept of State sovereignty. Much more can and should be done by Member States. But when they fail to assume their responsibility,

⁷⁵ SC, *Verbatim Record of the 3980th Meeting*, UN Doc S/PV.3980, 22 February 1999, 3 (declaration of Germany, on behalf of the European Union).

⁷⁶ SC, *Verbatim Record of the 4130th Meeting*, UN Doc S/PV.4130, 19 April 2000, 12 (declaration of Russia).

the Security Council must act. It is evident that the Council can and must do more.”⁷⁷

Similarly, the Belgian representative asserted in 2007:

“Belgium would also like to emphasize that it is above all States themselves that must assume the responsibility to protect civilians in situations of armed conflict. If they do not have the capacity or the will to guarantee adequate protection, then the international community has the responsibility — and even the duty — to respond.”⁷⁸

The declaration made by Ghana in the same year is even more explicit, the representative of Ghana stating:

“While it is recognized that the primary responsibility for the protection of civilians falls on States and Governments, the present situation clearly indicates that in most conflicts, States and Governments are either unable or unwilling to provide that protection. The international community, therefore, has a moral and legal duty to extend this protection as affirmed in paragraphs 138 and 139 of the 2005 *World Summit Outcome* (General Assembly *Resolution 60/1*), and as stressed in Council *Resolution 1674* (2006).”⁷⁹

Such a change also seems perceptible in the field of peacekeeping operations, mainly in the UN document entitled ‘Framework for Drafting Comprehensive Protection of Civilians (POC) Strategies in UN Peacekeeping Operation’.⁸⁰

⁷⁷ SC, *Verbatim Record of the 4990th Meeting*, UN Doc S/PV.4990 (Resumption 1), 14 June 2004, 16 (declaration of Canada).

⁷⁸ SC, *Verbatim Record of the 5703rd Meeting*, UN Doc S/PV.5703, *supra* note 28, 28 (declaration of Belgium).

⁷⁹ SC, *Verbatim Record of the 5781st Meeting*, UN Doc S/PV.5781, *supra* note 28, 17 (declaration of Ghana) (emphasis added).

⁸⁰ UN Office for the Coordination of Humanitarian Affairs (OCHA), ‘Framework for Drafting Comprehensive Protection of Civilians (POC) Strategies in UN Peacekeeping Operation’ (2011), available at http://globalprotectioncluster.org/_assets/files/tools_and_guidance/protection_of_civilians/Framework_Comprehensive_PoC_Strategies_EN.pdf (last visited 15 August 2014).

Although this document does not explicitly refer to R2P (contrary to the abovementioned document related to MONUC),⁸¹ it evidences an evolution endorsing a logic close to the R2P one. It is well-known that, since 1999, UN SC resolutions on peacekeeping operations have stipulated that missions to protect civilians must be conducted ‘without prejudice of the responsibility of the government’ in that matter. In other words, UN operations cannot act as a substitute for the government without its consent. By using another formula, founded upon a rationale resembling the R2P one, the ‘Framework for Drafting Comprehensive Protection of Civilians (POC) Strategies in UN Peacekeeping Operation’ brings a significant change. Paragraph five of this document states, under a section entitled ‘Key Considerations Prior to Drafting the Strategy’:

“[The Operational] Concept [on the protection of Civilians in United Nations Peacekeeping Operations] also recognizes that the protection of civilians is primarily the responsibility of the host government and that the mission is deployed to assist and build the capacity of the government in the fulfillment of this responsibility. However, in cases where the government is unable or unwilling to fulfill its responsibility, Security Council mandates give missions the authority to act independently to protect civilians [meaning that] *missions are authorized to use force against any party, including elements of government forces* [...]”⁸²

Such a change concerning the mandate of the UN peacekeeping operations also seems noticeable in the UN SC *Resolution 1856* (2008)⁸³ on the situation in the DRC. Previous resolutions defining the MONUC’s mandate generally attributed to this mission the task to protect civilians ‘without prejudice to the responsibility of the government of the DRC’. By contrast, *Resolution 1856* (2008) does not use such wording and indicates that the MONUC must “[e]nsure the protection of civilians, including humanitarian personnel, under imminent threat of physical violence, in particular violence emanating *from any of the parties engaged in the conflict*”.⁸⁴

Those last words therefore enable measures to be taken even against the Congolese governmental forces. Some States, including Belgium which was at the

⁸¹ Cf. *supra* note 72.

