



# Peacekeeping and Civilian Protection: An Interview with Conor Foley

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*Humanitarian aid worker Conor Foley discusses the nature and extent of United Nations peacekeepers' obligations to protect civilians.*

**Q. In the past few decades, the Protection of Civilians (POC) has become an important focus of international relations and international law and it is often central to debates on responding to major conflicts. Why was the POC concept introduced and how has it evolved?**

The first POC mandate was issued by the Security Council to the UN peacekeeping Mission to Sierra Leone (UNAMSIL) in 1999. The wording of the mandate was extremely cautious, but its significance was that it gave UNAMSIL Chapter VII authority to use force 'within its capabilities and areas of deployment, to afford protection to civilians under imminent threat of physical violence'. This was the first time a UN mission had been given such explicit authority and came against the background of the failure of UN peacekeepers in the mid-1990s to protect civilian populations against genocide in Rwanda and Srebrenica as well as NATO's 'humanitarian intervention' in Kosovo without Security Council authorization. The UN was suffering a crisis of confidence and POC was one response. Most of the UN's biggest missions now have POC mandates and 'protecting civilians' is considered part of the 'core business' of UN peacekeepers. The concept of POC developed slowly at first.

The Security Council became more detailed in the tasks that it gave missions and internal UN reports and 'lessons learned' documents began to identify both

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good practices and emerging challenges based on these practical experiences. Much of these developments took place in the field, 'below the radar' of much of the current legal and academic discourse about peacekeeping. It was not until the 2009 study, commissioned by the UN Department for Peacekeeping Operations (DPKO) and the UN Office for the Coordination of Humanitarian Affairs (OCHA) and drafted by Victoria Holt, Glyn Taylor and Max Kelly that POC began to take on its present focus. I helped to draft the first scenario-based training exercises on POC for UN missions arising out of this study, there was an important evaluation carried out by the UN Office of Internal Oversight Services (OIOS) in 2014 and POC was a central theme of discussion in the UN High Level Panel on Peace Operations (HIPPO) in 2015.

There are now around 100,000 uniformed UN peacekeeping personnel deployed around the world with legal permission to enter the territory of other States and protect people from certain grave violations of international human rights and humanitarian law. In fact, the UN has stated that they are 'legally required' to 'use force, including deadly force' to fulfil this mandate. POC's emergence poses challenges to the development of international law and policy that are as significant as the original concept of UN peacekeeping itself. At the same time, it raises very practical challenges for those on the ground trying to implement these increasingly ambitious mandates.

### **Q. How does POC relate to the Responsibility to Protect (R2P)?**

Both POC and R2P arose out of an initiative by the Canadian government when it occupied the Presidency of the Security Council in 1999 and both share the same overall goal of protecting civilians from grave violations of human rights and International Humanitarian Law (IHL). The Responsibility to Protect was

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the title of a report published by what was originally the Commission on Humanitarian Intervention (it later changed its name to the International Commission on Intervention and State Sovereignty) in 2001. This body was established after NATO's intervention in Kosovo in 1999 in response to the debates on the legality of this action. It was tasked with trying to find a consensus on whether and when such interventions could take place without UN Security Council authority – particularly when one member of the Permanent Five (P5) was using or threatening to use its veto power.

Unlike POC, the R2P concept initially received huge academic and media attention. The UN's first Special Advisor on R2P, Edward Luck, noted that it has generated a 'staggering' numbers of academic theses and the 'ever-expanding literature on the responsibility to protect could now fill a small library'. Anne Marie Slaughter, a legal scholar and high-level public official, called it 'the most important shift in our conception of sovereignty since the Treaty of Westphalia in 1648.' In 2005 a UN General Assembly Summit Outcome Document [report](#) contained two paragraphs referring to the concept, which has led some to claim it has been officially endorsed by the UN. But the actual wording of this report stripped the original concept of its normative content and merely stated that the Security Council might continue to authorise such interventions on a case by case basis as it so decided.

