

WHAT DO WE MEAN BY PROTECTION?

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“When *I* use a word,’ Humpty Dumpty said in rather a scornful tone,
‘it means just what I choose it to mean — neither more nor less.”
-Alice in Wonderland

The UN Security Council is making increasing use of its Chapter VII powers to authorize peacekeeping missions to protect civilians (POC) against threats to their right to life or physical integrity. This is of both normative and practical significance and is transforming “traditional” notions of peacekeeping. For protection to be effective, there must be a common understanding who should be protected, from what, by whom and until when. However, the term is also used in a number of other senses whose vagueness and elasticity diminishes their practical utility. Confusing the notion of protection of civilians—which is firmly rooted in international humanitarian and human rights law—with the political “responsibility to protect” (R2P) doctrine risks undermining the practical protection that UN peacekeeping missions should provide.

INTRODUCTION

There are now around 100,000 UN troops deployed around the world on missions who have authority from the Security Council to use force to protect civilians.¹ Armed soldiers are being given lawful permission to

1. See *Surge in Uniformed UN Peacekeeping Personnel from 1991 Present*, U.N. Peacekeeping Documents, UNITED NATIONS, <http://www.un.org/en/peacekeeping/documents/chart.pdf> (last visited Aug. 2013).

enter into the territory of other states in order to protect people from grave violations of international human rights or international humanitarian law (IHL). For protection to be effective there must be a common understanding of who should be protected, from what, by whom and until when. The term “protection” can be found in international humanitarian, human rights and refugee law and UN Security Council resolutions on POC often refer to all three bodies of law.² However, the “protection” that they provide is quite different in both conceptual and practical terms and this can lead to confusion about the applicable body of law for peacekeeping missions authorized by the Security Council under Chapter VII of the UN Charter.

The term “protection” is also commonly used by humanitarian aid workers to describe certain activities connected to the delivery of relief assistance. While notionally based on the above three legal frameworks, it is usually taken as referring to monitoring and advocacy work to ensure that assistance reaches its intended recipients, that their beneficiaries provide adequate physical protection and to “bear witness” to violations of fundamental rights. Finally, the term is also often associated with the concept of the “responsibility to protect” (R2P) doctrine, whose proponents often describe it as “an emerging international norm,” by which the “international community” may occasionally substitute itself for the protection that States are expected to provide those within their jurisdiction. This article provides a brief overview of how these different terms are generally understood, their inter-relationship and potential normative significance.

I. PROTECTION OF CIVILIANS MANDATES

On 12 February 1999 the UN Security Council, under a Canadian Presidency, held an open meeting on the matter of protection of civilians

2. S.C. Res. 1265, ¶ 14, U.N. Doc. S/RES/1265 (Sep. 17, 1999). This was the first resolution on the protection of civilians in armed conflict (POC) adopted by the UN Security Council and referred to the need for UN personnel “involved in peace-making, peacekeeping and peace-building activities have appropriate training in international humanitarian, human rights and refugee law.” *Id.*

in armed conflict.³ The Council noted with concern that civilians and humanitarian aid workers “continued to be targeted in instances of armed conflict, in flagrant violation of international humanitarian and human rights law” and requested that the Secretary General submit “a report with recommendations on how it could act to improve both the physical and legal protection of civilians in situations of armed conflict.”⁴ A Presidential statement following the meeting noted that:

Bearing in mind its primary responsibility for the maintenance of international peace and security, the Council affirms the need for the international community to assist and protect civilian populations affected by armed conflict. . . . The Council expresses its willingness to respond, in accordance with the Charter of the United Nations, to situations in which civilians, as such, have been targeted or humanitarian assistance to civilians has been deliberately obstructed.⁵

The report was published in September 1999 and contained a series of recommendations on how the Security Council could “compel parties to conflict to respect the rights guaranteed to civilians by international law and convention.”⁶ In welcoming its publication, the Security Council

3. S.C. Pres. Statement 1999/6, S/PRST/1999/6 (Feb. 12, 1999).

4. *Id.*

5. *Id.*

6. U.N. Secretary-General, *Report of the Secretary-General to the Security Council on the Protection of Civilians in Armed Conflict*, U.N. Doc. S/1999/957 (Sept. 8, 1999); see also U.N. Secretary-General, *Report of the Secretary-General to the Security Council on the Protection of Civilians in Armed Conflict*, U.N. Doc. S/2001/331 (Mar. 30, 2001); U.N. Secretary-General, *Report of the Secretary-General to the Security Council on the Protection of Civilians in Armed Conflict*, U.N. Doc. S/2004/431 (May 28, 2004); U.N. Secretary-General, *Report of the Secretary-General to the Security Council on the Protection of Civilians in Armed Conflict*, U.N. Doc. S/2005/740 (Nov. 28, 2005); U.N. Secretary-General, *Report of the Secretary-General to the Security Council on the Protection of Civilians in Armed Conflict*, U.N. Doc. S/2007/643 (Oct. 28, 2007); U.N. Secretary-General, *Report of the Secretary-General to the Security Council on the Protection of Civilians in Armed Conflict*, U.N. Doc. S/2007/643 (Oct. 28, 2007); U.N. Secretary-General, *Report of the Secretary-General to the Security Council on the Protection of Civilians in Armed Conflict*, U.N. Doc. S/2009/277 (May 29, 2009); U.N. Secretary-General, *Report of the Secretary-General to the Security Council on the Protection of Civilians in Armed Conflict*, U.N. Doc. S/2010/579 (Nov. 11, 2010); U.N.

adopted the first in a series of resolutions on the Protection of Civilians in Armed Conflict.⁷ This resolution noted, in its preamble, the “primary responsibility under the Charter of the United Nations for the maintenance of international peace and security,” the “importance of taking measures aimed at conflict prevention and resolution” and the “need to address the causes of armed conflict in a comprehensive manner in order to enhance the protection of civilians on a long-term basis, including by promoting economic growth, poverty eradication, sustainable development, national reconciliation, good governance, democracy, the rule of law and respect for and protection of human rights.”⁸ It underlined “the importance of safe and unhindered access of humanitarian personnel to civilians in armed conflict, including refugees and internally displaced persons, and the protection of humanitarian assistance to them” and emphasized “the need for combatants to ensure the safety, security and freedom of movement of United Nations and associated personnel, as well as personnel of international humanitarian organizations.”⁹

More specifically the resolution also expressed its “willingness to consider how peacekeeping mandates might better address the negative

Secretary-General, *Report of the Secretary-General to the Security Council on the Protection of Civilians in Armed Conflict*, U.N. Doc. S/2012/376 (May 22, 2012); U.N. Secretary-General, *Report of the Secretary-General to the Security Council on the Protection of Civilians in Armed Conflict*, U.N. Doc. S/2013/689 (Nov. 22, 2013).

7. See generally Sec. Res. 1265, *supra* note 2; see also S.C. Res. 1296, U.N. Doc. S/RES/1296 (Apr. 19, 2000); S.C. Res. 1502, U.N. Doc. S/RES/1502 (Aug. 26, 2003); S.C. Res. 1674, U.N. Doc. S/RES/1674 (Apr. 28, 2006); S.C. Res. 1894, U.N. Doc. S/RES/1894 (Nov. 11, 2009) (on the protection of civilians in armed conflict, which reaffirm, inter alia, the relevant provisions of the United Nations World Summit outcome document); S.C. Res. 1612, U.N. Doc. S/RES/1612 (Jul. 26, 2005); S.C. Res. 1882, U.N. Doc. S/RES/1882 (Aug. 4, 2009); S.C. Res. 1998, U.N. Doc. S/RES/1998 (Jul. 12, 2011); S.C. Res. 2068, U.N. Doc. S/RES/2068 (Sept. 19, 2012); S.C. Res. 1325, U.N. Doc. S/RES/1325 (Oct. 31, 2000); S.C. Res. 1820, U.N. Doc. S/RES/1820 (June 19, 2008); S.C. Res. 1888, U.N. Doc. S/RES/1888 (Sep. 30, 2009); S.C. Res. 1889, U.N. Doc. S/RES/1889 (Oct. 5, 2009); S.C. Res. 1960, U.N. Doc. S/RES/1960 (Nov. 11, 2009); S.C. Res. 1960, U.N. Doc. S/RES/1960 (Dec. 16, 2010) (on women, peace and security).

8. Sec. Res. 1265, *supra* note 2, at pmb1.

9. *Id.* ¶¶ 7, 8.

impact of armed conflict on civilians”¹⁰ and requested the Secretary-General “to ensure that United Nations personnel involved in peacemaking, peacekeeping and peace-building activities have appropriate training in international humanitarian, human rights and refugee law.”¹¹ The following month the Security Council authorized a peacekeeping operation in Sierra Leone, UNAMSIL, which stated that:

Acting under Chapter VII of the Charter of the United Nations, decides that in the discharge of its mandate UNAMSIL may take the necessary action to ensure the security and freedom of movement of its personnel and, within its capabilities and areas of deployment, to afford protection to civilians under imminent threat of physical violence taking into account the responsibilities of the Government of Sierra Leone.¹²

The decision to mandate UN forces to use force to protect civilians arose in response to a series of crises during the 1990s, which placed the “traditional principles” of peacekeeping under increasing strain. Chapter VII mandates have been subsequently developed in other peacekeeping missions that have forced a significant re-thinking about the protection of civilians by these missions under international law.

The debate in the Security Council that led to the UNAMSIL resolution being adopted was notable for the emphasis that was placed on the “protection provisions” of international law.¹³ It was opened by the Special Representative of the UN Secretary General for Children and Armed Conflict who detailed the atrocities committed against children by rebel groups in Sierra Leone.¹⁴ He was followed by the representative of the government of Sierra Leone who noted that the previous United Nations Observer Mission in Sierra Leone (UNOMSIL) “was not equipped to deal with certain situations” in the country and stated that:

10. *Id.* ¶ 11.

11. *Id.* ¶ 14.

12. S.C. Res. 1270, ¶ 14, U.N. Doc. S/RES/1270 (Oct. 22, 1999).

13. *See* U.N. SCOR, 53 Sess., 4054 Mtg., U.N. Doc. S/PV.4054 (Oct. 22, 1999), at 1 - 18

14. *See id.* at 2-5.

This is why the Sierra Leone delegation could not help but highlight paragraph 14 of the draft resolution, which says that acting under Chapter VII of the Charter, the new United Nations Mission in Sierra Leone, in discharge of its mandate, may take the necessary measures to ensure the safety and freedom of movement of United Nations personnel and, circumstances permitting, to afford protection to civilians under imminent threat of physical violence. In the view of my delegation, whatever interpretation others may give to this particular paragraph, we regard it as an insurance policy for both international peacekeepers and innocent civilians.¹⁵

The representative also stressed the positive role played by Nigeria, which had led an earlier regional intervention in Liberia and Sierra Leone¹⁶ and a representative of Nigeria was specially invited to address the Security Council.¹⁷ Russia chaired the debate, so it did not express a view on the resolution, but the other four permanent members of the Security Council all spoke in favour of it, along with Malaysia, Gambia, the Netherlands, Brazil, Argentina, Canada and Bahrain.¹⁸ This represented an extremely broad range of support for what was understood at the time to be a significant policy development within the UN.¹⁹ China's representative spoke of the "many rounds of consultations" that had gone into agreeing a draft that "accommodates the requests of the Government of Sierra Leone and the African members and reflects the concerns of other Council members."²⁰ Argentina described the resolution as introducing "a new, fundamental political, legal and moral dimension" to peacekeeping, which "shows that the Council has learned from its own experience and that it will not remain

15. *Id.* at 6.

16. *Id.* at 6.

17. *Id.* at 7-8.

18. *Id.*

19. Malaysia, Brazil and Argentina are all leading members of the non-aligned movement who, along with Russia and China, have traditionally taken a sceptical or hostile position towards "humanitarian interventions." For further discussion see Christine Gray, *The Use of Force for Humanitarian Purposes* (Jan. 14, 2013), *Research Handbook on International Conflict and Security Law* (2013), forthcoming, available at <http://ssrn.com/abstract=2309922> (last visited Mar. 30, 2015).

20. U.N. SCOR, 4054 Mtg., *supra* note 13, at 14.

indifferent to indiscriminate attacks against the civilian population.”²¹ Brazil said that it “augur[ed] well” for creating the conditions for “vigorous peacekeeping involvement of the United Nations in other conflicts in Africa.”²²

In the same year the UN published two reports on the failure of its missions to prevent genocide in Rwanda²³ and Srebrenica.²⁴ A subsequent resolution in April 2000 also indicated the Council’s intention to provide peacekeeping missions with appropriate mandates and resources to protect civilians and called on peacekeepers to consider the use of “temporary security zones . . . 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.”²⁵

In August 2000 the UN published the Report of the Panel on United Nations Peace Operations (the Brahimi Report).²⁶ This acknowledged that over the previous decade the organisation had “repeatedly failed to meet the challenge” of saving “generations from the scourge of war.”²⁷ It contained a series of recommendations designed to remedy problems that the UN had encountered in the deployment of its peacekeeping forces focussed on strategic direction, decision-making, rapid deployment, operational planning and support.²⁸ It also stated that UN peacekeepers “who witness violence against civilians should be presumed to be authorized to stop it, within their means, in support of basic United Nations principles. However, operations given a broad and explicit

21. *Id.* at 16.

22. *Id.* at 15.

23. See U.N. Secretary-General, *Report of the Independent Inquiry into the Actions of the United Nations During the 1994 Genocide in Rwanda*, U.N. Doc. S/1999/1257 (Dec. 16, 1999).

24. See U.N. Secretary-General, *Report of the Secretary-General pursuant to General assembly Resolution 53/35: The fall of Srebrenica*, U.N. Doc. A/54/549 (Nov. 15, 1999).

25. Sec. Res. 1296, *supra* note 7, ¶ 15.

26. See U.N. Secretary-General, *Report of the Panel on United Nations Peace Operations*, U.N. Doc. A/55/305-S/2000/809 (Aug. 21, 1999).

27. *Id.*

28. *Id.*

mandate for civilian protection must be given the specific resources needed to carry out that mandate.”²⁹

The Brahimi report listed the logistical and resources-based challenges that the UN faced in deploying peace-keeping troops in sufficient time and number and argued that “[t]he Secretariat must tell the Security Council what it needs to know, not what it wants to hear, when formulating or changing mission mandates.”³⁰ It also noted that “[t]here are hundreds of thousands of civilians in current United Nations mission areas who are exposed to potential risk of violence, and United Nations forces currently deployed could not protect more than a small fraction of them even if directed to do so.”³¹ Nevertheless, it argued that,

Once deployed, United Nations peacekeepers must be able to carry out their mandate professionally and successfully. This means that United Nations military units must be capable of defending themselves, other mission components and the mission’s mandate. Rules of engagement should not limit contingents to stroke-for-stroke responses but should allow ripostes sufficient to silence a source of deadly fire that is directed at United Nations troops or at the people they are charged to protect³²

The report also stated that:

There are many tasks which United Nations peacekeeping forces should not be asked to undertake, and many places they should not go. But when the United Nations does send its forces to uphold the peace, they must be prepared to confront the lingering forces of war and violence with the ability and determination to defeat them.³³

Since the publication of the Brahimi Report the number of UN peacekeeping missions has increased significantly and these are

29. *Id.* ¶ 62.