⁸² OCHA, *supra* note 80, 2-3 (para. 5) (emphasis added).

⁸³ SC Res. 1856, UN Doc S/RES/1856 (2008), 22 December 2008.

⁸⁴ *Ibid.*, 4 (operative part 3 (a)) (emphasis added).

origin of the resolution, expressly considered that such modification with respect to the MONUC mandate “fully [integrated] the notion of the responsibility to protect”.⁸⁵

Finally, a last significant difference between R2P and POC is related to the scope of application of these notions. While they partially overlap, they also partially diverge. *Ratione personae* firstly, as the primary responsibility to protect under R2P only falls on States while the responsibility under POC rests with not only States but also any party to the armed conflict in general, including armed groups. *Ratione materiae* secondly, since R2P is only concerned, regarding armed conflicts, with serious IHL violations amounting to war crimes whereas POC deals with any IHL violation in relation to the protection of civilians. *Ratione contextus* thirdly, as R2P also applies in situations which do not amount to armed conflicts since its aim is to protect populations not only from war crimes but also from genocide, crimes against humanity, and ethnic cleansing which do not technically require being committed in an armed conflict to exist. Yet this last apparent difference – the only one which would make the R2P scope of application larger than the POC scope – has to be nuanced. It must be first noted that some UN SC resolutions on POC provide for mechanisms which apply outside of armed conflict situations. According to these resolutions, such mechanisms indeed apply in case of threat not only of war crimes but also of “genocide [and] crimes against humanity [...] against the civilian population”.⁸⁶ Moreover, many States expressly consider that POC concerns any situation of violence, even if such a situation does not amount to an armed conflict. For example, Lichtenstein stated in May 2011 before the UN SC that there was “a collective responsibility to ensure the protection of civilians outside situations of armed conflicts, and the Council acted accordingly in adopting *Resolution 1973* (2011) [on Libya]”.⁸⁷

⁸⁵ SC, *Verbatim Record of the 6066th Meeting*, UN Doc S/PV.6066 (Resumption 1), *supra* note 28, 6 (declaration of Belgium). See also N. Hajjami, *La Responsabilité de protéger* (2013), 360.

⁸⁶ See, e.g., SC Res. 1296, *supra* note 18, 3 (operative part 15) in which the Council “[i]ndicates its willingness to consider the appropriateness and feasibility of temporary security zones and safe corridors for the protection of civilians and the delivery of assistance in situations characterized by the threat of genocide, crimes against humanity and war crimes against the civilian population”.

⁸⁷ SC, *Verbatim Record of the 6531st Meeting*, UN Doc S/PV.6531, *supra* note 28, 33 (declaration of Liechtenstein). See also SC, *Verbatim Record of the 6650th Meeting*, UN Doc S/PV.6650, *supra* note 35, 14 (declaration of Colombia); *ibid.*, 25 (declaration of Gabon).

E. Normative Impacts on International Law?

Does the association of R2P with POC have normative impacts on international law? One of the most significant impacts that such association could have on R2P relates to the normative nature of such notion. As already emphasized, R2P is generally viewed as a controversial and political notion. By contrast, POC is firmly rooted in international law and even seen as being itself a legal concept.⁸⁸ As a result, linking R2P to POC may facilitate the evolution of R2P from a controversial and political concept towards a legal one. Such link at least enables R2P to appear in UN SC resolutions and to be discussed by States before the UN SC, which may be seen as a form of State practice contributing, as wished by many NGOs, to the formation of a customary rule on the matter. This is particularly true with respect to references in UN SC resolutions dealing with specific situations, such as the UN SC resolutions concerning Libya⁸⁹ and the Ivory Coast,⁹⁰ since those general references materialized into physical acts. Those references could potentially be seen as expressing the *opinio juris* of the States having voted in favor of the resolutions and the actions concretely undertaken on the basis of those resolutions as the *State practice* element of the customary rule, as this element is classically construed – that is, as involving material conduct. In other words, the two main elements of customary law could be identified in this case. Yet a customary R2P rule could also be derived from references to R2P in international instruments unrelated to specific situations, such as the general UN SC resolutions on POC, or in State declarations preceding the adoption of such instruments even if no material act may support those declarations. Indeed, in accordance with a modern conception of the formation process of customary law,⁹¹ which is particularly defended in the fields of human rights and humanitarian law because of the lack of State material conduct in those domains,⁹² such abstract references to R2P could be considered as a form