The UN has also moved to distance itself from R2P in recent years stressing that it is a 'political concept' which lacks the legal foundation of POC 'based on international humanitarian, human rights and refugee law.' Part of the problem is that R2P became identified with the 'liberal interventionism' of politicians such as Tony Blair and Bernard Kouchner. As Gareth Evans, one of the authors of the original report [noted](#) the concept suffered due to 'a spectacular misuse

of R2P principles by the US-led coalition, supported particularly in this respect by the UK, in the case of the 2003 invasion of Iraq – and the suspicion that R2P will be just another excuse for neo-colonialist and neo-imperialist interventions.’ There was no reference to R2P in the UN Security Council resolution that authorised Chapter VII [intervention in Libya in 2011](#) and attempts to establish the *opinio juris* and state practice that might create a new norm of customary international law have failed.

One distinction that could be drawn between the two concepts is that POC is a principle of peacekeeping, which requires host state consent, while R2P could be invoked without the consent of the government of the state concerned (as happened in Libya). The debate about this has stalled in recent years, though, as R2P supporters seem to have moved away from advocating 'humanitarian intervention' to the uncontested areas of a 'responsibility' to prevent mass atrocities through diplomacy and monitoring, and to rebuild conflict-damaged societies. The R2P language about governments 'having the responsibility to protect their own people', does, however, now regularly appear in POC resolutions. Ironically this probably weakens their practical impact since UN peacekeepers may interpret this as excusing them of their own responsibility to provide such direct physical protection.

### **Q. What human rights obligations do UN peacekeeping soldiers have towards civilians under international law?**

In 1999, the UN Secretary General issued a Bulletin stating that IHL was applicable to [UN forces when](#) 'in situations of armed conflict *they are actively engaged therein as combatants, to the extent and for the duration of their engagement*' [emphasis added]. There is no equivalent Bulletin on the

applicability of international human rights law and it is widely assumed within the UN system that when military force is being used for POC purposes, IHL will be the applicable body of law guiding its use. I think that is an incorrect correct reading of the language of the Bulletin. IHL makes it a war crime to attack UN Peacekeepers unless and until they enter an armed conflict. Civilians also lose their protection under IHL if they actively participate in an armed conflict 'to the extent and for the duration of their engagement' and the wording of the Bulletin is consistent with that. What it does not tell us is what will be the applicable body of law when force is used for POC purposes, but the peacekeepers have not become a party to the conflict.

IHL and international human rights law take an entirely different approach to the use of lethal force and also treat concepts such as 'necessity' and 'proportionality' very differently. Under international human rights law, lethal force can only be used as a last resort and for specific purposes. It also contains a 'positive obligation' to protect the rights of others. Under IHL, a soldier may shoot an enemy soldier, so long as he or she is not *hors de combat*, even if he or she is unarmed and does not pose an 'immediate threat' at that particular point. It permits troops to launch surprise attacks on enemies even if this involves 'collateral damage' to civilians proportional to the military benefit and only requires investigations into potential war crimes. IHL prohibits intentional attacks on civilian targets but it does not contain any positive obligations on soldiers to protect civilians from attack.

International human rights law provides far more appropriate guidance to missions with POC mandates and it is far more consistent with the [UN Principles of Peacekeeping](#), including the minimum use of force. POC should be seen as a 'positive obligation' to protect people from threats to their rights to

life and protection against ill-treatment, while respecting – that is not infringing – these rights in the process. Using this interpretation, a positive obligation could be deemed to arise if a peacekeeping mission knew, or ought to have known at the time, of the existence of a real and immediate risk to civilians and failed to take measures within the scope of its powers which, judged reasonably, might be expected to have avoided or ameliorated the risk. Lethal force can be used for protective purposes, but only as a last resort, when strictly necessary, and its use should be proportionate to the sought objective. It also requires the appropriate authorities to exercise due diligence to prevent, punish, investigate or redress the harm caused by such acts, even when carried out by private persons or entities.