30. *Id.* ¶ 64(d).

31. *Id.* ¶ 63.

32. *Id.* ¶ 49.

33. *Id.* ¶ 1.

becoming increasingly multi-dimensional.³⁴ While the basic principles of “traditional peacekeeping”: consent, impartiality, and limited use of force continue to be reaffirmed by the UN General Assembly,³⁵ missions in the field are grappling with how to apply these while confronting situations in which civilians face a range of threats.³⁶ The *Capstone Doctrine*, published in 2008, for example, lists as a part of the ‘Core Business’ of UN peacekeeping the “[creation of] a secure and stable environment while strengthening the State’s ability to provide security, with full respect for the rule of law and human rights.”³⁷ It explains that:

[M]ost multi-dimensional United Nations peacekeeping operations are now mandated by the Security Council to protect civilians under imminent threat of physical violence. The protection of civilians requires concerted and coordinated action among the military, police and civilian components of a United Nations peacekeeping operation and must be mainstreamed into the planning and conduct of its core

34. See CHRISTINE GRAY, *INTERNATIONAL LAW AND THE USE OF FORCE* 249-54 (Oxford Univ. Press, USA 3d. 2008). See generally ALEX J. BELLAMY, PAUL D. WILLIAMS & STUART GRIFFIN, *UNDERSTANDING PEACEKEEPING* (Polity Press, 2d ed. 2010); SIOBHÁN WILLS, *PROTECTING CIVILIANS: THE OBLIGATIONS OF PEACEKEEPERS* (Oxford Univ. Press, 2009); UNITED NATIONS REFORM AND THE NEW COLLECTIVE SECURITY (Peter G. Danchin and Horst Fischer eds., Cambridge Univ. Press, 2010); ELIZABETH G. FERRIS, *THE POLITICS OF PROTECTION: THE LIMITS OF HUMANITARIAN ACTION* (The Brookings Inst., 2011); THOMAS G. WEISS, *HUMANITARIAN INTERVENTION: WAR AND CONFLICT IN THE MODERN WORLD PEACEKEEPING* (Polity Press, 2007).

35. Through the Annual Reports of the UN Special Committee for Peacekeeping Operations.

36. For the emphasis on the need to adapt to the changing nature of peacekeeping, see U.N. Secretary-General, *An Agenda for Peace: Preventive Diplomacy, Peacemaking and Peace-Keeping: Rep. of the Secretary-General*, ¶ 50, U.N. Doc. A/47/277-S/24111 (June 17, 1992); U.N. Secretary-General, *Supplement to an Agenda for Peace: Position Paper of the Secretary-General on the Occasion of the Fiftieth Anniversary of the United Nations*, ¶¶ 11-15, U.N. Doc. A/50/60-S/1995/1 (Jan. 3, 1995); UNITED NATIONS PEACEKEEPING OPERATIONS, PRINCIPLES AND GUIDELINES 18 (Dep’t of Peacekeeping Operations ed., 2008). See also THE NEW HORIZON INITIATIVE: PROGRESS REPORT NO. 2 (Dep’t of Peacekeeping Operations ed., 2011); WILLIAM J. DURCH ET AL., *THE BRAHIMI REPORT AND THE FUTURE OF UN PEACE OPERATIONS* (The Henry L. Stimson Ctr., 2003).

37. UNITED NATIONS PEACEKEEPING OPERATIONS, PRINCIPLES AND GUIDELINES, *supra* note 36, at 23.

activities. United Nations humanitarian agencies and non-governmental organization (NGO) partners also undertake a broad range of activities in support of the protection of civilians. Close coordination with these actors is, therefore, essential.³⁸

POC is also now debated at an open bi-annual session of the Security Council and this has resulted in a steady stream of statements, resolutions and reports.³⁹ The concept of POC has also been repeatedly endorsed by the UN General Assembly.⁴⁰ Guidance produced by the UN Department of Peacekeeping Operations (DPKO) and Office for the Coordination of Humanitarian Affairs (OCHA) also specifies that while 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, “in cases where the government is unable or unwilling to fulfill its responsibility, Security Council mandates give missions the authority to act independently to

38. *Id.* at 24.

39. *Id.* See also *Draft DPKO/DFS Operational Concept on the Protection of Civilians in United Nations Peacekeeping Operations*, U.N. Doc. DPKO/DFS (2010); *DPKO/DFS Lessons Learned Note on the Protection of Civilians in UN Peacekeeping Operations: Dilemmas, Emerging Practices and Lessons* U.N. Doc. DPKO/DFS (2010); *Protection of Civilian (POC) Resource and Capability Matrix for Implementation of UN Peacekeeping Operations with POC mandates*, U.N. Doc. DPKO/DFS (Feb. 2012); *Guidelines for Protection of Civilians for Military Components of UN Peacekeeping Missions*, UN DPKO, 2010; U.N. Office for the Coordination of Humanitarian Affairs, *Framework for Drafting Comprehensive Protection of Civilians (POC) Strategies in UN Peacekeeping Operations*, U.N. Doc. OCHA (2011); DIANE PAUL & SIMON BAGSHAW, PROTECT OR NEGLECT? TOWARD A MORE EFFECTIVE UNITED NATIONS APPROACH TO THE PROTECTION OF INTERNALLY DISPLACED PERSONS (Brookings ed., 2004), available at <http://www.brookings.edu/research/papers/2004/11/23humanrights-bagshaw> (explaining the Brookings-SAIS Project on Internal Displacement and the UN Office for the Coordination of Humanitarian Affairs, November 23, 2004).

40. See G.A. Res. 63/280, ¶ 2, U.N. Doc. A/RES/63/280 (May 20, 2009); Rep. of the Special Comm. on Peacekeeping Operations and its Working Grp., 63d Sess., Feb. 23-Mar. 20, 2009, ¶¶ 125-128, U.N. Doc. A/63/19; GAOR, 63d Sess., Supp. No. 19 (2009).

protect civilians [Meaning that] missions are authorized to use force against any party, *including elements of government forces*.”⁴¹

When the Security Council revised the mandate of the UN mission to the Democratic Republic of Congo (DRC) in 2007 it stated “that the protection of civilians must be given priority in decisions about the use of available capacity and resources.”⁴² Security Council mandates have become increasingly detailed in spelling out the tasks of UN peacekeeping missions. Although most continue to use a similar set of formulations regarding the POC-related tasks to those contained within the UNAMSIL mandate, there have been some important developments in the language used.⁴³ In 2008, the Security Council resolution on the DRC removed the reference to ‘without prejudice to the responsibility to the government’ and mandated the UN mission (MONUC) to: “Ensure 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.”⁴⁴ In 2014 the word “imminent” was removed from the formulation.⁴⁵

41. See *Framework for Drafting Comprehensive Protection of Civilians (POC) Strategies in UN Peacekeeping Operations*, *supra* note 39, at 3 (emphasis added). See also *Draft Framework for Drafting Mission-wide Protection of Civilians Strategies in UN Peacekeeping Operations*, UN DPKO, 2010.

42. S.C. Res. 1794, ¶ 5, U.N. Doc. S/RES/1794 (Dec. 21, 2007).

43. Since October 2008, the Security Council Report has published a series of reports on the protection of civilians in armed conflict tracking the issue on the Security Council agenda. See U.N. S.C. Rep. of the Security Council, *Cross-Cutting Report: Protection of Civilians*, 2008 No. 2 (Oct. 14, 2008); U.N. S.C. Rep. of the Security Council, *Cross-Cutting Report: Protection of Civilians in Armed Conflict*, 2009 No. 4 (Oct. 30, 2009); U.N. S.C. Rep. of the Security Council, *Cross-Cutting Report: Protection of Civilians in Armed Conflict*, 2010 No. 3 (Oct. 29, 2010); U.N. S.C. Rep. of the Security Council, *Cross-Cutting Report: Protection of Civilians in Armed Conflict*, 2011 No. 2 (July 20, 2011); U.N. S.C. Rep. of the Security Council, *Cross-Cutting Report: Protection of Civilians in Armed Conflict*, 2012 No. 2 (May 31, 2012); U.N. S.C. Rep. of the Security Council, *Cross-Cutting Report: Protection of Civilians in Armed Conflict*, 2013 No. 3 (Dec. 20, 2013).

44. S.C. Res. 1856, ¶ 3(a), U.N. Doc. S/RES/1856 (Dec. 22, 2008) (emphasis added).

45. S.C. Res. 2147, ¶ 4(a)(i), U.N. Doc. S/RES/2147 (Mar. 28, 2014) (“Ensure, within its area of operations, effective protection of civilians under threat of physical violence, including through active patrolling, paying particular attention to civilians

However, there remain considerable ambiguities about how to interpret POC mandates. Although the original Secretary General's report of 1999 set out a clear role for UN-mandated troops to provide physical protection to civilians, some subsequent reports were more ambiguous on this point.⁴⁶ Attempts to turn the concept into doctrine at the tactical and operational levels have also been fraught with difficulty.

In 2009, ten years after the deployment of the first mission with such a mandate, an independent review found that, "the presumed 'chain' of events to support protection of civilians – from the earliest planning to the implementation of mandates by peacekeeping missions in the field is [often] broken"⁴⁷ and made a series of recommendations for how the POC mandates could be better operationalized. The following year a concept note by the UN Department of Peacekeeping Operations (DPKO) noted that:

A number of senior mission leaders, mission personnel and troop and police contributors now feel that the absence of a clear, operationally-focused and practical concept for protection of civilians by United

gathered in displaced and refugee camps, humanitarian personnel and human rights defenders, in the context of violence emerging from any of the parties engaged in the conflict, and mitigate the risk to civilians before, during and after any military operation.”).

46. See U.N. Secretary-General, *Report of the Secretary-General on the Protection of Civilians in Armed Conflict*, U.N. Doc. S/2001/331 (Mar. 30, 2001); U.N. Secretary-General, *Report of the Secretary-General on the Protection of Civilians in Armed Conflict*, U.N. Doc. S/2002/1300 (Nov. 26, 2002). Both of these reports focused on the humanitarian rights-based concept of protection and failed to even mention the role of internationally-mandated forces in protecting civilians against violence. However, U.N. Secretary-General, was much clearer in calling for physical protection of refugees and IDPs ‘during transit as well as after return’ and from sexual and gender-based violence. *Report of the Secretary-General on the Protection of Civilians in Armed Conflict*, U.N. Doc. S/2004/431 (May 28, 2004). See also U.N. Secretary-General, *Report of the Secretary-General on the Protection of Civilians in Armed Conflict*, U.N. Doc. S/2005/740 (Nov. 28, 2005) (which called on peacekeepers to provide physical protection to civilians in camps, during population movements, and in their places of origin as well as the role of peacekeepers in restoring law and order, ensuring the civilian character of IDP camps, and securing humanitarian access).

47. VICTORIA HOLT & GLYN TAYLOR, *PROTECTING CIVILIANS IN THE CONTEXT OF UN PEACEKEEPING OPERATIONS*, 5 (Tania Inowlocki ed., 2009).

Nations peacekeeping operations has contributed to the disconnect between expectations and resources. . . . In the absence of a common UN position on the protection of civilians by UN peacekeeping operations, a wide range of views regarding what protection of civilians means for UN peacekeeping missions has taken root. Troop and police contributors, Member States, the Security Council, bodies of the General Assembly, as well as staff within the missions, DPKO and DFS, often understand POC in ways that may contradict one another, causing friction, misunderstanding and frustration in missions.⁴⁸

In March 2014, a report by the UN Office of Internal Oversight Services noted that peacekeeping missions routinely avoid using force to protect civilians who are under attack, intervening in only 20 percent of cases and that “force is almost never used to protect civilians under attack.”⁴⁹ It also noted that: “[f]orce was most likely to be used to protect civilians when troops were engaged in self-defence or defence of United Nations personnel and property. In some cases civilians had congregated in or around United Nations bases and the military component had fired on combatants to prevent their access to the base.”⁵⁰ However:

Interviewees also referred to gaps at the tactical level on the issue of how to respond to complex and ambiguous situations that might require

48. *DPKO/DFS Draft Operational Concept on the Protection of Civilians in Peace Operations*, *supra* note 35, ¶¶ 4, 9.

49. *See Evaluation of the Implementation and Results of Protection of Civilians Mandates in United Nations Peacekeeping Operations*, Rep. of the Office of Internal Oversight Services, 68th Sess., Mar. 7, 2014, ¶ 19, U.N. Doc. A/68/787 (2014) (“Of the 507 incidents involving civilians reported in Secretary-General’s reports from 2010 to 2013, only 101, or 20 per cent, were reported to have attracted an immediate mission response. Conversely, missions did not report responding to 406 (80 per cent) of incidents where civilians were attacked. The rate of reported response varied across missions, reflecting the seriousness of incidents and the availability of early warning, the accessibility of incident sites and other factors.” In an annex to the report UNDPKO accepted the report’s main conclusions and recommendations but noted that: “The report, however, misses an important opportunity to assess the implementation of protection of civilians mandates in their full scope. It focuses on a last resort option — the use of force — which we should expect and hope will be a rare occurrence where missions have so many other tools at their disposal.”).

50. *Id.* ¶ 23.

the use of force. . . such as intervening in fighting between two or more armed groups when civilian casualties were likely; when armed groups were openly visible in communities, committing extortion through fear but without physical violence; when the imminence of the threat could not be evaluated; when troops were outnumbered; when reinforcements were unavailable; when it would be difficult or impossible to reach the site; or when the use of force might provoke more violence or cause more civilian casualties...⁵¹

As Holt and Berkman have noted, “‘protection’ is often vague and undefined. . . . Deploying peacekeepers without either a clear vision of how to protect civilians or the means and authority to do so may result in a tragic shortfall.”⁵² Part of these difficulties is based on confusion over the meaning of the term “protection” and the rest of this chapter briefly discusses the other “definitions” of the term that are commonly used in the humanitarian discourse.

II. RIGHTS-BASED PROTECTION

In December 1991, the UN General Assembly adopted resolution 46/182.⁵³ This established the Inter-Agency Standing Committee (IASC), in order to strengthen the coordination of humanitarian emergency assistance during emergencies.⁵⁴ It also contained a set of principles relating to the distribution of humanitarian assistance.⁵⁵ The resolution emphasized respect for “the sovereignty, territorial integrity and national unity of States” and that “humanitarian assistance should be provided with the consent of the affected country and in principle on the basis of an appeal by [that] country.”⁵⁶ It also stressed that “humanitarian

51. *Id.* ¶ 52.

52. Victoria K. Holt & Tobias C. Berkman, *The Impossible Mandate? Military Preparedness, The Responsibility to Protect and Modern Peace Operations*, THE HENRY L. STIMSON CENTER, Sept. 2006, at 5, 50.