⁸⁸ Cf. *supra* note 40 and accompanying text.

⁸⁹ SC Res. 1970, UN Doc S/RES/1970 (2011), 26 February 2011; SC Res. 1973, UN Doc S/RES/1973 (2011), 17 March 2011.

⁹⁰ SC Res. 1975, UN Doc S/RES/1975 (2011), 30 March 2011.

⁹¹ See generally A. E. Roberts, 'Traditional and Modern Approaches to Customary International Law: A Reconciliation', 95 *American Journal of International Law* (2001) 4, 757. For the application of such modern conception by the International Court of Justice, see *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, ICJ Reports 1996, 226, 254-255, paras 70-73.

⁹² See generally B. Simma & P. Alston, 'The Sources of Human Rights Law: Custom, Jus Cogens, and General Principles', 12 *Australian Yearbook of International Law* (1988-1989), 82.

of State practice and, if sufficiently repeated over time by the majority of States, as expressing the *opinio juris* of those States.⁹³

Admittedly, it is clear that no customary R2P rule can claim to have emerged on the basis of all those references to R2P, since an important requirement, the widespread acceptance and repetition of the relevant State practice, must still be met. More fundamentally, it does not seem that the notion of R2P has gained an autonomous and normative content yet and it is far from being established that the above-mentioned references to R2P evidence the *opinio juris* of States – that is the belief to act in accordance with law – rather than a mere political endorsement of this concept. Yet these references significantly open the door for potential normative developments of R2P. While raising concerns regarding the non-binding nature of the 2005 UN *World Summit Outcome*, some NGOs have pushed for additional references to R2P in international instruments, mainly UN SC resolutions on POC, with the explicit hope of transforming R2P from an emerging norm into established customary international law.⁹⁴

The association of R2P with POC may also have legal normative impacts in relation to POC, to the extent that it may affect what constitutes the (legal) foundation of it, i.e. IHL. Those impacts may *a priori* be seen as positive ones. It is well-known that mechanisms for controlling the IHL application are limited. It is true that many international criminal jurisdictions, viewed as constituting such mechanisms,⁹⁵ have been established and are now operating. Yet their role is only to sanction individuals. It is also true that the UN SC has adopted sanctions against States in case of IHL violations,⁹⁶ but those sanctions remain limited.⁹⁷ They are far from being automatically adopted, the UN SC role being not to sanction violations of international law but primarily to maintain or restore international peace and security, which is not the same thing. It is

⁹³ See van Steenberghe, *La légitime défense*, *supra* note 74, 147-150; R. van Steenberghe, 'The Obligation to Extradite or Prosecute: Clarifying its Nature', 9 *Journal of International Criminal Justice* (2011) 4, 1089, 1093-1094 for further developments on this position.

⁹⁴ See, e.g., World Federalist Movement, 'Global Consultative Roundtables on the Responsibility to Protect: Civil Society Perspectives and Recommendations for Action' (January 2008), available at <http://responsibilitytoprotect.org/index.php?module=uploads&func=download&fileId=653> (last visited 15 August 2014), 11.

⁹⁵ See generally D. Scalia, 'Droit international pénal', in van Steenberghe (ed.), *Droit international humanitaire*, *supra* note 44, 195, 199.

⁹⁶ See P. d'Argent *et al.*, 'Article 39', in J.-P. Cot, A. Pellet & M. Forteau, *La Charte des Nations Unies: Commentaire article par article*, 3rd ed. (2005), 1131, 1155.