There is considerable controversy about the extent to which the UN feels that the positive and negative obligations of international human rights law can be applied to its operations. There have been a number of cases concerning soldiers operating in UN mandated missions in Kosovo, Iraq and Afghanistan. These raise some complicated issues related to the extraterritorial application of international human rights law, its concurrent applicability with IHL and the hierarchical relationship of these norms to UN Charter law. I can understand the caution of many in not wishing to bind the Security Council in a 'legal strait-jacket' that would hamper its primary purpose in taking prompt and effective action to preserve international peace and security, but I think that there are both practical and principled reasons for addressing this head-on.

Individual States contributing troops to UN missions have already faced legal challenges for actions, or inactions, which resulted in violations of the right to life. Both Dutch and Belgian courts have, for example, upheld claims that their troops on UN peacekeeping missions in the 1990s failed to protect some of the

victims of the genocides in Rwanda and Srebrenica. Challenging individual troop contributing countries (TCCs) for alleged violations, however, could lead to a potential crisis in peacekeeping because States that are party to strong regional human rights mechanisms, or with strong domestic human rights accountability, may become even more reluctant to participate in such missions. Another objection is that this might lead to claims that a UN peacekeeping mission with a POC mandate was responsible for protecting the full spectrum of all the rights and freedoms contained in the corpus of international human rights law, but I think a narrower set of 'core' obligations could logically be derived from the 'purposes, functions and practices' of the mission and an assessment of its 'effective control'. The adoption of policies such as Human Rights Up Front and Human Rights Due Diligence show that the UN is moving in the right direction on this issue.

**Q. As someone with extensive experience of peace operations, how do you feel the environments where peacekeepers are deployed have changed? For example, is peacekeeping more dangerous today than before?**

Yes. According to the [Aid Worker Security Report](#), produced by my colleagues in Humanitarian Outcomes, 2018 was the second worst year on record for aid worker security, with 405 aid workers affected by major violence in 226 separate attacks. They have tracked the number of attacks that have occurred since 2003 and the steadily rising trend is very clear. My own period in the field spanned the decade 1999 in Kosovo, through a couple of years in Afghanistan and then about twenty conflict and crisis zones culminating in Sri Lanka during the brutal closing months of the civil war in 2009. My book *The*



*Thin Blue Line: how humanitarianism went to war*, describes some of those experiences, including the loss of many friends and colleagues.

For the last 10 years I have worked as a consultant and my field visits have become more fleeting and intermittent. My impression is that both UN peacekeepers and aid workers have been forced to adopt ever more defensive stances, which, in practice isolate them ever more from the communities to whom they have been sent to protect and assist. Obviously, the environment in which peacekeepers are operating has also changed. As Cedric de Coning [has noted](#):

**“ In the 1990s and early 2000s, two-thirds of UN peacekeepers were deployed in places like Burundi, Cambodia, and Mozambique that implemented comprehensive peace agreements in the aftermath of civil wars. The focus of these missions, and others at the time such as in Kosovo and East Timor, was on peacebuilding and state-building. Today, in contrast, two thirds of peacekeepers are deployed in missions where the main focus is on the protection of civilians, amidst ongoing violent conflict, in places like the Central African Republic (CAR), Democratic Republic of Congo (DRC), Mali, and South Sudan. UN peacekeeping has experienced a significant shift away from conflict resolution, where peace consolidation and peacebuilding were the main activities, to conflict management, characterized by protection and stabilization activities. ”**

**Q. Peacekeeping soldiers have often been criticised for their reluctance to use force when civilians are under threat. Are the mandates on the use of force by peacekeepers clear enough?**

As I said above, POC mandates that the Security Council gives to missions have evolved considerably over the last 20 years. If anything, I would say that they are now too detailed and there is a danger of a) the Security Council trying to micro-manage mission staff on the ground and b) lobby groups treating these mandates as 'Christmas Trees' onto which they want hang all their own particular concerns.

The result is that mission staff become too overburdened and not enough trust is given to the judgement of individual commanders in the field, who are ultimately responsible for protecting civilian lives. UN HQ could never provide central guidance to cover each individual scenario in which civilians are under threat and there will always be situations in which mission personnel will need to use their own initiative. What is most important is for everyone who serves in such a mission to be aware that they are under a 'positive obligation' to provide protection, based on reasonable judgement about how to do so, and a clear understanding of the legal framework within which mission personnel are permitted, or even required, to use force.