53. U.N. GAOR, 68th Sess., 78th plen. mtg., U.N. Doc. A/RES/46/182 (Dec. 19, 1991), an annex was attached to the resolution and the operative paragraphs of this are referred to below.

54. *Id.* para 38.

55. *Id.* paras 1-2.

56. *Id.* para 3.

assistance must be provided in accordance with the principles of humanity, neutrality and impartiality.”⁵⁷ However, it stated that:

The magnitude and duration of many emergencies may be beyond the response capacity of many affected countries. . . . States whose populations are in need of humanitarian assistance are called upon to facilitate the work of these organizations in implementing humanitarian assistance, in particular the supply of food, medicines, shelter and health care, for which access to victims is essential.⁵⁸

The resolution was passed despite concern expressed during the debate that the guidelines could be used to legitimize infringements on state sovereignty.⁵⁹

In early 1992 three new UN Departments: DPKO, the Department for Political Affairs (DPA) and the Department for Humanitarian Affairs (later to become OCHA) were created in a major internal restructuring.⁶⁰ UN Agencies such as the UNHCR, the World Food Programme (WFP) and the UN Children’s Fund (UNICEF) also significantly expanded its field presence from the start of the 1990s. This means that UN agencies are increasingly providing direct protection and assistance to people in complex humanitarian emergencies.

Since the start of the 1990s the Security Council has also passed a number of resolutions demanding unimpeded access by international humanitarian organizations to all those in need of assistance.⁶¹ A series

57. *Id.* para 2.

58. *Id.* paras 5-6.

59. Francis K. Abiew, *The Evolution of the Doctrine and Practice of Humanitarian Intervention*, THE HAGUE: KLUWER LAW INTERNATIONAL, 1991, at 141.

60. See U.N. Secretary-General, *Review of the Efficiency of the Administrative and Financial Functioning of the United Nations: Restructuring of the Secretariat of the Organization: Rep. of the Secretary General*, U.N. Doc. A/RES/47/212, 23, Dec. 1992; and U.N. Secretary-General, *Review of the Efficiency of the Administrative and Financial Functioning of the United Nations: Restructuring of the Secretariat of the Organization: Rep. of the Secretary General*, U.N. Doc. A/48/218 (Dec. 23, 1993). For discussion see Richard Kereem Al-Qaq, *Managing World Order: United Nations Peace Operations and the Security Agenda*, London: Tauris Academic Studies, 2009, 49-69.

61. See, e.g., S.C. Res. 794, pmb., U.N. Doc. S/RES/794 (Dec. 3, 1992) (in relation to Somalia); S.C. Res. 770, U.N. Doc. S/RES/770 (Aug. 13, 1992); S.C. Res.

of UN General Assembly resolutions have expressed similar views.⁶² The Security Council has also specifically linked the denial of humanitarian access with threats to international peace and security with a growing body of resolutions on the importance of ensuring that access to such assistance is not arbitrarily prevented.⁶³ For example, Security Council resolution 1502 after the attack on the UN headquarters in Baghdad in 2003 urged “all those concerned . . . to allow full unimpeded access by humanitarian personnel to all people in need of assistance, and

836, ¶¶ 5, 9, U.N. Doc. S/RES/836 (June 1993) (in relation to Bosnia-Herzegovina); S.C. Res. 1216, U.N. Doc. S/RES/1216 (Dec. 21, 1998) on the crisis in Guinea-Bissau; S.C. Res. 1265, U.N. Doc. S/RES/1265 (1999); S.C. Res. 1296, U.N. Doc. S/RES/1296 (Apr. 19, 2000); S.C. Res. 1674, U.N. Doc. S/RES/1674 (Apr. 28, 2006); S.C. Res. 1738, U.N. Doc. S/RES/1738 (Dec. 23, 2006), all of which were adopted under the thematic heading of Protection of Civilians. *See also* S.C. Res. 1502, ¶ 6, U.N. Doc. S/RES/1502 (Aug. 26, 2003) (in relation to Iraq).

62. *See, e.g.*, G.A. Res., 49/139, U.N. Doc. A/RES/49/139 (1994); G.A. Res., 51/194, U.N. Doc. A/RES/51/194 (1996); G.A. Res., 54/233, U.N. Doc. A/RES/54/233 (1999); G.A. Res., 58/114, U.N. Doc. A/RES/58/114 (2003); G.A. Res., 59/141, U.N. Doc. A/RES/59/141 (2004); G.A. Res., 60/124, U.N. Doc. A/RES/60/124 (2005); G.A. Res., 61/134, U.N. Doc. A/RES/61/134 (2006); G.A. Res., 62/94, U.N. Doc. A/RES/62/94 (2007); G.A. Res., 63/141, U.N. Doc. A/RES/63/141 (2008); G.A. Res., 63/139 U.N. Doc. A/RES/63/139 (2008); G.A. Res., 63/138, U.N. Doc. A/RES/63/138 (2008); G.A. Res., 63/137, U.N. Doc. A/RES/63/137 (2008); G.A. Res., 63/136, U.N. Doc. A/RES/63/136 (2008). Some of these were generic concerning the strengthening of coordination of humanitarian assistance or protection of humanitarian personnel, while others concerned specific country situations. The increasing number of such resolutions shows its growing importance for the U.N.’s work. *See e.g.*, G.A. Res., 63/139, ¶¶ 25, 26, U.N. Doc. A/RES/63/139 (Mar. 5, 2009) (“calls upon all States and parties in complex humanitarian emergencies, in particular in armed conflict and in post-conflict situations, in countries in which humanitarian personnel are operating, in conformity with the relevant provisions of international law and national laws, to cooperate fully with the United Nations and other humanitarian agencies and organizations and to ensure the safe and unhindered access of humanitarian personnel, as well as delivery of supplies and equipment, in order to allow them to efficiently perform their task of assisting affected civilian populations, including refugees and internally displaced persons”). It also designates August 19th as World Humanitarian Day in memory of the UN staff killed in the bombing of Baghdad in 2003. *Id.*

63. *Compilation of United Nations Resolutions on Humanitarian Assistance: Selected Resolutions of the General Assembly, Economic and Social Council and Security Council Resolutions and Decisions*, Office for the Coordination of Humanitarian Affairs Policy Development and Studies Branch, Policy and Studies Series, OCHA, (2009).

to make available, as far as possible, all necessary facilities for their operations.”⁶⁴

The delivery of humanitarian assistance is increasingly being integrated into the POC concept and being linked to protection of UN personnel and humanitarian staff in conflict zones.⁶⁵ A UN DPKO concept note on POC in 2009 lists “creating conditions conducive to the delivery of humanitarian assistance” as a POC task and states that:

The provision of humanitarian assistance to conflict affected civilians has long been viewed by the humanitarian community as at the core of protection activity. Missions may be called upon to help create the necessary safe and secure environment to assist with the delivery of aid, and, *in extremis*, may be requested to support the delivery of humanitarian assistance by military means.⁶⁶

From the start of the 1990s, UNHCR became the lead UN humanitarian agency in a number of complex emergencies and has also

64. S.C. Res. 1502, *supra* note 7, ¶ 6.

65. The U.N. is also protected by the Safety Convention and the International Criminal Court. *See* The Convention of Safety of United Nations and Associated Personnel, Dec. 9, 1994, art. 7 (“1. United Nations and associated personnel, their equipment and premises shall not be made the object of attack or of any action that prevents them from discharging their mandate. 2. States Parties shall take all appropriate measures to ensure the safety and security of United Nations and associated personnel. In particular, States Parties shall take all appropriate steps to protect United Nations and associated personnel who are deployed in their territory from the crimes set out in article 9. 3. States Parties shall cooperate with the United Nations and other States Parties, as appropriate, in the implementation of this Convention, particularly in any case where the host State is unable itself to take the required measures”). The Rome Statute of the International Criminal Court also makes it a crime to attack “personnel, installations, material, units or vehicles involved in a humanitarian assistance or peacekeeping mission in accordance with the Charter of the United Nations, as long as they are entitled to the protection given to civilians or civilian objects under the international law of armed conflict.” United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, July, 17 1998, *The Rome Statute of the International Criminal Court*, art. 8.2(b), U.N. Doc. A/CONF.183/9 (July, 17 1998).

66. *Draft DPKO/DFS*, *supra* note 39, ¶ 13. It also noted that: “Police also contribute to this activity through the provision of route security or security in refugee/IDP camps, as well as public order management during relief item distribution. Eleven missions are currently mandated with this task.” *Id.*

taken increasing responsibility for providing humanitarian assistance and protection to IDPs in many situations.⁶⁷ The protracted nature of many conflicts since then and the increasing preference for “voluntary return” as the most desirable long-term solution to refugee crises, means that creating the conditions in which refugees can return “in safety and dignity” has become an increasingly important part of UNHCR’s work.⁶⁸ This has resulted in the agency establishing large-scale protection, assistance and monitoring projects in refugee producing countries and highlighting steps that might be taken in countries of origin with regard to the promotion of human rights or to removing the factors that force displacement.⁶⁹

UN agencies often convene Protection Working Groups (PWGs) during complex emergencies to coordinate protection-related activities.⁷⁰ In 2005, as part of a wider process of humanitarian reform, the Global Protection Cluster (GPC) was established as an “inter-agency forum at the global level for standard and policy setting as well as collaboration and overall coordination of activities supporting the protection response in complex and natural disaster humanitarian emergencies.”⁷¹ Many UN

67. See U.N. High Commissioner for Refugees (UNHCR), *UNHCR’s Role in Support of an Enhanced Humanitarian Response to Situations of Internal Displacement: Policy Framework and Implementation Strategy*, EC/58/SC/CRP.18 (June 4, 2007).

68. UNHCR, *HANDBOOK ON VOLUNTARY REPATRIATION: INTERNATIONAL PROTECTION* 4 (1996) (“Voluntary repatriation is usually viewed as the most desirable long-term solution by the refugees themselves as well as by the international community.”).

69. See G.A. Res. 46/106, ¶ 9, U.N. Doc. A/RES/46/106 (Dec. 16, 1991) (mentioning the promotion of solutions to refugee problems through preventive measures).

70. Protection Working Groups often have sub-clusters dealing with issues such as human rights, land and property, children’s rights and women’s rights, which may be chaired by other UN agencies such as OHCHR, UN Habitat, UN Women and UNICEF. For further discussion see: Phoebe Wynn-Pope, *Evolution of Protection of Civilians in Armed Conflict, United Nations Security Council, Department of Peacekeeping Operations and the humanitarian community*, Oxfam Australia, 2013.

71. GLOBAL PROTECTION CLUSTER, <http://www.globalprotectioncluster.org> (last visited Jan. 20, 2014).

and NGO aid agencies employ Protection Officers and donors often provide specific funding for protection projects.⁷²

At the end of the 1990s, a series of workshops on the protection of civilians organised by the International Committee of the Red Cross (ICRC), involving in-depth discussion among some 50 humanitarian, human rights and academic organisations/institutions. This defined “protection” as:

[A]ll activities, aimed at obtaining full respect for the rights of the individual in accordance with the letter and the spirit of the relevant bodies of law (i.e. human rights, humanitarian and refugee law). Human rights and humanitarian actors shall conduct these activities impartially and not on the basis of race, national, national or ethnic origin, language or gender.⁷³

This is sometimes referred to as the “rights-based” definition of protection.⁷⁴ Its all-encompassing description is intended to emphasize that humanitarian actors have responsibilities to ensure that their work does not harm those that they are trying to help.⁷⁵ It clearly obliges them to remain impartial and not to discriminate.⁷⁶ However, its normative significance beyond this is less clear and humanitarian agencies themselves appear to disagree about how it should be interpreted.⁷⁷

72. *See, e.g.*, EUROPEAN COMMISSION, HUMANITARIAN PROTECTION: DG ECHO’S FUNDING GUIDELINES (Apr. 2009).

73. INTERNATIONAL COMMITTEE OF THE RED CROSS, STRENGTHENING PROTECTION IN WAR: A SEARCH FOR PROFESSIONAL STANDARDS (2001).

74. *See* INTERNATIONAL COMMITTEE OF THE RED CROSS, PROFESSIONAL STANDARDS FOR PROTECTION WORK CARRIED OUT BY HUMANITARIAN AND HUMAN RIGHTS ACTORS IN ARMED CONFLICT AND OTHER SITUATIONS OF VIOLENCE (2009); INTER-AGENCY STANDING COMMITTEE, GROWING THE SHELTERING TREE: PROTECTING RIGHTS THROUGH HUMANITARIAN ACTION (2002); GLOBAL PROTECTION CLUSTER WORKING GROUP, HANDBOOK FOR THE PROTECTION OF INTERNALLY DISPLACED PERSONS (2007); SOPHIA SWITHERN & RACHEL HASTIE, IMPROVING THE SAFETY OF CIVILIANS: A PROTECTION TRAINING PACK (Oxfam GB ed., 2008).

75. *Id.*

76. *Id.*

77. *See, e.g.*, SARA PANTULIANO & SORCHA O’CALLAGHAN, THE ‘PROTECTION CRISIS’: A REVIEW OF FIELD-BASED STRATEGIES FOR HUMANITARIAN PROTECTION IN

The Sphere Handbook, for example, which was developed as part of a multi-agency initiative to develop a set of universal minimum standards in core areas of humanitarian response,⁷⁸ states that, “those affected by a disaster have a right to life with dignity and therefore a right to assistance.”⁷⁹ In 2000 it published the first version of a “Humanitarian Charter,” which “defines the legal responsibilities of states and parties to guarantee the right to assistance and protection.”⁸⁰ This stated that: When states are unable to respond “they are *obliged to allow* [the intervention of] humanitarian organizations”⁸¹ However, this claim was dropped from subsequent revised editions, to be replaced by a statement that emphasised the “moral principle of humanity” and that interventions will normally take place “at the request of or at least with the consent of the government of the state in question.”⁸²

In practice, humanitarian agencies often use the term “protection” in four different ways. It is used in the above sense that people have the “right” to receive humanitarian aid.⁸³ It is also used to describe the monitoring and evaluation of the delivery of this aid to ensure that it reaches its intended recipients and does not cause unforeseen negative

DARFUR (2006); HUGO SLIM & ANDY BONWICK, PROTECTION – AN ALNAP GUIDE FOR HUMANITARIAN AGENCIES (2004); SORCHA O’CALLAGHAN & SARA PANTULIANO, PROTECTIVE ACTION: INCORPORATING CIVILIAN PROTECTION INTO HUMANITARIAN RESPONSE (2007).

78. See THE SPHERE PROJECT, <http://www.sphereproject.org> (last visited Aug. 15, 2013).

79. THE SPHERE PROJECT, HUMANITARIAN CHARTER AND MINIMUM STANDARDS IN DISASTER RESPONSE 5 (2000).

80. *Id.*

81. *Id.* (emphasis added).