⁹⁷ See, e.g., SC Res. 787, UN Doc S/RES/787 (1992), 30 November 1992 concerning the situation in Bosnia and Herzegovina (see *ibid.*, 3 (operative parts 7 & 8) for a reference to serious IHL violations and *ibid.*, 3-4 (operative parts 9-12) regarding sanctions).

precisely this gap that the association of R2P with POC may possibly fulfill. By exporting its specific logic in the POC field, R2P has made the primary responsibility of States in that matter the starting point for legitimizing a coercive action by the international community in case of failure of the State to protect civilians on its territory. This association may therefore both clarify and put the accent on the possibility and necessity of coercive intervention of the international community in case of violations of IHL rules related to the protection of civilians. This conclusion is in line with the position asserted by political scientists who, questioning the complementarity of the two notions, contend that “[f]inally, RtoP as a whole can be seen as a specification and concretization of the amorphous and aspirational *Security Council POC*”,⁹⁸ those last terms referring to the POC reaction aspects.

Similarly, the association of R2P with POC may contribute, as suggested by some UN documents,⁹⁹ to modifying the ‘traditional’ conception of the UN peacekeeping operations mandated to protect civilians, in a way which would reinforce the mandate of those operations in order to give them the possibility to act *in lieu* of, or even against, the host State if the latter is unable or unwilling to protect civilians on its territory itself. Such a modification implies not only increasing the military, human, and logistical support of the UN operations but also adapting the rules of engagement (ROE) which indicate the specific instances in which UN soldiers can make use of force in accordance with IHL. At the origin, these ROE only enabled members of the UN operations to act in self-defense in order to protect themselves. While these rules necessarily evolved after the creation of the UN operations mandated to protect civilians under imminent threat of attack and incorporated the right to use force “up to, and including deadly force, to defend any civilian person who is in need of protection against a hostile act or hostile intent”,¹⁰⁰ this right now is even provided, in cases like the one concerning MONUC, without the ‘traditional’ limitation according to which force can only be exercised ‘without the prejudice of the responsibility of the host government’.

That said, the exportation of the R2P specific logic in the POC field is not without risk for IHL. The first and most evident one is the politicization

⁹⁸ Breakey, ‘Protection Norms and Human Rights’, *supra* note 22, 332.

⁹⁹ Cf. *supra* note 80.

¹⁰⁰ UN Department of Peacekeeping Operations (DPKO), *United Nations Master List of Numbered Rules of Engagement*, UN Doc MD/FGS/0220.001 annex 1, May 2002, Rule 1.18. The source is reprinted in T. Findlay, *The Use of Force in UN Peace Operations* (2002), 425-427.

of a field characterized by neutrality and impartiality. IHL belongs to law and therefore presents itself as a neutral language. In addition, the matter that it regulates is itself founded upon impartiality, as IHL provides for the protection of persons independently of the party of the conflict to which those persons belong. The association of POC with R2P, still a controversial political concept, could jeopardize those elements of neutrality and impartiality. Some States indirectly referred to that risk in their declaration, by stating:

“[W]e align ourselves with paragraph 21 of the Secretary-General’s report, which basically proposes that we [should] not politicize the noble task of humanitarian assistance. We have made no secret of our support for the norm of the responsibility to protect, which overlaps and has some aspects in common with the issue of the protection of civilians. However, we believe that the continuing debate surrounding the so-called third pillar of the responsibility to protect should not affect the integrity of the broader concept of the protection of civilians, which is rooted in humanitarian law.”¹⁰¹

Such ‘politicization’ phenomenon could not only directly affect IHL but also the activities of those working to implement it. The latter certainly include the International Committee of the Red Cross (ICRC), whose mandate under the IHL treaties can only be accomplished if the Committee is not viewed as favoring one party against the other, the principles of impartiality and neutrality being the main pillars of the ICRC’s activities.¹⁰² One may also mention the UN peacekeeping operations mandated to protect civilians in armed conflicts. As already noted, UN institutions are reluctant to associate R2P with such operations because they fear not only that the UN soldiers would not have enough material means to accomplish their mandate, which would supposedly involve stronger military operations,¹⁰³ but also that those operations would no

¹⁰¹ SC, *Verbatim Record of the 6790th Meeting*, UN Doc S/PV.6790, *supra* 28, 10 (declaration of Guatemala).

