

THE PROTECTION OF CIVILIANS BY UN PEACEKEEPING MISSIONS UNDER INTERNATIONAL LAW

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Abstract

This thesis considers the nature and extent of the United Nations' obligations to protect the lives and physical integrity of civilians. Over 100,000 UN peacekeeping personnel are currently deployed on missions with authority from the Security Council to protect civilians at risk. Chapter VII of the UN Charter provides a UN mission with the *jus ad bellum* authority to use force, but is silent on the rules that would govern the resulting actions, which must either be found in the *jus in bello* provisions of international humanitarian law (IHL) or the regulations on the use of force contained in international human rights law. Most existing UN guidance stresses the applicability of IHL. This thesis argues that the positive and negative obligations of international human rights law will usually be more appropriate.

Chapter VII contains no references to international human rights law and nor was this initially considered a concern of the Security Council. This has changed considerably in recent decades. It is increasingly accepted that humanitarian crises can justify the Security Council's use of its Chapter VII powers, although this has been accompanied by growing concern about the lack of accountability with which they are sometimes used.

The UN Charter specifies that its provisions take precedence over all other international treaties. There is no mechanism to judicially review the Security Council's actions and the legal immunities that cover UN missions, makes it difficult to scrutinise their records. UN missions mandated to protect civilians have repeatedly failed to do so. Yet there does not appear to be a single case where the UN has taken disciplinary action against senior staff for failing to protect civilians in line with a mission mandate. Mechanisms need to be created to improve the accountability of UN missions to those that they are responsible for protecting.

Acknowledgements

I grew up in an Irish family in Britain during what is often referred to as ‘the troubles’ in Northern Ireland. Several of my friends were killed during this and it gave me an early interest in the protection of human rights in conflict zones. I have since worked on legal reform, human rights and protection issues in over twenty-five conflict, post-conflict or fragile zones, for a variety of UN and non-governmental human rights and humanitarian organizations. This thesis is largely based on those experiences and thousands of people have shaped my views on the issues addressed here. It would be impossible to acknowledge everyone individually, but I owe a debt of gratitude to them all.

Between 2010 and 2012 I was contracted by the UN Department of Peacekeeping Operations (DPKO) to design a set of scenario-based training exercises on Protection of Civilians for UN personnel. The first was a generic exercise, the second involved preparing mission-specific material for the UN Organization Stabilization Mission in the Democratic Republic of the Congo (MONUSCO), the UN Organization in Cote d’Ivoire (UNOCI), the UN Mission South Sudan (UNMISS) and the UN/AU Mission in Darfur (UNAMID). The field research undertaken at the time laid the basis for this current thesis and I would like to thank DPKO’s Integrated Training Service, the Protection of Civilians Team in the Policy and Best Practice Service in headquarters and the Protection staff in the four field missions. I draw on material gathered during this time but have not cited directly from or named any individuals as the purpose of the work was different to the research undertaken for this study. I have also not used any documents that were not publicly available.

Drafting policy documents and training exercises is very different to the discipline of academia. My two supervisors at the University of Essex: Scott Sheeran and Noam Lubell patiently coaxed my random initial thoughts into a coherent structure. To have benefited from the encyclopaedic knowledge and acute legal insight of either one of them would have been an enormous help. It was a huge privilege to receive the support of them both.

The thesis draws on a number of my own books, papers and research projects over a number of years – which are listed in the bibliography. It also benefits from presentations that I made during the course of the current research at academic seminars and training events, including: Michigan State University Law Faculty, Birmingham University Law Faculty, Leicester University Department of Criminology, *Igarapé* and the Brazilian Centre for International Relations, the Canadian Defence Academy, the Brazilian Peacekeeping Training Centre (CCPOAB), the Brazilian Foreign Affairs Ministry (*Itamaraty*) the Harvard University Advanced Training Program on Humanitarian Action (ATHA) and Conectas/SUR. I am also grateful to my students and colleagues at the *Pontifícia Universidade Católica* (PUC) Rio de Janeiro where I teach a program of classes on conflict and international law.

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Glossary of Abbreviations

African Union (AU)

AU monitoring mission in Sudan (AMIS)

African Union-United Nations Hybrid Operation in Darfur (UNAMID)

American Convention on Human Rights (ACHR)

Brazil, Russia, India, China and South Africa (the BRICS)

Civilian Police (CIVPOL)

Community Alert Mechanisms (CANs)

Community Liaison Advisers (CLAs)

Comprehensive Peace Agreement (CPA)

Concept of operations (CONOPS)

Conflict-related sexual violence (CRSV)

Rassemblement Congolais pour la Démocratie (RCD)

Congrès National pour la Défense du Peuple (CNDP)

Darfur Peace Agreement (DPA)

Demobilization, disarmament, repatriation, resettlement, and reintegration (DDRRR)

Democratic Republic of the Congo (DRC)

Doha Document for Peace in Darfur (DDPD)

Economic Community of West African States (ECOWAS)

Economic Community of West African States Monitoring Group (ECOMOG)

European Commission (EC)

European Convention on Human Rights (ECHR)

European Court of Justice (ECJ)

European Union (EU)

Federal Republic of Yugoslavia (FRY)

Forces Democratiques de Liberation du Rwanda (FDLR)

Food and Agricultural Organisation (FAO)

Forces Armées de la République Démocratique du Congo (FARDC)

Foreign and Commonwealth Office (FCO)

Global Protection Cluster (GPC)

Human rights due diligence policy' (HRDDP)

Human Rights Watch (HRW)

Humanitarian Policy Group (HPG)

Inter-Agency Standing Committee (IASC)

Interim Emergency Multinational Force (IEMF)

Internally Displaced Persons (IDPs)

International Commission on Intervention and State Sovereignty (ICISS)

International Committee of the Red Cross (ICRC)

International Conference on the Great Lakes Region (ICGLR)

International Court of Justice (ICJ)

International Covenant on Civil and Political Rights (ICCPR)

International Covenant on Economic, Social and Cultural Rights (ICESCR)

International Criminal Court (ICC)

International Criminal Tribunals for Yugoslavia (ICTY)

International Criminal Tribunals for Rwanda (ICTR)

International Force for East Timor (INTERFET)

International Humanitarian Law (IHL)

International Labour Organization (ILO)

International Law Commission (ILC)

International Organisation for Migration (IOM)

Irish Republican Army (IRA)

Joint Protection Teams (JPTs)

Kosovo Force (KFOR)

Kosova Liberation Army (KLA)

Kurdish Workers Party (PKK)

Liberation and Justice Movement, (LJM)

Liberation Tigers of Tamil Eelam (LTTE)

Linás-Marcoussis Accord (LMA)

Lord's Resistance Army (LRA)

Médecins Sans Frontiers (MSF)

Mobile Operating Bases (MOBs)

Mouvement patriotique de Côte d'Ivoire (MPCI)

Movement pour la Liberation du Congo (MLC)

Non-governmental organization (NGO)

North Atlantic Treaty Organisation (NATO)

Ouagadougou Political Agreement (OPA)

Palestine Liberation Organization (PLO)

Permanent Court of International Justice (PCIJ)

Prisoner of War (POW)

Protection of Civilians (POC)

Protection Working Groups (PWGs)

Responsibility to Protect (R2P)

Responsibility While Protecting (RWP)

Revolutionary United Front (RUF)

Rules of engagement (RoE)

Rwandan Patriotic Front (RPF)

Southern African Development Community (SADC)

Southern Africa Litigations Centre (SALC)

Special Air Services (SAS)

Special Committee for Peacekeeping Operations (C34)

Standard Operating Procedure (SOP)

Status of forces agreement (SOFA)

Status of mission agreement (SOMA)

Sudan People's Liberation Army (SPLA)

Sudan Peoples' Liberation Movement (SPLM)

Troop Contributing Countries (TCCs)

Under Secretary-General for Peacekeeping Operations (USG DPKO)

Unified Task Force (UNITAF)

United Kingdom (UK)

United Nations (UN)

UN Assistance Mission in Rwanda (UNAMIR)

UN Children's Fund (UNICEF)

UN Country Team (UNCT)

UN Department of Field Support (DFS)

UN Department of Peacekeeping Operations (DPKO)

UN Department of Political Affairs (DPA)

UN Department of Humanitarian Affairs

UN Deputy Special Representative(s) of the Secretary-General (DSRSG)

UN Director of Mission Support/Chief of Mission Support (DMS/CMS)

UN Dispute Tribunal (UNDT)

UN Economic and Social Council (ECOSOC)

UN Emergency Force (UNEF)

UN High Commissioner for Refugees (UNHCR)

UN Interim Force in Lebanon (UNIFIL)

UN Interim Security Force for Abyei (UNISFA)

UN Military Observer Group in India and Pakistan (UNMOGIP),

UN Mission in the Democratic Republic of Congo (MONUC)

UN Mission in the Congo (ONUC)

UN Mission in Côte d'Ivoire (MINUCI)

UN Mission in Kosovo (UNMIK)

UN Mission in Liberia (UNMIL)

UN Mission in Sierra Leone (UNAMSIL)

UN Mission in South Sudan (UNMISS)

UN Mission in Sudan (UNMIS)

UN Multidimensional Integrated Stabilization Mission in Mali (MINUSMA)

UN Observer Mission in Sierra Leone (UNOMSIL)

UN Office for the Coordination of Humanitarian Affairs (OCHA)

UN Office of the High Commissioner for Human Rights (OHCHR)

UN Office of Internal Oversight Services (OIOS)

UN Operation in Somalia (UNOSOM)

UN Operation in Côte d'Ivoire (UNOCI)

UN Organization Stabilization Mission in the Democratic Republic of Congo (MONUSCO)

UN Peacekeeping Force in Cyprus (UNFICYP)

UN Protection Force for the former Yugoslavia (UNPROFOR)

UN Stabilization Mission in Haiti (MINUSTAH)

UN Transitional Authority in Cambodia (UNTAC)

UN Transitional Administration in East Timor (UNTAET)

UN Transition Group (UNTAG)

UN Truce Supervision Organization (UNTSO)

United States (US)

Universal Declaration of Human Rights (UDHR)

World Food Programme (WFP)

International Treaties and soft-law Instruments

- 2014 Optional Protocol to the Convention on the Rights of the Child on a Communication Procedure, U.N. Doc. A/RES/66/138, entered into force 14 April 2014
- 2013 UN Arms Trade Treaty, entered into force 24 December 2013
- 2013 Optional Protocol to the International Covenant on Economic, Social and Cultural Rights, G.A. res. 63/117, U.N. Doc. A/63/435, entered into force 5 May 2013
- 2010 International Convention for the Protection of all Persons from Enforced Disappearance, U.N. Doc. A/61/448, 2715 U.N.T.S., entered into force 23 December 2010
- 2008 Inter-American Commission on Human Rights, ‘Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas’ (‘American Principles’), OEA/Ser/L/V/II.131 doc. 26, March 2008
- 2006 International Convention for the Protection of All Persons from Enforced Disappearance (adopted 20 December 2006, not yet in force) UN Doc A/RES/61/177
- 2006 Council of Europe, Committee of Ministers, Recommendation (2006)2, ‘European Prison Rules’, 11 January 2006
- 2006 Convention on the Rights of Persons with Disabilities, adopted 13 December 2006, entered into force 3 May 2008, text in UN Doc A/61/611
- 2005 Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, UNGA Res 60/147 (16 December 2005)
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- 2004 Arab Charter on Human Rights (adopted 22 May 2004, entered into force 15 March 2008) reprinted in 12 International Human Rights Report 893 (2005)
- 2004 Protocol to the African Charter on Human and Peoples’ Rights on the Establishment of the African Court on Human and Peoples’ Rights, 1998, OAU Doc. OAU/LEG/EXP/AFCHPR/PROT (III), entered into force 25 January 2004
- 2003 Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa 11 July 2003
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- 1965 International Convention on the Elimination of All Forms of Racial Discrimination, adopted 7 March 1966, entered into force 4 January 1969, 660 UNTS 195
- 1963 Vienna Convention on Consular Relations, adopted 24 April 1963, entered into force 19 March 1967, 596 UNTS 261
- 1963 Charter of the Organisation of African Unity, 479 U.N.T.S. 39, entered into force 13 September 1963
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- 1957 Abolition of Forced Labour Convention, adopted 25 June 1957, entered into force 17 January 1959, ILO no. 105
- 1956 Supplementary Convention on the Abolition of Slavery, the Slave Trade and Institutions and Practices Similar to Slavery, adopted 7 September 1956, entered into force 30 April 1957, 266 UNTS 3

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The Protection of Civilians by UN Peacekeeping Operations Under International Law

Introduction

There are now over 100,000 United Nations (UN) uniformed peacekeeping personnel deployed around the world in missions that have legal authority from the Security Council, under Chapter VII of the UN Charter, to use force to protect civilians (POC).¹ Although such mandates have been given to missions since 1999, POC has only become a central task in more recent years. Its emergence poses challenges to the development of international law that are as significant as the original concept of UN peacekeeping itself. Armed soldiers are being given legal permission to enter into the territory of other States in order to protect people from grave violations of international human rights and humanitarian law. The UN has stated that they are ‘legally required’ to ‘use force, including deadly force’ to fulfil this mandate.² This raises two inter-linked questions: first of all, what gives the Security Council the right to offer such protection and secondly, what is the nature of the legal obligation on the mandated mission to provide it?

The UN Charter prohibits both the unilateral use of force and interference in the internal affairs of individual States, even by the UN itself.³ The use of force is only permissible, under the Charter, in self-defence or when it has been authorized by the Security Council, in response to

¹ *Surge in Uniformed UN Peacekeeping Personnel from 1991 present*, which gives a total of 104,688 for all uniformed peacekeeping personnel (soldiers, police and military observers) on 31 March 2015, UN peacekeeping documents, <http://www.un.org/en/peacekeeping/documents/chart.pdf> accessed 15 April 2016.

² *Evaluation of the implementation and results of protection of civilians mandates in United Nations peacekeeping operations*, Report of the Office of Internal Oversight Services, UN Doc A/68/787, 7 March 2014, [Hereinafter OIOS Protection Evaluation 2014], para 15. See also Mona Ali Khalil, ‘Legal aspects of the use of force by UN peacekeepers for the protection of civilians’, in Haidi Willmot, Marc Weller, Ralph Mamiya, and Scott Sheeran (eds), *The Protection of Civilians*, Oxford: Oxford University Press, March 2016. Khalil is the Senior Legal Officer in the Office of the Legal Counsel, United Nations Office of Legal Affairs, and refers repeatedly to the ‘duty’ on UN peacekeepers to use force, as a last resort, to protect civilians.

³ UN Charter, Article 2.

threats to international peace and security.⁴ Although it is increasingly accepted that humanitarian crises and situations of internal armed conflict can constitute such threats, this is a recent development and has been accompanied by growing concern about the lack of accountability surrounding such decisions and the powers they confer. POC mandates also blur the previous distinction between the ‘core principles’ of traditional peacekeeping, including minimum use of force, and Chapter VII ‘peace enforcement’ operations.

A Chapter VII mandate provides a UN mission with the *jus ad bellum* authority to use force, but is silent on the rules that would govern the resulting actions. These must either be found in the *jus in bello* provisions of International Humanitarian Law (IHL) or the regulations on the use of force contained in international human rights law.

Most of the existing guidance provided by the UN appears to be based on the assumption that IHL will be the appropriate legal framework for missions with POC mandates. The UN *Infantry Battalion* of 2102, for example, authorizes peacekeeping soldiers to use force ‘in *any circumstance* in which *they believe* that a threat of violence against civilians exists’ [emphasis added] and a threat is considered ‘imminent’ from ‘the time it is identified as a threat, until such a time the mission can determine that the threat no longer exists.’⁵ Guidance issued in 2015 repeats this formulation and also draws heavily on IHL language when stressing the importance of ‘principles of distinction between civilians and combatants, proportionality, the minimum use of force and the requirement to avoid and, in any event, minimize collateral damage’, while also

⁴ UN Charter Article 51 and Articles 39-42.

⁵ UN *United Nations Infantry Battalion Manual Volume I*, Department of Peacekeeping Operations/ Department of Field Support, August 2012 [Hereinafter UN Infantry Battalion, Vol. I, 2012], para 6.4.3.

stressing the need to abide by customary international human rights law and that ‘deadly force’ should only be used as a last resort.⁶

As will be discussed further in Part II of this thesis, under IHL the military are permitted to kill – or capture – enemy combatants and may even inflict harm on civilians when attacking military targets so long as they apply criteria such as proportionality. By contrast, under international human rights law, lethal force can only be used when strictly necessary, as a last resort, for specified purposes and people may only be deprived of their liberty on certain specific grounds, with detailed guarantees concerning their rights in detention.

In 1999, the same year that the UN Security Council gave its first POC mandate to a peacekeeping operation, the UN Secretary General issued a Bulletin stating that:

The fundamental principles and rules of international humanitarian law are applicable to UN forces when in situations of armed conflict they are actively engaged therein as combatants, to the extent and for the duration of their engagement. They are accordingly applicable in enforcement actions or in peacekeeping operations when the use of force is permitted in self-defence.⁷

There is no similar Bulletin on the applicability of international human rights law. As will be discussed in this thesis, there are a growing number of recent UN resolutions, reports and policy documents that do now refer to the relevance of international human rights law to its

⁶ *Policy on the Protection of Civilians in United Nations Peacekeeping*, Department of Peacekeeping Operations / Department of Field Support Ref. 2015.07, 1 April 2015, pp.5-6. See also *Protection of Civilians: Implementing Guidelines for Military Components of United Nations Peacekeeping Missions*, Department of Peacekeeping Operations / Department of Field Support, February 2015, p.15.

⁷ *Secretary General’s Bulletin, Observance by UN Forces of International Humanitarian Law*, ST/SGB/1999/13, 6 August 1999, [Hereinafter, Secretary General’s Bulletin on IHL 1999].

peacekeeping missions⁸ and there are an increasing number of references to international human rights law in the policy guidance provided to missions with POC mandates.⁹ In 2013 the UN adopted a ‘human rights due diligence policy’ (HRDDP), which acknowledges that the UN has a ‘responsibility to respect, promote and encourage respect for international humanitarian, human rights and refugee law’.¹⁰ It also launched a Human Rights Up Front (HRUF) initiative, which states that ‘human rights and the protection of civilians’ should be seen as a ‘system-wide core responsibility’ and that the UN should ‘take a principled stance’ and ‘act with moral courage to prevent serious and large-scale violations.’¹¹ The UN has yet, however, to produce comprehensive guidance on how the negative and positive obligations of international human rights law apply to UN peacekeeping missions, to ensure that this is fully integrated into the training and direction of its personnel and to create mechanisms by which it can be held to account under these provisions.

Given the widespread criticism of UN peacekeeping missions with POC mandates for their current reluctance to use force to protect civilians against physical harm even when they consider themselves to be operating within an IHL framework, it might seem counter-intuitive to wish to

⁸ *United Nations Peacekeeping Operations, Principles and Guidelines (Capstone Document)*, New York: Department of Peacekeeping Operations, 2008, p.60; *We are United Nations Peacekeepers*, New York: United Nations Department of Peacekeeping Operations Training Unit, undated; See also: UN Office for the Coordination of Humanitarian Affairs, *Security Council Norms and Practice on the Protection of Civilians in Armed Conflict: Analysis of Normative Developments in Security Council Resolutions 2009-2013*, OCHA, 2014.

⁹ See, for example: DPKO/DFS *Policy on the Protection of Civilians in United Nations Peacekeeping*, Ref. 2015.07, 1 April 2015; *Protection of Civilians: Implementing Guidelines for Military Components of United Nations Peacekeeping Missions*, Department of Peacekeeping Operations / Department of Field Support, February 2015; OCHA, UN Office for the High Commissioner of Human Rights and the UN High Commissioner for Refugees, *The Protection of Human Rights in Humanitarian Crises*, Geneva: OHCHR/UNHCR, 8 May 2013; and OHCHR/DPKO/DPA/DFS *Policy on Human Rights in United Nations Peace Operations and Political Missions*, Ref. 2011.20, 1 September 2011.

¹⁰ *Human rights due diligence policy on United Nations support to non-United Nations security forces*, UN Doc. A/67/775-S/2013/110, 5 March 2013, para 1. [Hereinafter Human Rights Due Diligence Policy 2013 or HRDDP].

¹¹ *Human Rights Up Front*, <http://www.un.org/sg/rightsupfront/>, accessed 30 July 2015.

constrain them to the more restrictive provisions of international human rights law. It will nevertheless be argued in this thesis that this will usually provide a more appropriate legal framework and far clearer guidance on the use of force for protective purposes.

It is clearly impossible for peacekeeping soldiers deployed in a conflict, or post-conflict, environment to provide protection against *all* threats of violence to *all* people at *all* times.

Threats to civilians are likely to come from a wide range of sources in such situations and take a variety of forms.¹² Nevertheless, international human rights jurisprudence does contain a fairly clear definition of the ‘positive obligation’ to protect the right to life and physical integrity. The European Court of Human Rights has observed that:

Bearing in mind the difficulties in policing modern societies, the unpredictability of human conduct and the operational choices which must be made in terms of priorities and resources, the positive obligation must be interpreted in a way which does not impose an impossible or disproportionate burden on the authorities. Accordingly, not every claimed risk to life can entail for the authorities a Convention requirement to take operational measures to prevent that risk from materialising. For a positive obligation to arise, it must be established that the authorities knew or ought to have known at the time of the existence of a real and immediate risk to the life or failed to take measures within

¹² The protection of women from conflict-related sexual violence (CRSV) is understood to be part of a POC mandate, but the extent to which UN troops are authorized to protect women against ‘private’ as opposed to ‘public’ forms of violence raises issues which go beyond the scope of this thesis adequately to explore. For further discussion of CRSV see, for example, *Report of the Secretary-General on Conflict-related sexual violence*, S/2015/203, 23 March 2015. For a summary of recent resolutions and debates see *Cross-Cutting Report on Women, Peace and Security*, Security Council Report, 14 April 2014. See also UN Security Council Resolutions 1325 of 31 October 2000, 1820 of 19 June 2008, 1888 of 30 September 2009), 1889 of 5 October 2009, 1960 of 16 December 2010, 2122 of 18 October 2013, and 2106 of 24 June 2013 on women and peace and security; and Resolution 1314, of 11 August 2000 on the need to provide special protection for children in armed conflict.

the scope of their powers which, judged reasonably, might have been expected to avoid that risk.¹³

It will be argued in this thesis that POC is best understood in similar terms. It should be seen as a positive obligation to protect people from threats to their rights to life and physical integrity, while respecting – that is not infringing – these rights in the process. A positive obligation could be deemed to arise if a peacekeeping mission knew, or ought to have known at the time, of the existence of a real and immediate risk to civilians and failed to take measures within the scope of its powers which, judged reasonably, might be expected to have avoided or ameliorated the risk. International human rights law also imposes positive obligations on the appropriate authorities to prevent, investigate and punish such acts and provide redress to those who have suffered from them, even when they are carried out by private persons or entities. The lack of an effective investigation could itself be a violation of the protections provided in the right to life and physical integrity.

These obligations are firmly rooted in international human rights law and will be discussed in more detail in Chapter Four of this thesis. It will be argued that the safeguards contained in this legal framework could be interpreted in ways that do not impose impossible or disproportionate burdens on UN peacekeeping missions. Its guidance is both relevant and potentially applicable to missions and provides a standard against which the conduct of missions should be judged.

UN missions mandated to protect civilians have repeatedly failed to do so and internal inquiries and lessons learned reports have often identified failures of both management and political leadership. Missions have also failed to investigate fully and speak out against violations,

¹³ ECtHR *Mahmut Kaya v. Turkey*, Appl. No. 22535/93, Judgment 28 March 2000, para 86. See also *Osman v. UK*, Appl. No. 23452/94, Judgment 28 October 1998, paras 115-6.

particularly when these are committed by, or with the acquiescence of, government forces in the host State. In some cases missions have been complicit in these violations by providing support to the forces that committed them. Yet there does not appear to be a single case where the UN has initiated disciplinary action against senior mission or headquarters staff for failing to protect civilians in line with a mission mandate. Mechanisms need to be created to improve the accountability of UN missions to those that they are responsible for protecting and to provide redress for victims of violations.

Individual States contributing troops to UN missions have already faced legal challenges for actions, or inactions, which resulted in violations of the right to life. Both Dutch and Belgian courts have upheld claims that their troops on UN peacekeeping missions in the 1990s failed to protect some of the victims of the genocides in Rwanda and Srebrenica.¹⁴ Challenging individual troop contributing countries (TCCs) for alleged violations, however, could lead to a potential crisis in peacekeeping because States that are party to strong regional human rights mechanisms, or with strong domestic human rights accountability, may become even more reluctant to participate in such missions. This thesis argues, instead, that the UN should issue a Secretary General's Bulletin acknowledging the applicability of international human rights law to its peacekeeping missions and setting out the obligations that this entails. Monitoring mechanisms should also be established which could receive individual complaints and issue advisory opinions on the compliance of missions with these obligations.