82. See *id.* at 20. See also THE SPHERE PROJECT, 2011 EDITION OF THE SPHERE HANDBOOK: WHAT IS NEW? 3 (2011) (explaining the reason for the change in emphasis: “The doctrine of state sovereignty means that, in practice, almost all intervention by these bodies is at the request of or at least with the consent of the government of the state in question. International non-governmental organizations (NGOs), for their part, have no formal rights or responsibilities in international law other than the right to offer assistance. The state has an obligation to provide humanitarian assistance – and if it cannot (or will not), it is obliged to allow others to do so. But ultimately, the basis for engagement by non-governmental agencies remains a moral rather than a legal one.”).

83. This will be discussed further in Chapter Three under the section on Positive extra-territorial obligations during complex emergencies.

effects.⁸⁴ It can refer to physical protection of beneficiaries, usually through cooperation with host country security forces or UN peacekeeping soldiers, to provide security inside camps and protect the recipients of humanitarian aid from attacks by third parties.⁸⁵ It is also used in relation to advocacy activity where humanitarian actors may “bear witness to” or “document and denounce” grave violations of human rights and IHL.⁸⁶

The last two uses of the term sometimes cause dilemmas for humanitarian agencies, as one may involve becoming too closely linked to military forces while the other could lead to an antagonistic

84. See, e.g., INTERNATIONAL COMMITTEE OF THE RED CROSS, *supra* note 74; INTER-AGENCY STANDING COMMITTEE, *supra* note 74; GLOBAL PROTECTION CLUSTER WORKING GROUP, *supra* note 74; SWITHERN & HASTIE, *supra* note 74; SLIM & BONWICK, *supra* note 71. See also CARITAS AUSTRALIA ET AL., MINIMUM AGENCY STANDARDS FOR INCORPORATING PROTECTION INTO HUMANITARIAN RESPONSE (2008) (describing a project recently developed by a number of aid agencies which seeks to incorporate “protection standards” into evaluations of humanitarian programming).

85. See, e.g., Victoria Metcalfe, *Protecting Civilians? The Interaction Between International Military and Humanitarian Actors* (Humanitarian Policy Grp., Working Paper, 2012); Cedric De Coning, Walter Lotze, & Andreas Øien Stensland, *Mission-Wide Strategies for the Protection of Civilians, A Comparison of MONUC, UNAMID and UNMIS* (Norwegian Inst. of Int’l Affairs, Working Paper No. 792, 2011); Jane Barry & Anna Jefferys, *A Bridge Too Far: Aid Agencies and the Military in Humanitarian Response* (Humanitarian Practice Network, Working Paper No. 37, 2002); Hugo Slim, *Military Intervention to Protect Human Rights: the Humanitarian Agency Perspective* (The Int’l Council on Human Rights Policy, Working Paper, 2001); Danielle Coquoz, *The Involvement of the Military in Humanitarian Activities, in THE CHALLENGES OF COMPLEMENTARITY: FOURTH WORKSHOP ON PROTECTION FOR HUMAN RIGHTS AND HUMANITARIAN ORGANIZATIONS* (International Committee of the Red Cross, 2000); AMNESTY INTERNATIONAL, *PEACE-KEEPING AND HUMAN RIGHTS* (1994).

86. Bearing witness to violations is closely associated with MSF which split from the ICRC during the Biafra crisis over the latter’s perceived reluctance to speak out publicly against violations of international human rights law and IHL committed by the Nigerian government. For a brief overview of the founding of MSF, see MSF USA Homepage ‘The founding of MSF’, available at <http://www.doctorswithoutborders.org/about-us/history-principles/founding-msf> (last visited Mar. 7 2015). For the ICRC’s view of events see *David P. Forsythe*, ‘The International Committee of the Red Cross and humanitarian assistance - A policy analysis’, *International Review of the Red Cross*, Oct. 1996, ICRC publication No. 314, 512-31.

relationship with them. Aid agencies usually wish to maintain their neutrality in conflicts⁸⁷ and often rely on the consent of the host state, and other parties to the conflict, in order to gain access to the victims. Both activities could potentially compromise this access. As one study noted, in relation to Darfur, “[a]dvocacy by operational aid actors is frequently juxtaposed with programming, with speaking out weighed against potential costs to programmes, staff and beneficiaries.”⁸⁸

This issue was also graphically highlighted by the experiences of the agencies working in Sri Lanka, in the spring of 2009, when government forces massacred between 40,000 and 70,000 people at the end of the country’s civil war.⁸⁹ A UN appointed panel noted that the organization “did not adequately invoke principles of human rights that are the foundation of the UN but appeared instead to do what was necessary to avoid confrontation with the government.”⁹⁰ Some UN agencies even cooperated in the construction of “closed camps” into which the survivors were herded for screening.⁹¹ Both UN and NGO aid workers

87. While most humanitarian agencies adhere to the principle of neutrality set out in the Geneva Conventions and the ICRC statute, some believe that adherence to it can be naive or even harmful. See Thomas Weiss, *Principle, Politics and Humanitarian Action*, 13 ETHICS & INT’L AFF. 1 (1999); Hugo Slim, *Sharing a Universal Ethic: Principle, Politics and Humanitarian Action*, 2 THE INT’L J. OF HUM. RTS. 28 (1998); Michael Ignatieff, *International Committee of the Red Cross*, in CRIMES OF WAR: WHAT THE PUBLIC SHOULD KNOW 203 (Roy Gutman & David Rieff eds., 1999); MARY ANDERSON, DO NO HARM: SUPPORTING LOCAL CAPACITIES FOR PEACE THROUGH AID (1996) (“Although aid agencies often seek to be neutral or non-partisan towards the winners and losers of a war, the impact of their aid is not neutral regarding whether conflict worsens or abates. The development of programming principles such as ‘Do No Harm’ or Local Capacities for Peace (LCP) are intended to ensure that humanitarian assistance should be provided in ways that contributes to ‘justice, peace and reconciliation.’”).

88. HUMANITARIAN POLICY GROUP, HUMANITARIAN ADVOCACY IN DARFUR: THE CHALLENGE OF NEUTRALITY (2007).

89. See U.N. Secretary General, *Report of the Secretary General’s Panel of Experts on Accountability in Sri Lanka* (Mar. 31, 2011); INTERNATIONAL CRISIS GROUP, WAR CRIMES IN SRI LANKA (May 2010); *Sri Lanka’s Killing Fields: War Crimes Unpunished* (Channel 4 television broadcast Mar. 14, 2012).

90. U.N. Secretary-General’s Internal Review Panel, *United Nations Action in Sri Lanka*, ¶ (Nov. 2012), at 4.

91. *Id.* at 32 (“During the final months and then weeks of the conflict, civilians emerging from the conflict zone were severely malnourished, traumatized, exhausted,

argued that since speaking out would result in their expulsion from the country, the “humanitarian imperative” required them to remain and that ‘quiet diplomacy’ could reinforce their “protection by presence.”⁹² An internal review of the performance of the UN’s performance in Sri Lanka concluded that there had been a ‘systemic failure’ to protect the civilian population.⁹³

Aid agencies are divided amongst themselves about how to respond to this “protection” dilemma. For example, CARE International has stated that: “Agency staff must know the basics of human rights law and IHL [international human rights law]. Staff must know who is protected, and the threats from which they are protected.”⁹⁴ However, it is less clear what CARE believes staff should do when they see violations:

Sometimes speaking out publicly is necessary. . . . The questions for an organization like CARE, however, is to establish thresholds for speaking out, since it will lead to obvious organizational and personal risks. Over time, we have gained some experience with establishing these thresholds (basically we feel obligated to speak out until such a

and often seriously injured. The security forces, attempting to identify LTTE cadres, screened everyone and detained 280,000 people in military-run closed internment camps – which the Government referred to as ‘welfare villages.’ In the camps, IDPs were screened again and the military detained those suspected of LTTE affiliations in ‘surrender’ camps. There were persistent allegations of human rights violations at the screening points and in IDP camps but the UN was not permitted fully independent protection monitoring access. The UNCT had used its March 9 briefing and subsequent documents to inform the diplomatic corps of UN efforts to be present at screening locations, but did not mention the reports of people disappearing from other screening locations to which the UN had no access. UN officials said they were confronted with a dilemma over whether to hold back and insist on respect for principles or to provide urgently needed assistance through camps that were operating in violation of international standards. The UN chose to support the camps.”)

92. The author of this thesis was carrying out an evaluation of “protection projects” for a humanitarian aid organization in Sri Lanka in February, March and April 2009 and these comments are based on interviews carried out with the senior staff of a number of UN and NGO humanitarian agencies working in the country at the time.

93. *United Nations Action in Sri Lanka*, *supra* note 90, ¶ 80.

94. Dan Maxwell, *Humanitarian Protection: Recommendations Towards Good Practice for Non-Mandated Organizations*, CARE, Apr. 2006.

time as a Country Director determines that speaking out will endanger staff or other program commitments).⁹⁵

The implication of this position, that an agency would stop denouncing violations once they reached a certain level of severity, was traditionally rejected by other organisations such as Medecins Sans Frontieres (MSF) whose former legal director has argued:

Protecting means recognizing that individuals have rights and that the authorities who exercise power over them have obligations. It means defending the legal existence of individuals, alongside their physical existence. It means attaching the juridical link of responsibility to the chain of assistance measures that guarantee the survival of individuals When providing relief in times of conflict, humanitarian organizations therefore must not separate the provision of assistance from protection . . . and must report any violations encountered in the exercise of their work.⁹⁶

The views of humanitarian agencies also appear to be in some considerable flux about the issue. A paper published by the Humanitarian Policy Group (HPG) in 2011 argued that “it is generally accepted that protecting civilians in armed conflict and other situations of violence relates to violations of international humanitarian and human rights law, and is not limited to mere physical security but rather encompasses “the broader spectrum of human security and human dignity.”⁹⁷ However, four years previously an HPG paper had stated that humanitarian agencies were seeking to develop:

[M]ore accessible working definitions [of protection] which emphasise safety rather than rights. These working definitions distil a distinctive

95. *Id.*

96. FRANCOISE BOUCHET-SAULNIER, *THE PRACTICAL GUIDE TO HUMANITARIAN LAW* 308 (2002).

97. HUMANITARIAN POLICY GRP., *ROUNDTABLE ON CIVIL-MILITARY COORDINATION: THE CONCEPT OF PROTECTION: TOWARDS A MUTUAL UNDERSTANDING* 10 (2011); Victoria Metcalfe, *Protecting Civilians? The Interaction Between International Military and Humanitarian Actors* 1 (Humanitarian Policy Group, Working Paper, 2012) (citing the conclusions of a round-table discussion).

humanitarian element from the all-encompassing ICRC definition, in that they focus on the more acute forms of suffering. Put simply, protection is about seeking to assure the safety of civilians from acute harm.⁹⁸

Still others are critical of the entire concept of “humanitarian protection.” In 2010, for example, Marc DuBois of MSF, questioned the “obsession with protection,” which, he argued has become a “sort of self-flagellation in the humanitarian community over the death and destruction of our beneficiaries.”⁹⁹ He maintained that claims by humanitarians that they can “develop truly practical programming that protects people from all forms of violation, exploitation, and abuse during war and disaster”¹⁰⁰ amount to “delusions of grandeur” and “false advertising.” It is “not the lack of protection activities or legal protections *in the first instance*, but the surplus of violence that is the primary problem.” He concluded that “the protection of civilians during periods of violent crisis (in the sense of providing physical safety) is not our job.”¹⁰¹

The ultra-elasticity of the “rights-based definition” has also sometimes been used by UN peacekeeping missions with POC mandates to define ‘protection’ as including their own activities in distributing humanitarian assistance, monitoring for violations of international human rights law and IHL, and liaison and advocacy with the national authorities.¹⁰² However, this definition fails to provide clear legal guidance about the circumstances in which missions should use physical

98. PANTULIANO & O’CALLAGHAN, *supra* note 77, at 12.

99. Marc DuBois, *Protection: Fig-Leaves and Other Delusions*, HUMANITARIAN EXCH. MAGAZINE, Mar. 2010.

100. *Id.* (quoting HUGO SLIM & ANDY BONWICK, PROTECTION – AN ALNAP GUIDE FOR HUMANITARIAN AGENCIES 12 (2004)).

101. *Id.*

102. See U.N. Secretary-General, *Report of the Secretary-General on the Protection of Civilians in Armed Conflict*, S/2001/331, (Mar. 30, 2001); U.N. Secretary-General, *Report of the Secretary-General on the Protection of Civilians in Armed Conflict*, S/2002/1300, (Nov. 26, 2002) (discussing the humanitarian rights-based concept of protection and failed to even mention the role of internationally-mandated forces in protecting civilians against violence). This issue will be discussed further in relation to specific missions in Chapter Six.

force to protect civilians or to address the negative and positive legal obligations that this places on missions and the UN itself. A similar ambiguity can be found in the R2P concept, which is described below.

III. THE RESPONSIBILITY TO PROTECT

Advocates of the “responsibility to protect” (R2P) doctrine commonly describe it as:

[A]n emerging international norm which sets forth that states have the primary responsibility to protect their populations from genocide, war crimes, crimes against humanity and ethnic cleansing, but that when the state fails to protect its populations, the responsibility falls to the international community.¹⁰³

In September 2005, a reference to R2P was incorporated into two paragraphs of the outcome document of the high-level meeting of the General Assembly (Outcome Document), which was subsequently adopted by the General Assembly.¹⁰⁴ The UN Security Council has also reaffirmed these principles.¹⁰⁵ In 2007 the Secretary General appointed a Special Adviser on the Responsibility to Protect, based in the office of the Special Adviser on the Prevention of Genocide.¹⁰⁶ R2P can, therefore, be said to have been endorsed at the UN’s highest decision-making levels and to reflect a global consensus, at least in abstract, that

103. *Frequently Asked Questions*, RESPONSIBILITYTOPROTECT.ORG, <http://www.responsibilitytoprotect.org/files/R2Pcs%20Frequently%20Asked%20Question.pdf>.