¹⁰² *Statutes of the International Committee of the Red Cross* (2013), Art. 4 (1) (a), available at <http://icrc.org/eng/resources/documents/misc/icrc-statutes-080503.htm> (last visited 15 August 2014).

¹⁰³ See, for a similar observation, the declarations of some members of the DPKO, quoted in Breakey, ‘The Responsibility to Protect’, *supra* note 70, 74: “[...] A number of DPKO officials effectively divorced R2P cases from the POC concerns of peacekeepers. One argued that the DPKO ‘should not get into a position where we are meant to respond to R2P situations. We do not have the resources or the capacity’. A second interviewee

longer be seen as impartial and neutral since they would be carried out under (the controversial and political concept of) R2P.

Another major risk is to conflate the *ratione materiae* scopes of application of R2P and POC. Legal literature has wondered whether the specific R2P third pillar, implying a collective responsibility in case of failure of the national authorities to protect their civilian population, added something to the already existing IHL mechanisms. Many scholars consider that it is not the case, mainly because common Article 1 to the four 1949 *Geneva Conventions* and the 1977 *Additional Protocol I* to those conventions obliges States not only to respect but also to ensure respect of those legal texts and, therefore, provides a collective responsibility in case of IHL violations.¹⁰⁴ The existence of such a collective responsibility was confirmed by the International Court of Justice (ICJ) in its Advisory Opinion on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*.¹⁰⁵ It may also be asserted on the basis of the special nature of IHL obligations, at least of those related to the protection of civilians. It is well-known that, in the above-mentioned ICJ Advisory Opinion, the Court inferred from the *erga omnes* nature of some IHL obligations that the violation of those obligations involved specific consequences for any State, including the obligation to cooperate to bring the violation to an end.¹⁰⁶ Several elements, like common Article 1 to the four *Geneva Conventions* and *Additional Protocol I* to those conventions¹⁰⁷ as well as the case law of the International Criminal Tribunal for the former Yugoslavia (ICTY),¹⁰⁸ strongly suggest that most of the IHL obligations are of *erga omnes* nature. At least the ICJ qualified the rules being “so fundamental to the respect of the human person and ‘elementary

asserted that [...] ‘[t]o date personnel involved in peacekeeping missions are not trained to respond to genocide and there is no support for the idea that they should be’.”

¹⁰⁴ See Boisson de Chazournes & Condorelli, *supra* note 24, 16; I. Moullet, ‘L’obligation de “faire respecter” le droit international humanitaire’, in M. J. Matheson & D. Momtaz (eds), *Rules and Institutions of International Humanitarian Law Put to the Test of Recent Armed Conflicts* (2010), 697, 755. See also H. Brollowski, ‘The Responsibility to Protect and Common Article 1 of the 1949 Geneva Conventions and Obligations of Third States’, in Hoffmann & Nollkaemper (eds), *supra* note 23, 93.

¹⁰⁵ *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, ICJ Reports 2004, 136, 199-200, paras 158 & 159.

¹⁰⁶ *Ibid.*, 199 & 200, paras 157 & 159.

¹⁰⁷ See, e.g., in this sense, J. d’Aspremont & J. de Hemptinne, *Droit international humanitaire: Thèmes choisis* (2012), 41.

¹⁰⁸ *Prosecutor v. Zoran Kupreškić et al.*, Judgment, IT-95-16-T, 14 January 2000, 202-203, para. 518.

considerations of humanity”¹⁰⁹ which undoubtedly include those related to the protection of civilians. Finally, still in the same Advisory Opinion, the ICJ stated, after its considerations on the obligation to ensure respect of IHL and the consequences stemming from the violation of *erga omnes* obligations, that

“the United Nations, and especially the General Assembly and the Security Council, should consider what further action is required to bring to an end the illegal situation resulting from the construction of the wall and the associated regime, taking due account of the present Advisory Opinion”.¹¹⁰