If it is accepted that UN peacekeeping missions do have 'protection' obligations under international human rights law, however, it will be important to clarify the extent of these and

¹⁴ *Mothers of Srebrenica v. the Netherlands* ECLI:NL:RBDHA:2014:8748 (The Hague District Court) 2014; and *Mukeshimana-Ngulinzira and Others v Belgium and Others*, Court of First Instance Judgment, RG No 04/4807/A, 07/15547/A, ILDC 1604 (BE 2010) 8th December 2010.

which rights missions are obligated to protect. Human rights are often declared to be ‘universal, indivisible and interdependent and interrelated’.¹⁵ There are a number of both civil and political rights and economic, social and cultural rights that will be of obvious relevance during the type of humanitarian crises in which UN peacekeeping missions often operate. Indeed it has been argued that ‘human rights protection cannot and must not be reduced to protection against violence and oppression, against death or torture, but always has to be protection against basic deprivation like hunger, sickness or lack of shelter’¹⁶ This poses the question as to whether a UN peacekeeping mission with a POC mandate should be obliged to protect the full spectrum of all the rights and freedoms contained in the corpus of international human rights law, or if a narrower set of ‘core’ obligations can be derived from the ‘purposes, functions and practices’ of the mission and an assessment of its ‘effective control’.

At the end of the 1990s, a series of workshops organised under the auspices of the International Committee of the Red Cross (ICRC) defined ‘protection’ as:

all 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.¹⁷

¹⁵ *Vienna Declaration and Programme of Action*, Adopted by the World Conference on Human Rights in Vienna on 25 June 1993. See also *What are human rights?*, OHCHR website, <http://www.ohchr.org/en/issues/pages/whatarehumanrights.aspx>, accessed 27 October 2014.

¹⁶ Sylvia Maus, ‘Human rights in peacekeeping missions’, Hans-Joachim Heintz and Andrej Zwitter, (eds) *International Law and Humanitarian Assistance*, Berlin: Springer, 2011, p.112.

¹⁷ ICRC *Strengthening Protection in War: A Search for Professional Standards*, Geneva: International Committee of the Red Cross, 2001. The workshops involved some 50 humanitarian, human rights and academic organisations and institutions and, as will be discussed further in Part II of this thesis, this definition is now widely used by both UN agencies and non-governmental organisations.

The UN has developed a similar definition.¹⁸ This is often referred to as humanitarian ‘rights-based’ protection. 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. It clearly obliges humanitarian agencies to remain impartial and not to discriminate.¹⁹ The wording, however, suggests an aspirational, rather than legal, commitment and humanitarian agencies themselves appear to disagree about how it should be interpreted. POC is often conflated with humanitarian ‘rights-based’ protection, but it will be argued here that it should be seen as a distinct and narrower legal obligation based on the definition above on protecting the right to life and physical integrity.

The term ‘protection’ is often also associated with the ‘responsibility to protect’ (R2P) although, as will be discussed in Chapter One of this thesis, this is a political rather than a legal concept. There are few references to POC in the existing academic literature and, where it is mentioned, it is often treated either as an ‘operationalization’ of R2P or else viewed through the humanitarian ‘rights-based’ lens.²⁰ This is partly because it is still a comparatively new concept and partly

¹⁸ The UN Office for the Coordination of Humanitarian Affairs (OCHA) in its *Glossary of Humanitarian Terms: In Relation to the Protection of Civilians in Armed Conflict*, OCHA, December 2003, Chapter 4: The Field. This defines protection as: ‘A concept that encompasses all activities aimed at obtaining full respect for the rights of the individual in accordance with the letter and spirit of human rights, refugee and international humanitarian law. Protection involves creating an environment conducive to respect for human beings, preventing and/or alleviating the immediate effects of a specific pattern of abuse, and restoring dignified conditions of life through reparation, restitution and rehabilitation.’ See also *2015 Strategic Response Plan, Syrian Arab Republic*, UN Country Team, December 2014, p.3, which states that ‘‘protection’ refers to the protection of all affected civilians including men, women, children, and other groups with specific needs from violence, exploitation, discrimination, abuse and neglect.’

¹⁹ See ICRC, *Professional Standards for Protection Work carried out by humanitarian and human rights actors in armed conflict and other situations of violence*, Geneva: International Committee of the Red Cross, October 2009; IASC, *Growing the Sheltering Tree, protecting rights through humanitarian action*, Geneva: Inter-Agency Standing Committee, 2002; GPC, *Handbook for the Protection of Internally Displaced Persons*, Global Protection Cluster Working Group, Geneva: December 2007; Sophia Swithern and Rachel Hastie, *Improving the Safety of Civilians: A protection training pack*, Oxford: Oxfam, December 2008.

²⁰ The former is an underlying assumption of Siobhán Wills, *Protecting Civilians*, Oxford: Oxford University Press, 2009; Edward Luck, ‘The Responsibility to Protect: Growing Pains or Early Promise?’ *Ethics and International Affairs* Vol. 24 Issue 4, September 2010; and Nicholas Tsagourias, ‘Self-defence, protection and humanitarian values and the doctrine of impartiality and neutrality in enforcement mandates’, in Marc Weller (ed.), *The Oxford Handbook on the Use of Force in International Law*, Oxford:

because POC mandates have mainly developed and adapted in the field ‘below the radar’ of much of the current legal and academic discourse. This thesis, therefore aims to make an original contribution to the research in this area.

Thesis road map

The first three chapters provide a general overview of the international legal framework that provides ‘protection’ to individuals and discusses why and how UN peacekeeping missions have become increasingly tasked with POC mandates.

Chapter One provides historical background to the discussion. It introduces the main bodies of law and examines the tension between promoting the universality of basic rights on the one hand and respecting national sovereignty on the other. It also discusses the arguments surrounding ‘humanitarian intervention’, and the emergence of R2P. It argues that while the growing prominence of ‘protection’ in international law has helped to reframe debates about the use of force for ‘protective purposes, the *jus ad bellum* justification for this still requires authorization of the UN Security Council, unless it can be justified as self-defence. Attempts to foster a ‘global political consensus’ favouring ‘humanitarian interventions’ through R2P have largely failed.

Chapter Two traces the evolution and conceptual development of UN peacekeeping and discusses how the principles on which it is traditionally based emerged and developed.

Peacekeeping expanded rapidly during the 1990s, placing these principles under strain. The UN Security Council increasingly began to use its Chapter VII powers to provide missions with

Oxford University Press, 2014. The latter view informs the treatment of the chapter on Protection of Civilians in Alex Bellamy and Paul Williams, *Understanding Peacekeeping*, Second Edition, Polity Press, 2011, pp.337-58.

authority to use force for ‘protective purposes’. The failure of UN peacekeeping missions to protect people from genocide in Bosnia-Herzegovina and Rwanda, however, led to a crisis of credibility in the Organization. Criticisms grew, particularly amongst western liberal opinion, and, in 1999, the North Atlantic Treaty Organisation (NATO) took action in Kosovo without UN Security Council authority. The UN also established transitional administrations in Kosovo and East Timor that exercised executive powers over these territories.

Chapter Three analyses the emergence of POC as a new normative concept and the problems of turning it into an operational doctrine. The UN mission to Sierra Leone was the first one to be given a POC mandate, in 1999. POC was not initially considered a significant departure from ‘traditional peacekeeping’. It has primarily developed through Security Council resolutions and policy guidance from the Department of Peacekeeping Operations (DPKO) based on the experiences of its field missions. These have become increasingly detailed in spelling out POC tasks and making it a priority for missions. A lack of clarity about what the term ‘protection’ actually means and the legal framework governing the use of such force have, however, contributed to the challenges that missions face.

Part Two of the thesis discusses the applicable legal framework governing the use of force for protective purposes and the inter-relationship between the different bodies of law.

Chapter Four examines the provisions of international humanitarian, human rights and refugee law that may be relevant to a UN peacekeeping mission with a POC mandate. It first sets out the relevant provisions of IHL and then the potentially relevant provisions of international human rights law governing the use of lethal force and arrest and detention powers. The applicability of refugee law is also briefly considered, particularly in relation to attempts to develop a ‘doctrine of protection’ for Internally Displaced Persons (IDPs). The chapter argues that the negative and

positive obligations of international human rights law provide the most comprehensive and relevant guidance for UN peacekeeping missions with POC mandates and that its provisions can be applied both extraterritorially and concurrently with IHL.

Chapter Five explores the relationship between the provisions of UN Charter law and international human rights law and the problems of holding peacekeeping missions accountable for their ‘protection responsibilities’. Both national courts and the European Court of Human Rights have declared inadmissible complaints of human rights violations carried out by troops on missions mandated by the Security Council, unless they can attribute responsibility for these acts to member States rather than the UN itself. There is, however, growing acceptance that the widening use by the Security Council of its Chapter VII powers has created circumstances in which the lack of effective accountability mechanisms is becoming an increasing issue. This has particularly arisen in relation to the Security Council’s use of individual sanctions as well due to complaints of sexual abuse by UN peacekeepers. It also has implications for the use of force and detention powers of peacekeeping soldiers, particularly if they become more proactive in implementing their POC mandates.

The final section of the thesis provides an overview of four contemporary UN peacekeeping missions, which have POC mandates: the UN Organization Stabilization Mission in the Democratic Republic of the Congo (MONUSCO), the UN Organization in Cote d’Ivoire (UNOCI), the UN Mission South Sudan (UNMISS) and the UN/AU Mission in Darfur (UNAMID). All four started as ‘traditional’ peacekeeping missions, established to monitor ceasefires that were supposed to bring an end to civil wars in each country.²¹ They are amongst

²¹ The missions in the Democratic Republic of Congo (DRC), Côte d’Ivoire and Darfur were originally deployed to monitor peace agreements and help to organize elections. UNMISS and UNAMID developed out of an earlier UN mission in Sudan (UNMIS), which was established to supervise a referendum on independence, agreed by negotiations that ended Sudan’s long running civil war.

the UN's largest missions and together account for over half the total number of personnel deployed on missions.²² They also provide a representative cross-section of the places where missions have been given POC mandates.

Chapter Six discusses the UN mission to the DRC and, more briefly, the mission to Côte d'Ivoire. Both of these missions have been marked by controversy for failing to provide sufficient protection to civilians in many cases, but also because it is alleged that they may have become parties to the conflicts that they were sent to try and help to resolve. MONUSCO has developed innovative community outreach measures as part of its POC strategy, but has also formed heavily armed brigades to 'neutralise' armed groups that threaten civilians. UNOCI participated in military action that brought down the incumbent President of the country, although the UN continues to insist that it never actually became a party to the conflict. This chapter highlights the positive obligations of peacekeeping missions to protect civilians and also poses the question should a POC mandate be used as justification for UN missions to change from peacekeeping to war-fighting postures?

Chapter Seven discusses the missions in Sudan and South Sudan. Both have been particularly criticized for their reluctance to use force to protect civilians. UNAMID has also been accused of failing to speak out sufficiently clearly in the face of widespread violations of international human rights law and IHL and even providing logistical support to a senior Sudanese official under indictment by the International Criminal Court (ICC). Both missions are, however, currently sheltering tens of thousands of civilians on their bases. The chapter also explores the

²² *United Nations Peacekeeping Operations Factsheet*, 31 December 2014. <http://www.un.org/en/peacekeeping/documents/bnote1214.pdf>, accessed 14 January 2015. This lists a total of 13 UN peacekeeping missions with over 122,000 personnel deployed (103,798 of whom are uniformed personnel). Around 68,000 of these are in the four case-study missions.

UN's positive obligations where civilians are under a mission's effective control, and discusses their obligations to investigate and report violations of international human rights law and IHL.

The conclusion of this thesis argues that POC has emerged as a new normative principle guiding UN peacekeeping missions. UN peacekeeping soldiers will never be able to secure to everyone within their areas of responsibilities all the rights and freedoms safeguarded by international human rights law. Neither can they realistically protect more than a small fraction of the civilians whose lives are at risk in armed conflicts. In accepting that its missions have POC responsibilities, however, the UN also needs to accept its human rights obligations to the people it has been sent to protect.

**PART ONE: THE RELATIONSHIP BETWEEN ‘PROTECTION’ AND
‘PEACEKEEPING’**

Chapter One

**Laws and wars and rights and wrongs: the general international legal framework relevant
to protection**

Introduction

Provisions relating to ‘protection’ can be found in four main international legal frameworks: international human rights law, international humanitarian law (IHL), refugee law and the UN Charter. The International Court of Justice (ICJ) has drawn on these different frameworks when considering the negative and positive ‘protection obligations’ that the Charter places on both States and the UN itself.

Some believe that the growing prominence of ‘protection’ in international law has helped to reframe the debate about ‘humanitarian interventions’, whereby a State, or group of States, may forcibly intervene in the territory of another State for humanitarian protective purposes.¹ A

¹ There is no universally accepted definition for the term ‘humanitarian intervention’, but for further discussion see: Marko Marjanovic, ‘Is Humanitarian War the Exception?’, *Mises Institute*, 4 April 2011; Francis Kofi Abiew, *The Evolution of the Doctrine and Practice of Humanitarian Intervention*, Kluwer Law International, 1999, p. 31; and *Humanitarian Intervention, Legal and Political Aspects*, Copenhagen: Danish Institute of International Affairs, 1999, p. 11. Marjanovic has described it as a State’s use of ‘military force against another state when the chief publicly declared aim of that military action is ending human-rights violations being perpetrated by the state against which it is directed.’ Abiew calls it ‘the theory of intervention on the ground of humanity . . . [that] recognizes the right of one State to exercise international control over the acts of another in regard to its internal sovereignty when contrary to the laws of humanity. The Danish Institute of International Affairs, defines it as ‘coercive action by States involving the use of armed force in another State without the consent of its government, with or without authorisation from the United Nations Security Council, for the purpose of preventing or putting to a halt gross and massive violations of human rights or international humanitarian law.’

report published in 2001 also coined the term the ‘Responsibility to Protect’ (R2P),² whose proponents 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.³

The Protection of Civilians (POC) is sometimes associated with both R2P and ‘humanitarian interventions’. It will be argued here, however, that POC is best understood as a quite separate concept that is firmly based in international law and with an emerging normative significance that the other two concepts lack. Indeed, as will be discussed in subsequent chapters, conflating them may actually have made it more difficult for UN peacekeeping missions to provide effective protection to civilians in practice.

Historical overview

Attempts to replace the use of force with a system of collective security can be traced back to the Peace of Westphalia in 1648 by which States agreed to end the European ‘wars of religion’ and respect the principle of non-intervention in one another’s internal affairs.⁴ The Grotian⁵ theories

² Gareth Evans and Mohamed Sahnoun (Co-Chairs), *The Responsibility to Protect: Report of the International Commission on Intervention and State Sovereignty*, Ottawa: International Development Research Centre, 2001 [Hereinafter ICISS 2001].

³ *R2P, Frequently Asked Questions*, <http://www.responsibilitytoprotect.org>, accessed 2 August 2015. ‘R2P is an 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.’

⁴ Amos S. Hershey, ‘History of International Law Since the Peace of Westphalia’, *The American Journal of International Law*, Vol. 6, No. 1, Jan., 1912. See also Malcolm Shaw, *International Law, Sixth Edition*, Cambridge: Cambridge University Press, 2008, pp.1-65.

⁵ 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; and T M C Asser Instituut (ed) *International Law and the Grotian Heritage*, 1983.

of natural law gave way to the Vattelian⁶ positivist belief that the rules of international law governing the conduct between ‘civilised nations’, were based on common consent.⁷ Individuals were objects not subjects in the latter scheme and only municipal law regulated relations between different individuals and the State.⁸ The first edition of Oppenheim’s *International Law*, published in 1905, for example, declared that individuals had no place in international law, except as objects over which a State exercised jurisdiction, or through the protection provided by their own State if they were abroad.⁹

Although the principle of non-intervention was generally accepted as part of the ‘western’ legal order of the nineteenth century, certain exceptions to it existed, including the concept of ‘humanitarian intervention’.¹⁰ This doctrine played a role in the interventions by European powers in 1827; in support of a Greek uprising against the Turks; by Britain and France in Sicily in 1856; by a number of European powers in Syria in 1860; and repeated interventions in the

⁶ E. de Vattel, *The Law of Nations or, The Principles of the Law of Nature Applied to the Conduct and Affairs of Nations and Sovereigns*, 1758, Republished B. Kapossy and R Whatmore (eds), Indianapolis, Liberty Fund, 2008.

⁷ Martti Koskeniemi, ‘The Politics of International Law’, *European Journal of International Law*, No. 4, 1990, pp.1-32; Prosper Weil, ‘Towards Relative Normativity in International Law’, *American Journal of International Law*, Vol. 77, No. 3 July 1983, pp.413-442.

⁸ Kate Parlett, *The Individual in the International Legal System, continuity and change in international law*, Cambridge: Cambridge University Press, 2011, p.3. See also Ian Brownlie *The Rule of Law in International Affairs*, The Hague/London/Boston: Martin Nijhoff Publishers, 1998; and Cátia Lopes and Noëlle Quéniwet, ‘Individuals as Subjects of International Humanitarian Law and Human Rights Law’, in Roberta Arnold and Noelle Quéniwet (eds), *International Humanitarian Law and Human Rights Law*, Leiden and Boston: Martinus Nijhof, 2008, pp.199-236.

⁹ Lassa Oppenheim, *International Law: A Treatise*, London: Longmans Green & Co., 1905, paras 291-3, 297-302, 319-22, 344-7 and 347; and *Chorzow Factory Case (Germany v. Poland)*, Indemnity and Merits, PCIJ Reports, Series A, No. 17, 1928, where the PCIJ affirmed that in a diplomatic protection claim, the rights at issue are States’ rights, not individual rights. See also Guy Goodwin Gill, *The Refugee in International Law, Third Edition*, Oxford: Oxford University Press, 2007, pp.173-4; and Parlett, 2011, pp.1-26. Diplomatic protection is often referred to as a ‘fiction’ that transposes wrongs against individuals into wrongs against their State of nationality.

¹⁰ For a short overview of the legal debates surrounding ‘humanitarian interventions’ see Peter Malanczuk, *Akehurst’s Modern Introduction to International Law, seventh revised edition*, London and New York: Routledge, 1999, pp.19-20; and DJ Harris *Cases and materials on international law, fifth edition*, London: Sweet and Maxwell, 1998, pp.624-6.

Ottoman Empire in 1866, 1875, 1877 and 1887.¹¹ It was also widely relied upon during the ‘scramble for Africa’, with many European commentators citing the need to ‘save’ Africa’s people from backwardness in general and the Arab-led slave trade in particular.¹² Some of the treaties that ‘carved up’ Africa’s new borders between the European powers, consequently contained clauses relating to the treatment of the native population.¹³ The British navy also took unilateral action against slave-trading ships off the African coast.¹⁴

Some international courts did begin to recognise the rights of individuals at the start of the twentieth century.¹⁵ The Treaty of Versailles of 1919 allowed individuals to bring claims against foreign States for war damage and the creation of the League of Nations required some modification of the notion that only States had rights and duties in international law.¹⁶ Large-

¹¹ For an overview see Davide Rodogono, *Against massacre: humanitarian intervention in nineteenth century Europe*, Princeton, New Jersey: Princeton University Press, 2011.

¹² See Thomas Pakenham, *The scramble for Africa*, London: Abacus books, 1991; David Olusoga and Casper Erichsen, *The Kaisers's Holocaust: Germany's Forgotten Genocide and the Colonial Roots of Nazism*. London: Faber and Faber, 2010; Adam Hochschild, *King Leopold's Ghost, A Story of Greed, Terror, and Heroism in Colonial Africa*, Boston: Houghton Mifflin Company, 1998; and Roger Casement, *Casement Report, Report from His Majesty's Consul at Boma Respecting the Administration of the Independent State of the Congo*, Presented to Both Houses of Parliament by Command of His Majesty, March 1904.

¹³ For further discussion see Tom J Farer and Felice Gaer, ‘Chapter 8’, in Adam Roberts, and Benedict Kingsbury, *United Nations, Divided World, the UN's role in international relations*, Oxford: Clarendon Paperbacks, 1996, pp.241-2. For example, Article 6 of the General Act of the Berlin Conference in 1884-5 required: ‘All the Powers exercising sovereign rights or influence in the aforesaid territories bind themselves to watch over the preservation of the native tribes, and to care for the improvement of the conditions of their moral and material well-being, and to help in suppressing slavery, and especially the slave trade. They shall, without distinction of creed or nation, protect and favour all religious, scientific or charitable institutions and undertakings created and organized for the above ends, or which aim at instructing the natives and bringing home to them the blessings of civilization.’ The Convention Relative to the Slave Trade and Importation into Africa of Firearms, Ammunition, and Spiritous Liquors (Brussels Conference) of 1890 also urged parties ‘to improve the moral and material conditions of existence of the native races.’ Neither treaty provided for monitoring or enforcement mechanisms.

¹⁴ For further discussion see Adam Hochschild, *Bury the Chains: The British Struggle to Abolish Slavery*, London: Macmillan, 2005. The Royal Navy established the West Africa Squadron (or Preventative Squadron) in 1808 after Parliament passed the Slave Trade Act of 1807. At the height of its operations, squadron employed a sixth of the entire fleet and Marines. Britain had previously been the world’s leading slave trader and its subsequent efforts to eliminate the practice amongst competitors may have owed as much to economics as altruism.

¹⁵ See Parlett, 2011, p.60. These included the Central American Court of Justice and the International Prize Court, both established in 1907.

¹⁶ For further details see Francisco Orrego Vicuna, *Individuals and Non-State Entities before International Courts and Tribunals*, Max Planck Yearbook of United Nations Law, Vol. 5, 2001, pp.55-6; and A.

scale forced migration as a result of the First World War created the need for new arrangements for dealing with refugees.¹⁷ The drawing of new borders in Europe and the changing status of some countries' colonial possessions also led to mechanisms being devised to protect the rights of minorities as well as the inhabitants of mandated territories.¹⁸

In the *Lotus* case of 1927 the Permanent Court of International Justice (PCIJ) re-stated the classical positivist view that: 'International law governs relations between independent States. The rules of law binding upon States therefore emanate from their own free will as expressed in conventions or by usages generally accepted as expressing principles of law.'¹⁹ However, in *Danzig*, the following year, the Court held that individual rights could be created by an international treaty when this was the clearly expressed intent of the contracting parties.²⁰

The inter-war period saw some strengthening of the laws of armed conflict and the two Geneva Conventions of 1929 were the first humanitarian law treaties to refer to rights for individuals.²¹

McNair, *Oppenheim's International Law, Fourth Edition*, London: Longmans, 1928, Vol. 1, pp.133-4. The Treaty of Versailles was one of the five peace treaties imposed on the defeated Central Powers. These imposed reparations and laid the guilt for the war on 'the aggression of Germany and her allies' as well as awarding German and Ottoman overseas possessions as 'mandates' chiefly to Britain and France. The conference also created the League of Nations with the aim of preventing future war.

¹⁷ Ibid. See also James Hathaway, *The Rights of Refugees under International Law*, Cambridge: Cambridge University Press, 2005, pp.81-91.

¹⁸ For further discussion on the mandate system see Michael D. Callahan, *Mandates and Empire, The League of Nations and Africa, 1914-1931*, Eastbourne: Sussex Academic Press, 1998. On minorities see Helmer Rosting, 'Protection of Minorities by the League of Nations', *The American Journal of International Law*, Vol. 17, No. 4, 1923, pp.641-60; and Gaetano Pentassuglia, 'Minority rights, human rights: a review of Basic concepts, entitlements and implementation procedures under international law,' in *Mechanisms for the Implementation of Minority Rights*, Council of Europe, 2005.

¹⁹ *The Case of the S.S. Lotus (France v. Turkey)*, PCIJ Reports, Series A, No. 10, 1927, p.18.

²⁰ *Jurisdiction of the Courts of Danzig (Pecuniary Claims of the Danzig Railway Officials who have passed into the Polish Service, Against the Polish Railways Administration)*, PCIJ Reports, Series B, No.15, 1928, pp.17-18.

²¹ For more details see Susan Tiefenbrun, *Decoding International Law: Semiotics and the Humanities*, Oxford: Oxford University Press, 2010, p. 147. In particular, the Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare, June 1925. See also the two Conventions 1929: the (Geneva) Convention relative to the Treatment of Prisoners of War 1929; and the (Geneva) Convention for the Amelioration of the Condition of the Wounded and Sick Armies in the Field 1929.