104. G.A. Res. 60/1, U.N. GAOR, 60th Sess., Supp. No. 49, U.N. Doc. A/RES/60/1 (Oct. 24, 2005).

105. Sec. Res. 1674, *supra* note 7, ¶ 4; *see also* S.C. Res. 1706, U.N. SCOR, 61st year, S/RES/1706 (Aug. 31, 2006).

106. U.N. Secretary-General, *Letter Dated Aug. 31, 2007 From the Secretary-General Addressed to the President of the Security Council*, U.N. Doc. S/2008/721 (Dec. 7, 2007). The latter post was upgraded to the Under-Secretary-General level while the R2P advisor position was designated at the level of Assistant Secretary-General, on a part-time basis. *Id.*

people should be protected against such crimes.¹⁰⁷ As the first Special Advisor on R2P has noted the concept has generated a “staggering” number of academic theses and the “ever-expanding literature on the responsibility to protect . . . could now fill a small library.”¹⁰⁸ However, as will be discussed further below, there is considerable confusion about precisely what – if anything – it really means in practice.¹⁰⁹

The term was originally coined by the International Commission on Intervention and State Sovereignty (ICISS), established in the aftermath of NATO’s military action during the Kosovo crisis of 1999¹¹⁰ whose report was published in December 2001.¹¹¹ NATO’s intervention had taken place without the explicit approval of the UN Security Council and appears to have violated the provisions of the UN Charter.¹¹² However,

107. *See generally* GARETH EVANS, *THE RESPONSIBILITY TO PROTECT: ENDING MASS ATROCITY CRIMES ONCE AND FOR ALL* (2008); *see generally* THOMAS G. WEISS & RAMESH THAKUR, *GLOBAL GOVERNANCE AND THE UN: AN UNFINISHED JOURNEY* (Ind. University Press 2010); *see generally* RAMESH THAKUR, *THE UNITED NATIONS, PEACE AND SECURITY: FROM COLLECTIVE SECURITY TO THE RESPONSIBILITY TO PROTECT* (2006); *see generally* *RESPONSIBILITY TO PROTECT: THE GLOBAL MORAL COMPACT FOR THE 21ST CENTURY* (Richard H. Cooper & Juliette Voïnov Kohler eds., 2009); *see generally* *PROTECTING THE DISPLACED: DEEPENING THE RESPONSIBILITY TO PROTECT* (Sara E. Davies & Luke Glanville eds., 2010); *see generally* *RESPONSIBILITY TO PROTECT: CULTURAL PERSPECTIVES IN THE GLOBAL SOUTH* (Rama Mani & Thomas G. Weiss eds., 2011).

108. Edward C. Luck, *The Responsibility to Protect: Growing Pains or Early Promise?*, 24 *ETHICS & INT’L AFF.* 349, 349 (2010); *see generally* Edward C. Luck, *Sovereignty, Choice, and the Responsibility to Protect*, 1 *Global Resp. to Protect* 10 (2009).

109. *See, e.g.*, Aidan Hehir & Eric A. Heinze, *The Responsibility to Protect: “Never Again!” for the 21st Century?*, in *Human Rights, Human Security, and State Security: The Intersection* 1, 19 (Saul Takahashi ed., 2014).

110. *See generally* TIM JUDAH, *KOSOVO: WAR AND REVENGE* (2000); *see generally* NOEL MALCOLM, *KOSOVO: A SHORT HISTORY* (1998); *see generally* JULIE A. MERTUS, *KOSOVO: HOW MYTHS AND TRUTHS STARTED A WAR* (1999); *see generally* DAVID L. PHILLIPS, *LIBERATING KOSOVO: COERCIVE DIPLOMACY AND US INTERVENTION* (2012).

111. *INT’L COMM’N ON INTERVENTION AND STATE SOVEREIGNTY*, *The Responsibility to Protect* (2001) [hereinafter *ICISS*].

112. *See, e.g.*, CHRISTINE GRAY, *INTERNATIONAL LAW AND THE USE OF FORCE* 31, 39-51, 351-54 (3rd ed. 2008); *see, e.g.*, SIMON CHESTERMAN, *JUST WAR OR JUST PEACE? HUMANITARIAN INTERVENTION AND INTERNATIONAL LAW* 53-86 (2001); *see, e.g.*, Mary

some argued that the scale of violations of international human rights law and IHL that were allegedly taking place in Kosovo immediately before the intervention provided at least mitigating circumstances for the action.¹¹³ As one report has argued the intervention was “illegal but legitimate.”¹¹⁴

In his 1999 General Assembly report Kofi Annan, the then UN Secretary General, had famously questioned whether a hypothetical coalition of states should have “stood aside,” if they had not received “prompt Security Council authorization” to act in Rwanda to stop the genocide, but also warned of the danger of “military action outside the established mechanisms for enforcing international law.”¹¹⁵ Such interventions, he warned, could “undermin[e] the imperfect, yet resilient, security system created after the Second World War, and of setting dangerous precedents for future interventions without a clear criterion to decide who might invoke these precedents and in what circumstances.”¹¹⁶ The following year he again posed the question that “if humanitarian intervention is, indeed, an unacceptable assault on sovereignty, how should we respond to Rwanda, to a Srebrenica?”¹¹⁷

The ICISS was established, on an initiative by the Canadian government, with the expressed aim of fostering a global political

Ellen O’Connell, *The UN, NATO, and International Law After Kosovo*, 22 HUM. RTS. Q. 57, 57 (2000).

113. See generally Martti Koskenniemi, ‘The Lady Doth Protest Too Much’ Kosovo, and the Turn to Ethics in International Law, 65 MOD. L. REV. 159 (2002); see generally Antonio Cassese, A Follow-Up: Forcible Humanitarian Countermeasures and *Opinio Necessitatis*, 10 EUR. J. INT’L L. 791 (1999); see generally Antonio Cassese, *Ex iniuria ius oritur: Are We Moving Towards International Humanitarian Countermeasures in the World Community?*, 10 EUR. J. INT’L L. 23 (1999); see generally Bruno Simma, NATO, the UN and the Use of Force: Legal Aspects, 10 EUR. J. INT’L L. 1 (1999).

114. INDEPENDENT INTERNATIONAL COMMISSION ON KOSOVO, THE KOSOVO REPORT: CONFLICT, INTERNATIONAL RESPONSE, LESSONS LEARNED 4 (2000).

115. Press Release, Secretary General, Secretary-General Presents His Annual Report to General Assembly, U.N. Press Release SG/SM/7136 (Sept. 20, 1999).

116. *Id.*

117. U.N. Secretary-General, ‘We the Peoples’: The Role of the United Nations in the 21st Century, 48, U.N. A/54/2000 (2000).

consensus on the issue.¹¹⁸ Its original title had been the “‘Commission on Humanitarian Intervention’”, but this was changed due to concerns that the language would be seen as controversial.¹¹⁹ The report noted that the term “intervention” can cover a range of activities from the “delivery of emergency relief assistance to military action.”¹²⁰ Its authors stated that “[t]he kind of intervention with which we are concerned in this report is action taken against a state or its leaders, without its or their consent, for purposes which are claimed to be humanitarian or protective.”¹²¹ The report recognized that interventions were often harmful, destabilizing states and “fanning ethnic or civil strife.”¹²² Nevertheless, it argued that:

The notion that there is an emerging guiding principle in favour of military intervention for human protection purposes is also supported by a wide variety of legal sources – including sources that exist independently of any duties, responsibilities or authority that may be derived from Chapter VII of the UN Charter. These legal foundations include fundamental natural law principles; the human rights provisions of the UN Charter; the Universal Declaration of Human Rights together

118. For accounts of the negotiations that led to the wording adopted at the summit see ALEX J. BELLAMY, *RESPONSIBILITY TO PROTECT: THE GLOBAL EFFORT TO END MASS ATROCITIES* 66-97 (2009); see generally Gareth Evans, *The Responsibility to Protect: An Idea Whose Time Has Come ... and Gone?*, 22 INT’L REL. 283 (2008).

119. BELLAMY, *supra* note 118, at 35; see also ICISS, *supra* note 111, ¶¶ 1.39, 1.40, 2.4 (The ICISS report recognized “the long history, and continuing wide and popular usage, of the phrase ‘humanitarian intervention,’ and also its descriptive usefulness in clearly focusing attention on one particular category of interventions.” However, its authors “made a deliberate decision not to adopt this terminology, preferring to refer either to ‘intervention,’ or as appropriate ‘military intervention,’ for human protection purposes.” This was partly due “to the very strong opposition expressed by humanitarian agencies, humanitarian organizations and humanitarian workers towards any militarization of the word ‘humanitarian’” and, more broadly, because they felt that it “did not help to carry the debate forward.”).

120. ICISS, *supra* note 111, ¶ 1.38.

121. *Id.*

122. *Id.* ¶ 4.12 (It also stated that “[t]he rule against intervention in internal affairs encourages states to solve their own internal problems” and that “[w]hen internal forces seeking to oppose a state believe that they can generate outside support by mounting campaigns of violence, the internal order of all states is potentially compromised.”). See also *Id.* ¶ 2.9 (describing forcible interventions during the Cold War).

with the Genocide Convention; the Geneva Conventions and Additional Protocols on international humanitarian law; the statute of the International Criminal Court; and a number of other international human rights and human protection agreements and covenants.¹²³

The report suggested that when the Security Council fails to act the “responsibility” may pass to the General Assembly¹²⁴ or Regional Organisations, including occasions when the latter act outside their area of membership.¹²⁵ As an interim measure it suggested that the Security Council’s permanent members adopt a voluntary code of conduct restricting the use of their veto power¹²⁶ and “consider and seek to reach agreement on a set of guidelines, embracing the ‘Principles for Military Intervention’ . . . to govern their responses to claims for military intervention for human protection purposes.”¹²⁷

Three years after the publication of the ICISS report, in December 2004, the UN High-Level Panel on Threats, Challenges and Change report *A More Secure World: Our Shared Responsibility*, endorsed R2P as an “emerging norm,” while specifying that the responsibility was

123. *Id.* ¶ 2.26; *see also Id.* ¶ 8.22 (It notes the “positive influence” of international non-governmental organizations (INGOs) as “advocates of cross-border human protection” and “stirring response – especially in the West” for military interventions.); *Id.* ¶ 4.29 (“Ideally there would be a report as to the gravity of the situation, and the inability or unwillingness of the state in question to manage it satisfactorily, from a universally respected and impartial non-government source. The International Committee for the Red Cross (ICRC) is an obvious candidate for this role, often mentioned to us, but for understandable reasons – based on the necessity for it to remain, and be seen to remain, absolutely removed from political decision making, and able to operate anywhere on the ground – it is absolutely unwilling to take on any such role.”).

124. *Id.* ¶¶ 6.29-6.30.

125. *Id.* ¶¶ 6.31-6.35.

126. *Id.* ¶ 6.21; *Id.* ¶ 6.20 (Noting that “[t]hose states who insist on the right to retaining permanent membership of the UN Security Council and the resulting veto power, are in a difficult position when they claim to be entitled to act outside the UN framework as a result of the Council being paralyzed by a veto cast by another permanent member.”).

127. *Id.* ¶ 8.29; *Id.* ¶ 8.30 (Stating “[t]hat the Secretary-General [should] give consideration, and consult as appropriate . . . as to how the substance and action recommendations of this report can best be advanced in those two bodies, and by his own further action.”).

‘exercisable by the Security Council . . . as a last resort, in the event of genocide and other large-scale killing, ethnic cleansing or serious violations of international humanitarian law.’¹²⁸ The following year, in March 2005, the UN Secretary-General’s report *In Larger Freedom: Towards Development, Security and Human Rights for All*, used similar language.¹²⁹ The Outcomes Document of the World Summit included two paragraphs referring to R2P.¹³⁰ This included a commitment:

128. U.N. Secretary-General’s High Level Panel on Threats, Challenges and Change, *A More Secured World: Our Shared Responsibility*, ¶ 203, U.N. Doc. A/59/5665 (Dec. 2, 2004) (“We endorse the emerging norm that there is a collective international responsibility to protect, exercisable by the Security Council authorizing military intervention as a last resort, in the event of genocide and other large-scale killing, ethnic cleansing or serious violations of international humanitarian law which sovereign Governments have proved powerless or unwilling to prevent.”).

129. U.N. Secretary-General, *In Larger Freedom: Towards Development, Security and Human Rights for All*, ¶ 135, U.N. Doc. A/59/2005 (Mar. 21, 2005) (Annan stated, “While I am well aware of the sensitivities involved in this issue, I strongly agree with this approach. I believe that we must embrace the responsibility to protect, and, when necessary, we must act on it. This responsibility lies, first and foremost, with each individual State, whose primary *raison d’être* and duty is to protect its population. But if national authorities are unable or unwilling to protect their citizens, then the responsibility shifts to the international community to use diplomatic, humanitarian and other methods to help protect the human rights and well-being of civilian populations. When such methods appear insufficient, the Security Council may out of necessity decide to take action under the Charter of the United Nations, including enforcement action, if so required.”).

130. 2005 World Summit Outcome, ¶¶ 138-39, U.N. Doc. A/60/L.1 (Sept. 15, 2005) (“Each individual State has the responsibility to protect its populations from genocide, war crimes, ethnic cleansing and crimes against humanity. This responsibility entails the prevention of such crimes, including their incitement, through appropriate and necessary means. We accept that responsibility and will act in accordance with it. The international community should, as appropriate, encourage and help States to exercise this responsibility and support the United Nations in establishing an early warning capability. The international community, through the United Nations, also has the responsibility to use appropriate diplomatic, humanitarian and other peaceful means, in accordance with Chapters VI and VIII of the Charter, to help protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity. In this context, we are prepared to take collective action, in a timely and decisive manner, through the Security Council, in accordance with the Charter, including Chapter VII, on a case-by-case basis and in cooperation with relevant regional organizations as appropriate, should peaceful means be inadequate and national authorities manifestly fail to protect their

to take collective action, in a timely and decisive manner, through the Security Council, in accordance with the Charter, including Chapter VII, on a case-by-case basis and in cooperation with relevant regional organizations as appropriate, should peaceful means be inadequate and national authorities manifestly fail to protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity.¹³¹

The significance of this commitment continues to be debated and a wide-range of views have been expressed on the subject.¹³² As Hehir and Heinze have caustically noted, “the pronouncements made about the novelty of R2P regarding both international law and international norms,

populations from genocide, war crimes, ethnic cleansing and crimes against humanity. We stress the need for the General Assembly to continue consideration of the responsibility to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity and its implications, bearing in mind the principles of the Charter and international law. We also intend to commit ourselves, as necessary and appropriate, to helping States build capacity to protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity and to assisting those which are under stress before crises and conflicts break out.”)

131. *Id.* ¶ 139.