In other words, a collective responsibility may arguably be seen as imposed not only on States but also on the United Nations. This is in line with the obligation under Article 89 of *Additional Protocol I*, which expressly imposes on State parties to “undertake to act, jointly or individually, in co-operation with the United Nations and in conformity with the *United Nations Charter*” in case of serious IHL violations.¹¹¹ As a result, the collective responsibilities under R2P and IHL do not look so different from each other. One may be tempted to confuse them entirely. However, one must not forget that the application of R2P collective responsibility is limited to war crimes whereas under IHL it extends beyond the IHL rules, whose violation amounts to such crimes. Therefore, the association of R2P with POC should not affect the scope of this particular collective responsibility under IHL and lead third States, or even the United Nations, to consider undertaking actions only in case of the most serious IHL violations. One can be satisfied in that regard that the UN SG expressly emphasized this risk of confusion and stated in his 2012 report on POC:

“The protection of civilians relates to violations of international humanitarian and human rights law in situations of armed conflict. The responsibility to protect is limited to violations that constitute war crimes or crimes against humanity or that would be considered

¹⁰⁹ *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, *supra* note 105, 199, para. 157.

¹¹⁰ *Ibid.*, 200, para. 160.

¹¹¹ *Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I)*, 8 June 1977, 1125 UNTS 3, 43.

acts of genocide or ethnic cleansing. [...] I urge the Security Council and Member States to be mindful of these distinctions.”¹¹²

Another risk is to conflate the bearers of the primary responsibility under both R2P and POC. As far as the latter is concerned, the primary responsibility does not only fall on States. It is borne by any party to the armed conflict, including armed groups. The applicability of IHL, in particular the rules related to the protection of civilians, on armed groups is now generally admitted, although the mechanisms through which those groups are bound by IHL remain controversial.¹¹³ By contrast, the primary responsibility to protect under R2P can only be borne by States, since this notion is fundamentally based upon sovereignty. What made its success, being more acceptable than the concept of humanitarian intervention, actually prevents it from applying to armed groups. Yet one may question why such groups, especially when they are controlling large parts of a State territory, could not be vested with a primary responsibility to protect civilian populations, in particular on the territory that they would control. However, no State has ever suggested extending the

¹¹² SC, *Report of the Secretary-General on the Protection of Civilians in Armed Conflict*, UN Doc S/2012/376, *supra* note 19, 5-6, para. 21.

¹¹³ See J. S. Pictet (ed.), *The Geneva Conventions of 12 August 1949: Commentary*, Vol. I (1952), 51; J. S. Pictet (ed.), *The Geneva Conventions of 12 August 1949: Commentary*, Vol. II (1960), 34; A. Cassese, ‘The Status of Rebels Under the 1977 Geneva Protocol on Non-International Armed Conflict’, 30 *International Comparative Law Quarterly* (1981) 2, 416; G. Abi-Saab, ‘Non-international Armed Conflict’, in UNESCO (ed.), *International Dimensions of Humanitarian Law* (1988), 217; S.-S. Junod, ‘Protocol II: Part I – Scope of This Protocol’, in Y. Sandoz, C. Swinarski & B. Zimmermann (eds), *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (1987), 1342, 1345, para. 4444; L. Zegveld, *The Accountability of Armed Opposition Groups in International Law* (2002), 14-26; E. David, *Principes de droit des conflits armés*, 5th ed. (2012), 245 *et seq.*, para. 1.216; E. David, ‘Le droit international humanitaire et les acteurs non étatiques’, *Collegium* (2003) 27, 27, 29-30; J.-M. Henckaerts, ‘Binding Armed Opposition Groups Through Humanitarian Treaty Law and Customary Law’, *Collegium* (2003) 27, 123, 126-129; S. Sivakumaran, ‘Binding Armed Opposition Groups’, 55 *International Comparative Law Quarterly* (2006) 2, 369; A. Clapham, ‘Human Rights Obligations of Non-state Actors in Conflict Situations’, 88 *International Review of the Red Cross* (2006) 863, 491, 497-499 & 511; C. Ryngaert, ‘Human Rights Obligations of Armed Groups’, 41 *Revue belge de droit international* (2008) 1-2, 355, 357-358; R. Kolb, *Ius in bello: Le droit international des conflits armés*, 2nd ed. (2009), 208-209; R. van Steenberghe, ‘Non-state Actors From the Perspective of the International Committee of the Red Cross’, in J. d’Aspremont (ed.), *Participants in the International Legal System: Multiple Perspectives on Non-state Actors in International Law* (2011), 204, 217-223.