The International Labour Organization (ILO) concluded numerous conventions aimed at improving the conditions of workers.²² The 1926 Slavery Convention also imposed obligations on States parties to ‘prevent and suppress the slave trade’ pending the ‘complete abolition of slavery’.²³ Most legal scholars nevertheless continued to argue that individuals could not be the subjects of international law and had no rights or duties under it.²⁴ The League of Nation’s Covenant made no reference to individual rights, although it expressed a commitment to respect principles of humanity.²⁵

The post-Second World War framework saw a significant transformation of this doctrine. The UN Charter, of 1945,²⁶ contains a number of references to human rights, although these are mainly ‘promotional’ in character.²⁷ The Charter created the ICJ,²⁸ which can both adjudicate inter-state disputes and issue Advisory Opinions.²⁹ It also provided that the UN General Assembly should ‘initiate studies and make recommendations’ for the purposes of ‘assisting in the realization of human rights and fundamental freedoms’.³⁰ It may also establish ‘subsidiary

²² ILO Conventions 1 – 67, See *ILOLEX Database of International Labour Standards*, <http://www.ilo.org/ilolex/english/convdisp1.htm> accessed 5 December 2012. A total of sixty-seven conventions were concluded between 1919 and 1939.

²³ Slavery, Servitude, Forced Labour and Similar Institutions and Practices Convention of 1926 (Slavery Convention of 1926), 60 L.N.T.S. 253, *entered into force* March 9, 1927, Article 2.

²⁴ Parlett, 2011, pp.16 – 26 provides a summary discussion of the contrasting views of two of the period’s leading international scholars on the significance of the Danzig decision *Dioniso Anzilotti*, *Cours de droit International*, Paris: Librairie de Recueil Sirey, 1929; and Hersch Lauterpacht, *The Development of International Law by the Permanent Court of International Justice*, London: Longmans, 1934.

²⁵ The Covenant of the League of Nations, the Avalon Project: documents in law, history and diplomacy, Yale Law School, http://avalon.law.yale.edu/20th_century/leagcov.asp, accessed 21 January 2013.

²⁶ UN Charter, June 26, 1945, 59 Stat. 1031, T.S. 993, 3 Bevans 1153, *entered into force* Oct. 24, 1945.

²⁷ There are eight total in total: in its Preamble, in Article 1.3 (where promotion of human rights is listed as one of the UN’s purposes), in Article 13.1 (functions of the UN General Assembly), Articles 55 and 56 (pledging to promote human rights and take joint action to do so, Article 62 (ECOSOC), Article 68 (ECOSOC Commissions), Article 76 on international trusteeships. The references to the promotion of human rights in Articles 1.3 and Articles 55 and 56 are the main references for subsequent discussion.

²⁸ UN Charter, Articles 92 – 96.

²⁹ The Competence of the Court is defined in Articles 34-8 of its statute. Article 65, paragraph 1, of the ICJ’s Statute provides that ‘[it] may give an advisory opinion on any legal question at the request of whatever body may be authorized by or in accordance with the Charter of the United Nations to make such a request.’

³⁰ Article 13(1).

organs as it deems necessary for the performance of its functions.³¹ The International Law Commission (ILC) was also tasked with the codification of international law and its progressive development.³² The ICJ's findings in contentious cases are binding only as between the parties to them,³³ while its Advisory Opinions are, by definition, non-binding.³⁴ Nevertheless, its jurisprudence has significantly guided the development of international law within the UN Charter framework.³⁵

The Universal Declaration of Human Rights (UDHR) was proclaimed at the UN in 1948,³⁶ laying the basis for the development of subsequent human rights treaties.³⁷ The Geneva Conventions of 1949 enhanced the provisions of earlier treaties and added a Fourth Convention, which set out the rights and duties of an occupying power and expanded the protections due to civilians.³⁸ Two

³¹ UN Charter, Article 22.

³² This was established by the UN in 1947. See <http://www.un.org/law/ilc/index.htm>, accessed 30 April 2013. The ILC has been responsible for drafting of new conventions, such as the Additional Protocols to Geneva Conventions 1977; the Vienna Convention on the Law of Treaties 1969 and the Rome Statute of the International Criminal Court 1988. It has also produced reports summarizing existing law, such as the Draft Articles on State Responsibility 2001.

³³ Article 59 of the ICJ Statute provides that: 'The decision of the Court has no binding force except between the parties and in respect of that particular case.' See also *Land and Maritime Border (Cameroon v. Nigeria), Judgment*, ICJ Reports 2002, pp.303 and 406.

³⁴ Humphrey, 'The Universal Declaration of Human Rights: Its History, Impact and Juridical Character', in B G Ramcharan (ed), *Human Rights: Thirty Years After the Universal Declaration* (1979), p. 36. See also Erika De Wet, *The Chapter VII powers of the United Nations Security Council*, Portland, Oregon: Hart Publishing, 2004, p.28 and p.126. She notes that 'in practice advisory opinions are treated as having the same efficacy, authority and precedential value as a judgment in contentious proceedings. In *Difference relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights*, 29 April 1999, Advisory Opinion, ICJ Reports 1999, the Court stated that its advisory opinion on a dispute between the UN and a member state, 'shall be accepted as decisive between the parties.'

³⁵ Article 38 of the Statute of the International Court of Justice lists the means for determining the rules of international law as: international conventions establishing rules, international custom as evidence of a general practice accepted as law, the general principles of law recognised by civilised nations and judicial decisions and the teaching of eminent publicists. See also International Court of Justice, *North Sea Continental Shelf cases*, ICJ Reports 1969, p. 3.

³⁶ Universal Declaration of Human Rights, UN General Assembly Resolution 172 A (III), 10 December 1948.

³⁷ The first of these, the Convention on the Prevention and Punishment of the Crime of Genocide, Adopted by Resolution 260 (III) A of the United Nations General Assembly on 9 December 1948 (Genocide Convention), was adopted by the UN General Assembly the following day.

³⁸ Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field of 12 August 1949; Geneva Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea of 12 August 1949; Geneva Convention Relative

Additional Protocols were adopted, in 1977, the first of which reinforced protections for civilians in international armed conflicts, the second addressing the concept of protection in non-international conflicts.³⁹

The Nuremberg Tribunal, which conducted a trial of leading Nazis between November 1945 and October 1946, ruled that individuals could be directly held to account for crimes against peace, war crimes, and crimes against humanity, when committed in connection with an international armed conflict.⁴⁰ It also declared 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'.⁴¹ Certain crimes, such as genocide, war crimes, and crimes against humanity are now recognised as being so serious that they can be prosecuted in third countries regardless of who committed them or where they took place.⁴² International criminal tribunals, such as the one for Yugoslavia (ICTY) in 1993,⁴³ for Rwanda (ICTR) in 1994⁴⁴ and the International Criminal Court (ICC) of 2003,⁴⁵ have also been established to bring the perpetrators to justice.⁴⁶

to the Treatment of Prisoners of War of 12 August 1949; Geneva Convention Relative to the Protection of Civilian Persons in Time of War of 12 August 1949.

³⁹ Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977; Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-international Armed Conflicts (Protocol II), 8 June 1977.

⁴⁰ See Telford Taylor, *The Anatomy of the Nuremberg Trials*, London: Bloomsbury, 1993.

⁴¹ International Military Tribunal, judgment of 1 October 1946, in *The Trial of German Major War Criminals. Proceedings of the International Military Tribunal sitting at Nuremberg, Germany, Part 22* (22nd August 1946 to 1st October, 1946), p.25.

http://crimeofaggression.info/documents/6/1946_Nuremberg_Judgement.pdf, accessed 1 September 2015.

⁴² For an overview discussion see Antonio Cassese, *International Criminal Law, Second Edition*, Oxford: Oxford University Press, 2008, pp.3-27.

⁴³ Home page of the ICTY, <http://www.icty.org/> accessed 12 December 2012.

⁴⁴ Home page of the ICTR, <http://www.unicttr.org/> accessed 12 December 2012.

⁴⁵ Home page of the ICC, http://www.icc-cpi.int/EN_Menus/icc/Pages/default.aspx accessed 12 December 2012. Text of the Rome Statute circulated as document A/CONF.183/9 of 17 July 1998 and corrected by process-verbaux of 10 November 1998, 12 July 1999, 30 November 1999, 8 May 2000, 17 January 2001 and 16 January 2002. The Statute of the ICC was agreed in 1998 and the Court came into existence in 2003, once it had received 60 state ratifications.

⁴⁶ ICTY was established by Security Council Resolution 827 of 25 May 1993. ICTR was established by Security Council Resolution 955 of 8 November 1994. The ICC was created by a separate treaty, although

In 1950 the UN General Assembly established the UN High Commissioner for Refugees (UNHCR)⁴⁷ and the following year it adopted the Convention Relating to the Status of Refugees.⁴⁸ UNHCR was initially viewed as a temporary organization to address the needs of those displaced in Europe by the Second World War, but its global reach was confirmed by a Protocol to the Convention in 1967.⁴⁹ UNHCR has also become the lead UN humanitarian agency in a number of complex emergencies and has taken increasing responsibility for providing assistance and protection to IDPs.⁵⁰

it has a negotiated relationship agreement with the UN. See Negotiated Relationship Agreement between the International Criminal Court and the United Nations, signed 4 October 2004, pursuant to Article 2 of the Rome Statute.

⁴⁷ UN General Assembly Resolution 428(V), annex paras. 1,2. This defined UNHCR's purposes as being to provide 'international protection' and to seek 'permanent solutions for the problems of refugees.' For an overview see, Alexander Betts, Gil Loescher and James Milner, *UNHCR: the politics and practice of refugee protection*, second edition, Oxon and New York: Routledge, 2012; Goodwin Gill, 2007; and United Nations Library of International Law, Guy Goodwin Gill, 'Convention relating to the Status of Refugees Geneva, 28 July 1951, Protocol Relating to the Status of Refugees New York, 31 January 1967', <http://untreaty.un.org/cod/avl/ha/prsr/prsr.html>, accessed 3 December 2012.

⁴⁸ Convention relating to the Status of Refugees, Adopted on 28 July 1951 by the United Nations Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons convened under General Assembly resolution 429 (V) of 14 December 1950 [Hereinafter the Refugee Convention 1951].

⁴⁹ Protocol Relating to the Status of Refugees, Entry into force: 4 October 1967, Text: 606 UNTS 267.

⁵⁰ UN 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*, 4 June 2007, EC/58/SC/CRP.18. This will be discussed further in Chapter Four.

Refugee law and IHL require States and parties to conflicts, respectively, to recognize persons as having a certain status according to their membership of a defined group and treat them accordingly. International human rights law, by contrast, provides protections for all human beings at all times in all places within a State's jurisdiction.⁵¹ It also includes various measures aimed at ensuring effective remedies for persons whose rights have been violated.⁵²

The Council of Europe drafted the European Convention on Human Rights (ECHR) in 1950.⁵³ In 1966 the UN adopted the International Covenant on Economic, Social and Cultural Rights (ICESCR)⁵⁴ and the International Covenant on Civil and Political Rights (ICCPR).⁵⁵ There are a number of other universal⁵⁶ and regional treaties,⁵⁷ protecting a broad range of human rights.

⁵¹ For further discussion see Rosalyn Higgins, *'Human Rights: Some Questions of Integrity'*, *Commonwealth Law Bulletin* Vol 2, Issue 15, 1989, p.607; and Rosalyn Higgins, *Problems and Processes: International Law and How We Use It* (OUP 1994). Higgins has noted that, in contrast to the obligations that treaties create between States, international human rights laws 'reflect rights *inherent* in human beings, not dependent upon grant by the state.'

⁵² ECHR, Article 13, Article 6 (access to court) and Article 41(reparations); ICCPR Article 2.3; Article 14 (fair trial); ACHR, Article 1 and Article 25 (judicial protection); African Charter, Article 7 (fair trial). See also Human Right Committee General Comment No. 31 - Nature of the General Legal Obligation Imposed on States Parties to the Covenant, paras 15-17.

⁵³ Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), 213 U.N.T.S. 222, *entered into force* 3 September 1953, *as amended by* Protocols Nos. 3, 5, 8, and 11 *which entered into force* on 21 September 1970, 20 December 1971, 1 January 1990, and 1 November 1998 *respectively*.

⁵⁴ International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3 (ICESCR).

⁵⁵ International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR).

⁵⁶ For example: International Convention on the Elimination of All Forms of Racial Discrimination (adopted 7 March 1966, entered into force 4 January 1969) 660 UNTS 195 (CERD); International Convention on the Suppression and Punishment of the Crime of Apartheid (adopted 30 November 1973, entered into force 18 July 1976) 1015 UNTS 243; Convention for the Elimination of all forms of Discrimination Against Women (adopted 18 December 1979 entry into force 3 September 1981), (CEDAW); Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (adopted 10 December 1984, entered into force 26 June 1987) 1465 UNTS 85 (CAT) Convention on the Rights of the Child (adopted 20 November 1989, entered into force 2 September 1990) 1577 UNTS 3 (CRC); and the International Convention on the Rights of Persons with Disabilities (adopted 13 December 2006, entered into force 3 May 2008), text in UN Doc A/61/611.

⁵⁷ For example: the Organization of American States: American Convention on Human Rights, 'Pact of San Jose', Costa Rica, 1969; Inter-American Convention to Prevent and Punish Torture (adopted 9 December 1985, entered into force 28 February 1987) OAS TS 67; the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights ('Protocol of San Salvador'), 16 November 1999, A-52; Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women ('Convention of Belem do Para'), 9 June 1994; Inter-American Convention on Forced Disappearance of Persons Adoption: June 9, 1994. Entry into force: March 28, 1996, 3

Courts and monitoring bodies have been established to oversee how these are being respected in practice and their case-law has elaborated these provisions in more detail.⁵⁸ At the World Conference on human rights in Vienna, in 1993, the UN declared that: ‘All human rights are universal, indivisible and interdependent and interrelated’.⁵⁹ This principle has been restated many times since.⁶⁰

‘Humanitarian interventions’ and the UN Charter

The growing prominence of human rights in international law has led some to argue that where a State is manifestly failing to protect its own population from widespread violations, other States may be justified in intervening on ‘humanitarian’ grounds.⁶¹ The doctrine of ‘humanitarian

ILM 1429; Inter-American Convention on the Elimination of All Forms of Discrimination against Persons with Disabilities, 7 June 1999, AG/RES. 1608 (XXIX-O/99); African Union: African [Banjul] Charter on Human and Peoples' Rights, adopted June 27, 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), entered into force 21 October 1986; the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, 11 July 2003; African Charter on the Rights and Welfare of the Child (adopted 1990, entered into force 29 November 1999), OAU Doc. CAB/LEG/24.9/49; Convention Governing the specific aspects of Refugee problems in Africa 10 September 1969, 1001 UNTS 45; Council of Europe, the European Social Charter ETS No. 035 - Turin, 18.X.1961; European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment 1987 (adopted 26 November 1987, entered into force 1 February 1989) ETS 126.

⁵⁸ The first human rights treaty to directly confer rights on individuals and corresponding legal obligations on States was the ECHR in 1950, which created the European Court on Human Rights. Individuals may directly petition or complain of violations to this court. The ICCPR, ICERD, CEDAW, CAT, Inter-American Commission of Human Rights (IACHR) and African Charter also all have individual petition mechanisms.

⁵⁹ Vienna Declaration and Programme of Action, Adopted by the World Conference on Human Rights in Vienna on 25 June 1993, A/CONF.157/23, 14-25 June 1993.

⁶⁰ For further discussion see, for example: Andrew Clapham, *Human Rights: A Very Short Introduction*, Oxford: Oxford University Press, 2007; Samuel Moyné, *The last utopia, human rights in history*, Cambridge Mass and London: The Belknap Press of Harvard University Press, 2010; Javaid Rehman, *International Human Rights Law, a practical guide*, Harlow: Pearson Education Ltd.; Theodor Merron, (ed) *Human Rights in International Law*, Oxford: Oxford University Press, 1988; and Obrad Savic, *The politics of human rights*, London: Verso, 1999.

⁶¹ For generally supportive arguments see Lillich (ed) *Humanitarian Intervention and the United Nations*, University of Virginia Press, Charlottesville, 1973; Jean-Pierre Fonteyne, ‘The customary international law doctrine of humanitarian intervention: its current validity under the UN Charter’, *California Western International Law Journal*, 1974, p.203; Nikolaos Tsagourias, *Jurisprudence of international law, The humanitarian dimension*, Manchester University Press, 2000, pp.5-41; Sean Murphy, *Humanitarian Intervention, The United Nations in an Evolving World Order*, University of Pennsylvania Press, 1996, pp. 7-20; and Brian Lepard, *Rethinking Humanitarian Intervention: A Fresh Legal Approach Based on*

intervention' was originally associated with apologies for nineteenth century imperialism.⁶² The revelations about the Holocaust, however, made some legal scholars urge its reconsideration. 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 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.⁶³

Although some consider 'humanitarian intervention' to be an exception to the principle of non-intervention, it is difficult to see how it is compatible with the system of international relations envisaged by the UN Charter and the framework of international law developed since 1945.

While this does provide greater protection to individuals, it has been balanced by the development of three countervailing principles: the strengthening of people's right to self-

Fundamental Ethical Principles in International Law and World Religions, Pennsylvania: Pennsylvania State University, 2003.

⁶² John Stuart Mill, 'A few words on non-intervention 1859' in *The Collected Works of John Stuart Mill, Volume XXI - Essays on Equality, Law, and Education* [1825], ed. John M. Robson, Introduction by Stefan Collini, Toronto: University of Toronto Press, London: Routledge and Kegan Paul, 1984. See also: See 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; and T M C Asser Instituut (Ed) *International Law and the Grotian Heritage*, 1983 for the origins of 'just war' theory.

⁶³ Hersch Lauterpacht, *Oppenheim's International Law*, London: Longmans, Green & Co, 1947, p.96.

determination;⁶⁴ restrictions on outside interference in what are properly a country's internal affairs⁶⁵ and a reaffirmation of the legal prohibition on the unilateral threat or use of force.⁶⁶

Membership of the UN is open to all 'peace-loving nations' irrespective of the nature of their government, providing that they accept the obligations of the Charter.⁶⁷ This enshrines core principles of international law including respect for the sovereign equality of nations, a prohibition on the unilateral use of force and an obligation to act in good faith. Article 1 of the Charter states the UN's primary purpose to be the collective maintenance of international peace and security.⁶⁸ The prohibition on the use of force and external intervention is set out in Article 2:

4. All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.

7. Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter; but this principle shall not prejudice the application of enforcement measures under Chapter VII.⁶⁹

⁶⁴ The ICCPR and ICESCR both place the right to 'self-determination' as the first Article in their list of human rights.

⁶⁵ *Case Concerning Military and Paramilitary Activities in and against Nicaragua*, (Merits) Judgment, of 27 June 1986, ICJ Report 1986, paras 172 – 200; *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, Judgment, ICJ Report 2005, para 148 .

⁶⁶ International Military Tribunal (Nuremberg Tribunal), Judgment of 1 October 1946, p.25. See also, Annex I, Amendments to the Rome Statute of the International, Criminal Court on the crime of aggression, Article 8 bis, Crime of aggression, 1, Resolution RC/Res.6, Adopted at the 13th plenary meeting, on 11 June 2010, by consensus.

⁶⁷ For further discussion see: Christopher Joyner (ed), *The United Nations and International Law*, Cambridge: Cambridge University Press, 1997; Bruno Simma, *The Charter of the United Nations A Commentary Second Edition*, Oxford: Oxford University Press, 2002; and Michael Matheson, *Council Unbound: the growth of UN decision-making on conflict and post-conflict issues after the Cold War*, Washington: US Institute for Peace, 2006; and Malanczuk, 1999, pp.26-9.

⁶⁸ UN Charter, Article 1.1.

⁶⁹ UN Charter Article 2.

The only two explicit exceptions to the prohibition of the threat or use of force in the Charter are the ‘inherent right of self-defence’ recognized by Article 51⁷⁰ and operations authorized by the Security Council under Chapter VII.⁷¹ Some have argued that Article 2(4) only specifically prohibits the threat or use of force ‘against the territorial integrity or political independence of any State or in any other manner inconsistent with the Purposes of the United Nations’ and that this may not preclude its use for other purposes.⁷² Powerful States who believe that a weak State is violating international law may be tempted to rely on this formulation if they decide to take matters into their own hands.⁷³

This argument was made in 1949 by the United Kingdom (UK) in the *Corfu Channel* case, in which the British Navy sent minesweepers into Albanian territorial waters after damage suffered by their ships and loss of lives.⁷⁴ The ICJ criticised Albania for neglecting to warn shipping that its waters were mined and awarded damages to Britain.⁷⁵ However it also stated that it could ‘not accept’ the UK’s ‘theory of intervention’, which it described as ‘a policy of force . . . and as such cannot, whatever be the present defects in international organisation, find a place in international

⁷⁰ UN Charter Article 51. See also the *Caroline case 1841-42*. Quoted in D J Harris, *Cases and Materials in International Law* 5th Ed. Sweet and Maxwell, 1998, p.894-917.

⁷¹ UN Charter Articles 39-51. Article 39 provides that the Security Council shall ‘determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken’. Article 40 provides for ‘provisional measures’ to be taken. Article 41 provides for sanctions and Article 42 provides for the use of military force.

⁷² For a summary of this debate see, for example, Christine Gray, *Use of Force in International Law, Third Edition*, Oxford: Oxford, University Press, 2008, pp.6-24 and 32-3; and Noam Lubell, *Extraterritorial Use of Force Against Non-State Actors*, Oxford: Oxford University Press, 2010, pp.27-8.

⁷³ *Ibid.*, Israel argued a similar point at the UN Security Council in justification for its raid on the Entebbe airport in Uganda in 1976 to rescue a group of hostages being held captive. However, the majority of countries, even those supporting Israel’s actions, did not wish to accept a reduction of the scope of Article 2(4) in this way.

⁷⁴ *Corfu Channel Case (UK v. Albania)*, Judgment of 9 April 1949, ICJ Reports 1949. In the first incident British ships entered Albanian territorial waters and came under fire from Albanian fortifications, although no one was injured. In the second incident two British ships struck mines, killing 44 British sailors. In the third incident British ships carried out mine clearing operations in Albanian territorial waters.

⁷⁵ *Ibid.*, p.36. Albania refused to pay the damages awarded and the two countries broke off diplomatic relations.

law. Intervention is perhaps less admissible in the particular form it would take here, for, from the nature of things, it would be reserved to the most powerful States, and might easily lead to perverting the administration of international justice itself.⁷⁶

In *Nicaragua v the United States*, in 1986, the ICJ restated its decision in the *Corfu Channel* case, and held that both the principles of non-intervention and the prohibition on the use of force were a part of customary international law, and that the principle of non-use of force may also be *jus cogens*.⁷⁷ The ICJ rejected the United States (US) justification of collective self-defence, because Nicaragua had allegedly helped rebels in neighbouring countries. It also rejected the US argument that its intervention had been justified by the human rights situation in Nicaragua, stating that ‘where human rights are protected by international conventions, that protection takes the form of such arrangements for monitoring or ensuring respect for human rights as are provided for in the conventions themselves’:⁷⁸

In any event, while the United States might form its own appraisal of the situation as to respect for human rights in Nicaragua, the use of force could not be the appropriate method to monitor or ensure such respect. . . A strictly humanitarian objective cannot be compatible with the mining of ports, the destruction of oil installations, or again with the training, arming and equipping of the *contras*.⁷⁹

⁷⁶Ibid., pp.34-5. It also stated that, ‘Between independent States, respect for territorial sovereignty is an essential foundation of international relations. The Court recognises that the Albanian Government’s complete failure to carry out its duties after the explosions, and the dilatory nature of its diplomatic notes, are extenuating circumstances for the action of the United Kingdom Government. But to ensure respect for international law, of which it is the organ, the Court must declare that the action of the British Navy constituted a violation of Albanian sovereignty.’

⁷⁷ *Case Concerning Military and Paramilitary Activities in and against Nicaragua*, Judgment, of 27 June 1986, ICJ Reports 1986, paras 172-202.

⁷⁸ Ibid., para 268.

⁷⁹ Ibid.. It concluded that: ‘the argument derived from the preservation of human rights in Nicaragua cannot afford a legal justification for the conduct of the United States’.

While the ICJ rejected most of the US's arguments for interfering in Nicaragua's internal affairs, it ruled that not all of the support extended to the *contras* was unlawful. It distinguished between the delivery of humanitarian aid and weapons to the *contras* and stated that: 'There can be no doubt that the provision of strictly humanitarian aid to persons or forces in another country, whatever their political affiliations or objectives, cannot be regarded as unlawful, or as in any other way contrary to international law.'⁸⁰

In the view of the Court, if the provision of 'humanitarian assistance' is to escape condemnation as an intervention in the internal affairs of Nicaragua, not only must it be limited to the purposes hallowed in the practices of the Red Cross, namely 'to prevent and alleviate human suffering' and 'to protect life and health and to ensure respect for the human being'; it must also and above all be given without discrimination to all in need in Nicaragua, not merely to the *contras* and their dependents.⁸¹

In *Armed Activities on the Territory of the Congo*, in 2005, the ICJ restated that the prohibition on the threat or use of force is a 'cornerstone of the UN Charter'⁸² and ruled that Uganda had violated the sovereignty and territorial integrity of the Democratic Republic of the Congo (DRC) both directly and by actively extending military, logistic, economic and financial support to irregular forces that had operated on its territory.⁸³ It also noted that certain provisions in the UN Declaration on Friendly Relations – prohibiting the promotion of civil strife, terrorism and armed activities in other States – were declaratory of customary international law.⁸⁴

⁸⁰Ibid., para, 242.