132. For generally supportive views see Alex J. Bellamy, *The Responsibility to Protect—Five Years On*, 24 ETHICS & INT’L AFF. 143 (2010); GARETH EVANS, THE RESPONSIBILITY TO PROTECT: ENDING MASS ATROCITY CRIMES ONCE AND FOR ALL 47 (2008); RAMESH THAKUR, THE RESPONSIBILITY TO PROTECT: NORMS, LAWS AND THE USE OF FORCE IN INTERNATIONAL POLITICS (2011); RAMESH THAKUR, THE UNITED NATIONS, PEACE AND SECURITY: FROM COLLECTIVE SECURITY TO THE RESPONSIBILITY TO PROTECT (2006); THOMAS G. WEISS & RAMESH THAKUR, GLOBAL GOVERNANCE AND THE UN: AN UNFINISHED JOURNEY (2010); Gareth Evans, *From Humanitarian Intervention to the Responsibility to Protect*, 24 WIS. INT’L L.J. 703, 703-22 (2006); Gareth Evans, *The Responsibility to Protect: An Idea Whose Time Has Come ... and Gone?*, 22 INT’L REL. 283, 288 (2008); Ramesh Chandra Thakur & Thomas G. Weiss, *R2P: From Idea to Norm—and Action?*, 1 GLOBAL RESP. TO PROTECT 22 (2009). For more critical accounts, see Simon Chesterman, *‘Leading from Behind’: The Responsibility to Protect, the Obama Doctrine, and Humanitarian Intervention After Libya*, 25 ETHICS & INT’L AFF. 279 (2011). See also Carlo Focarelli, *The Responsibility to Protect Doctrine and Humanitarian Intervention: Too Many Ambiguities for a Working Doctrine*, 13 J. CONFLICT & SECURITY L. 191 (2008); Carsten Stahn, *Responsibility to Protect: Political Rhetoric or Emerging Legal Norm?*, 101 AM. J. INT’L L. 99 (2007); ANNE ORFORD, INTERNATIONAL AUTHORITY AND THE RESPONSIBILITY TO PROTECT (2011); Anne Orford, *From Promise to Practice? The Legal Significance of the Responsibility to Protect Concept*, 3 GLOBAL RESP. TO PROTECT 400, 401 (2011).

as well as its efficacy in solidifying a commitment by states to acknowledge that they have a bona fide ‘responsibility’ to protect, are overly sanguine and hyperbolic.”¹³³

This lack of clarity has led to a number of strikingly conflicting claims about R2P.¹³⁴ For example, Stuenkel claims that the emerging powers of Brazil, Russia, India, China and South Africa (the BRICS) have “supported R2P in the vast majority of cases,”¹³⁵ although all are notably sceptical about UN authorised military interventions on humanitarian grounds.¹³⁶ Conversely, government members of other permanent Security Council members have made references to R2P when seeking to justify actions which have little to do with the original concept.¹³⁷ Its ambiguity is perhaps best summarized by Thomas Weiss,

133. Aidan Hehir and Eric A. Heinze, ‘The Responsibility to Protect: “Never Again!” for the 21st Century?’, in *HUMAN RIGHTS, HUMAN SECURITY, AND STATE SECURITY* 19 (Saul Takahashi ed., 2004).

134. See, e.g., Press Release, General Assembly, Delegates Seek to End Global Paralysis in Face of Atrocities as General Assembly Holds Interactive Dialogue on Responsibility to Protect, U.N. Press Release GA/10847 (July 23, 2009) (statements by Gareth Evans, Edward Luck, Professor Noam Chomsky, and Professor Jean Brimont).

135. Oliver Stuenkel, Abstract, *The BRICS and the Future of R2P*, 6 *GLOBAL RESP. TO PROTECT* 3 (2014). See also Kai Michael Kenkel, *Brazil and R2P: Does Taking Responsibility Mean Using Force?*, 4 *GLOBAL RESP. TO PROTECT* 5 (2012). Both make the point that Brazil bases its support for R2P on its agreement with the first two pillars, but differs with the “interventionists” over the use of force.

136. For example, Brazil, Russia, India, China, and Germany all abstained from Security Council Resolution 1973, authorizing military intervention in Libya, while South Africa voted in favor of it; though, it subsequently expressed reservations about NATO’s military action. See EMILY O’BRIEN & RICHARD GOWAN, CENTER ON INTERNATIONAL COOPERATION, *THE INTERNATIONAL ROLE IN LIBYA’S TRANSITION* 15 (2012), available at http://cic.es.its.nyu.edu/sites/default/files/libya_diplomatic_transition.pdf. In 2012, BRICS issued a joint statement calling for “respect [of] Syrian independence, territorial integrity and sovereignty.” *BRICS Summit: Delhi Declaration*, COUNCIL ON FOREIGN RELATIONS para. 21 (Mar. 29, 2012), <http://www.cfr.org/brazil/brics-summit-delhi-declaration/p27805>.

137. Tony Blair, Prime Minister, Speech at Labour’s Local Government, Women’s and Youth Conferences (2003); Tony Blair, Prime Minister, Speech to the U.S. Congress (2003); Tony Blair, Prime Minister, Prime Minister Warns of Continuing Global Terror Threat (2004) (referring to R2P in relation to the invasion of Iraq);

who served as the ICISS Research Director and is one of its leading academic proponents:

the proverbial new bottom-line is clear: when a state is unable or unwilling to safeguard its own citizens and peaceful means fail, the resort to outside intervention, including military force (preferably with Security Council approval) remains a distinct possibility.¹³⁸

This vagueness, and the clearly controversial nature of some interpretations that have been put on it, are particularly problematic given the widespread confusion between R2P and POC.

IV. R2P AND POC

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 share the same overall goal of protecting civilians from grave violations of human rights and IHL.¹³⁹ The first Security Council resolution to reaffirm the two paragraphs on R2P in the Summit Outcome document, in April 2006, was devoted to POC¹⁴⁰ and a

Interview by Minister of Foreign Affairs of the Russian Federation Sergey Lavrov with BBC, in Moscow, Russ. (Aug. 9, 2008) (using R2P to justify military action in South Ossetia); Foreign Minister, Burma – Joint Communiqué Issued by the Ministry of Foreign and European Affairs and Ministry of Defence, in Paris, France (May 25, 2008) (citing R2P in relation to a proposed forcible intervention to deliver food aid in Myanmar); John Reid, Secretary of State for Defense, 20th-Century Rules, 21st-Century Conflict (Apr. 3, 2006). *See also* John Reid, *I Do Not Reject the Geneva Conventions*, THE GUARDIAN (Apr. 5, 2006), <http://www.theguardian.com/commentisfree/2006/apr/05/comment.politics> (stating that his claim—that the protections which the Geneva Conventions provide to inmates at Guantanamo Bay should be reconsidered—is supported).

138. THOMAS G. WEISS, WHAT'S WRONG WITH THE UNITED NATIONS AND HOW TO FIX IT 142 (2008).

139. For discussion see Raphael van Steenberghe, The Notions of the Responsibility to Protect and the Protection of Civilians in Armed Conflicts: Detecting Their Association and its Impact Upon International Law, 6 GOETTINGEN J. INT'L L. 81 (2014).

140. S.C. Res. 1674, ¶ 4, U.N. Doc. S/RES/1674 (Apr. 28, 2006).

resolution a few months later on the situation in Darfur also contained references to both POC and R2P.¹⁴¹

A number of states have made declarations associating the two concepts together and the Secretary General's report on POC in 2007 contains a reference to the Summit Outcome document as an advance in POC's "normative framework."¹⁴² A POC strategy document published by the UN Mission in the Democratic Republic of Congo (MONUC) and the UN Office for the High Commissioner for Human Rights (OHCHR) expressly refers to R2P in three paragraphs under a section entitled "Rationale and the Responsibility to Protect."¹⁴³

However, in his 2012 report on POC the Secretary General stated that he was "concerned about the continuing and inaccurate conflation of the concepts of the protection of civilians and the responsibility to protect," and that while "the two concepts share some common elements" there were also "fundamental differences" between them as POC "is a legal concept based on international humanitarian, human rights and refugee law, while the responsibility to protect is a political concept."¹⁴⁴ In his report on R2P he also noted that, "While the work of peacekeepers may contribute to the achievement of RtoP goals, the two concepts of the responsibility to protect and the protection of civilians have separate and distinct prerequisites and objectives."¹⁴⁵

As Steenberghe has noted the references to R2P in some resolutions dealing with POC has been deliberately pushed by some NGOs "with the explicit hope of transforming R2P from an emerging norm into

141. S.C. Res. 1706, U.N. Doc. S/RES/1706 (Aug. 31, 2006).

142. U.N. Secretary-General, *The Protection of Civilians in Armed Conflict*, ¶¶ 11-12, U.N. Doc. S/2007/643 (Oct. 28, 2007).

143. *UN System-Wide Strategy for the Protection of Civilians in the Democratic Republic of the Congo* (Jan. 2010), available at http://www.globalprotectioncluster.org/_assets/files/field_protection_clusters/Democratic_Republic_Congo/files/UN_Wide_Protection_Strategy_Final_150110_EN.pdf.

144. U.N. Secretary-General, *The Protection of Civilians in Armed Conflict*, ¶ 21, U.N. Doc. S/2012/376 (May 22, 2012).

145. U.N. Secretary-General, *Responsibility to Protect: Timely and Decisive Response*, ¶ 16, U.N. Doc. A/66/874-S/2012/578 (July 25, 2012).

established customary international law.”¹⁴⁶ This has led some countries to complain that the two concepts must not be “confused or conflated,” since this could undermine POC’s accepted neutral “humanitarian imperative.”¹⁴⁷ A briefing from the Global Centre for the Responsibility to Protect, in 2009, explained:

Open debates on POC have indeed been the only occasions within the formal [Security] Council agenda to reflect on the development of the R2P norm and its practice. Yet the sensitivities around the inclusion of R2P within the protection of civilians’ agenda have increased in recent months. There are concerns that the POC agenda is being needlessly politicized by the introduction of R2P into the Council’s work and resolutions on the protection of civilians, as those who seek to roll back the 2005 endorsement of R2P raise questions about the protection of civilians in the attempt to challenge hard-won consensus reached on both issues.¹⁴⁸

Holt and Berkman have warned that debates about R2P could “distract the international community from addressing the practical, immediate challenges within current operations.”¹⁴⁹ Willmot and

146. Steenberghe, *supra* note 139, at 105. “Numerous letters have 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.” *Id.* at 112-13.

147. U.N. SCOR, 6531st mtg. at 11, U.N. Doc. S/PV.6531 (May 10, 2011) (“The protection of civilians is a humanitarian imperative. 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.”).

148. See *The Relationship between the Responsibility to Protect and the Protection of Civilians in Armed Conflict*, GLOBAL CENTRE FOR THE RESPONSIBILITY TO PROTECT (Jan. 2009), available at <http://www.responsibilitytoprotect.org/files/GCR2P%20Policy%20Brief-%20The%20relationship%20between%20R2P%20and%20the%20Protection%20of%20Civilians%20in%20Armed%20Conflict.pdf>.

149. Victoria K. Holt & Tobias C. Berkman, *The Impossible Mandate? Military Preparedness, the Responsibility to Protect and Modern Peace Operations*, THE HENRY L. STIMSON CENTER 180 (Sept. 2006), available at http://www.stimson.org/images/uploads/research-pdfs/Complete_Document-TheImpossible_Mandate-Holt_Berkman.pdf.

Mamiya argue that that, “While the international community struggled with the revolutionary strategic concepts of humanitarian intervention and the Responsibility to Protect, a quiet evolution was taking place through UN peacekeeping’, through the development of POC.”¹⁵⁰ Steenberghe has noted that the attempts to export R2P language into POC risks politicizing a “field characterized by neutrality and impartiality.”¹⁵¹ To which it can be added that the vagueness and differing interpretations of R2Ps actual meaning make it even more difficult to turn POC into an effective working doctrine when the two concepts are associated together.

V. RESPONSIBILITY WHILE PROTECTING

The distinctions between R2P and POC were further blurred by the UN Security Council authorization when it adopted two Chapter VII resolutions on the crisis in Libya in early 2011.¹⁵²

The first of these, in February, “[d]eplor[ed] the gross and systematic violation of human rights, including the repression of peaceful demonstrators . . . and reject[ed] unequivocally the incitement to hostility and violence against the civilian population made from the highest level of the Libyan government.”¹⁵³ It urged Libya to “respect human rights and international humanitarian law” as well as ensuring “the safe passage of humanitarian and medical supplies, and humanitarian agencies and workers, into the country.”¹⁵⁴ The resolution recalled that it was “the Libyan authorities’ responsibility to protect its population” and

150. Haidi Willmot & Ralph Mamiya, *Mandated to Protect: Security Council Practice on the Protection of Civilians*, in *THE OXFORD HANDBOOK OF THE USE OF FORCE IN INTERNATIONAL LAW* (Marc Weller ed., 2014).

151. Raphael van Steenberghe, *The Notions of the Responsibility to Protect and the Protection of Civilians in Armed Conflicts: Detecting Their Association and its Impact on International Law*, 6 *GOETTINGEN J. INT’L L.* 81, 106-07 (2014).

152. See generally EMILY O’BRIEN & RICHARD GOWAN, *CENTER ON INTERNATIONAL COOPERATION, THE INTERNATIONAL ROLE IN LIBYA’S TRANSITION* (2012), available at http://cic.es.its.nyu.edu/sites/default/files/libya_diplomatic_transition.pdf (discussing the international response to this crisis).

153. S.C. Res. 1970, U.N. Doc. S/RES/1970 (Feb. 26, 2011).

154. *Id.*

reaffirmed its “strong commitment to the sovereignty, independence, territorial integrity and national unity” of the country.¹⁵⁵ Nevertheless, the Security Council, acting under Chapter VII of the UN Charter, imposed an arms embargo on the country and subjected key members of the Libyan government to a travel ban and an asset freeze.¹⁵⁶ The situation was also referred to the International Criminal Court for further investigation.¹⁵⁷

On March 17 the Security Council adopted another resolution, restating many of these provisions and deploring the failure of the Libyan authorities to comply with them.¹⁵⁸ It also authorized:

Member States that have notified the Secretary-General, acting nationally or through regional organizations or arrangements, and acting in cooperation with the Secretary-General, to take all necessary measures . . . to protect civilians and civilian populated areas under threat of attack . . . while excluding a foreign occupation force of any form on any part of Libyan territory.¹⁵⁹

Two days later NATO began a massive bombardment of Libyan air defenses and military hardware, with a focus just outside the rebel-held town of Benghazi, which was besieged by government forces.¹⁶⁰ NATO’s campaign was to continue until the end of October when Gaddafi was captured, tortured and killed by rebels after losing control of the capital Tripoli.¹⁶¹

155. *Id.*

156. *Id.*

157. *Id.*

158. S.C. Res. 1973, U.N. Doc. S/RES/1973 (Mar. 17, 2011).

159. *Id.* ¶ 4.

160. CONOR FOLEY, HUMANITARIAN ACTION IN COMPLEX EMERGENCIES 1, available at <http://www.atha.se/content/humanitarian-action-complex-emergencies-managing-linkages-security-agendas>.

161. *Id.* Gaddafi’s death on October 20, 2011 was captured on mobile phone videos which circulated widely on the internet. These “[v]ideos taken on mobile phones show them beating Gaddafi and manhandling him on the back of a utility vehicle. He pleads with his captors, saying, ‘What are you doing? It’s not allowed in Islamic law Do you know what is right or wrong?’ The men scream, ‘Muammar, you dog!’ as blood pours from various parts of his body. One video then shows him being sodomized with

While the conflict was still ongoing Britain's Prime Minister stated that his government's understanding of the UN resolution was that it was "limited in its scope...[i]t explicitly does not provide legal authority for action to bring about Gaddafi's removal from power by military means."¹⁶² "NATO's senior military planners have also subsequently stated that their rules of engagement (RoE) throughout the campaign were only to hit military targets and only if these had been identified as a specific threat to civilians at the time."¹⁶³ This was a significantly narrower RoE than those used by NATO during its campaign over Kosovo which deliberately targeted Serbian civilian infrastructure and also killed considerably more civilians.¹⁶⁴ Nevertheless, the fact that the campaign continued until Gaddafi had been militarily deposed and the refusal of NATO to consider a ceasefire or facilitate negotiations which could conceivably have led to a peaceful power change of power led

some kind of stick or knife. A gun is placed against his head and he is thrown onto a car, then dragged along the ground by his hair. Shots ring out, hidden from the camera, and his lifeless and badly scarred body is subsequently shown lying on the ground."