ratione personae scope of the primary responsibility to protect under R2P to armed groups. In fact, many State declarations evidence an opposite evolution resulting from the association of R2P with POC, namely the assimilation of the bearers of the primary responsibility under POC to those considered under R2P, that is, only States. This evolution is clear: while States often took care to mention that the POC primary responsibility was borne not only by States but also and more generally by any party to the armed conflict,¹¹⁴ such a care has curiously disappeared in many State declarations since the emergence of the R2P concept.¹¹⁵ Several States now emphasize that the responsibility to protect civilians in armed conflict primarily fall on States in accordance with what has been said in relation to R2P.¹¹⁶ Some States go even further and entirely confuse the *ratione personae* scopes of application of R2P and POC. For example, the Netherlands stated before the UN SC:

“[The two notions] are also closely related, as they share a similar normative foundation that consists of four elements. The first is that the protection of individuals is a primary responsibility of each State.”¹¹⁷

Such an evolution is also latent in the statements of the UN SC President on POC, one of its last statements curiously indicating that “[t]he Security

¹¹⁴ See, e.g., *supra* notes 75-76 and accompanying text.

¹¹⁵ See, e.g. SC, *Verbatim Record of the 5703rd Meeting*, UN Doc S/PV.5703, *supra* note 28, 20 (declaration of Ghana); SC, *Verbatim Record of the 5781st Meeting*, UN Doc S/PV.5781, *supra* note 28, 17 (declaration of Ghana); SC, *Verbatim Record of the 5781st Meeting*, UN Doc S/PV.5781 (Resumption 1), *supra* note 28, 17-18 (declaration of Nepal); SC, *Verbatim Record of the 6151st Meeting*, UN Doc S/PV.6151, *supra* note 28, 16 (declaration of France); SC, *Verbatim Record of the 6216th Meeting*, UN Doc S/PV.6216 (Resumption 1), *supra* note 28, 42 (declaration of Sudan); SC, *Verbatim Record of the 6427th Meeting*, UN Doc S/PV.6427 (Resumption 1), *supra* note 28, 26 (declaration of Sudan); *ibid.*, 8-9 (declaration of Portugal); and SC, *Verbatim Record of the 6531st Meeting*, UN Doc S/PV.6531 (Resumption 1), *supra* note 28, 26 (declaration of Bangladesh).

¹¹⁶ See, e.g., SC, *Verbatim Record of the 5703rd Meeting*, UN Doc S/PV.5703, *supra* note 28, 20 (declaration of Ghana); SC, *Verbatim Record of the 5781st Meeting*, UN Doc S/PV.5781, *supra* note 28, 17 (declaration of Ghana); SC, *Verbatim Record of the 5781st Meeting*, UN Doc S/PV.5781 (Resumption 1), *supra* note 28, 2 (declaration of Portugal, on behalf of the EU); and SC, *Verbatim Record of the 6216th Meeting*, UN Doc S/PV.6216, *supra* note 28, 29 (declaration of Austria).

¹¹⁷ SC, *Verbatim Record of the 6531st Meeting*, UN Doc S/PV.6531 (Resumption 1), *supra* note 28, 24 (declaration of the Netherlands).