⁸¹ Ibid., para 243.

⁸² *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, Judgment, ICJ Reports 19 December 2005, ICJ Reports 2005, para 148.

⁸³ Ibid., paras 160 and 345.

⁸⁴ Ibid., para 162; See also ICJ Reports 1986, paras 190 and 202. 'Every State has the duty to refrain from organizing, instigating, assisting or participating in acts of civil strife or terrorist acts in another State or acquiescing in organized activities within its territory directed towards the commission of such acts, when the acts referred to in the present paragraph involve a threat or use of force' and 'no State shall organize,

The principle of non-interference and non-intervention has been re-stated on many occasions by the UN General Assembly, such as in the Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States the Definition of Aggression; the Declaration on Friendly Relations and the Declaration on the Inadmissibility of Intervention and Interference in the Internal Affairs of States.⁸⁵ General proscriptions on intervention have also been written into the Charter of the Organisation of African Unity,⁸⁶ the Charter of the Organisation of American States⁸⁷ and the Principles of the Final Act of the Helsinki Conference.⁸⁸ States are also prohibited from transferring weapons and military assistance to non-state groups if these violate UN Security Council arms embargos, or other international agreements, or if a State has knowledge that they will be used in the commission of grave violations of international human rights law or IHL.⁸⁹

The crime of aggression was included in the 1998 Rome Statute of the ICC, although it was agreed that the Court could only ‘exercise jurisdiction over the crime’ once its elements had been

assist, foment, finance, incite or tolerate subversive, terrorist or armed activities directed towards the violent overthrow of the regime of another State, or interfere in civil strife in another State.’

⁸⁵ UN General Assembly Resolution 2131 (1965) *Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of their Independence and Sovereignty*. See also Resolution 3314, (1974) *On the Definition of Aggression*; Resolution 2625 (1970) *Declaration on Principles of International Laws concerning Friendly Relations and Co-operation among States*; Resolution 36/103 (1981) *Declaration on the Inadmissibility of Intervention and Interference in the Internal Affairs of States*.

⁸⁶ Charter of the Organisation of African Unity, Article 3.

⁸⁷ Charter of the Organisation of American States, Article 18.

⁸⁸ Principles of the Final Act of the Helsinki Conference, 1(a) Declaration on principles guiding relations between participating states: II. Refraining from the threat or use of force.

⁸⁹ UN Arms Trade Treaty of 24 December 2013. For background see Amnesty International, *The long journey towards an Arms Trade Treaty*, 5 June 2013; Andrew Clapham, ‘The Arms Trade Treaty: A Call for an Awakening’, *European Society of International Law Reflections*, Volume 2, Issue 5, May 6, 2013; *The Arms Trade Treaty (2013)*, Geneva: The Geneva Academy, June 2013; Matthew Bolton, Helena Whall, Allison Pytlak, Hector Guerra and Katelyn E. James, ‘The Arms Trade Treaty from a Global Civil Society Perspective’, *Global Policy* (2014) doi: 10.1111/1758-5899.12171. During the negotiations that led to the treaty’s adoption some argued that a total prohibition of such transfers was implicit in general international law. Although this was not reflected in the final text, the treaty states: ‘If the export is not prohibited under article 6, each exporting state party, under article 7, agrees that, prior to authorization of exports, they will assess the potential that conventional arms or related items will undermine peace and security or be used to commit or facilitate a serious violation of international humanitarian or human rights law, or acts constituting terrorism or transnational organized crimes.’

defined at a later date.⁹⁰ This was finally agreed at the Kampala review conference of 2010, which further stipulated that the actual exercise of jurisdiction over the crime is subject to a decision to be taken after 1 January 2017.⁹¹ A US sponsored amendment, which could have exempted some ‘humanitarian interventions’ from these provisions was rejected.⁹²

While the treaty provisions prohibiting unilateral ‘humanitarian interventions’ appear extremely clear, some States and some legal scholars have argued that there will be occasions when such action is the only way to save lives and prevent mass atrocities.⁹³ Belgium briefly referred to the doctrine during its oral submission to a case arising out of the NATO intervention during the Kosovo crisis,⁹⁴ but did not mention it in its written submission.⁹⁵ Britain has asserted its existence in some public statements, although it has not relied on the doctrine in any legal cases.⁹⁶

⁹⁰ Rome Statute, Article 5.2: The Court shall exercise jurisdiction over the crime of aggression once a provision is adopted in accordance with articles 121 and 123 defining the crime and setting out the conditions under which the Court shall exercise jurisdiction with respect to this crime. Such a provision shall be consistent with the relevant provisions of the Charter of the United Nations.’

⁹¹ Resolution RC/Res.6, Adopted at the 13th plenary meeting, on 11 June 2010, by consensus. See Annex for full text of the definition of the crime.

⁹² For discussion see Matthew Gillett, ‘The Anatomy of an International Crime: Aggression at the International Criminal Court’, *International Criminal Law Review*, Volume 13, Issue 4, 2013, pp.829–864; and Carrie McDougall, *The Crime of Aggression Under the Rome Statute of the International Criminal Court*, Cambridge: Cambridge University Press, 2013. The proposed wording read: ‘It is understood that, for purposes of the Statute, an act cannot be considered to be a manifest violation of the United Nations Charter unless it would be objectively evident to any State conducting itself in the matter in accordance with normal practice and in good faith, and thus an act undertaken in connection with an effort to prevent the commission of any of the crimes contained in articles 6, 7 or 8 of the Statute would not constitute an act of aggression.’

⁹³ Matthew C. Waxman, *Intervention to Stop Genocide and Mass Atrocities*, New York: Council on Foreign Relations, Special Report No. 49 October 2009.

⁹⁴ *International Court of Justice, The Hague, Public sitting held on Monday 10 May 1999, at 3 p.m., at the Peace Palace, Vice-President Weeramantry, Acting President, presiding in the case concerning Legality of Use of Force (Yugoslavia v. Belgium) Request for the indication of provisional measures*, p.12.

⁹⁵ See *International Court of Justice Case Concerning Legality of Use of Force (Yugoslavia v. Belgium) Preliminary Objections of the Kingdom of Belgium* ICJ Reports, 5 July 2000.

⁹⁶ See, for example, Prime Minister’s Office, *Guidance, Chemical weapon use by Syrian regime: UK government legal position*, 29 August 2013, No. 10 Downing Street, London, <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> accessed 7 November 2014. See also Parliamentary Under-Secretary of State, FCO, Written Reply in the House of Lords (16 Nov. 1998) in: HL Debs., vol. 594, WA 139-40; and The expanding role of the United

Cassese has argued that ‘a new customary rule might be in the process of formation’ legitimising such actions ‘in the event of a failure of the UN Security Council to respond to egregious violations’.⁹⁷ Wolf maintains that ‘abstract declarations’ by the UN General Assembly supporting the principle of non-intervention should not be taken at face value and that States may legitimately intervene ‘to prevent mass slaughter [in cases where this] does not implicate intense global rivalries.’⁹⁸ Greenwood states that unilateral intervention to prevent ‘another Rwanda, another Holocaust or even acts of mass killing that cannot be characterised as genocide, must be permissible under customary international law.’⁹⁹ Lillich questions, rhetorically, whether, in the absence of ‘collective machinery’ to protect human rights, States should ‘sit by and do nothing merely because Article 2(4) arguably was intended by its drafters in 1945 to preclude unilateral humanitarian intervention.’¹⁰⁰

As will be discussed in Chapter Two these arguments gained force in the 1990s due to the failure of UN peacekeeping missions to protect civilians. Forsythe, for example, argued that, ‘if a state fail[s] to meet its responsibility to protect internationally recognized human rights standards, then the UN Security Council or some other entity might override traditional notions of state

Nations and its implications for UK policy: minutes of evidence, hearing of the Foreign Affairs Committee of the House of Commons, 2 December 1992, para 84. Statement of Tony Aust, Foreign and Commonwealth Office Legal Counsellor.

⁹⁷ Antonio Cassese, ‘A Follow-Up: Forcible Humanitarian Countermeasures and *Opinio Necessitatis*’ *European Journal of International Law* Vol.10, No.4, 1999, pp.791-799; see also Cassese, ‘*Ex iniuria ius oritur: Are We Moving towards International Legitimation of Forcible Humanitarian Countermeasures in the World Community?*’, *European Journal of International Law*, Vol.10, No.1, 1999, p.23-30; and Antonio Cassese, *International Law*, Oxford: Oxford University Press, 2004, p. 321.

⁹⁸ Daniel Wolf ‘Humanitarian intervention’, *Michigan Yearbook on International Studies*, 1998, p.358-359.

⁹⁹ Interview with the author of this thesis at seminar on the use of force under international law, Save the Children UK Offices, London, June 2002.

¹⁰⁰ Richard Lillich, ‘Humanitarian Intervention: A reply to Dr. Brownlie and a Plea for Constructive Alternatives’, in: John Norton Moore (ed.), *Law and civil war in the modern world*, Baltimore: John Hopkins University Press, 1974, p. 238.

sovereignty and try international *direct* protection of rights.’¹⁰¹ Robertson maintained that since requiring Security Council authorization grants a veto to each of its permanent members, such decisions ‘cannot be the sole prerogative of the UN, because its defective procedures have blocked it [intervention] on many appropriate occasions.’¹⁰² Shue has stated that ‘an authorizing body for military intervention needs to be either democratic or impartial or both. The Security Council is neither.’¹⁰³ Others have argued for the creation of a League of Democracies, which could take military action in cases ‘where the UN failed to act’.¹⁰⁴ Buchanan, for example, proposes that liberal democratic States draw up a new treaty containing criteria for when military interventions on human rights grounds are permissible and that this would explicitly ‘violate existing UN-based law’ which ‘should be regarded as ‘not identical with international law’, but only ‘one, historically contingent institutional embodiment of the idea of an international legal system.’¹⁰⁵

The obvious riposte to these – essentially political – arguments is that unilateral military interventions are likely to be prompted by a variety of motives and that humanitarian arguments may just be a convenient excuse for an act of aggression. Decisions involving the use of force which may have huge international ramifications are often driven by the domestic considerations

¹⁰¹ David Forsythe, *Human Rights in International Relations*, Cambridge: Cambridge University Press, 2000, p.23. [emphasis in original]

¹⁰² Geoffrey Robertson, *Crimes Against Humanity: the struggle for global justice*, Allen Lane, 1999, p.72. He argues that ‘there is an ‘evolving principle of humanitarian necessity’ in which States may, in exceptional, conscience-shocking, situations use ‘proportionate force’ to intervene in other States’ internal affairs in order to uphold certain basic rights or end gross violations.’

¹⁰³ Henry Shue, ‘Let whatever is smouldering erupt’, in Albert Paolini, Anthony Jarvis, and Christian Reus-Smit, (eds.) *Between sovereignty and global governance: the state, civil society and the United Nations*, London and New York: Macmillan, 1998, p.73.

¹⁰⁴ *Associated Press*, ‘McCann favours a League of Democracies’, 30 April 2008, reporting on US Presidential candidate John McCain’s support for this proposal.

¹⁰⁵ Allen Buchanan ‘Reforming the law of humanitarian intervention’, in J L Holzgrefe and Robert Keohane (eds), *Humanitarian Intervention: ethical, legal and political dilemmas*, Cambridge: Cambridge University Press, 2003, 139. For other more polemical arguments in favour of ‘humanitarian interventions’ see, for example Norman Geras, *Crimes against Humanity: Birth of a Concept*, Manchester: Manchester University Press, 2012; James Traub, *The Freedom Agenda: Why America Must Spread Democracy (Just Not the Way George Bush Did)*, London: Picador, 2009.

of political leaders of powerful States.¹⁰⁶ The state practice relied upon is also extremely limited. Some 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.¹⁰⁷ As Gray has noted, however, none of the intervening States actually cited 'humanitarian intervention' as the basis for their use of force and so the case seems to be that they '*should have or could have* used this justification.'¹⁰⁸ Indeed Britain, one of the most enthusiastic exponents of the doctrine, had previously displayed marked a scepticism towards it. For example, in 1986, the British Foreign and Commonwealth Office (FCO) noted 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 . . . 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

¹⁰⁶ See, for example, *Christian Science Monitor*, 'Sudanese factory destroyed by US is now a shrine', 7 August 2012. Reporting on the US bombing of an alleged chemical weapons factory that turned out to be a pharmaceutical factory by President Clinton at the height of the Monica Lewinsky scandal.

¹⁰⁷ For example: 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 International Law*, Oxford: Oxford University Press, 2001. See also J L Holzgrefe, 'The humanitarian intervention debate', in Holzgrefe and Keohane, 2003, p.46; Robertson, 1999, p.72; Shue, 1998, p.73.

¹⁰⁸ Gray, 2008, p.34 [emphasis in original].

prudential grounds, that the scope for abusing such a right argues strongly against its creation.¹⁰⁹

The non-intervention norm can be justified on three main grounds: the ‘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.¹¹⁰ It can also be justified ‘negatively’ on the grounds that military interventions – whatever their purported justification – often cause great harm.

During the cold war both the US and the Soviet Union intervened in countries that they considered within their ‘spheres of influence’, often referring to the supposedly universal principles that underpinned their respective political and economic systems.¹¹¹ Proxy-wars and low-intensity conflicts were also fought in parts of Africa, Asia and Latin America, with devastating consequences for the people of the countries concerned.¹¹² More recently, the US-led interventions in Afghanistan and Iraq have also led to widespread civilians suffering.¹¹³ While

¹⁰⁹ *UK Foreign Office Policy Document, No. 148*, Quoted in Harris, 1998, p.918.

¹¹⁰ See J Bryan Hehir, ‘Military intervention and national sovereignty’ in Jonathan Moore (ed) *Hard Choices, moral dilemmas in humanitarian intervention*, Maryland and Oxford: Rowman & Littlefield, 1998, pp.29-53. For strong examples of the ‘anti-imperialist’ approach, see: Noam Chomsky, ‘The Responsibility to Protect’, Text of lecture given at UN General Assembly, New York City, July 23, 2009; David Chandler, *From Kosovo to Kabul, human rights and international intervention*, London: Pluto Press, 2002; David Chandler, ‘The Road to Military Humanitarianism: How the Human Rights NGOs Shaped A New Humanitarian Agenda’, *Human Rights Quarterly*, Vol. 23, No. 3, 2001, pp.678-700; Anne Orford, *International Authority and the Responsibility to Protect*, Cambridge: Cambridge University Press, 2011.

¹¹¹ Hehir, 1998, pp.29-53. The US primarily in Latin America, where it sponsored a number of coups and propped up dictatorships with appalling human rights records, the Soviet Union primarily in Eastern Europe, where Communist regimes were installed and maintained by military means.

¹¹² *Ibid.* Amongst the notable of these were in Greece, Indonesia, Malaysia, Korea, Vietnam, Laos, Congo, Guatemala, Nigeria, Angola, and Mozambique.

¹¹³ Emma Sky, *The Unravelling: High Hopes and Missed Opportunities in Iraq*, New York: PublicAffairs, 2015; Jack Fairweather, *A war of choice: honour, hubris and sacrifice, the British in Iraq*, London: Vintage, 2012; Lucy Morgan Edwards, *The Afghan Solution: the inside story of Abdul Haq, the CIA and how western hubris lost Afghanistan*, London: Bactria Press, 2011; Ahmed Rashid, *Descent into chaos*, London: Penguin 2009; Jason Burke, *On the road to Kandahar*, London: Penguin, 2006; Rory Stewart, *Occupational hazards*, London: Picador, 2006; Nathan Hodge, *Armed humanitarians: the rise of the nation builders*, London: Bloomsbury, 2011.

neither of these two actions was primarily justified on humanitarian grounds, western political leaders did use ‘liberal interventionist’ arguments based on the promotion of human rights in support of them.¹¹⁴ As will be discussed further in this thesis, some military interventions that were undertaken on humanitarian grounds have also exacerbated the crises that they were meant to resolve and made things worse for the people they were supposed to help.

One scholar has commented that, ‘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’,¹¹⁵ while another notes that ‘the only certainty’ within the debate is that ‘as of yet it remains unsettled’.¹¹⁶ From the above discussion, however, it is difficult to see how ‘humanitarian interventions’ can be deemed lawful without the authority of the UN Security Council.

The protection provisions of the UN Charter

The UN Charter predates the UDHR and most international human rights treaties and case-law, so it is now widely accepted that its general references to human rights should be read in

¹¹⁴ Ibid. See also, for example, Tony Blair, Speech to the US Congress, Friday July 18, 2003; Tony Blair, Text of speech delivered by Prime Minister, Sedgefield, 5 March 2004; Opinion of the Attorney General, “Iraq”, Attorney General’s Office, 7 March 2003; and Foreign Secretary David Miliband, ‘Speech on the Democratic Imperative’, 12 February 2008. ‘Liberal intervention’ can be distinguished from ‘humanitarian intervention’ in that the latter could only be justified ‘exceptionally to avert an overwhelming humanitarian catastrophe’, while ‘liberal intervention’ might presumably be used to justify regime-change interventions or for purposes such as ‘spreading democracy around the world’.

¹¹⁵ Keohane, in Holzgrefe and Keohane, 2003, p.1.

¹¹⁶ Lubell, 2010, p.28.

the context of their subsequent codification and development.¹¹⁷ The ICJ's decisions clearly support the UN Human Rights Committee's assertion that 'there is a United Nations Charter obligation to promote universal respect for, and observance of, human rights and fundamental freedoms'.¹¹⁸ As the following section will show, however, these obligations must be interpreted in harmony with other rules of international law of which the Charter forms part.¹¹⁹

In its Advisory Opinion on *Reservations to the Convention for the Prevention and Punishment of Genocide* in 1951, the ICJ held that the provisions of the Convention express pre-existing customary international law since genocide was a crime that 'shock[ed] the conscience of mankind' and was 'contrary to moral law and to the spirit and aims of the United Nations.'¹²⁰ The principles underlying the Convention were, therefore, recognized by 'civilized nations' as binding on all States, even if they have not ratified the Convention itself.¹²¹ In *Namibia*, the ICJ

¹¹⁷ For an early exposition of this argument see Thomas Franck and Nigel Rodley, 'After Bangladesh: the law of humanitarian intervention by military force', *American Journal of International Law*, Vol. 67, No. 2, 1973, pp.275-305; and Nigel Rodley (ed) *To loose the bands of wickedness, international intervention in defence of human rights*, London: Brassey's 1992. See also Kjetil Mujezinovic Larsen, *The Human Rights Treaty Obligations of Peacekeepers*, *Cambridge Studies in International and Comparative Law*, Cambridge: Cambridge University Press, 2012, p.24 who notes, in this regard, that the European Court of Human Rights also frequently states that it considers its own Convention to be a 'living instrument' which must be interpreted in the light of present day conditions.

¹¹⁸ Human Rights Committee, 'General Comment no 31 (2004), para 2. See also Louis Henkin, *The Age of Rights*, New York: Colombia University Press, 1990, pp.55-6. 'The generality of states have supported the view that 'a consistent pattern of gross violations of human rights' is now a violation of international law and obligation if practiced by any party to the UN Charter and even, perhaps, by non-members.' For further discussion see: Malanczuk, 1999, p.61; Lorna MacGregor, 'Torture and State Immunity: Deflecting Impunity, Distorting Sovereignty', *The European Journal of International Law*, Vol. 18, No.5 2008; and Alexander Orakhelashvili, 'Restrictive Interpretation of Human Rights Treaties in the Recent Jurisprudence of the European Court of Human Rights', *European Journal of International Law*, Vol. 14, No. 3, 2003, pp.529-68.

¹¹⁹ These basic principles were summarized by the European Court of Human Rights in *Loizidou v. Turkey* (merits), Appl. No. 25781/94, Judgment 18 December 1996, para 43. 'It is recalled that the Convention must be interpreted in the light of the rules of interpretation set out in the Vienna Convention of 23 May 1969 on the Law of Treaties and that Article 31 para. 3 (c) of that treaty indicates that account is to be taken of "any relevant rules of international law applicable in the relations between the parties" (see, inter alia, the *Golder v. the United Kingdom* judgment of 21 February 1975, Series A no. 18, p. 14, para. 29, the *Johnston and Others v. Ireland* judgment of 18 December 1986, Series A no. 112, p. 24, para. 51, and the above-mentioned *Loizidou* judgment (preliminary objections), p. 27, para. 73).'

¹²⁰ *Reservations to the Genocide Convention*, Advisory Opinion of 28 May 1951, ICJ Reports 1951, p.23-4.

¹²¹ *Ibid.*

held that South Africa's policy of imposing apartheid was 'a flagrant violation of the purposes and principles of the Charter.'¹²² In *Barcelona Traction*, in 1970, the ICJ ruled that obligations *erga omnes* 'derive, for example, in contemporary international law, from the outlawing of acts of aggression, and of genocide, as also from the principles and rules concerning the basic rights of the human person, including protection from slavery and racial discrimination.'¹²³ In *Tehran Hostages*, in 1980, it stated that: 'Wrongfully to deprive human beings of their freedom and to subject them to physical constraint in conditions of hardship is in itself manifestly incompatible with the principles of the Charter of the United Nations, as well as with the fundamental principles enunciated in the Universal Declaration of Human Rights.'¹²⁴ As Rodley has noted, this implies that the UDHR was considered to be 'a document of sufficient legal status to justify its invocation by the Court in the context of a State's obligations under general international law.'¹²⁵

In the *Case Concerning East Timor*, in 1995, however, the ICJ decided that it could not rule on the lawfulness of the conduct of one State (Australia) when its judgment would imply an evaluation of the lawfulness of the conduct of another State (Indonesia) which had forcibly invaded East Timor.¹²⁶ The Court accepted the principle that 'the right of peoples to self-determination, as it evolved from the Charter and from United Nations practice, has an *erga*

¹²² *Legal consequences for States of the Continued Presence of South Africa in Namibia*, Advisory Opinion of 21 June 1971, ICJ Reports 1971, para 131.

¹²³ *Barcelona Traction case (Belgium v Spain)*, Judgment of 5 February 1970, ICJ Reports 1970, paras 33 and 34.

¹²⁴ *Case Concerning United States Diplomatic and Consular Staff in Tehran (United States of America v Iran)*, Judgment of 24 May 1980, ICJ Reports 1980, para 91.

¹²⁵ Nigel Rodley, *The treatment of prisoners under international law*, Third Edition, Oxford: Oxford University Press, 2011, pp.73-4. See also Nigel White and Dirk Klaasen, *The UN, human rights and post-conflict situations*, Manchester University Press, 2005, p.7; Nigel White *The United Nations System: toward international justice*, Boulder, Col.: Lynne Rienner, 2002, pp.14-17; and Shaw, 2008, pp.265-300.

¹²⁶ *Case Concerning East Timor, (Portugal v. Australia)*, Judgment of June 30, 1995, ICJ Reports 1995.

omnes character’,¹²⁷ but it could only exercise jurisdiction over a State with its consent.’¹²⁸ In *Jurisdictional Immunities of the State*, in 2012, the Court concluded that ‘under customary international law as it presently stands, a State is not deprived of immunity by reason of the fact that it is accused of serious violations of international human rights law or the international law of armed conflict’¹²⁹ In *Arrest Warrant*, in 2002, the ICJ did not even discuss Belgium’s argument that *jus cogens* overrides immunity,¹³⁰ while in *Armed Activities* it also did not accept that an allegation of genocide could override the principle of consent to jurisdiction.¹³¹

In its 2007 judgment in *Bosnia Genocide*, the ICJ ruled that Serbia had ‘failed to comply both with its obligation to prevent and its obligation to punish genocide’¹³² even though the acts had taken place in another country and by forces which were not under the effective control of the Serbian State.¹³³ As the facts of this case made clear the responsibility of Serbia was engaged because of its very close links with the Bosnian Serb forces that carried out the killings. The Court stated that there was ‘no doubt’ that Serbia ‘was providing substantial support’, including ‘payment of salaries and other benefits’ to some officers in its army.¹³⁴ This did not, however, mean that their acts could be ‘equated’ with those of the Serbian State because they were not ‘wholly dependent on it’ and nor were they acting under its ‘effective control’ at the time of the

¹²⁷ *Ibid.*, para 29. It also stated that and that ‘the principle of self-determination of peoples has been recognized by the United Nations Charter and in the jurisprudence of the Court; it is one of the essential principles of contemporary international law.’