162. *Libya: Removing Gaddafi Not Allowed, Says David Cameron*, BBC NEWS, Mar. 21, 2011, <http://www.bbc.co.uk/news/uk-politics-12802749>.

163. Conor Foley, *To Save Succeeding Generations: UN Security Council Reform and the Protection of Civilians*, IGARAPÉ INST., Aug. 2013, at 27, available at <http://pt.igarape.org.br/to-save-succeeding-generations-un-security-council-reform-and-the-protection-of-civilians/>. This is based on an interview with General Rob Weighill who was director of operations during NATO's operation.

164. See also C. J. Chivers, *In Strikes on Libya by NATO, an Unspoken Civilian Toll*, N.Y. TIMES (Dec. 17, 2011), http://www.nytimes.com/2011/12/18/world/africa/scores-of-unintended-casualties-in-nato-war-in-libya.html?pagewanted=all&_r=0 (According to NATO the air campaign had resulted in zero civilian casualties, "[b]ut an on-the-ground examination by The New York Times of airstrike sites across Libya — including interviews with survivors, doctors and witnesses, and the collection of munitions remnants, medical reports, death certificates and photographs — found credible accounts of dozens of civilians killed by NATO in many distinct attacks. The victims, including at least 29 women or children, often had been asleep in homes when the ordnance hit." By contrast a Human Rights Watch investigation into the number of civilians killed by NATO during its air campaign over Kosovo killed between 489 and 520 civilians.); see *Civilian Deaths in the NATO Air Campaign*, 12 HUM. RTS. WATCH 1, 15 (2000).

many to argue that it had gone beyond the terms of the March Security Council resolution.¹⁶⁵

Less than two weeks after the Security Council authorized the use of force to protect civilians in Libya, it adopted a resolution in relation to Côte d'Ivoire, which imposed targeted sanctions on the incumbent President, Laurent Gbagbo, and some of his close associates, and reinforced the authorisation of the UN mission to use force to protect civilians.¹⁶⁶ Acting under this mandate, the UN mission launched operation "Protect the Civilian Population," using attack helicopters to destroy the government's heavy weapons in the capital city.¹⁶⁷ Gbagbo was captured in the presidential palace by opposition forces, backed by French tanks, and brought into custody,¹⁶⁸ where he was subsequently transferred to The Hague to stand trial at the International Criminal Court on charges of crimes against humanity.¹⁶⁹

In November 2011 the Brazilian government, which had been on the Security Council during both operations, published a paper entitled "Responsibility while protecting: elements for the development and promotion of a concept" (RWP).¹⁷⁰ This noted that:

The 1990s left us with a bitter reminder of the tragic human and political cost of the international community's failure to act in a timely

165. See Foley, *supra* note 163.

166. See S.C. Res. 1975, U.N. Doc. S/RES/1975 (Mar. 30, 2011).

167. Press Release, UNOCI, UNOCI Calls on Gbagbo's Special Forces to Lay Down Their Arms (Apr. 5, 2011); Press Release, UNOCI, UNOCI Launches Operation "Protect the Civilian Population" (Apr. 5, 2011); Press Release, UNOCI, UNOCI Transports Passengers Blocked in Abidjan (Apr. 5, 2011); Press Release, UNOCI, Pro-Gbagbo Forces Ready to End Combat (Apr. 5, 2011); Press Release, UNOCI, UN Assistant Secretary-General for Human Rights Visits Côte d'Ivoire' (Apr. 4, 2011).

168. Adam Nossiter, Scott Sayare & Dan Bilefsky, *Leader's Arrest in Ivory Coast Ends Standoff*, N.Y. TIMES (Apr. 11, 2011), <http://www.nytimes.com/2011/04/12/world/africa/12ivory.html?pagewanted=all>.

169. Stephanie Maupas & Jean-Philippe Remy, *Laurent Gbagbo Appears at the Hague to Face Trial*, THE GUARDIAN (Dec. 6, 2011), available at <http://www.theguardian.com/world/2011/dec/06/laurent-gbagbo-trial-the-hague>.

170. U.N. S.C., transmitted by letter dated Nov. 9, 2011 from the Permanent Representative of Brazil to the United Nations addressed to the Secretary-General, U.N. Doc. A/66/551-S/2011/701 (Nov. 11, 2011).

manner to prevent violence on the scale of that observed in Rwanda. There may be situations in which the international community might contemplate military action to prevent humanitarian catastrophes. Yet attention must also be paid to the fact that the world today suffers the painful consequences of interventions that have aggravated existing conflicts, allowed terrorism to penetrate into places where it previously did not exist, given rise to new cycles of violence and increased the vulnerability of civilian populations. There is a growing perception that the concept of the responsibility to protect might be misused for purposes other than protecting civilians, such as regime change.¹⁷¹

The paper stressed that the specific wording on R2P incorporated into the 2005 World Summit Outcome document had been the result “of long and intense negotiations,” and that military force should only be authorised in “exceptional circumstances” where all other measures had “manifestly failed.”¹⁷² It stated that this authorization:

must be limited in its legal, operational and temporal elements and the scope of military action must abide by the letter and the spirit of the mandate conferred by the Security Council or the General Assembly, and be carried out in strict conformity with international law, in particular international humanitarian law and the international law of armed conflict.¹⁷³

Further, “the Security Council must ensure the accountability of those to whom authority is granted to resort to force.”¹⁷⁴

RWP received a fairly mixed reaction. It has not been endorsed by the BRICS - some of whom regard it “as making too many concessions to the original R2P concept.”¹⁷⁵ Some R2P supporters regarded it as an

171. *Id.* ¶¶ 8-10.

172. *Id.* ¶¶ 3, 4.

173. *Id.* ¶ 11(d).

174. *Id.* ¶ 11(i).

175. This comment is based on a discussion at an invitation-only seminar, organized by the Brazilian Foreign Ministry, in Bahia in April 2013. The seminar was attended by Brazil’s foreign Minister and senior diplomatic corps along with the UN Ambassadors of India, Germany, Japan, South Africa and Sierra Leone. The discussion was conducted under Chatham House rules.

attempt to “undermine” the original concept,¹⁷⁶ although others see the two as complementary.¹⁷⁷ One particular criticism has been that by insisting on Security Council accountability over the use of force RWP concept would lead to the micro-management of interventions.¹⁷⁸ However, as will be discussed further in subsequent chapters, this is in fact how UN peacekeeping missions with POC mandates are managed.

In July 2012 the UN Secretary General published his fourth paper on the progress made since the 2005 World Summit in implementing the responsibility to protect.¹⁷⁹ This noted that “in recent years the responsibility to protect has been invoked in more situations than ever before. . . . With expanded use has come a deeper and wider conversation about how to ‘operationalize’ the responsibility to protect in a manner that is responsible, sustainable and effective.” “In that context, the

176. Thomas Wright, *Brazil Hosts Workshop on “Responsibility While Protecting”*, FOREIGN POL’Y (Aug. 29, 2012), <http://www.foreignpolicy.com/2012/08/29/brazil-hosts-workshop-on-responsibility-while-protecting/>. He concluded that Brazil’s main motivation for proposing the concept was that its officials had felt “personal[ly] humiliate[ed]” by their treatment on the Security Council by the US, Britain and France during the Libya crisis. *Id.* He argued that “giving the UNSC operational control over a military intervention would place troops at great risk and make failure more likely” and charged that “RWP would undermine R2P, not strengthen it; . . . that in practice RWP could result in greater harm to civilians because it incentivizes such behavior by the adversary; and that it does not offer answers to the very real dilemmas of R2P operations or explain what other alternatives might have been possible in R2P cases.” *Id.*

177. Gareth Evans, *Responsibility While Protecting*, PROJECT SYNDICATE (Jan. 27, 2012), <http://www.project-syndicate.org/commentary/responsibility-while-protecting>. He also criticized the sneering reaction towards RWP of some western diplomats. *Id.*

178. H.J., *Our Friends in the South*, ECONOMIST (Apr. 7, 2012), <http://www.economist.com/blogs/Democracyinamerica/2012/04/dilmar-rousseffs-visit-america> (“Mr Obama will surely want to know, too, what exactly Brazil means by its big new foreign-policy idea. That is to complement the UN’s justification for intervention in another country’s affairs under the rubric ‘Responsibility to Protect’ with ‘Responsibility while Protecting’ after it has gone in. Since Brazil tends not to support going in in the first place, when would it want to see this new responsibility kick in? Even some experienced and sympathetic diplomatic observers in Brasília say they have no idea what concrete difference this would make on the ground.”).

179. U.N. Secretary-General, *Responsibility to Protect: Timely and Decisive Response*, U.N. DOC. A/66/874–S/2012/578 (July 25, 2012).

initiative on ‘responsibility while protecting’ that was introduced by the President of Brazil during the general debate in September 2011 is welcome.”¹⁸⁰ The report reviewed the debate about the intervention in Libya without offering any conclusions beyond observing that “[d]ecisions to use force or apply other coercive measure are never to be taken lightly and may involve ‘difficult choices.’”¹⁸¹ It concluded that there was a need for greater dialogue on this issue with the General Assembly since while there was wide acceptance that the “fundamental principles of international law” should be drawn upon to prevent and respond to genocide, war crimes, ethnic cleansing and crimes against humanity, controversy still persisted on “aspects of implementation, in particular with respect to the use of coercive measures to protect populations.”¹⁸²

VI. ‘HUMANITARIAN INTERVENTIONS’ AND THE UNILATERAL USE OF FORCE

As discussed above, NATO’s military intervention in Kosovo in 1999 led to the establishment of an international commission whose report, published in December 2001, coined the term R2P.¹⁸³ A few months before this, the attacks on 11th September 2001, led the US administration under President Bush, to declare a so-called “war on terror.”¹⁸⁴ Forcible actions taken in response to these terrorist attacks have included the invasion of Iraq in 2003, as well as targeted assassinations of suspected terrorists in Pakistan, Somalia, Yemen and elsewhere, cross-border pursuits, extraterritorial law enforcement,

180. *Id.* ¶ 50.

181. *Id.* ¶¶ 57-58.

182. *Id.* ¶ 59.

183. ICISS, *supra* note 111.

184. For the initial international response to these attacks see S.C. Res. 1368, U.N. Doc. S/RES/1368 (Sept. 12, 2011); see also S.C. Res. 1373, U.N. Doc. S/RES/1373 (Sept. 28, 2011); Press Release, N. Atl. Treaty Org., Statement by the N. Atl. Council (Sept. 12, 2001); Press Release, Org. of Am. States, Rio Treaty Countries Lend Full Support to U.S. (Oct. 16, 2001) (showing an increasing acceptance that this type of force may be justified in certain circumstances).

extraordinary renditions, detentions without trial and the use of torture.¹⁸⁵ These actions provide some of the contextual background about the controversies surrounding R2P. As one prominent R2P supporter has noted it was the “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” that caused many states to conclude “that R2P will be just another excuse for neo-colonialist and neo-imperialist interventions.”¹⁸⁶

There is no standard definition for the term “humanitarian intervention,” although many associate it with apologies for nineteenth century imperialism by writers such as John Stewart Mill.¹⁸⁷ However, the revelations about the Holocaust made some legal scholars urge a reconsideration of the doctrine, to permit interventions to protect basic human rights.¹⁸⁸ In the sixth edition of Oppenheim’s *International Law*, published in 1947, for example, Lauterpacht argued that:

There is general agreement that, by virtue of its personal and territorial supremacy, a State can treat its own nationals according to discretion. But there is a substantial body of opinion and of practice in support of

185. NOAM LUBELL, *EXTRATERRITORIAL USE OF FORCE AGAINST NON-STATE ACTORS* 25-63, 85-131 (2010); CHRISTINE GRAY, *INTERNATIONAL LAW AND THE USE OF FORCE* 30-65, 114-52, 327-426 (3d ed. 2008); HELEN DUFFY, *THE ‘WAR ON TERROR’ AND THE FRAMEWORK OF INTERNATIONAL LAW* 151-61 (2005).

186. Gareth Evans, President, Int’l Crisis Grp., Keynote Address, at Harvard University Weatherhead Center for International Affairs Conference on Democracy in Contemporary Global Politics, Talloires, France (June 16, 2007).

187. John Stuart Mill, *A Few Words on Non-Intervention*, in *ESSAYS ON EQUALITY, LAW, AND EDUCATION* 109 (John M. Robson ed., 1984); Hugo Grotius ‘Comentarius in Theses XI’: *An Early Treatise on Sovereignty, the Just War and the Legitimacy of the Dutch Revolt*, (Commentary Peter Borschenberg), Berne: New York, P. Lang, 199; T M C Asser Instituut (Ed) *International Law and the Groatian Heritage*, 1983 for the origins of ‘just war’ theory.

188. For some contemporary polemical arguments in favor of “humanitarian interventions” see, e.g., NORMAN GERAS, *CRIMES AGAINST HUMANITY: BIRTH OF A CONCEPT* (2011); see also GEOFFREY ROBERTSON, *CRIMES AGAINST HUMANITY: THE STRUGGLE FOR GLOBAL JUSTICE* (1999); see also JAMES TRAUB, *THE FREEDOM AGENDA: WHY AMERICA MUST SPREAD DEMOCRACY (JUST NOT THE WAY GEORGE BUSH DID)* (2008); see also FRANCIS KOFI ABIEW, *THE EVOLUTION OF THE DOCTRINE AND PRACTICE OF HUMANITARIAN INTERVENTION* (1999).

the view that there are limits to that discretion . . . when a State renders itself guilty of cruelties against and persecution of its nationals, in such a way as to deny their fundamental human rights and to shock the conscience of mankind, intervention in the interest of humanity is legally permissible.¹⁸⁹

This argument was and remains controversial. Although the framework of international law developed since 1945 does provide more protection for individuals, this has been balanced by the development of three countervailing principles. The first of these is the strengthening of people's right to self-determination.¹⁹⁰ The second is the restrictions on outside interference in what are properly a country's internal affairs.¹⁹¹ The third is a reaffirmation of the legal prohibition on the unilateral threat or use of force and the crime of aggression.¹⁹² The non-intervention norm is often justified on three main grounds: the

189. Hersch Lauterpacht, *Oppenheim's International Law*, London: Longmans, Green & Co, 1947, p.96.

190. The twin International Covenants on Civil and Political and Economic, Social and Cultural Rights both place the right to "self-determination" as the first Article in their list of human rights. See International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI), UN GAOR, 21st Sess., Supp. No. 16, UN Doc. A/6316, at 52 (Mar. 23, 1976); International Covenant on Economic, Social and Cultural Rights, G.A. Res. 2200A (XXI), UN GAOR, 21st Sess., Supp. No. 16, UN Doc. A/6316 at 49 (Jan. 3, 1976).