Council recognises that States bear the primary responsibility to protect civilians [...] as provided for by relevant international law”¹¹⁸

Finally, in case no ‘politicization’ or ‘regression’ of IHL happens due to the (potential) lack of any influence from R2P through its association with POC, another risk is the emergence of parallel and concurrent legal regimes applicable to the protection of civilians in armed conflict. On the one hand, the ‘classical’ regime, based on IHL, whose scope of application related to the protection of civilians as well as the collective responsibility in case of its violations is well established in international conventional and customary law; and, on the other hand, a ‘modern’ regime, based on R2P, whose scope, more limited with respect to the protection of civilians in armed conflict, would essentially stem from the UN practice and whose main feature would be to put the accent on the necessity of a ‘coercive’ intervention in case of failure of the national authorities to ensure such protection. This phenomenon would be similar to the one evidenced in recent UN practice, consisting in the creation by the United Nations of security zones in armed conflicts, whose regime was different from the one under IHL regarding the protected zones,¹¹⁹ as well as in the assertion by UN institutions of a duty to humanitarian intervention, whose regime was not the same as the one provided under IHL with respect to humanitarian assistance.¹²⁰ One could therefore observe a phenomenon of fragmentation and differentiated application of the regulation of the protection of civilians in armed conflict.

F. Conclusion

The R2P added value should definitely not be underestimated. Although R2P is based on already existing legal mechanisms, it has the advantage of re-ordering all those mechanisms under the same heading. It is indeed a concept which is now automatically referred to in situations when civilian populations are massively persecuted. However, R2P remains a political concept whose content is still controversial and must be discussed before the UN GA. Therefore, it does not come as a surprise that R2P supporters, in particular NGOs, sought to associate it to POC, a well-established and neutral notion, having some common features with it and firmly rooted in international law. Numerous letters have

¹¹⁸ SC, *Statement by the President of the Security Council*, UN Doc S/PRST/2013/2, 12 February 2013, 1 (para. 4).

¹¹⁹ On this subject see, e.g., M. Torrelli, ‘Les zones de sécurité’, 4 *Revue générale de droit international public* (1995), 787.

¹²⁰ On this subject see, e.g., M. Torrelli, ‘De l’assistance à l’ingérence humanitaire’, 74 *Revue internationale de la Croix-Rouge* (1994) 795, 238.

been sent by NGOs to States, before UN SC meetings on POC, in order to push those States to refer to R2P in their declarations during the meeting and in the resolution adopted at this occasion.

Those efforts have been successful. The UN and State practice evidences a clear trend to associate R2P with POC. This association does not seem unreasonable at first glance. The two notions share some important characteristics, including that they both serve the protection of civilian populations against massive persecutions. In addition, their scopes of application partially overlap and they both involve a similar continuum of actions and responsibilities. Similarities nonetheless stop here. One must not forget that the two notions not only have a distinct scope of application in several respects but also and most importantly have very dissimilar bases. The whole R2P mechanism is founded upon the notion of sovereignty and originally seeks to justify in a more acceptable manner the intervention of the international community in case of failure of the national authorities, while the POC thematic issue is characterized by an idea of impartiality and neutrality ultimately based on IHL.

One may therefore call into question this recent trend, if not to conflate the two notions, to export the R2P specific logic into the POC field. It is true that by putting the accent on the necessity of a reaction by the international community on the territory of a State when this State is unable or unwilling to put an end to IHL violations concerning the protection of civilians, this may have advantage of reinforcing the – still too limited – mechanisms for controlling the IHL application. Yet this may also be hazardous for IHL. Conflating R2P and POC could affect the IHL legal nature by ‘politicizing’ it and therefore, could also put at risk the actors charged with implementing it. The other risks stem from the possibility of conflation of the respective scopes of application of the two notions. The *ratione materiae* risk is that the collective responsibility under IHL would be seen as applying only with respect to the IHL violations triggering the collective responsibility under R2P, that is, war crimes. The *ratione personae* risk is that, under the influence of the logic of sovereignty underlying R2P, only States would be considered as the bearers of the primary responsibility under POC, although it is clearly established that IHL, and in particular the rules related to the protection of civilians, must be respected by any party to the armed conflict, including armed groups.

These risks of IHL ‘regression’ require that States be more cautious and precise when discussing R2P and POC. This is particularly recommended as their declarations before the UN SC and UN GA may be seen as a form of State practice or *opinio juris*, likely to contribute to the interpretation of the existing rules or to the formation of customary law. The distinction between the

two notions must therefore be claimed and repeated, without, however, such a distinction leading to the existence of two parallel and concurrent regimes on the regulation of the protection of civilians in armed conflict.