¹²⁸ *Ibid.*, para 34. See also *Monetary Gold Removed from Rome in 1943 (Italy v. UK, US and France)*, Judgment of 15 June 1954, ICJ Reports 1954, p. 32; *Certain Phosphate Lands in Nauru (Nauru v. Australia)*, Preliminary Objections, 26 June 1992, ICJ Report 1992, pp.240 and 259-62.

¹²⁹ *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)*, Judgment of 3 February 2012, ICJ Reports 2012, para. 91.

¹³⁰ *Case Concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*, Judgment of 14 February 2002, ICJ Reports 2002, para. 58.

¹³¹ *Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v. Rwanda)* Jurisdiction and Admissibility, 3 February 2006, ICJ Reports 2006, para. 64. See also the

¹³² *Application of Genocide Convention (Bosnia and Herzegovina v Serbia and Montenegro)*, Judgment 26 February 2007, ICJ Report 2007, para 450.

¹³³ *Ibid.*, paras 385, 394, 402 and 471.

¹³⁴ *Ibid.*, para 388.

massacre.¹³⁵ It therefore rejected, by majority votes, the claims that Serbia had committed, conspired to commit or incited genocide.¹³⁶ It nevertheless ruled that there was a ‘due diligence’ test when a State ‘manifestly failed to take all measures to prevent genocide which were within its power, and which might have contributed to preventing the genocide’ then it could be held accountable for the resulting consequences.¹³⁷

The ICJ had earlier been requested by the government of Bosnia-Herzegovina to issue provisional measures in this case, which it did in April and September 1993.¹³⁸ Bosnia-Herzegovina had also asked the Court to consider the legality of a Security Council resolution in September 1991 imposing an arms embargo on the territories of the former Federal Republic of Yugoslavia (FRY).¹³⁹ The embargo had been imposed before Bosnia-Herzegovina had declared its independence, but was then reaffirmed on a number of occasions, which Bosnia-Herzegovina maintained was preventing it from obtaining the necessary means to exercise its right to self-defence and protect its people from genocide.¹⁴⁰ Bosnia-Herzegovina sought the Court’s opinion

¹³⁵ Ibid., paras 385-415.

¹³⁶ Ibid., para 471.

¹³⁷ Ibid., para 430.

¹³⁸ Ibid., *Request for the Indication of Provisional Measures, Order of 8 April 1993*, para 52; and *Further Requests for the Indication of Provisional Measures, Order of 13 September 1993*, para 61. The Court ordered that the then Federal Republic of Yugoslavia (FRY) ‘should immediately, in pursuance of its undertaking in the Convention on the Prevention and Punishment of the Crime of Genocide of 9 December 1948, take all measures within its power to prevent commission of the crime of genocide’.

¹³⁹ Security Council Resolution 713 of 25 September 1991.

¹⁴⁰ For further discussion see Mark Bromley *United Nations Arms Embargoes Their Impact on Arms Flows and Target Behaviour Case study: Former Yugoslavia, 1991–96* Stockholm: Stockholm International Peace Research Institute 2007. For contrasting views of the conflict and the merits of external intervention see Marko Attila Hoare, *How Bosnia Armed*, London: Saqi books, 2004; and Adam LeBor, *Complicity with Evil, the United Nations in the age of modern genocide*, New Haven: Yale University Press, 2006, which take a ‘pro-interventionist’ position; David Gibbs, *First do no harm: humanitarian intervention and the destruction of Yugoslavia*, Nashville: Vanderbilt University Press, 2009; and David Chandler, *Bosnia: Faking Democracy after Dayton*, London: Pluto Press, 1999 argue the opposite case. Bosnia-Herzegovina gained admission to the UN on 22 May 1992. The arms embargo against Bosnia was not formally lifted by the UN and European Union until July 1999. The request for the embargo had been made by the Government of Yugoslavia itself and was widely criticised for its disproportionate impact on the Bosnian armed forces. FRY inherited the lion’s share of the Yugoslav People Army’s arsenal, while the Croatian Army could smuggle weapons through its coast, which was not an option for largely land-locked Bosnia-Herzegovina. The Bosnian government lobbied to have the embargo lifted but that was opposed by Britain, France and Russia.

as to whether other parties to the Genocide Convention had the right to supply it with equipment for this purpose, despite the embargo, but the ICJ stated that it could not rule on the issue since this affected third parties.¹⁴¹

In a separate opinion, however, Judge Lauterpacht noted that while the arms embargo may initially have been justifiable, its continued imposition could be contributing ‘to the intensity of ethnic cleansing in areas under Serbian control’ and the ‘exposure of the Muslim population of Bosnia to genocidal activity’.¹⁴² He argued that while the obligations of the UN Charter took primacy of other international treaties, the prohibition of genocide, ‘has generally been accepted as having the status not of an ordinary rule of international law but of *jus cogens*’ and that: ‘The relief which Article 103 . . . may give the Security Council in case of conflict between one of its decisions and an operative treaty obligation cannot – as a simple hierarchy of norms – extend to a conflict between a Security Council resolution and *jus cogens*’¹⁴³ He maintained that while:

it is not to be contemplated that the Security Council would ever deliberately adopt a resolution clearly and deliberately flouting a rule of *jus cogens* or requiring a violation of human rights. But the possibility that a Security Council resolution might inadvertently or in an unforeseen manner lead to such a situation cannot be excluded. And that, it appears, is what has happened here.¹⁴⁴

¹⁴¹ *Request for the Indication of Provisional Measures*, Order of 8 April 1993, para 47; and *Further Requests for the Indication of Provisional Measures*, Order of 13 September 1993, paras 39 – 41. ICJ Report 2007.

¹⁴² *Further Requests for the Indication of Provisional Measures*, Order of 13 September 1993, Separate Opinion of Judge Lauterpacht paras 89-97.

¹⁴³ *Ibid.*, para 100.

¹⁴⁴ *Ibid.*, para 102. He concluded that ‘the Security Council resolution can be seen as having in effect called on Members of the United Nations, albeit unknowingly and assuredly unwillingly, to become in some degree supporters of the genocidal activity of the Serbs’.

Lauterpacht reasoned that the Security Council could not ‘act free of all legal controls’ and that the Court had a ‘duty to ensure the rule of law within the UN system.’ He suggested either that the ‘relevance here of *jus cogens* should be drawn to the attention of the Security Council’ or that members of the UN should be ‘free to disregard’ the resolution in question.¹⁴⁵ He acknowledged, however, that the Court could not ‘substitute its discretion for that of the Security Council’ in imposing such embargos and so its ‘power of judicial review’ was limited.¹⁴⁶ Bosnia-Herzegovina subsequently withdrew the issue of the arms embargo from its case, which prevented further exploration of the legal issues involved.¹⁴⁷

Arbour has suggested extrapolating from the *Bosnia Genocide* judgment a responsibility on ‘other States Parties to the [Genocide] Convention, and indeed to the wider international community’ to intervene in a broad range of circumstances to prevent genocide.¹⁴⁸ She argues that a failure to act by the five permanent members of the Security Council ‘could carry legal consequences’, particularly if they exercised or threatened to use their veto to ‘block action that is deemed necessary by other members to avert genocide or crimes against humanity.’¹⁴⁹ Carvin, however, notes that responsibility for a failure to prevent genocide only exists if there is a real risk of it occurring, which is actually quite difficult to determine, given its legal definition.¹⁵⁰

¹⁴⁵ Ibid., paras 103 and 104.

¹⁴⁶ Ibid., para 96.

¹⁴⁷ For an overall discussion on the conflict in Bosnia-Herzegovina see Misha Glenny, *The Fall of Yugoslavia*, London: Granta, 1992. A number of States adopted something close to Lauterpacht’s second option, by covertly subverting it. The US congress passed two resolutions calling for the embargo to be lifted, in a policy that became known as ‘lift and strike’, but both were vetoed by President Bill Clinton. Nonetheless, the US used a number of covert routes, including Islamist groups to smuggle weapons to the Bosnian armed forces, which eventually helped to turn the tide of the conflict in 1995.

¹⁴⁸ Louise Arbour ‘The responsibility to protect as a duty of care in international law and practice’, *Review of International Studies*, No. 34, 2008, pp.445–58.

¹⁴⁹ Ibid., p.453.

¹⁵⁰ Stephanie Carvin, ‘A responsibility to reality: a reply to Louise Arbour’, *Review of International Studies*, 2010, pp.47–54.

This then leads to problems such as ‘who should make a determination that genocide is to take place, who should prevent it and what kind of international approval they would need.’¹⁵¹

The provisions of the Genocide Convention itself clearly indicate that its enforcement provisions should be undertaken within the framework of the UN Charter and at the discretion of its ‘competent organs’.¹⁵² The ICJ was also very clear about the scope of its ruling. It did not:

purport to establish a general jurisprudence applicable to all cases where a treaty instrument, or other binding legal norm, includes an obligation for States to prevent certain acts. Still less does the decision of the Court purport to find whether, apart from the texts applicable to specific fields, there is a general obligation on States to prevent the commission by other persons or entities of acts contrary to certain norms of general international law.¹⁵³

The clearest opportunity that the ICJ has ever had to rule on the legality of ‘humanitarian interventions’ came in *Legality of Use of Force*, in 1999, when it was asked by the then FRY to grant provisional measures against 10 members of NATO over the bombing campaign mounted during the Kosovo crisis.¹⁵⁴ FRY argued both that there was no ‘right of

¹⁵¹ Ibid., p.50.

¹⁵² Genocide Convention, Article VIII states that any contracting party may ‘call upon the competent organs of the UN to take such action under the Charter of the UN as they consider appropriate for the prevention and suppression of acts of genocide or any of the other acts enumerated in Article 3.’ Article VI. ‘Persons charged with genocide or any of the other acts enumerated in article III shall be tried by a competent tribunal of the State in the territory of which the act was committed, or by such international penal tribunal as may have jurisdiction with respect to those Contracting Parties which shall have accepted its jurisdiction.’ The international criminal court envisaged by the Convention was finally created in 1998. The Security Council also used its Chapter VII powers to create ad hoc tribunals for FRY and Rwanda during the genocides in both countries.

¹⁵³ ICJ Report 2007, para 429

¹⁵⁴ *Case concerning Legality of Use of Force, (Provisional Measures) (Serbia and Montenegro v. Netherlands); (Serbia and Montenegro v. Belgium) (Serbia and Montenegro v. Canada) (Serbia and Montenegro v. France) (Serbia and Montenegro v. Germany) (Serbia and Montenegro v. Italy) (Serbia and Montenegro v. Portugal) (Yugoslavia v. Spain) (Serbia and Montenegro*

humanitarian intervention' in international law and that even if one could be found the modalities of NATO's intervention, bombing civilian populated areas from a height of 15,000 feet, could not qualify as such.¹⁵⁵ It also invoked Article IX of Genocide Convention as a basis for the compulsory jurisdiction of the Court.¹⁵⁶ The NATO States responded by referring to the well-publicised cases of atrocities being committed in Kosovo, as previously highlighted in debates at the Security Council.¹⁵⁷ They stressed, however, that FRY's break-up and the ambiguity that surrounded its continued UN membership, meant that it was not in fact a State party to the statute of the ICJ and, therefore, had no access to the Court.¹⁵⁸ The UK and US briefly referred to the need to avert a humanitarian catastrophe, but only Belgium argued for the existence of a 'doctrine of humanitarian intervention' and then only in its oral submission.¹⁵⁹

v. United Kingdom) (*Yugoslavia v. United States of America*), Preliminary Objections, International Court of Justice, International Court of Justice, Order of 2 June 1999, ICJ Reports 1999. Identical cases were brought against 10 NATO States. For convenience of reference only the cases against Belgium and Netherlands are cited here.

¹⁵⁵ Memorial submitted by The Federal Republic of Yugoslavia, 5 January 2000, ICJ Reports 1999, paras 301-28.

¹⁵⁶ *Ibid.*, paras.329-49.

¹⁵⁷ See, for example, Preliminary Objections of the Netherlands, 5 July 2000, ICJ Reports 1999.

¹⁵⁸ *Ibid.* For further discussion see Christine Gray, 'The Use and Abuse of the International Court of Justice: Cases concerning the Use of Force after Nicaragua', *European Journal of International Law* Vol. 14, No. 5, 2003, pp.867-905. See also see Gray, 2008, pp.44-8; and Anika Gauja, 'Legality of the Use of Force (Serbia and Montenegro v. United Kingdom et al.) (Preliminary Objections)', *Australian journal of International Law*, 11, 2004, pp.168-186.

¹⁵⁹ See ICJ Public sitting 10 May 1999, p.12. Statement by Rusen Ergec, Advocate at the Brussels Bar and Professor at the Free University of Brussels. 'There is another important feature of NATO's action: NATO has never questioned the political independence and the territorial integrity of the Federal Republic of Yugoslavia - the Security Council's resolutions, the NATO decisions, and the press releases have, moreover, consistently stressed this. Thus this is not an intervention against the territorial integrity or independence of the former Republic of Yugoslavia. The purpose of NATO's intervention is to rescue a people in peril, in deep distress. For this reason the Kingdom of Belgium takes the view that this is an armed humanitarian intervention, compatible with Article 2, paragraph 4, of the Charter, which covers only intervention against the territorial integrity or political independence of a State. There is no shortage of precedents. India's intervention in Eastern Pakistan; Tanzania's intervention in Uganda; Vietnam in Cambodia, the West African countries' interventions first in Liberia and then in Sierra Leone. While there may have been certain doubts expressed in the doctrine, and among some members of the international community, these interventions have not been expressly condemned by the relevant United Nations bodies. These precedents, combined with Security Council resolutions and the rejection of the draft Russian resolution on 26 March, which I have already referred to, undoubtedly support and substantiate Our contention that the NATO intervention is entirely legal'. Belgium did not, however, repeat this argument in its written submission. See *Legality of Use of Force (Yugoslavia v. Belgium) Preliminary Objections of the Kingdom of Belgium* 5 July 2000.

The Court rejected FRY's argument that NATO's bombing campaign amounted to genocide.¹⁶⁰ It also ruled that because FRY had only accepted the compulsory jurisdiction of the Court in April 1999, a few days before it filed its complaint, and had entered a reservation limiting the Court's jurisdiction to events that had occurred before this date, the ICJ had no jurisdiction on the merits of the case, because the start of the bombing campaign pre-dated it.¹⁶¹ In 2004 the ICJ subsequently ruled that the States of Serbia and Montenegro, which considered themselves to be the successor States of FRY, had not been members of the UN at the time of NATO's action and so had no access to the Court, again, without commenting on the wider issues raised.¹⁶²

A Responsibility to Protect?

Given that NATO's 'humanitarian intervention' over Kosovo had taken place without the explicit approval of the UN Security Council, it was a *prima facie* violation of the provisions of the UN Charter.¹⁶³ The conflict cost between 5,000 and 10,000 lives, with most of the casualties being inflicted after NATO's intervention.¹⁶⁴ By some estimates NATO may have killed 10 per cent of

¹⁶⁰ *Legality of Use of Force, (Serbia and Montenegro v. Belgium)*, ICJ Report 1999, para 41, where it stated that the Genocide Convention could not 'constitute a basis on which the jurisdiction of the Court could *prima facie* be founded'.

¹⁶¹ ICJ Report 1999, paras 24-9 and paras 42-5. Although the start of the bombing campaign predated FRY's acceptance of the court's jurisdiction, it was ongoing at the time the ICJ made this ruling.

¹⁶² *Legality of Use of Force, (Serbia and Montenegro v. Netherlands)* International Court of Justice, Judgment of 15 December 2004, paras 74-8. The Court ruled that an application to membership of the UN by the Federal Democratic Republic of Yugoslavia in October 2000 brought an end to the previously ambiguous question of the State's membership, but also confirmed that it was not a member at the time of the original application. See also *Legality of Use of Force, (Serbia and Montenegro v. Belgium)* (*Serbia and Montenegro v. Canada*) (*Serbia and Montenegro v. France*) (*Serbia and Montenegro v. Germany*) (*Serbia and Montenegro v. Italy*) (*Serbia and Montenegro v. Portugal*) (*Yugoslavia v. Spain*) (*Serbia and Montenegro v. United Kingdom*) (*Yugoslavia v. United States of America*), Preliminary Objections, International Court of Justice, Judgment of 15 December 2004

¹⁶³ For a discussion of some of the legal issues, see, for example: Gray, 2008, pp. 31, 39-51, 351-4; Chesterman, 2001, pp. 53-86; and Mary Ellen O'Connell, 'International law after Kosovo', *Human Rights Quarterly*, Vol. 22, 1, February 2000.

¹⁶⁴ For an overview discussion of the conflict and its background see, for example: Tim Judah, *Kosovo: War and Revenge*, New Haven: Yale University Press, 2000; Noel Malcolm, *Kosovo: A Short History*, New York: Harper Perennial, 1999; Julie Mertus, *Kosovo: How Myths and Truths Started a War*, Berkeley:

the total civilian death toll,¹⁶⁵ mainly due to the decisions to target civilian infra-structure as well as military targets and to bomb from such a high altitude.¹⁶⁶ Nevertheless, as Koskenniemi, observed: ‘Most international lawyers approved of the 1999 bombing of Serbia by the members of the North Atlantic alliance. But most of them also felt that it was not compatible with a strict reading of the UN Charter . . . most lawyers – including myself – have taken the ambivalent position that it was both formally illegal and morally necessary.’¹⁶⁷ Some argued that the scale of violations of international human rights law and IHL that were allegedly taking place provided at

University of California Press, 1999; David Phillips, *Liberating Kosovo: Coercive Diplomacy and US Intervention*, Belfer Center Studies in International Security, Cambridge, Ma: The MIT Press, 1999. It is generally accepted that the death toll before NATO’s intervention in March 1999 was between 1,500 and 2,000 deaths, while estimates of the total number killed by the end range between 5,000 and 10,000, which was far fewer than was claimed at the time by supporters of the intervention. For further discussion on the death toll see Richard Goldstone and General Carl Tham, *The Kosovo Report: Conflict, International Responses to be Learned*, Oxford: Oxford University Press, 2000, p.2 ‘In the first phase of the conflict from February 1998 to March 1999, casualties were relatively low: around 1,000 civilians were killed up to September although the evidence is uncertain; the number of victims between September and March is unknown but must be lower. . . . In the period March 24, 1999 to June 19, 1999, the Commission estimates the number of killings in the neighborhood of 10,000, with the vast majority of the victims being Kosovar Albanians killed by FRY forces.’ See also US State Department, *Ethnic Cleansing in Kosovo: An Accounting*, US. State Department Report, December 1999 which contains similar figures. However, a Human Rights Watch report, *Under orders: war crime in Kosovo*, 26 October 2001 contained far lower confirmed numbers of killings (3,453 based on its direct interviews but with a limited sample) and also cited the International Criminal Tribunal for the former Yugoslavia (ICTY) as stating that it had exhumed approximately 4,300 bodies by July 2001. See also *BBC News*, ‘3,000 missing in Kosovo’, 7 June 2000 which reported that the Red Cross reported that 3,368 civilians (2,500 Albanians, 400 Serbs, and 100 Roma) were still missing, nearly one year after the conflict. Supporters of the intervention tend to cite higher casualty figures, to justify it, while opponents and sceptics cite lower ones. Both agree, however, that most of the casualties occurred after NATO’s intervention.

¹⁶⁵ Human Rights Watch, *Civilian deaths in the NATO air campaign*, HRW, Vol. 12, No. 1, February 2000, puts the number of civilians killed by NATO during its air campaign at between 489 and 520. See also Amnesty International, *No justice for the victims of NATO bombings*, 23 April 2009. This notes that: ‘Approximately 500 civilians were killed and 900 injured during the course of the conflict. Many of these casualties were caused by indiscriminate and disproportionate attacks and a failure to take necessary precautions to protect civilians. In several attacks, including the Grdelica railroad bridge on 12 April 1999, the road bridge in Lužane on 1 May 1999 and Varvarin bridge on 30 May 1999, NATO forces failed to suspend their attack after it was evident that they had struck civilians. In other cases, including the attacks on displaced civilians in Djakovica on 14 April 1999 and Koriša on 13 May 1999, NATO failed to take necessary precautions to minimize civilian casualties.’

¹⁶⁶ See General Wesley Clark in William Joseph Buckley, (ed) *Kosovo, Contending voices on Balkans interventions*, Grand Rapids: William Eerdmans Publishing Company, 2000, p.253. General Clarke was NATO’s Supreme Commander in Europe during the campaign and he states that its ‘first objective’ was the ‘avoidance of Allied losses’ to enable the bombing campaign to ‘persist as long as it was needed’. Clearly only ground troops could have actually protected civilians from attacks and the failure to deploy these undermines the ‘humanitarian’ claims made for the intervention.

¹⁶⁷ Martti Koskenniemi, ‘The Lady Doth Protest Too Much’ Kosovo, and the Turn to Ethics in International Law’, *The Modern Law Review*, Vol. 65, No. 2 March 2002.

least ‘mitigating circumstances’ for the action.¹⁶⁸ One report argued it was ‘unlawful but legitimate’.¹⁶⁹

In his 1999 General Assembly report Kofi Annan, the then UN Secretary General, famously questioned whether a hypothetical coalition of States should have ‘stood aside’, if they had not received ‘prompt Security Council authorization’ to stop the genocide in Rwanda, but also warned of the danger of ‘military action outside the established mechanisms for enforcing international law.’¹⁷⁰ Such interventions, he warned, could undermine ‘the imperfect, yet resilient, security system created after the Second World War’, and set ‘dangerous precedents’ for the future.¹⁷¹ 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 Srebrenica’.¹⁷²

The International Commission on Intervention and State Sovereignty (ICISS) was established in response, with the expressed aim of fostering a global political consensus on the issue.¹⁷³ Its original title had been the ‘Commission on Humanitarian Intervention’, but this was changed due

¹⁶⁸ For example, Cassese, Antonio, ‘A Follow-Up: Forcible Humanitarian Countermeasures and Opinio Necessitatis’ *European Journal of International Law*, Vol. 10, No. 4, 1999, pp.791-799; Cassese, Antonio, ‘Ex iniuria ius oritur: Are We Moving towards International Legitimation of Forcible Humanitarian Countermeasures in the World Community?’, Vol.10, No. 1, *European Journal of International Law*, p.23-30; and Bruno Simma, ‘NATO, the UN and the Use of Force: Legal Aspects’, *European Journal of International Law*, 10, 1999.

¹⁶⁹ Richard Goldstone and General Carl Tham, *The Kosovo Report: Conflict, International Responses to be Learned*, Oxford: Oxford University Press, 2000.

¹⁷⁰ *Annual Report of the Secretary General to the General Assembly*, 20 September 1999.

¹⁷¹ *Ibid.*

¹⁷² *We the People’s, the role of the UN in the 21st Century, Millennium Report of the Secretary General of the United Nations*, New York: UN, 2000, p.48.

¹⁷³ For accounts of the negotiations that led to the wording adopted at the summit see Alex Bellamy, *Responsibility to protect: the global effort to end mass atrocities*, Cambridge: Polity, 2009, pp.66-97; Gareth Evans, ‘The Responsibility to Protect: An Idea Whose Time Has Come . . . and Gone?’, *International Relations*, Vol. 22, No 3, September 2008, pp.283-298.

to concerns that the language would be seen as controversial.¹⁷⁴ The report noted that the term ‘intervention’ can cover a range of activities from the delivery of emergency relief assistance to military action. Its authors stated that ‘the 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.’¹⁷⁵ The report recognised that interventions were often harmful, destabilizing states and ‘fanning ethnic or civil strife’.¹⁷⁶ 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.¹⁷⁷

The report suggested that when the Security Council ‘fails to act’ the ‘responsibility’ may pass to the General Assembly¹⁷⁸ or Regional Organisations,¹⁷⁹ including occasions when the latter act outside their area of membership – although it noted the controversy surrounding NATO’s intervention in Kosovo.¹⁸⁰ As an interim measure it suggested that the Security Council’s

¹⁷⁴Ibid. See also ICISS, 2001, para 137-40 and 2.4. The report recognised ‘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.’

¹⁷⁵ ICISS 2001, para 1.37 and 1.38.

¹⁷⁶ ICISS 2001, paras 2.9 and 4.12.

¹⁷⁷ ICISS 2001, para 2.26.

¹⁷⁸ ICISS 2001, paras 6.29-30.

¹⁷⁹ ICISS 2001, paras 6.31-5.