191. U.N. Charter art. 2, para. 4; The International Court of Justice (ICJ) has held that both the principles of non-intervention and the prohibition on the use of force are a part of customary international law, and that the prohibition of use of force may also be *jus cogens*. See *Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.)*, Merits, 1986 I.C.J. 14, ¶¶ 172-200 (June 27); *Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda)*, judgment, 2005 I.C.J. 168, ¶ 148 (Dec. 19).

192. U.N. Charter art. 2; The Trial of German Major War Criminals, Judgment (Int'l Military Trib. for Nuremberg Oct. 1, 1946); Proceedings of the International Military Tribunal sitting at Nuremberg, Germany, vol. 22 at 25 (Int'l Military Trib. for Nuremberg Aug. 27, 1946) (stating that initiating a war of aggression "is not only an international crime; it is the supreme international crime differing only from other war crimes in that it contains within itself the accumulated evil of the whole."); see also Rome Statute of the International Criminal Court, art. 25, July 17, 1998, 2187 U.N.T.S. 90; The Crime of Aggression, Resolution RC/Res.6, I.C.C. Doc. RC/Res.6, Annex I, Amendments to the Rome Statute of the International, Criminal Court on the crime of aggression, Article 8 bis, Crime of aggression, 1 (June 11, 2010).

“Westphalian” emphasis on reducing conflict amongst major states, the “liberal” emphasis on allowing each society to solve its own problems and the “anti-imperialist” emphasis on preventing the subordination of small independent states.¹⁹³

Some legal scholars argue that there is an emerging norm under customary international law, which permits such interventions when basic rights are being violated on a widespread or systematic scale.¹⁹⁴ However, apart from Britain, only Belgium¹⁹⁵ has argued for the norm’s existence, which scarcely gives it either the *opinio juris* or repeated state practice required.¹⁹⁶ Some scholars cite India’s intervention in Bangladesh in 1971, Tanzania’s intervention in Uganda in 1979 and Vietnam’s intervention in Cambodia as “humanitarian” because they ousted despotic regimes.¹⁹⁷ However, as Gray has noted, none of the

193. See J Bryan Hehir, *Military Intervention and National Sovereignty: Recasting the Relationship*, in *HARD CHOICES: MORAL DILEMMAS IN HUMANITARIAN INTERVENTION* 40 (Jonathan Moore ed., 1998); see also FRANCIS KOFI ABIEW, *THE EVOLUTION OF THE DOCTRINE AND PRACTICE OF HUMANITARIAN INTERVENTION* (1999); DAVID CHANDLER, *FROM KOSOVO TO KABUL AND BEYOND: HUMAN RIGHTS AND INTERNATIONAL INTERVENTION* (2d ed. 2006); ANNE ORFORD, *INTERNATIONAL AUTHORITY AND THE RESPONSIBILITY TO PROTECT* (2011).

194. Antonio Cassese, *A Follow-Up: Forcible Humanitarian Countermeasures and Opinio Necessitatis*, 10 *EUR. J. INT’L L.* 791, 791-99 (1999); see also Antonio Cassese, *Ex iniuria ius oritur: Are We Moving towards International Legitimation of Forcible Humanitarian Countermeasures in the World Community?*, 10 *EUR. J. INT’L L.* 23, 23-30 (1999); Cassese, *International Law*, p. 321; Daniel Wolf, *Humanitarian Intervention*, in *MICHIGAN YEARBOOK OF INTERNATIONAL LEGAL STUDIES* 333, 358-59 (1988); GEOFFREY ROBERTSON, *CRIMES AGAINST HUMANITY, THE STRUGGLE FOR GLOBAL JUSTICE* 470-77 (3d ed., 2006); see generally *HUMANITARIAN INTERVENTION: ETHICAL, LEGAL, AND POLITICAL DILEMMAS* (J.L. Holzgrefe & Robert O. Keohane eds., 2003).

195. *Legality of Use of Force (Yugoslavia v. Belg.)*, 1999 *I.C.J.* 1, 12 (June 2).

196. See Legal Information Institute, CORNELL UNIVERSITY LAW SCHOOL, http://www.law.cornell.edu/wex/customary_international_law (last visited Nov. 14, 2014) (defining “customary international law” as law that “results from a general and consistent practice of states that they follow from a sense of legal obligation.”).

197. For example, Richard Lillich, ‘Humanitarian Intervention: A reply to Dr. Brownlie and a Plea for Constructive Alternatives’, in: Moore (ed.), *Law and civil war in the modern world*, Baltimore: John Hopkins University Press, 1974, p. 238; Warbrick, Colin and Lowe, Vaughan (eds), *The United Nations and the Principles of International Law: essays in memory of Michael Akehurst*, Routledge, London and New York, 1994; Simon Chesterman, *Just War or Just Peace? Humanitarian Intervention and*

intervening states actually cited “humanitarian intervention” as the basis for their use of force and so the case seems to rest on the opinion that they “should have or could have used this justification.”¹⁹⁸ Governments themselves have changed their own views on the subject.¹⁹⁹ For example, in the 1980s, the British Foreign and Commonwealth Office (FCO) comprehensively rejected the concept, arguing that:

The state practice to which advocates of the right of humanitarian intervention have appealed provides an uncertain basis on which to rest such a right. Not least this is because history has shown that humanitarian ends are almost always mixed with less laudable motives the best case that can be made in support of humanitarian intervention is that it cannot be said to be unambiguously illegal. To make that case, it is necessary to demonstrate, in particular by reference to Article 1(3) of the UN Charter, which includes the promotion and encouragement of respect for human rights as one of the Purposes of the United Nations, that paragraphs 7 and 4 of Article 2 do not apply in cases of flagrant violations of human rights. But the overwhelming majority of contemporary legal opinion comes down against . . . [it] for three main reasons: first, the UN Charter and the corpus of modern international law do not seem specifically to incorporate such a right; secondly, state practice in the past two centuries, and especially since 1945, at best provides only a handful of genuine cases of humanitarian intervention, and, on most assessments, none at all; and finally, on prudential grounds, that the scope for abusing such a right argues strongly against its creation.²⁰⁰

International Law, Oxford: Oxford University Press, 2001; Sean Murphy, *Humanitarian Intervention, The United Nations in an Evolving World Order*, Philadelphia: University of Pennsylvania Press, 1996.

198. CHRISTINE GRAY, *INTERNATIONAL LAW AND THE USE OF FORCE* 34 (3d ed. 2008) (emphasis in original).

199. *See generally* SIMON CHESTERMAN, *JUST WAR OR JUST PEACE?: HUMANITARIAN INTERVENTION AND INTERNATIONAL LAW* (2001); SEAN D. MURPHY, *HUMANITARIAN INTERVENTION: THE UNITED NATIONS IN AN EVOLVING WORLD ORDER* (1996).

200. FOREIGN AND COMMONWEALTH OFFICE, *FOREIGN POLICY DOCUMENT NO. 148* (1986), as reprinted in *United Kingdom Materials on International Law 1986*, 57 *BRIT. Y.B. INT'L L.* 487, 618-19.

In 1992, however, the FCO's legal counsellor told the Foreign Affairs Committee that Operation Provide Comfort, undertaken in Northern Iraq, while "not specifically mandated" by the Security Council had been taken by states "in exercise of the customary international law principle of humanitarian intervention."²⁰¹ By 1998 the British government was arguing that while "[t]here is no general doctrine of humanitarian necessity in international law" there were some cases when "in the light of all the circumstances, a limited use of force was justifiable in support of purposes laid down by the Security Council but without the council's express authorisation."²⁰² It cited the intervention in Northern Iraq in 1991 as one such case – where the intervention had been "the only means to avert an immediate and overwhelming humanitarian catastrophe" and stressed that these cases would be "in the nature of things be exceptional" and "depend on an objective assessment of the factual circumstances at the time and on the terms of the relevant decisions of the Security Council bearing on the situation in question."²⁰³

In 2003 Britain's Attorney General stated in private advice to the then prime minister, Tony Blair, that the three legal grounds for the use of force were "a) self-defence (which may include collective self-defence); b) exceptionally to avert overwhelming humanitarian catastrophe; and c) authorisation by the Security Council acting under Chapter VII of the UN Charter."²⁰⁴ His advice was that the situation in Iraq at the time did not constitute a basis for a 'humanitarian intervention' and advised first of all attempts to obtain a specific resolution authorising the invasion and then an interpretation of the existing resolutions so that they might be used to provide such a legal basis.²⁰⁵ After the invasion of Iraq Blair argued that the definition of a "humanitarian intervention" should be

201. Tony Aust, Legal Counsellor, Foreign and Commonwealth Office, Hearing of the Foreign Affairs Committee of the House of Commons (Dec. 2, 1992), *available at* <http://www.parliament.the-stationery-office.co.uk/pa/cm199900/cmselect/cmcaff/28/28ap03.htm>.

202. 594 PARL. DEB., H.L. (1998) WA140.

203. *Id.*

204. Memorandum from Lord Goldsmith, Att'y Gen., on the Legality of War Against Iraq to Tony Blair, Prime Minister (Mar. 7, 2003), *available at* http://news.bbc.co.uk/2/shared/bsp/hi/pdfs/28_04_05_attorney_general.pdf.

205. *Id.*

expanded to include these type of regime-change invasions.²⁰⁶ In August 2013 the British government published legal advice stating that it would be lawful to take military action, without Security Council authorization, in response to the humanitarian crisis in Syria and the alleged use of chemical weapons by its government.²⁰⁷

As previously discussed, R2P supporters have gone to considerable lengths to persuade states to include references to R2P in their declarations at the UN and in the resolutions adopted by the Security Council and General Assembly in order to try and develop R2P as a customary norm of international law through *opinio juris* and state practice.²⁰⁸ However, they have consciously distanced the concept from its original association with ‘humanitarian intervention’ and the unilateral use of force without Security Council authorisation. During the civil war and humanitarian crisis in Syria in 2013 and 2014, for example, the International Coalition for the Responsibility to Protect, an NGO coalition group, stated that:

The Responsibility to Protect norm, as agreed to in the 2005 World Summit Outcome Document, does not sanction a unilateral military response or a response by a “coalition of the willing. Any military response under RtoP must be authorized by the Security Council.”²⁰⁹

206. Tony Blair, Prime Minister, Speech on the Terror Threat Facing the UK and Defending the Iraq War (Mar. 5, 2004) (“[A] regime can systematically brutalise and oppress its people and there is nothing anyone can do, when dialogue, diplomacy and even sanctions fail, unless it comes within the definition of a humanitarian catastrophe (though the 300,000 remains in mass graves already found in Iraq might be thought by some to be something of a catastrophe). This may be the law, but should it be?”).

207. PRIME MINISTER’S OFFICE, 10 DOWNING STREET, CHEMICAL WEAPON USE BY SYRIAN REGIME: UK GOVERNMENT LEGAL POSITION (Aug. 29, 2013), *available at* [https://www.gov.uk/government/publications/chemical-weapon-use-by-syrian-regime-uk-government-legal-position/html-version](https://www.gov.uk/government/publications/chemical-weapon-use-by-syrian-regime-uk-government-legal-position/chemical-weapon-use-by-syrian-regime-uk-government-legal-position-html-version).

208. See Raphaël van Steenberghe, *The Notions of the Responsibility to Protect and the Protection of Civilians in Armed Conflict: Detecting Their Association and Its Impact Upon International Law*, 6 GOETTINGEN J. INT’L L. 81, 104-12 (2014).

209. *The Crisis in Syria*, INT’L COAL. FOR RESP. TO PROTECT,

The Global Centre for the Responsibility to Protect, another NGO, published a paper in the aftermath of the Libya crisis, clearly distinguishing R2P from “humanitarian interventions” and criticizing NATO members for going beyond - and breaching - the terms of UN Security Council resolution 1973 by promoting regime-change in Libya.²¹⁰ Even the British government, a supporter of both R2P and “humanitarian interventions,” notes that while the two concepts share the same origin they have developed quite distinctively. It states that R2P:

was in many ways a response to what its framers saw as the failures of the Security Council over its reaction to the genocide in Rwanda in 1994 (where it acted too late), and to the humanitarian crisis in Kosovo in 1999 (where it did not authorise an intervention). The adoption of the responsibility to protect was therefore an attempt to move debate away from a focus solely on external military intervention by emphasising the responsibility of States towards their own populations, but also to signal the UN membership’s support for the idea that, if necessary, the Security Council can and should act in the face of genocide, ethnic cleansing, war crimes and crimes against humanity; the expectation being that this political commitment would make Security Council action more likely and less controversial in future.²¹¹

As one scholar has commented, “saying the phrase ‘humanitarian intervention’ in a room full of philosophers, legal scholars and political scientists is a bit like crying ‘fire’ in a crowded theatre,”²¹² while another notes that “the only certainty within [the debate] is that as of yet it

<http://www.responsibilitytoprotect.org/index.php/crises/crisis-in-syria> (last visited Feb. 13, 2015).

210. Simon Adams, *Libya and the Responsibility to Protect* (Global Ctr. for the Responsibility to Protect, Occasional Paper Ser. No. 3, 2012).

211. Letter from Hugh Robertson, Minister of State, Foreign and Commonwealth Office to the Foreign Affairs Committee on Humanitarian Intervention and the Responsibility to Protect (USA 19), Annex A (Jan. 14, 2014), available at <http://justsecurity.org/wp-content/uploads/2014/01/Letter-from-UK-Foreign-Commonwealth-Office-to-the-House-of-Commons-Foreign-Affairs-Committee-on-Humanitarian-Intervention-and-the-Responsibility-to-Protect.pdf>.

212. Robert O. Keohane, *Introduction to HUMANITARIAN INTERVENTION: ETHICAL, LEGAL, AND POLITICAL DILEMMAS 1* (J.L. Holzgrefe & Robert O. Keohane eds., 2003).

remains unsettled.”²¹³ However, the wording of the UN Charter and the ICJ’s case law means that the balance of opinion is firmly against allowing individual states to act as judge, jury and executioner in deciding when such “humanitarian interventions” are permissible.²¹⁴ Ironically, the rise of R2P may have contributed to its demise.

213. NOAM LUBELL, *EXTRATERRITORIAL USE OF FORCE AGAINST NON-STATE ACTORS* 28 (2010).

214. *See, e.g.*, Mary Ellen O’Connell, *The UN, NATO, and International Law After Kosovo*, 22 *HUM. RTS. Q.* 57, 57-89 (2000); Noam Chomsky, *The Responsibility to Protect*, Lecture Given at UN General Assembly, New York City (July 23, 2009); CHRISTINE GRAY, *INTERNATIONAL LAW AND THE USE OF FORCE* 30-55 (3rd ed. 2008); HELEN DUFFY, *THE “WAR ON TERROR” AND THE FRAMEWORK OF INTERNATIONAL LAW* 179-82 (2006).