**Q. Related to this, there have been discussions about whether peacekeepers should be engaging in counterterrorism to protect civilians. Do you feel peacekeeping mandates should be made more robust so that they include counter-terrorism operations? Would this measure actually aid the protection of civilians?**

No. Blurring the distinction between peacekeeping war fighting makes no sense for both practical and principled reasons. Peacekeeping missions are fundamentally ill-suited to counter-terrorism operations due to their composition and character. They are almost always under-funded, under-equipped and reliant on troops who are under-trained. The NATO countries which have most experience of such operations are noticeably absent from the list of major TCCs and China is the only P5 Security Council member to be remotely fulfilling its peacekeeping obligations. Where UN peacekeeping missions have been most successful is in supporting political processes for peace and I agree with the HIPPO report that political solutions should always guide their design and deployment. I was in Goma, in the Eastern DRC, in 2012, when the M23 rebels were advancing on it and I supported the creation of the UN Intervention Brigade that eventually defeated this group.

MONUSCO's Force Commander at the time, the Brazilian General Carlos Dos Santos Cruz, is a friend as well as a former colleague and we have spoken about this experience in public debates. MONUSCO had already been involved in several offensive operations prior to the Brigade's formation. Indeed, some argue that the UN had been a party to the conflict since its Ituri and Kivus Brigades launched offensives in 2003 or Operation Kimia II in 2009. This is clearly an area of ongoing debate within the UN. While the HIPPO report urged the Security Council to exercise 'extreme caution' before giving missions such mandates, the OIOS report and [General Cruz's own report](#) on the Security of UN Peacekeepers, see these Brigades as a model for more robust deployments. My view is that peacekeeping missions can and should provide better protection to civilians without becoming party to the conflicts that they were sent to help resolve.

## **Q. What mechanisms need to be created to improve the accountability of peacekeepers to those that they are responsible for protecting?**

UN missions mandated to protect civilians have repeatedly failed to do so and internal inquiries and 'lessons learned' reports have often identified failures of both management and political leadership. Missions have also failed to investigate fully and speak out against violations, particularly when these are committed by, or with the acquiescence of, government forces in the host State. In some cases missions have been complicit in these violations by providing support to the forces that committed them. It was not until November 2016 that the UN sacked a Force Commander for failing to protect civilians and there are very few cases where the UN has initiated disciplinary action against senior mission or headquarters staff for failing to carry out POC mission mandates. It is clearly impossible for peacekeeping soldiers deployed in a conflict, or post-conflict, environment to provide protection against *all* threats of violence to *all* people at *all* times.

Threats to civilians are likely to come from a wide range of sources in such situations and take a variety of forms. Nevertheless, international human rights jurisprudence does contain fairly clear guidance as to how the 'positive obligation' to protect the right to life and physical integrity should be interpreted by States. It could be deemed to arise if a peacekeeping mission knew, or ought to have known at the time, of the existence of a real and immediate risk to civilians and failed to take measures within the scope of its powers which, judged reasonably, might be expected to have avoided or ameliorated the risk. The type of monitoring mechanisms that need to be put in place are very similar to those that are currently being created in response to complaints of

Sexual Exploitation and Abuse (SEA) against UN personnel. Communities have to know where they can lodge complaints and what type of behaviour they can complain against. The UN needs to show that it will take these complaints seriously, investigate all allegations and take appropriate action through its disciplinary structures.

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Image credit: [MONUSCO Photos/Flickr](#).

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### ***About the interviewee***

**Conor Foley** is a Professor of Conflict and International Law at the Pontifícia Universidade Católica Rio de Janeiro. He has worked on legal reform, human rights and protection issues in over thirty conflict zones for a variety of human rights and humanitarian agencies including: UN DPKO, UN OHCHR, UNHCR, UN-Habitat and Amnesty International. His recent books include *The Protection of Civilians by UN Peacekeeping missions*, Cambridge University Press, and *The Thin Blue Line: how humanitarianism went to war*, Verso.

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