¹⁸⁰ ICISS 2001, para 6.34. ‘It is much more controversial when a regional organization acts, not against a member or within its area of membership, but against a non-member. This was a large factor in the criticism of NATO’s action in Kosovo since it was outside NATO’s area. NATO argues, nevertheless, that the conflict in Kosovo had the potential to spill over NATO borders and cause severe disruption, and was

permanent members adopt a voluntary code of conduct restricting the use of their veto power¹⁸¹ 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’¹⁸²

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 ‘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.’¹⁸³ 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.¹⁸⁴

In September 2005, a reference to R2P was incorporated into two paragraphs of the 2005 General Assembly World Summit Outcome Document.¹⁸⁵ This included a commitment ‘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

thus a matter of direct concern to it. Other regional and sub-regional organizations which have mounted military operations have acted strictly within their geographical boundaries against member states.’

¹⁸¹ ICISS 2001, para 6.21. It also noted that: ‘Those 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.’

¹⁸² ICISS 2001, paras 8.28-30.

¹⁸³ Anand Panyarachun, High Level Panel on Threats, Challenges, and Change, *A More Secure World: Our Shared Responsibility*, The United Nations, 2004, para 203: ‘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.’

¹⁸⁴ *In Larger Freedom: Toward Development, Security and Human Rights for All*, UN Doc. A/59/2005, March 2005, para 135.

¹⁸⁵ General Assembly Resolution 60/1, of A/RES/60/1, 24 October 2005, paras 138 and 139.

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.’¹⁸⁶ The UN Security Council has also ‘reaffirmed’ these principles.¹⁸⁷ 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.¹⁸⁸

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 people should be protected against such crimes.¹⁸⁹ As the first UN Special Adviser on R2P has noted the concept has generated a ‘staggering’ numbers of academic theses and the ‘ever-expanding literature on the responsibility

¹⁸⁶ Ibid.

¹⁸⁷ UN Security Council Resolution 1674, of 28 April 2006, para.4.

¹⁸⁸ *Letter dated 31 August 2007 from the Secretary-General addressed to the President of the Security Council, S/2007/721*, 7 December 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.

¹⁸⁹ For generally sympathetic accounts see Gareth Evans, *The Responsibility to Protect: Ending Mass Atrocity Crimes Once and for All*, Washington DC: Brookings Institution Press, 2008; Thomas G. Weiss, and Ramesh, Thakur, *Global Governance and the UN: an unfinished journey*, Bloomington: Indiana University Press, 2010; Ramesh Thakur, *The United Nations, peace and security: from collective security to the responsibility to protect*, Cambridge: Cambridge University Press, 2006; Richard H. Cooper and Juliette Voinov Kohler, (eds), *Responsibility to Protect: The Global Moral Compact for the 21st Century*, New York: Macmillan, 2009; Sara E. Davies and Luke Glanville (eds), *Protecting the Displaced: Deepening the Responsibility to Protect*, The Hague/London/Boston: Martinus Nijhoff, 2010; Rama Mani and Thomas G. Weiss, *Responsibility to Protect: cultural perspectives from the global south*, London and New York: Routledge, 2011; Alex Bellamy, ‘The Responsibility to Protect—Five Years On’, *Ethics and International Affairs*, Volume 24 Issue 2, 2010, pp.123-69; Ramesh Thakur, *The Responsibility to Protect: Norms, Laws and the use of Force in International Politics*, London and New York: Routledge, 2011; Ramesh Thakur, *The United Nations, peace and security: from collective security to the responsibility to protect*, Cambridge: Cambridge University Press, 2006; Gareth Evans, ‘From Humanitarian Intervention to the Responsibility to Protect’, *Wisconsin International Law Journal*, 2006/07, Vol. 24, p. 703 – 722; Ramesh Thakur and Thomas Weiss, ‘R2P: From Idea to Norm—and Action?’, *Global Responsibility to Protect*, Martin Nijhoff Publishers, 1, 2009, pp.10–21.

to protect could now fill a small library'.¹⁹⁰ There is, however, considerable confusion about precisely what – if anything – it really means in practice.¹⁹¹

Arbour, has called R2P 'the most important and imaginative doctrine to emerge on the international scene for decades',¹⁹² while Slaughter has heralded it as 'the most important shift in our conception of sovereignty since the Treaty of Westphalia in 1648'.¹⁹³ Chesterman, however, notes that the wording adopted amounts to saying little more than that the Security Council should continue authorizing, on an *ad hoc* basis, the type of interventions that it has been authorizing for many years.¹⁹⁴ Stahn states that by limiting interventions to four specific situations and stipulating that the national authorities concerned must be *manifestly* failing to protect their own populations the language of the text actually raises the threshold needed to get

¹⁹⁰ Edward Luck, 'The Responsibility to Protect: Growing Pains or Early Promise?' *Ethics and International Affairs* Vol. 24 Issue 4, September, 2010. See also Edward Luck, 'Sovereignty, Choice, and the Responsibility to Protect', *Global Responsibility to Protect*, Leiden: Martinus Nijhoff Publishers, 2009, pp.10–21. See, for example, Gareth Evans, *The Responsibility to Protect: Ending Mass Atrocity Crimes Once and for All*, Washington DC: Brookings Institution Press, 2008; Ramesh Thakur, *The Responsibility to Protect: Norms, Laws and the use of Force in International Politics*, London and New York: Routledge, 2011; Thomas G. Weiss, and Ramesh Thakur, *Global Governance and the UN: an unfinished journey*, Bloomington: Indiana University Press, 2010; Ramesh Thakur, *The United Nations, peace and security: from collective security to the responsibility to protect*, Cambridge: Cambridge University Press, 2006; Sara E. Davies, Luke Glanville (eds.) *Protecting the Displaced: Deepening the Responsibility to Protect*, The Hague/ London/ Boston: Martinus Nijhoff, 2010; and Nicholas Wheeler, 'The Humanitarian Responsibilities of Sovereignty: Explaining the Development of a New Norm of Military Intervention for Humanitarian Protection in International Society', in Jennifer Welsh (ed.) *Humanitarian Intervention and International Relations*, Oxford: Oxford University Press, 2004, pp.29–52. For an alternative 'anti-imperialist' approach see David Chandler, *From Kosovo to Kabul, human rights and international intervention*, London: Pluto Press, 2002; and Richard Kareem Al-Qaq, *Managing world order, United Nations peace operations and the security agenda*, London/New York: Tauris Academic Studies, 2009.

¹⁹¹ For more sceptical accounts see: Carlo Focarelli, 'The responsibility to protect doctrine and humanitarian intervention: too many ambiguities for a working doctrine', *Journal of Conflict & Security Law*, 2008; and Anne Orford, 'From Promise to Practice? The Legal Significance of the Responsibility to Protect Concept', *Global Responsibility to Protect*, Martin Nijhoff Publishers, Vol. 3, Issue 4, 2011, p.400–424.

¹⁹² See cover blurb review of Gareth Evans, *The Responsibility to Protect: Ending Mass Atrocity Crimes Once and for All*, Washington DC: Brookings Institution Press, 2008.

¹⁹³ See cover blurb review of Richard H. Cooper and Juliette Voinov (eds) *Responsibility To Protect: The Global Moral Compact for the 21st Century*, London: Palgrave Macmillan, 2009.

¹⁹⁴ For further discussion see Simon Chesterman, 'Leading from Behind': *The Responsibility to Protect, the Obama Doctrine, and Humanitarian Intervention After Libya*, New York University School of Law, Public law & legal theory research paper series, Working paper No. 11-35, June 2011.

agreement about an intervention adopted by the Security Council.¹⁹⁵ Hehir notes that North Korea, Iran, Myanmar and Sudan were amongst the States to have endorsed the wording at the General Assembly,¹⁹⁶ and says its supporters' claims are 'overly sanguine and hyperbolic.'¹⁹⁷ Bellamy, a strong supporter of R2P, has also acknowledged that:

Five years ago a majority of academic papers on R2P failed to distinguish between what the ICISS proposed in 2001 and what the UN General Assembly had adopted four years later. It was also extremely common to see R2P described as a new norm of humanitarian intervention or a new legal principle, despite the fact that what emerged in 2005 was neither.¹⁹⁸

This lack of clarity has led to a number of strikingly conflicting claims about R2P.¹⁹⁹ For example, Stuenkel states that the emerging powers of Brazil, Russia, India, China and South Africa (the BRICS) have 'supported R2P in the vast majority of cases',²⁰⁰ although all are notably sceptical about military interventions on humanitarian grounds even when these have

¹⁹⁵ Carsten Stahn, 'Responsibility to Protect: Political Rhetoric or Emerging Legal Norm?', *The American Journal of International Law*, Vol. 101, No. 1, January 2007, pp. 99-120.

¹⁹⁶ Aidan Hehir, *The responsibility to protect: rhetoric, reality and the future of humanitarian intervention*, Basingstoke and New York: Palgrave Macmillan, Basingstoke, 2012, p.74.

¹⁹⁷ Aidan Hehir and Eric A. Heinze, 'The Responsibility to Protect: "Never Again!" for the 21st Century?', in Saul Takahashi (ed), *Human Rights, Human Security, and State Security*, Santa Barbara, California: Praeger Security International, 2004, p.19.

¹⁹⁸ Alex Bellamy, *Responsibility to Protect: a defence*, Oxford: Oxford University Press, 2015, p.12.

¹⁹⁹ See for example, 'Statement by Gareth Evans to United Nations General Assembly Informal Interactive Dialogue on the Responsibility to Protect, 23 July 2009, New York; Edward Luck, Special Adviser to the Secretary-General, Remarks to the General Assembly on the Responsibility to Protect, New York, 23 July 2009; Statement by Professor Noam Chomsky to the United Nations General Assembly Thematic Dialogue on the Responsibility to Protect United Nations, New York 23 July 2009; Statement by Professor Jean Bricmont to the United Nations General Assembly Informal Interactive Thematic Dialogue on the Responsibility to Protect United Nations, New York 23 July 2009.

²⁰⁰ Oliver Stuenkel, 'The BRICS and the Future of R2P Was Syria or Libya the Exception?', *Global Responsibility to Protect*, Martin Nijhoff Publishers, Vol. 6, 2014, pp.3-28. See also Kai Michael Kenkel, 'Brazil and R2P: Does Taking Responsibility Mean Using Force?', *Global Responsibility to Protect*, Vol. 4 Issue, 2012, pp.5-32. 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.

been authorised by the Security Council.²⁰¹ Conversely, government ministers of permanent Security Council members have made references to R2P when seeking to justify actions such as the invasion of Iraq,²⁰² military intervention in South Ossetia²⁰³ and a proposed weakening of the protections of the Geneva Conventions,²⁰⁴ which are difficult to define as humanitarian. It is also sometimes cited in relation to the international mediation efforts that followed the violence in Kenya in 2007, although this bears little relationship to its original purpose.²⁰⁵ Evans, another strong supporter of the initiative has warned that much of this confusion is due to ‘a spectacular misuse of R2P principles by the US-led coalition, supported particularly in this respect by the UK, in the case of the 2003 invasion of Iraq – and the suspicion that R2P will be just another excuse for neo-colonialist and neo-imperialist interventions.’²⁰⁶ The ambiguity is perhaps best

²⁰¹ For example Brazil, Russia, India, China and Germany all abstained on Security Council Resolution 1973 (2011) authorising military intervention in Libya, while South Africa voted in favour but subsequently expressed reservations about NATO’s military action. See Emily O’Brien and Andrew Sinclair, *The International Role in Libya’s Transition*, Center on International Cooperation, New York University, July 2012, p. 15. In 2012 the BRICS issued a joint statement calling for ‘respect Syrian independence, territorial integrity and sovereignty’. See *Government of India, Ministry of External Affairs*, ‘Fourth BRICS Summit: Delhi Declaration’, article 21, 29 March 2012, article 21: ‘Global interests would best be served by dealing with the crisis through peaceful means that encourage broad national dialogues that reflect the legitimate aspirations of all sections of Syrian society and respect Syrian independence, territorial integrity and sovereignty.’

²⁰² Tony Blair Speech, Labour Party Spring Conference, Glasgow, 15 February 2003; Text of Tony Blair’s speech to the US Congress, Friday July 18, 2003; and Text of speech delivered by Prime Minister, Sedgfield, 5 March 2004, in which he referred to R2P in relation to the invasion of Iraq.

²⁰³ Interview by Minister of Foreign Affairs of the Russian Federation Sergey Lavrov to *BBC, Moscow*, 9 August 2008, in which Russia’s foreign minister used it in justification of military action in South Ossetia.

²⁰⁴ John Reid, ‘Twenty-First Century Warfare – Twentieth Century Rules’, speech at Royal United Services Institute for Defence and Security Studies, 3 April 2006. See also *Guardian*, John Reid, ‘I do not reject the Geneva conventions: international law needs to adapt to modern conflicts, but we should never operate outside it’, 5 April 2006, in which Britain’s minister of defence said that R2P supported his claim that the protections which the Geneva Conventions provided to inmates in Guantanamo Bay were out of date and should be re-considered.

²⁰⁵ See, for example, Abdullahi Boru Halakhe, “*R2P in Practice*”: *Ethnic Violence, Elections and Atrocity Prevention in Kenya*, New York: Global Centre for the Responsibility to Protect Occasional Paper Series No. 4, December 2013; Johannes Langer, ‘The Responsibility to Protect: Kenya’s Post-Electoral Crisis’, *Journal of International Service*, Fall 2011; and Mark Schneider, ‘Implementing the Responsibility to Protect in Kenya and Beyond: Address to the World Affairs Council of Oregon’, International Crisis Group, March 2010.

²⁰⁶ Gareth Evans, ‘Hypocrisy, Democracy, War and Peace’, *Harvard University Weatherhead Center for International Affairs Conference on Democracy in Contemporary Global Politics*, Talloires 16 June 2007.

summarized by Weiss, 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.²⁰⁷

As Steenberghe has noted, R2P supporters have gone to considerable lengths to persuade States to include references to R2P in their declarations and in the resolutions adopted by the UN Security Council and General Assembly in the hope that this will create sufficient *opinio juris* and State practice to transform the concept from a political into a legal norm.²⁰⁸ In the process, however, they have consciously distanced the concept from its original association with ‘humanitarian intervention’ without Security Council authorisation. For example, the Global Centre for the Responsibility to Protect, a non-governmental organization (NGO), published a paper in the aftermath of the Libya crisis, clearly differentiating 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.²⁰⁹ In 2014 the International Coalition for the Responsibility to Protect, another NGO coalition group, stated that R2P could not be used to justify unilateral military intervention in Syria because:

²⁰⁷ Thomas Weiss, *What’s wrong with the United Nations and how to fix it*, London: Polity, 2008, p.142.

²⁰⁸ 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’, *Goettingen Journal of International Law*, Vol. 6, 2014, p.105.

²⁰⁹ Simon Adams, *Libya and the Responsibility to Protect*, The Global Centre for the Responsibility to Protect, 2012.

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.²¹⁰

Proponents of R2P commonly describe it as ‘an emerging international norm’, yet the arguments surrounding its significance are circular. It can only claim to be offering a new contribution to the ‘protection provisions’ of international law if the precise content of this contribution remains hopelessly ambiguous. Orford, however, argues that R2P is best understood not as creating a new international norm, but as legitimating existing practice.²¹¹ Its significance ‘lies not in its capacity to transform promise into practice, but rather in its capacity to transform practice into promise’.²¹²

R2P, POC and humanitarian interventions

Both POC and R2P arose out of an initiative by the Canadian government when it occupied the Presidency of the Security Council in 1999 and both share the same overall goal of protecting civilians from grave violations of human rights and IHL.²¹³ The first Security Council resolution to reaffirm the two paragraphs on R2P in the Summit Outcome document, in April 2006, was devoted to POC²¹⁴ and a resolution a few months later on the situation in Darfur also contained references to both POC and R2P.²¹⁵ Some academic writers treat R2P and POC as almost inter-

²¹⁰ International Coalition for the Responsibility to Protect, Homepage, <http://www.responsibilitytoprotect.org/index.php/crises/crisis-in-syria>, accessed 8 November 2014.

²¹¹ Orford, 2011, p.2.

²¹² Ibid.

²¹³ van Steenberghe, 2014, pp.81-114.

²¹⁴ UN Security Council Resolution 1674, of 28 April 2006, para.4.

²¹⁵ UN Security Council Resolution 1706, of 31 August 2006.

changeable, with Tsagourias, for example, stating that they are ‘subsets– indeed interrelated ones–of the same concept’.²¹⁶ 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’.²¹⁷ A POC strategy document published by the UN Mission in the Democratic Republic of Congo (MONUC) and UNHCR expressly refers to R2P in three paragraphs under a section entitled ‘Rationale and the Responsibility to Protect’.²¹⁸

In his 2012 report on POC, however, the UN Secretary General stated that he was ‘concerned about the continuing and inaccurate conflation’ of the two concepts, which, while they may ‘share some common elements’ also contained ‘fundamental differences’.²¹⁹ POC ‘is a legal concept based on international humanitarian, human rights and refugee law, while the responsibility to protect is a political concept.’²²⁰ In his report on R2P he noted that: ‘While the work of peacekeepers may contribute to the achievement of RtoP goals, the two concepts . . .

²¹⁶ Nicholas Tsagourias, ‘Self-defence, protection and humanitarian values and the doctrine of impartiality and neutrality in enforcement mandates’, in Marc Weller (ed.), *The Oxford Handbook on the Use of Force in International Law*, Oxford: Oxford University Press, 2014. See also Elizabeth G. Ferris, *The Politics of Protection: The Limits of Humanitarian Action*, Washington DC: Brookings Institution Press, 2011, pp.146-73. This is also an underlying assumption throughout in Siobhán Wills, *Protecting Civilians*, Oxford: Oxford University Press, 2009.

²¹⁷ *Report of the Secretary-General on the protection of civilians in armed conflict*, S/2007/643, 28 October 2007, para 11.

²¹⁸ UN Organization Mission in the Democratic Republic of Congo (MONUC) & UN High Commissioner for Refugees, ‘UN System-Wide Strategy for the Protection of Civilians in the Democratic Republic of the Congo’, January 2010, para 4. ‘The acceptance by all Member States at the 2005 World Summit of a fundamental “responsibility to protect” represents a critically important affirmation of the primary responsibility of each State to protect its citizens and persons within its jurisdiction from genocide, war crimes, ethnic cleansing and crimes against humanity. Paragraphs 138 and 139 of the World Summit Outcome also place a responsibility upon the United Nations to support Member States in protecting their populations.’

²¹⁹ *Report of the Secretary-General on the protection of civilians in armed conflict*, S/2012/376, 22 May 2012, para 21.

²²⁰ *Ibid.*

have separate and distinct prerequisites and objectives.’²²¹ A briefing from the Global Centre for the Responsibility to Protect, in 2009, also noted that:

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.²²²

In April 2015 DPKO guidance issued to peacekeeping missions stated that: ‘While the R2P framework shares some legal and conceptual foundations and employs some common terminology with POC, they are distinct. Most importantly, R2P may be invoked without the consent of the host state, specifically when the host state is failing to protect its population – R2P thus envisages a range of action that goes beyond the principles of peacekeeping, which require the consent of the host state.’²²³ As will be discussed further in Chapter Seven, the debates

²²¹ *Secretary General’s report Responsibility to protect: timely and decisive response*, July 2012 A/66/874–S/2012/578, 25 July 2012, para 16.

²²² *The Relationship between the Responsibility to Protect and the Protection of Civilians in Armed Conflict*, Global Centre for the Responsibility to Protect, January 2009. For arguments in favour of the continuing relevance of R2P see: Edward Luck, *The Responsibility to Protect at Ten: The Challenges Ahead*, Policy Analysis Brief, Stanley Foundation, May 2015; Stanley Foundation, *Taking Stock of the Responsibility to Protect in Africa: Challenges, Prospects, and Priorities for the Next Decade*, Policy Dialogue Brief, May 2015; and Stanley Foundation, *The Responsibility to Protect in the Next Decade, 46th United Nations Issues Conference*, Policy Dialogue Brief, May 2015.

²²³ *Policy on the Protection of Civilians in United Nations Peacekeeping*, Department of Peacekeeping Operations / Department of Field Support, Ref. 2015.07, 1 April 2015, p.19. See also *Protection of Civilians: Implementing Guidelines for Military Components of United Nations Peacekeeping Missions*, Department of Peacekeeping Operations / Department of Field Support, February 2015, p.15. ‘The Protection of Civilians mandate is clearly distinct from the concept of the Responsibility to Protect (R2P). POC is a mandated task in peacekeeping from the Security Council that is regularly reviewed by the

around R2P coincided with discussions in the Security Council about how to respond to the humanitarian crisis in Darfur and may have exacerbated the political tensions that weakened the peacekeeping mission which was eventually deployed. The distinctions between R2P and POC were further blurred by the UN Security Council authorized military intervention in Libya in March 2011.²²⁴

NATO's senior military planners have subsequently stated that their rules of engagement (RoE) throughout the campaign were only to hit military targets that had been identified as a specific threat to civilians at the time.²²⁵ This was a significantly narrower RoE than those used by NATO during its campaign over Kosovo and resulted in far fewer civilian deaths.²²⁶

Nevertheless, the fact that the campaign continued until Muammar Gaddafi had been militarily deposed and the refusal of NATO to consider a ceasefire or negotiations for a peaceful power change of power led many to argue that it had gone beyond the terms of the March Security

General Assembly. R2P is primarily aimed at national governments but can also apply to UN peacekeeping in a reinforcing role. The Protection of Civilians and the Responsibility to Protect share some legal and conceptual foundations, but they remain distinct.

²²⁴ Security Council Resolution 1970, adopted on 26 February 2011 imposed an arms embargo on the country, subjected key members of the Libyan government to a travel ban and an asset freeze and referred the situation to the International Criminal Court for further investigation. Security Council Resolution 1973, adopted on 17 March 2011, para 4, 'Authorizes 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'. For further discussion of the international response to this crisis see Emily O'Brien and Andrew Sinclair, *The International Role in Libya's Transition*, Center on International Cooperation, New York University, July 2012.

²²⁵ Presentation by Major General Robert Weighill, Director of Operations for Operation Unified Protector, Escola Superior da Guerra, Rio de Janeiro, August 2012.

²²⁶ See *New York Times*, 'In strikes on Libya by NATO an unspoken civilian toll', 17 December 2011. According to NATO the air campaign had resulted in zero civilian casualties, 'but 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 see Human Rights Watch, *Civilian deaths in the NATO air campaign*, HRW, Vol. 12, No. 1, February 2000; and Amnesty International, *No justice for the victims of NATO bombings*, 23 April 2009, which both claim NATO killed around 500 civilians in its intervention in Kosovo.

Council resolution.²²⁷ The widespread civilian suffering that has accompanied the subsequent disintegration of the Libyan State also weakens the case for such ‘humanitarian interventions’.²²⁸

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 and reinforced the authorisation of the UN mission to use force to protect civilians.²²⁹ 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,²³⁰ as part of a regime-change intervention, which led to the arrest of the incumbent President who was subsequently transferred to the ICC to stand trial for crimes against humanity.²³¹ In March 2013 the Security Council ‘approved the creation of its first-ever “offensive” combat force, intended to carry out targeted operations to “neutralize and disarm” rebels groups in the Democratic Republic of Congo (DRC) as part its mission’s POC mandate.’²³² Both developments will be discussed further in Chapter Six of this thesis.

²²⁷ For a summary of these arguments see Conor Foley, *Humanitarian Action in Complex Emergencies: Managing linkages with security agendas*, Advanced Training Program on Humanitarian Action, March 2013.

²²⁸ For a summary of human rights concerns in Libya in 2015 see Amnesty International, *World Report 2014/5, Libya*, 2015

²²⁹ UN Security Council Resolution 1975 of 30 March 2011, para 6. ‘Recalls its authorization and stresses its full support given to the UNOCI, while impartially implementing its mandate, to use all necessary means to carry out its mandate to protect civilians under imminent threat of physical violence, within its capabilities and its areas of deployment, including to prevent the use of heavy weapons against the civilian population and requests the Secretary-General to keep it urgently informed of measures taken and efforts made in this regard’.

²³⁰ UNOCI Press Releases ‘UNOCI calls on Gbagbo's special forces to lay down their arms’, 5 April 2011; ‘UNOCI launches Operation “Protect the Civilian Population”’, 5 April 2011; ‘UNOCI transports passengers blocked in Abidjan; 5 April 2011; ‘Pro-Gbagbo forces ready to end combat’, 5 April 2011; ‘UN Assistant Secretary-General for Human Rights visits Côte d’Ivoire’, 4 April 2011.

²³¹ *Guardian*, ‘Laurent Gbagbo appears at The Hague to face trial’, 6 December 2011; and *New York Times*, ‘Leader’s Arrest in Ivory Coast Ends Standoff’, 11 April 2011.

²³² ‘UN News’, ‘United Nations, ““Intervention Brigade” Authorized as Security Council Grants Mandate Renewal for United Nations Mission in Democratic Republic of Congo’, 28 March 2013, <http://www.un.org/press/en/2013/sc10964.doc.htm>, accessed 5 May 2015.

In November 2011 the Brazilian government, which had been on the Security Council during both the Libyan and Côte d'Ivoire operations,²³³ published a paper entitled 'Responsibility while protecting' (RWP), which questioned both the legal and practical implications of such actions.²³⁴ RWP received a fairly mixed reaction.²³⁵ It has not been endorsed by the BRICS – some of whom regard it as making too many concessions to R2P.²³⁶ Some R2P supporters regarded it as an attempt to 'undermine' the original concept,²³⁷ although others see the two as complementary.²³⁸ It does, however, raise a question about the applicable legal framework governing both UN authorized 'humanitarian intervention' and peacekeeping missions with POC mandates, which will be explored further in subsequent chapters.

Some also argue that the right of 'humanitarian access' could create a right of 'humanitarian intervention'. In 2008, for example, France's foreign minister Bernard Kouchner cited R2P in relation to a proposed forcible intervention to deliver food aid in Myanmar against the wishes of its government.²³⁹ He was supported by his British counter-part, David Miliband, who claimed

²³³ Brazil had abstained on the vote authorizing intervention in Libya along with Russia, China, India and Germany.

²³⁴ 'Responsibility while protecting: elements for the development and promotion of a concept' *Letter dated 9 November 2011 from the Permanent Representative of Brazil to the United Nations addressed to the Secretary-General, 11 November 2011*, UN Doc. A/66/551-S/2011/701.

²³⁵ For further discussion see Conor Foley, *To save succeeding generations: UN Security Council Reform and the protection of civilians*, Igarapé Institute and the Brazilian Centre for International Relations, August 2012

²³⁶ This view was expressed to the author of this thesis by the Indian and South African Ambassadors to the UN at a seminar in Bahia, Brazil in April 2012.

²³⁷ *Foreign Policy*, Thomas Wright, 'Brazil hosts workshop on "responsibility while protecting"' 29 August 2012. He concluded that Brazil's main motivation for proposing the concept was that its officials had felt 'personally humiliated' by their treatment on the Security Council by the US, Britain and France during the Libya crisis. 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.'

²³⁸ *Project Syndicate*, Gareth Evans, 'Responsibility while protecting', 27 January 2012. He also criticized the 'sneering reaction' towards RWP of some western diplomats.

²³⁹ French Embassy: France in the UK, *Burma – Joint communiqué issued by the Ministry of Foreign and European Affairs and Ministry of Defence*, Paris, 25 May 2008.

that the UK was considering sending military escorts with aid convoys.²⁴⁰ Neither of these statements was, however, followed through with action.

In 2000 a group of humanitarian agencies published a ‘Humanitarian Charter’, which stated that, ‘those affected by a disaster have a right to life with dignity and therefore a right to assistance When states are unable to respond they are *obliged to allow* the intervention of humanitarian organizations’ [emphasis added] although this claim was subsequently dropped from subsequent revised editions.²⁴¹ Francis Deng, the first UN representative on internal displacement and a key proponent of R2P, has argued that where a State is unable to fulfil its responsibilities to protect its own population, it should ‘invite and welcome’ international assistance to complement its own efforts’.²⁴² Goodwin Gill maintains that reports by international monitoring bodies on ‘policies and practices that result in displacement’ could conceivably ‘become part of a process leading to the provision of international relief, even including protection, that is not contingent on request or consent.’²⁴³ Kourula claims that: ‘Large-scale humanitarian crises that generate refugee flows

²⁴⁰ *BBC World Tonight*, Robin Lustig, ‘Miliband on Burma, Britain and the world’, 14 May 2008. http://www.bbc.co.uk/blogs/worldtonight/2008/05/miliband_on_burma_britain_and.html, accessed 20 October 2015.

²⁴¹ The Sphere Project, *Humanitarian Charter and Minimum Standards in Disaster Response*, 2000, part one. [emphasis added] See also The Sphere Project, *Humanitarian Charter and Minimum Standards in Disaster Response*, 2011, p.20. See also The Sphere Project, *2011 edition of the Sphere Handbook: WHAT IS NEW?*, 2011, p.2. In its background notes on the 2011 edition of the Charter Sphere explains the reason for the change. ‘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.’

²⁴² Roberta Cohen and Francis M. Deng, *Masses in flight: the global crisis of internal displacement*, Washington DC: the Brookings Institute, p.275. See also Francis M. Deng, ‘The impact of state failure on migration’, *Mediterranean Quarterly*, Fall 2004, p.14 For further discussion of Deng’s role in the development of the R2P doctrine see Alex Bellamy, *Responsibility to protect: the global effort to end mass atrocities*, Cambridge: Polity, 2009, pp. 2, 21-3, 26-7, 33 and 63. Gareth Evans, *The Responsibility to Protect: Ending Mass Atrocity Crimes Once and for All*, Washington DC: Brookings Institution Press, 2008; Thomas G, Weiss, and Ramesh, Thakur, *Global Governance and the UN: an unfinished journey*, Bloomington: Indiana University Press, 2010; and Anne Orford, *International Authority and the Responsibility to Protect*, Cambridge University Press, 2011.

²⁴³ Goodwin Gill, 2007, p.488.

could justify ‘non-consensual and forcible rendering of assistance to implement the right of peoples to receive assistance in conflict situations.’²⁴⁴

As will be discussed further in Chapter Three, UN missions with POC mandates are often authorized to help create the necessary safe and secure environment to assist with the delivery of humanitarian aid and there are strong grounds for asserting that there is a ‘right of humanitarian access’ contained in international law. All relief activity in non-international conflicts is ‘subject to the consent of the High Contracting Party concerned’,²⁴⁵ however, and humanitarian agencies are bound by the principle of neutrality as set out in IHL and the ICJ’s judgment in *Nicaragua*.²⁴⁶ While a POC mandate might authorize a mission to help create the necessary safe and secure environment to assist with the delivery of this aid, and to protect both those delivering and receiving it, mission deployments are based on host state consent and the aid itself should be delivered according to strictly humanitarian principles, including neutrality and independence. As the ICRC has noted, IHL ‘cannot serve as a basis for armed intervention in response to grave violations of its provisions’ since ‘the use of force is governed by the United Nations Charter’.²⁴⁷

Conclusions

This chapter has provided an historical overview of the concept that civilians are entitled to ‘protection’ under the general framework of international law. This concept, which was barely recognized at the time when the UN Charter was drafted is now increasingly accepted in the

²⁴⁴ Pirkko Kourula, *Broadening the Edges: refugee definition and protection revisited*, Hague/Boston/London: Martinus Nijhoff Publishers, 1997, p.13.

²⁴⁵ Additional Protocol II, Article 18(2). See also General Assembly Resolution 46/182, UN Doc. A/RES/46/182, 19 December 1991.

²⁴⁶ ICJ Report 1986, para 242.

²⁴⁷ Anne Ryniker, The ICRC’s position on “humanitarian intervention”, *International Review of the Red Cross*, Vol. 83, No. 482, 30 June 2001, pp.527-32.

jurisprudence of the ICJ. Most relevant to the discussion here, it can be noted that the ICJ has accepted that States have, in certain circumstances, positive extraterritorial legal obligations to prevent genocide and protect civilians from violence by third parties. At the same time the ICJ has repeatedly restated that both the principles of non-intervention and the prohibition on the use of force are a part of customary international law, and may also be *jus cogens*. As the ICJ held in *Nicaragua*, States may not rely on their ‘own appraisal’ of the human rights situation in other States as justification for resort to unilateral use of force.²⁴⁸

Attempts to foster a new ‘global political consensus’ favouring interventions through R2P have largely failed. Indeed, by retreating from the argument – tentatively raised by Lauterpacht amongst others – that UN members might be free to ‘disregard’ the authority of the Security Council to prevent an act of genocide, R2P may even have strengthened the non-interventionist norm. If the ‘responsibility to protect’ can only be exercised by the Security Council then it is difficult to see how this can be considered an obligation because the Security Council’s *jus ad bellum* powers to authorise the use of force are discretionary and the obligations of the UN Charter take precedence over those of other international treaties.²⁴⁹ Nevertheless, this discretion is not ‘unbound’. The UN’s actual use of force must be consistent with the wider ‘protective’ legal framework set out in this chapter and which will be discussed further in Part II of this thesis.

²⁴⁸ ICJ Report 1986, para 268.

²⁴⁹ UN Charter, Articles 25 and 103. See also *Mothers of Srebrenica v. The Netherlands, The Hague District Court C-09/295247/HA ZA 07-2973*, para 4.149, 2014, in which the Court noted that the mandate of UNPROFOR ‘is indeed regarded as a decision by an international law organisation it only has a powers-creating character and does not call to life any obligations Claimants can enforce at a court of law.’

Chapter 2:

To save succeeding generations: the evolution and conceptual development of UN peacekeeping and the protection of civilians

Introduction

UN peacekeeping is commonly divided into three ‘phases’:¹ the forty year period 1948-1988, in which the concept emerged and its ‘core principles’ were established; the decade 1989-1999, in which the number of operations increased dramatically, but in which these principles came under harsh scrutiny; and the period from 1999 to the present, in which POC has become central to a number of mission mandates. In June 2015 the High Level Panel report on Peace Operations stated that it was ‘convinced’ of the continuing importance of the ‘core principles’ of peacekeeping in ‘guiding successful operations’, but that these must be ‘interpreted progressively and with flexibility in the face of new challenges’ and ‘should never be an excuse for failure to protect civilians’.² This chapter contextualizes the development of these principles and the challenges that they subsequently faced. The next chapter will look at the third phase and how POC has been integrated into peacekeeping at the global level.

¹ The *UN Peacekeeping Homepage* uses this chronological division, see: <https://www.un.org/en/peacekeeping/operations/history.shtml> accessed 8 May 2013. Others have subdivided the phases further. See Ramesh Thakur and Albrecht Schnabel (eds) *United Nations Peacekeeping Operations: ad hoc missions, permanent engagement*, New York: United Nations University Press, 2001, pp. 9-14; Henry Wiseman, ‘The United Nations and International Peacekeeping: a comparative analysis’, in United Nations Institute for Training and Research, *The United Nations and the Maintenance of International Peace and Security*, Dordrecht: Martinus Nijhoff, 1987, pp.73-95; Dennis Jett, *Why peacekeeping fails*, New York: St Martin’s Press, 1999, pp.21-4. See also Joseph Camilleri, Kamal Malhotra and Majid Tehrania, *Reimagining the future: towards democratic governance: a report of the global governance reform project*, La Trobe University, 2000, pp.78-9. These have referred to up to nine different chronological phases: the nascent period (1946-56), the assertive period (1956-67), the dormant period (1967-73), the resurgent period (1973-8), the maintenance period (1978-88), the transition period (1988-91), the enforcement period (1991-6), the moderation period (1996-7), and the period of ambiguity (1998-200). More phases could presumably be added since the publication of this study.

² *Uniting our strengths for peace – politics, partnerships and people*, Report of the High Level Panel on United Nations Peace Operations, Advance Copy, 16 June 2015, [Hereinafter High Level Panel Report on Peace Operations 2015], Executive Summary, p.x.

The first phase of peacekeeping

The UN Charter contains no express basis for peacekeeping. There is also no universally accepted definition of the phrase,³ although it is used here consistently with the UN's own terminology. This states that:

Peacekeeping is a technique designed to preserve the peace, however fragile, where fighting has been halted, and to assist in implementing agreements achieved by the peacemakers. Over the years, peacekeeping has evolved from a primarily military model of observing cease-fires and the separation of forces after inter-state wars, to incorporate a complex model of many elements – military, police and civilian – working together to help lay the foundations for sustainable peace.⁴

According to this definition, UN peacekeeping 'began in 1948' when the Security Council authorized the deployment of the UN Truce Supervision Organization (UNTSO), whose role was to monitor the Armistice Agreement between Israel and its Arab neighbours.⁵ This was followed by the deployment of the UN Military Observer Group in

³ For further discussion see, for example, Indarjit Rikhye *The theory and practice of peacekeeping*, London: C Hurst & Co., 1984, pp.1-2; Ralph Zacklin, 'The Use of Force in Peacekeeping Operations', in Neils Blokker and Nico Schrijver, *The Security Council and the Use of Force: theory and reality – a need for change?*, Martin Nijhoff Publishers, 2005.

⁴ *UN Peacekeeping Homepage*, 'What is peacekeeping', <https://www.un.org/en/peacekeeping/operations/peacekeeping.shtml>, accessed 6 May 2013. See also *United Nations Peacekeeping Operations, Principles and Guidelines* (Capstone Document), New York: Department of Peacekeeping Operations, 2008, p.18. The above definition has subsequently been expanded to include considerably more detail on the various elements listed. See <https://www.un.org/en/peacekeeping/operations/peacekeeping.shtml>, accessed 4 September 2015.

⁵ *UN Peacekeeping Homepage*, 'History of Peacekeeping', <https://www.un.org/en/peacekeeping/operations/history.shtml>, accessed 6 May 2013. See also Helga Haftendorn, Robert Keohane and Celeste Wallander (eds), *Imperfect Unions: Security Institutions Over Time and Space*, Oxford: Oxford University Press, 1999, pp.234-6. A Special Commission on the Balkans (UNSCOB) was established by the UNGA from 1947-51 to monitor alleged infiltration into Greece by Communist guerrillas from Yugoslavia, Albania and Bulgaria. The Security Council also created a UN Commission for Indonesia (UNCII) from 1947-51 to monitor the violence that

India and Pakistan (UNMOGIP), which carried out a similar ceasefire monitoring function.⁶ Since then over 70 peacekeeping operations have been deployed by the UN, the vast majority of which have taken place in the last twenty-five years.⁷

In November 1950, in response to political paralysis in the Security Council, the UN General Assembly adopted a resolution, which became known as *Uniting for Peace*.⁸ This stated that where the Security Council ‘because of lack of unanimity of the permanent members, fails to exercise its primary responsibility for the maintenance of international peace and security’ then the General Assembly may consider the issue ‘with a view to making appropriate recommendations to Members for collective measures, including in the case of a breach of the peace or act of aggression the use of armed force when necessary, to maintain or restore international peace and security.’⁹

erupted during the decolonization process by the Netherlands. Both missions included the deployment of military observers, although in both cases these remained under the authority of the troop contributing countries (TCCs) rather than the UN and they are not usually included in official accounts of UN peacekeeping.

⁶ *UN Peacekeeping Homepage*, ‘<http://www.un.org/en/peacekeeping/operations/>’, accessed 15 March 2015.

⁷ *Ibid.* This lists 16 current operations and 56 previous operations. According to the UN website 54 of its missions have taken place since 1988. As discussed above there are some disagreements about what officially counts as a UN peacekeeping mission.

⁸ UN General Assembly Resolution 377 A (V), of 3 November 1950.

⁹ For a summary overview see Christian Tomuschat, *Uniting for Peace, Resolution 377 A (V), New York 3 November 1950*, UN Audiovisual library of international law, <http://untreaty.un.org/cod/avl/ha/vcltsio/vcltsio.html>, accessed 4 February 2013. In January 1950 the Soviet Union walked out of the Security Council in protest at its decision to allocate China’s permanent seat to the government of Taiwan, rather than mainland China. Because the UN Charter, Article 27 (3) specifies that ‘the concurring votes of the permanent members’ are necessary for decisions the Soviet Union assumed that this would paralyze the work of Council. However, the majority of the Council believed that it could still discharge its functions and during the Soviet Union’s absence the Security Council used its Chapter VII powers to provide support to the Republic of (South) Korea when it faced an ‘armed attack’ from the north in June 1950. The Soviet Union returned to the Security Council in August 1950 and was able to use its veto to block a resolution condemning North Korea, for its ‘continued defiance’ of the UN. The US government sponsored the *Uniting for Peace* resolution in response. The ICJ subsequently ruled in *Legal consequences for States of the Continued Presence of South Africa in Namibia notwithstanding Security Council Resolution 276 (1970)*. Advisory Opinion, ICJ Report 1971, para 22, that ‘the voluntary abstention of a permanent member has consistently been interpreted as not constituting a bar to the adoption of resolutions by the Security Council’.

On 4 November 1956 the General Assembly used the Uniting for Peace procedure to request the Secretary General, Dag Hammarskjöld, to draw up an emergency plan to deploy a peacekeeping mission to address the ‘Suez Crisis’, after France and Britain had vetoed a resolution in the Security Council calling for Israel’s withdrawal from the Sinai.¹⁰ Two days later Hammarskjöld submitted three options for how the Force could be assembled.¹¹ The first was to deploy it directly under UN control.¹² The other two options – which were rejected – were that the UN should either delegate the responsibility to third countries entirely outside the UN’s structures, or that the Force should be assembled first and then brought ‘into an appropriate relationship’ with the UN later.¹³ One proposal considered under the third option was to ‘blue hat’ the British and French forces already in the region.¹⁴

The General Assembly supported the first option, which became the basis for the deployment of the first UN Emergency Force (UNEF).¹⁵ Troops began to be deployed almost immediately, and the Force eventually reached a strength of 7,000.¹⁶ UNEF was actually only able to deploy on the Egyptian side of the border and a status of forces agreement (SOFA) was reached with the Egyptian government through an exchange of letters.¹⁷ The government

¹⁰ General Assembly Resolution 3276 of 4 November 1956. For a general overview of the crisis see Keith Kyle, *Suez: Britain's End of Empire in the Middle East*, London: IB Tauris, 2011.

¹¹ UN General Assembly Resolution A/3302 of 6 November 1956

¹² *Ibid.*, para 4. This stated that it should be deployed ‘on the basis of principles reflected in the constitution of the United Nations itself. This would mean that its chief responsible officer should be appointed by the United Nations and that he [sic] in his function should be responsible ultimately to the General Assembly and/or Security Council.’ It further stated that ‘His authority should be so defined as to make him fully independent of the policies of any one nation and his relations to the Secretary-General of the United Nations should correspond to those of [a] Chief of Staff’.

¹³ *Ibid.*

¹⁴ Colonel D.W. Bowett, *United Nations Forces: A legal study*, New York: Frederick A Praeger, 1964, p.91. The Canadian government initially proposed that the UK and France should be ‘asked to act as a United Nations force and should, for this purpose be furnished with the United Nations flag’.

¹⁵ UN General Assembly Resolution A/3276 of 4 November 1956. UNEF was subsequently legally described as ‘a subsidiary organ of the General Assembly established under Article 22 of the Charter’. See *Exchange of letters constituting an Agreement between the United Nations and the Government of Egypt concerning the Status of the United Nations Emergency Force in Egypt*, New York, 8 February 1957, UN-doc. A/3526 UNTS Vol. 260, p. 6.

¹⁶ Bowett, 1964, p.91.

¹⁷ *Exchange of letters*, 8 February 1957, UN-doc. A/3526 UNTS Vol. 260, p. 6. See also UN General Assembly Resolution 1126 (XI) 22 February 1957. Amongst other things the agreements granted members of UNEF full freedom of movement in the performance of their duties and subjected them to the exclusive jurisdiction of their respective national governments in respect of any criminal offences committed in Egypt.

of Israel initially refused to the deployment, but, under diplomatic pressure, began to withdraw its forces from the areas to which UNEF would deploy.¹⁸

UNEF's two main functions were: first to secure and supervise the ceasefire and the withdrawal of foreign forces from Egyptian territory and then to maintain peaceful conditions in the area by preventing subsequent clashes.¹⁹ It also took on 'limited responsibility for administrative and security functions',²⁰ including 'measures to protect civilian life and public and private property'.²¹ UNEF was also 'authorized to apprehend infiltrators and persons approaching the demarcation line in suspicious circumstances' and to hand them over to the local police 'after interrogation'.²²

On the face of it, the General Assembly's actions seem at odds with Articles 11 and 12 of the Charter, which specify that it is for the Security Council rather than the General Assembly to decide on what 'actions' are necessary for the preservation of international peace and security.²³ In its Advisory Opinion on *Certain expenses of the United Nations*,²⁴ however, the ICJ ruled that while 'primary responsibility' for the maintenance of international peace and security was conferred upon the Security Council, the Charter made it 'abundantly clear' that

¹⁸ *UN Peacekeeping Operations, Past Missions, UNEF I*, <http://www.un.org/en/peacekeeping/missions/past/unef1backgr2.html>, accessed 4 February 2013. Israel initially stated that it would not agree to the stationing of a foreign force, no matter how called, in her territory, or in any of the areas occupied by her', but subsequently agreed to the deployment while stating that this was contingent on 'satisfactory arrangements' being established to ensure security 'against the recurrence of the threat or danger of attack'.

¹⁹ *Report of the Secretary General, Summary of the experiences derived from the establishment and operation of the force*, UN Doc. A/3943, 9 October 1958, para 10. UNEF forces were deployed along the Egyptian-Israeli armistice demarcation line in the Gaza area and to the south along the international frontier. UNEF came to an end when the Egyptian government withdrew permission for its deployment in May 1967, shortly before the outbreak of the Six Day war. In October 1973 a second mission was established – UNEF II – to supervise the ceasefire agreement between Israel and Egypt following the Yom Kippur war.

²⁰ *Ibid.*, para 14.

²¹ *Ibid.*, para 54.

²² *Ibid.*, paras 70 and 165. Although it made limited use of these powers in practice, this was mainly because the mission remained largely peaceful for the ten years of its existence. It nevertheless represents a significant infringement on the right to liberty since detentions are normally only permissible 'in accordance with the law'. This will be discussed further in Part II of this thesis.

²³ UN Charter, Articles 11 and 12

²⁴ *Certain expenses of the United Nations (Article 17, paragraph 2, of the Charter)*, Advisory Opinion of 20 July 1962, ICJ Reports 1962.

the General Assembly could also make decisions on such ‘important questions’.²⁵ Only the Security Council, using its Chapter VII powers, had the authority to ‘require enforcement by coercive action’, but the General Assembly had been given powers to ‘recommend measures for the peaceful adjustment of any situation’.²⁶ The Court reasoned that ‘the word “measures” implies some kind of action’ and the only specified limitation was that it should not act while the Security Council was dealing with the same matter.²⁷

The UN also published a ‘lessons learned’ report on the mission, which concluded with some ‘basic principles’ that may ‘provide an adaptable framework’ for subsequent operations.²⁸ Although Findlay has described this report as a ‘work in progress’, rather than a ‘definitive word’,²⁹ its conclusions prefigured most of the principal challenges that peacekeeping missions were to encounter as they were to later take on increasing ‘protective’ functions.

The report highlighted the need to obtain the consent of the host State,³⁰ sensitivity about the nationality of troop-contributing countries³¹ and stated that the mission should not get involved in internal conflicts or involve itself in political issues.³² It also stressed the need for

²⁵ ICJ Reports 1962, p.163.

²⁶ UN Charter, Article 14.

²⁷ ICJ Report 1962, p.163. ‘The only limitation which Article 14 imposes on the General Assembly is the restriction found in Article 12, namely, that the Assembly should not recommend measures while the Security Council is dealing with the same matter unless the Council requests it to do so.’ See also p.177 in which the ICJ found that the Security Council had the ‘implied power’ to establish peacekeeping forces and the competence to delegate this power to the Secretary General

²⁸ Report of the Secretary General, *Summary of the experiences derived from the establishment and operation of the force*, UN Doc. A/3943, 9 October 1958, para 154.

²⁹ For further discussion see Trevor Findlay, *The Use of Force in UN Peace Operations*, Oxford: Oxford University Press, 2002, p.48. He states the ‘study was a useful first attempt at describing the new phenomenon of peacekeeping, [but] it was rambling, repetitive and at times incoherent. It was essentially a work in progress and not the definitive word that some observers today assume it to be.’

³⁰ Report of the Secretary General, *Summary of the experiences derived from the establishment and operation of the force*, UN Doc. A/3943, 9 October 1958, paras 15 and 155-9. The force was meant to be temporary, although the length of the mission was left open-ended. It had no rights over the territory on which it was deployed other than those necessary for the execution of its functions and was defined as ‘more than an observer corps, but in no way a military occupation force’.

³¹ *Ibid.*, paras 16 and 44 and 160-1. The force was recruited ‘from Member States who were not permanent members of the Security Council’ and were seen as neutral by parties to the conflict. Participation in the mission was voluntary with the Secretary General deciding which contingents to accept, partly to ensure the above criteria, but also to take into account the technical needs of the mission.

³² *Ibid.*, para 167.

a SOFA which ensured freedom of movement for the mission and that its personnel were exempt from the criminal jurisdiction of the host country.³³ The mission should not exercise authority in a territory either in competition or cooperation with the national authorities, ‘on the basis of any joint operation’, although it should have the right to detain people in certain specified circumstances.³⁴ The fact that all disciplinary authority had to be exercised through national contingents was described as ‘rather anomalous’, but it noted that conferring disciplinary authority on the mission Force commander ‘would probably require legislation in the participating States.’³⁵ The report concluded that it was ‘essential to the preservation of the independent exercise of the functions of such a Force that its members should be immune from the criminal jurisdiction of the host state’.³⁶

The use of force was limited to self-defence. The report noted the danger that a ‘wide interpretation of the right to self-defence’ might blur the distinction between peacekeeping and combat operations, but the only thing that was expressly forbidden was for UN troops to ‘take the initiative in the use of armed force’.³⁷ They were, however, permitted to ‘respond with force to an attack’ including attempts to make them withdraw from positions they had occupied in accordance with their mandate.³⁸ The Force’s military commander, Lt. General Prem Singh Gyani, subsequently laid down a set of principles governing the use of such force including that it should be no more than necessary in the circumstances, be preventative rather than punitive, not involve reprisals or unnecessary physical coercion, that there must be justification for each separate act, and that ‘action must not be taken in one place with the object of creating an effect in another place.’³⁹

³³ Ibid., paras 127-9, 162-4 and 136.

³⁴ Ibid., para 165.

³⁵ *Report of the Secretary General, Summary of the experiences derived from the establishment and operation of the force*, A/3943, 9 October 1958, para 139.

³⁶ Ibid., para 136.

³⁷ Ibid., paras 178-80.

³⁸ Ibid.

³⁹ *Instructions for the guidance of troops for protective duty tasks*, ref. 2131/7(OPS), UNEF Headquarters, Gaza, 1 September 1962.

Four years after UNEF's deployment, on 14 July 1960, the Security Council authorized the deployment of the UN Mission to the Congo (ONUC), after a report by Hammarskjöld, acting under Article 99 of the Charter,⁴⁰ and a request for military assistance by the Congolese government.⁴¹ The Security Council called upon Belgium to withdraw its troops from the territory and authorized the Secretary General to 'take the necessary steps to provide the Government with such military assistance as may be necessary'.⁴²

Congo had gained independence from Belgium on 30 June 1960, but a mutiny by the Congolese armed forces against their Belgian officer corps, resulted in attacks on European civilians.⁴³ The Belgian army redeployed its forces, ostensibly to protect these, but it also occupied the mineral-rich province of Katanga, which announced its secession from the Congo on 11 July.⁴⁴ The Security Council passed two more resolutions, the first of which supported Congo's 'territorial integrity and political independence',⁴⁵ the second of which

⁴⁰ UN Charter, Article 99. According to Dag Hammarskjöld this article 'more than any other was considered by the drafters to have transformed the Secretary-General of the United Nations from a purely administrative official to one with explicit political responsibility. See Wilder, Foote (ed) *The Servant of Peace: A Selection of the Speeches and Statements of Dag Hammarskjöld*, London: Bodley Head, 1962, pp.334-5.

⁴¹ UN Security Council Resolution 143 of 14 July 1960: '*Considering* the report of the Secretary-General on a request for United Nations action in relation to the Republic of the Congo, *Considering* the request for military assistance addressed to the Secretary-General by the President and the Prime Minister of the Republic of the Congo, 1. *Calls upon* the Government of Belgium to withdraw its troops from the territory of the Republic of the Congo; 2. Decides to authorize the Secretary-General to take the necessary steps, in consultation with the Government of the Republic of the Congo, to provide the Government with such military assistance as may be necessary until, through the efforts of the Congolese Government with the technical assistance of the United Nations, the national security forces may be able, in the opinion of the Government, to meet fully their tasks.

⁴² *Ibid.*

⁴³ For a more detailed discussion of the period see Michael Deibert, *The Democratic Republic of Congo, between hope and despair*, London: Zed Books, 2013, pp.9-27; Martin, Meredith, *The State of Africa, a history of fifty years of independence*, Johannesburg and Cape Town: Jonathan Ball Publishers, 2006, pp.93-115; Georges Abi-Saab, *The United Nations Operation in the Congo 1960-1964*, Oxford: Oxford University Press, 1978; and Jane Boulden, *Peace enforcement: the United Nations experience in Congo, Somalia and Bosnia*, Westport CT: Praeger Publishing, 2001.

⁴⁴ *Ibid.* For the UN's account of events see *UN Peacekeeping Operations, Past Missions, ONUC, UN Department of Peacekeeping Operations, and UN Security Council, Situation in the Congo*, http://www.un.org/en/sc/repertoire/59-63/Chapter%208/59-63_08-8-Situation%20in%20the%20Republic%20of%20Congo.pdf; accessed 6 February 2013.

⁴⁵ UN Security Council Resolution 145 of 22 July 1960.

again called on Belgium to withdraw its forces and reminded member States that they were under a legal obligation ‘to accept and carry out the decisions of the Security Council’.⁴⁶

Hammarhjold informed the Security Council that ONUC could be based on the same principles as UNEF, with similar stipulations regarding non-interference in internal affairs and the use of force.⁴⁷ The UN refused to enter Katanga forcibly, or to expel a group of Belgian officers and mercenaries leading and training a secessionist army, despite pleas from Prime Minister Patrice Lumumba.⁴⁸ When the diamond-rich province of Kasai also proclaimed its secession Lumumba turned to the Soviet Union, which provided air support for an unsuccessful assault on the province.⁴⁹ ONUC troops stationed there failed to intervene during an alleged massacre of hundreds of civilians by Congolese armed forces because their rules of engagement (RoE) did not permit them to use force except in self-defence.⁵⁰ In September 1960, President Joseph Kasa-Vubu dismissed Lumumba from office and suspended parliament.⁵¹ The UN closed all airports in the country, cutting Lumumba off from his supporters in Stanleyville (Kisangani) in the east of the country.⁵² He was subsequently seized by the army and tortured and murdered while ONUC failed to intervene or protect him.⁵³

⁴⁶ UN Security Council Resolution 146 of 9 August 1960. This cited Articles 25 and 49 of the Charter.

⁴⁷ *First report of the Secretary General on the implementation of Security Council Resolution S/4387 of 14 July 1960*, UN Doc. S/4389, 18 July 1960.

⁴⁸ For an overview of the crisis from a UN peacekeeper see Major David Bloomer, *Violence in the Congo: A Perspective Of United Nations Peacekeeping*, Congo (Brazzaville): Marine Corps Command and Staff College, Education Center, 1984.

⁴⁹ For further discussion see Thomas Mockaitis, *Peace Operations and Intrastate Conflict: The Sword or the Olive Branch?*, Westport, CT: Praeger, 1999, pp.11-47.

⁵⁰ *Ibid.* See also Gordon King, *The United Nations in the Congo*, New York: Carnegie Endowment for International Peace, 1962, p. 52.

⁵¹ For a summary see Deibert, 2013, pp.22-3.

⁵² *Ibid.*

⁵³ Meredith, 2006, pp.108-12. The UN had placed soldiers outside his house to protect him from the surrounding Congolese army, but he was seized when he fled in November in an attempt to link up with his supporters in Stanleyville. The Léopoldville government covertly handed Lumumba over to the secessionist government in Katanga, where he was viciously tortured and then shot in secret by a firing squad, commanded by Belgian officers, in January 1961. Western involvement in his death was officially denied at the time and his body was disposed of covertly.

Hammarškjold maintained that the UN should maintain its impartiality, although the country was clearly dividing along cold war lines.⁵⁴ The Security Council paralysed on the issue, due to the vetoes of its permanent members, and so the General Assembly met in September, under the Uniting for Peace procedure.⁵⁵ This reaffirmed previous Security Council resolutions and gave broad support to the Secretary General's approach to implementing the mandate.⁵⁶ In October 1960 the UN Secretariat issued a directive which provided that 'threatened areas' could be declared 'under UN protection' and 'marauders or armed bands' would be 'opposed by force'.⁵⁷ New RoE allowed for the use of force in response to attempts to make UNOC troops withdraw from positions, disarm them, or prevent them from carrying out orders.⁵⁸ Troops were authorized to 'protect civilians when they were threatened by tribal war or violence', to take 'preventive action' to deal with incitement to or preparation of civil war', and to disarm and detain those preparing to attack UN troops'.⁵⁹

Mission strength was increased to 20,000 troops during 1961, but ONUC was now coming under attack both from Katangese secessionist forces and elements in the Congolese army.⁶⁰ In his annual report to the General Assembly Hammarškjold stated that in order to ensure 'the protection of the lives of the civilian population in the spirit of the Universal Declaration of Human Rights and the Genocide Convention' it might be necessary for ONUC to undertake a 'temporary disarming of military units which . . . were an obstacle to the restoration of law

⁵⁴ Foote (ed) 1962 contains a number of reflections on this dilemma. See also Boulden, 2001, p.27. She argues that ONUC was effectively supporting the Léopoldville government and that the suspension of parliament also presented a legal and constitutional dilemma for ONUC, since it was there at the invitation of a body which no longer existed. Parliament was reconvened in July 1961 and a new government was duly created. Some African countries, however, withdrew their troops in protest at the mission's alleged bias.

⁵⁵ UN General Assembly Resolution ES-1474 of 16 September 1960.

⁵⁶ Ibid.

⁵⁷ Operations Directive No. 6 of 28 October 1960. Cited in Mockaitis, 1999, p.44.

⁵⁸ Boulden, 2001, p.32.

⁵⁹ Boulden, 2001, p.33. Hammarškjold also stated that political leaders could also be arrested if this was requested by both the central government and provincial authorities, however, peaceful demonstrations against the UN should be tolerated.

⁶⁰ The mission received a further Security Council mandate with UN Security Council Resolution 161 of 21 February 1961. This urged UNOC to take 'all appropriate measures' to prevent civil war 'including the use of force, if necessary, in the last resort' It also called for an inquiry into the circumstances of the death of Lumumba. See also Boulden, 2001, pp.32-5.

and order.⁶¹ In August and September 1961 ONUC launched two operations against Katangese secessionist forces.⁶² The second of these went badly wrong, resulting in the deaths of seven UN troops and around 200 Katangese civilians and soldiers. Hammarskjöld was killed in a plane crash while trying to bring an end to the fighting.⁶³ Separately, thirteen ONUC pilots were murdered in early November by the Congolese army.⁶⁴ Against this background the Security Council passed a second resolution authorizing full military support to the Congolese government to ‘maintain law and order and national integrity’.⁶⁵ The Katangese leaders sued for peace that December and ONUC began withdrawing its forces in 1963, although the mission was not formally ended until June 1964.⁶⁶ It had cost the lives of 249 UN peacekeeping soldiers.⁶⁷

Findlay claims that: ‘So traumatic and enervating was the Congo mission that it produced a ground-swell of opinion that the UN should never again become involved in messy internal conflicts involving peace enforcement, whether mandated explicitly by the Security Council or not.’⁶⁸ Durch has observed that many UN officials regarded the Congo as ‘the UN’s

⁶¹ *Annual Report of the Secretary General on the Work of the Organization, June 1960 – June 1961*, 16th Session, UN Doc A/4800, para 11.

⁶² For an overview of the crisis from a UN diplomat see Conor Cruise O’Brien, *To Katanga and Back, a UN case history*, London: Hutchinson, 1962.

⁶³ *New York Times*, ‘Hammarskjöld Dies In African Air Crash; Kennedy Going To U. N. In Succession Crisis’, 19 September 1961.

⁶⁴ Boulden, 2001, p.36. The group of Italian pilots were arriving in Kindu on 11 November 1961 when they were detained, beaten and shot by the army who then cut up their bodies and distributed pieces to a watching crowd.

⁶⁵ UN Security Council Resolution 169 of 24 November 1961. Para 4 authorized ONUC to detain ‘pending legal action . . . all foreign military and para-military personnel and political advisers not under United Nations command, and mercenaries’. See also Walter Dorn and David Bell, ‘Intelligence and Peacekeeping: the UN Operation in Congo 1960 - 64’, *International Peacekeeping*, Vol. 2, No. 1, Spring 1995, pp.11-33. Deibert, 2013, pp.26-7. UNOC forcibly removed road blocks and carried out air strikes against Katangese positions.

⁶⁶ Meredith, 2006, p.114; and Deibert, 2013, pp.26-7. On 21 December 1961 the leader of the Katanga secession, Moïse Tshombe, signed an agreement with the government in Léopoldville formally recognizing its authority, although minor clashes continued until early 1963. Tshombe went into exile but was persuaded to return to take up the post of Prime Minister in 1964, but was sacked from this post by Kasa-Vubu in November 1965. A rebellion also broke out in eastern Congo, Lumumba’s previous stronghold, in 1964 in which up to a million people may have died. In November 1965 General Joseph-Désiré Mobutu staged a coup and declared himself President.

⁶⁷ *UN Peacekeeping, Fatalities by Mission up to 31 March 2014*, http://www.un.org/en/peacekeeping/fatalities/documents/stats_4a.pdf, accessed 28 April 2014.

⁶⁸ Findlay, 2002, p.87.

Vietnam' and this was one of the reasons why the organization feared 'mission creep' in Bosnia-Herzegovina and other crises during the 1990s.⁶⁹ The UN Secretariat were, on the whole, however, 'more interested in forgetting than learning, more interested in avoiding future ONUCs than in doing them better'.⁷⁰ Autesserre notes that ONUC 'became *the* example of what peacekeeping missions should not do' – until it was eclipsed by more recent failures.⁷¹

The other two main missions during the 'first phase' of peacekeeping were the UN Peacekeeping Force in Cyprus (UNFICYP) deployed in 1964,⁷² and the UN Interim Force in Lebanon (UNIFIL) deployed in 1978,⁷³ both of which remain in existence to the present day. Although both of these missions were deployed to monitor ceasefires or troop withdrawals, their mandates were subsequently expanded in response to new outbreaks of violence.

UNFICYP troops were frequently shot at while trying to protect civilians in the early days of the mission⁷⁴ and an *Aide Memoire* issued by the UN Secretary General specified, in response, that 'self-defence' should include responding to attempts to forcibly prevent troops from carrying out their mandated activities.⁷⁵ This was globally endorsed in a Report by the

⁶⁹ William Durch (ed.), *The Evolution of UN Peacekeeping: Case Studies and Comparative Analysis*, New York: The Stimson Center, 1993, p. 8.

⁷⁰ *Ibid.*, p.38.

⁷¹ Séverine Autesserre, *The trouble with the Congo: local violence and the failure of international peacebuilding*, Cambridge: Cambridge University Press, 2010, p.36.

⁷² UNFICYP's original mandate was provided by UN Security Council resolution 186 of 4 March 1964, which was supplemented by resolutions 187, 192, 193 and 194 the same year. The request for the mission's deployment came from both the Cypriot government and from Britain, the former colonial power. For a summary of the background to the mission see *UN Peacekeeping Force in Cyprus (UNFICYP) Homepage*, <http://www.un.org/en/peacekeeping/missions/unficyp/>, accessed 7 May 2013.

⁷³ *UN Interim Force in Lebanon (UNIFIL)*, <http://www.un.org/en/peacekeeping/missions/unifil/>, accessed 7 May 2013.

⁷⁴ Indarjit Rikhye, *The theory and practice of peacekeeping*, London: C Hurst & Co., 1984, p.95.

⁷⁵ *Aide Memoire of the Secretary General concerning some questions relating to the function and operation of the UN Peacekeeping Force in Cyprus, 10 April 1964*, UN Doc. S/5653 of 11 April 1964. See also Siobhán Wills, *Protecting Civilians*, Oxford: Oxford University Press, 2009, p.13. Wills notes that mandated tasks included: providing escorts for civilians and supplies, and patrols to protect harvesting and guard government property, as well as procedures to ensure the functioning of the postal service and the payment of social benefits.

UN Secretary General in 1973⁷⁶ and the concept of ‘self-defence’ as including ‘defence of the mission mandate’ has been reflected in the RoEs of subsequent UN missions.⁷⁷ UNIFCYP troops actually engaged in limited combat operations with Turkish troops during their invasion of Cyprus, in 1974, to protect both themselves and threatened civilians.⁷⁸

UNIFIL was deployed at the request of the government of Lebanon following the Israeli invasion in 1978.⁷⁹ It has also frequently come under attack and the nearly 300 fatalities it has suffered are one of the highest of any UN mission.⁸⁰ Neither the government of Israel nor the Palestine Liberation Organization (PLO) gave their full consent to UNIFIL’s deployment.⁸¹ There was also considerable ambiguity about its area of operations.⁸² During Israel’s invasion of 1982 some UNIFIL battalions tried to protect civilians by physically interposing themselves in front of the Israeli forces.⁸³ These tactics were largely unsuccessful,⁸⁴ however, its positions were overrun and UNIFIL found itself operating behind

⁷⁶ *Report of the Secretary General on the implementation of Security Council Resolution 340 (1973)*, UN Doc. S/11052/Rev.1, 27 October 1973.

⁷⁷ For further discussion see Findlay, 2002, pp.87-123.

⁷⁸ For a list of the UNICYP mandates see

<http://www.un.org/en/peacekeeping/missions/unficyp/resolutions.shtml>, accessed 7 May 2013. See also *UN Interim Force in Lebanon (UNIFIL)*, <http://www.un.org/en/peacekeeping/missions/unifil/>, accessed 7 May 2013. For further discussion see Karl Birgisson, ‘United Nations Peacekeeping Forces in Cyprus’, in Durch (ed), 1993, pp. 218-236.

⁷⁹ UNIFIL was established by UN Security Council Resolutions 425 and 426 of 19 March 1978. The resolutions authorising it also called upon Israel immediately to cease its military action and withdraw its forces from all Lebanese territory. The mission was tasked with: confirming Israeli withdrawal from southern Lebanon; restoring international peace and security; and assisting the Lebanese Government in restoring its effective authority in the area. The concept of UNIFIL operations were adjusted following the 1982 Israeli-Lebanese war and its functions were limited primarily to humanitarian assistance; and then again after the Israeli withdrawal in 2000, when it resumed its military functions. A third adjustment occurred following the 2006 Israeli-Hizbullah war.

⁸⁰ For a summary to the background of the mission See *UNIFIL, Homepage, UNIFIL Background*, <http://unifil.unmissions.org/Default.aspx?tabid=11554&language=en-US> accessed 8 May 2013. For its mandate see <http://www.un.org/en/peacekeeping/missions/unifil/mandate.shtml>, accessed 7 May 2013. See also <http://www.un.org/en/peacekeeping/missions/unifil/facts.shtml>, accessed 8 May 2013.

⁸¹ *Report of the Secretary-general on the Implementation of Security Council Resolution 425*, UN Doc. S/12611, 19 March 1978. See also Wills, 2009, p.15. She notes that the PLO argued that it should only be deployed to the area previously occupied by Israel while Israel argued that it should ensure the demilitarisation of the whole of southern Lebanon.

⁸² *Ibid.*

⁸³ For official and personal accounts of these efforts see: E A Erskine *Mission with UNIFIL: an African soldier’s reflections*, New York: St Martin’s Press, 1989, p.108; and United Nations, *The Blue Helmets: a review of United Nations peacekeeping, Third Edition*, New York: UN department of Public Information, 1996, p.116.

⁸⁴ For critical appraisals see Eugene Yukin ‘UNIFIL’s Mandate and Rules of Engagement’, *Middle East Policy and Society*, Volume 1, 2009, American University of Beirut; and Wills 2009, p.17. Yukin

Israeli lines for three years.⁸⁵ A non-UN multi-national force, led by the US, organized the evacuation of around 7,500 Palestinians, including PLO fighters, from Beirut in August 1982, but little was done to protect the civilians left behind who were massacred by an Israeli-backed militia at Sabra and Shatila refugee camps the following month.⁸⁶ In 2006 UNIFIL was again expanded in strength to 15,000 military personnel in 2006 and a new mandate expanded its tasks.⁸⁷ This includes the ‘protection of civilians’, although the mission mandate is not issued under Chapter VII of the Charter.⁸⁸

The ‘core principles’ of UN peacekeeping and their evolution

The debt incurred from the UN’s first two peacekeeping operations nearly bankrupted the Organization and it was the refusal of France and the Soviet Union to pay these costs that led to the *Certain expenses* Advisory Opinion by the ICJ.⁸⁹ The financial crisis also led to the UN establishment of a Special Committee for Peacekeeping Operations (C34) to undertake a comprehensive review of these missions and tasks.⁹⁰ The annual reports of the C34 have

notes that: ‘A few attempts were made by Nepalese troops to blockade Israeli soldiers from crossing certain roads. Other units attempted to stop the advancing Israeli tanks. Apart from several attempts here and there, Israel’s 1982 invasion completely overran UN troops, demonstrating the futility of its mandate.’ Wills, 2009, cites a variety of damning assessments of the mission, which describe it as ‘dismal’, ‘so futile as to make its mandate appear absurd’, unlikely to be a model anyone would like to emulate’ and ‘an attestation to the weakness and impotence of UN forces when these have been confronted with large-scale, offensive military actions’.

⁸⁵ See *UNIFIL Background*, <http://www.un.org/en/peacekeeping/missions/unifil/background.shtml>, accessed 9 May 2013. This cites its total fatalities as 297.

⁸⁶ For further details see Robert Fisk, *Pity the Nation: Lebanon at War*, Oxford: Oxford University Press 2001 pp.382-3; Helena Cobban, *The Palestinian Liberation Organisation: people, power, and politics*. Cambridge: Cambridge University Press, 1984. p. 4; and Linda A. Malone, ‘The Kahan Report, Ariel Sharon and the Sabra Shatila Massacres in Lebanon: Responsibility Under International Law for Massacres of Civilian Populations’, *William & Mary Law School Scholarship Repository, Faculty Publications*, Paper 587, 1985. The massacre killed between 750 and 3,500 civilians and was carried out virtually within sight of the Israeli armed forces who received reports that it was occurring, but did not to stop it.

⁸⁷ *UNIFIL, Homepage, UNIFIL Background*, <http://unifil.unmissions.org/Default.aspx?tabid=11554&language=en-US> accessed 8 May 2013. Between 1982 and 2000 UNIFIL’s functions were limited to the delivery of humanitarian assistance, but it resumed its monitoring functions in 2000, following Israel’s withdrawal.

⁸⁸ Resolution 1701 of 11 August 2006 para 12.

⁸⁹ See *Certain expenses of the United Nations (Article 17, paragraph 2, of the Charter)*, *Advisory Opinion of 20 July 1962*, ICJ Report, 1962.

⁹⁰ The Committee was established by General Assembly resolution 2006 (XIX) of 18 February 1965. It reports to the General Assembly on its work through the Fourth Committee (Special Political and

repeatedly reaffirmed that peacekeeping is based on three fundamental principles: consent of the parties, impartiality and non-use of force except in self-defence.⁹¹

Gray argues that the ‘former operation [UNEF] led to agreement on the basic principles underlying what later became known as peacekeeping operations; the latter [ONUC] revealed the difficulties that arise when these principles are compromised.’⁹² Critics maintain that it was attachment to these core principles that led to repeated failures to prevent mass human rights violations in the 1990s because ‘peacekeepers observed rather than enforced.’⁹³ Wills argues that the principles are based on ‘highly idealized’ assumptions that the UN’s authority will be respected due to the mere presence of its emissaries.⁹⁴

From the brief survey above, however, it is clear that those involved in the ‘first phase’ of peacekeeping took a far more pragmatic approach. Although consent of the host State was a prerequisite for initial deployments, the explicit consent to and acceptance of the presence of a peacekeeping mission by all the parties to the conflict was rarely achieved and resolutions mandating them often singled out one particular party for demands and criticisms.⁹⁵ The use

Decolonization) and is comprised of 147 Member States, mostly past or current contributors to peacekeeping operations. 14 other Member States, intergovernmental organizations and entities, including the African Union, the European Community, the Organization of Islamic Cooperation, the International Committee of the Red Cross (ICRC) and the International Criminal Police Organization (Interpol), participate as observers.

⁹¹ The annual Reports of the Special Committee for Peacekeeping Operations, from 1999 to 2012 can be found through the UN peacekeeping home page at http://www.un.org/en/peacekeeping/ctte/spcmt_rep.htm, accessed 8 May 2013.

⁹² Christine Gray, *Use of Force in International Law, Third Edition*, Oxford: Oxford, University Press, 2008, p.262.

⁹³ Adam LeBor, *Complicity with Evil, the United Nations in the age of modern genocide*, New Haven: Yale University Press, 2006, p.14. See also Dominic Donald Neutrality, impartiality and UN peacekeeping at the beginning of the 21st Century, *International Peacekeeping*, Vol. 9, Issue No. 4, 2002, p.21; and Tsagourias ‘Consent, Neutrality/ Impartiality and the Use of Force in Peacekeeping: Their Constitutional Dimension’, *Journal of Conflict and Security Law*, Vol. 11, No. 3, 25 January 2007, p.465. This view also underpins many of the ‘standard’ works on peacekeeping. See, for example: Bellamy and Williams, 2011, Thakur, 2011; Thakur, 2006; and Sara E. Davies, Luke Glanville (eds.) *Protecting the Displaced: Deepening the Responsibility to Protect*, The Hague/ London/ Boston: Martinus Nijhoff, 2010.

⁹⁴ Wills, 2009, p.5. This ‘idealized view’ is also expressed by many contemporary commentators writing during the ‘first phase’ of peacekeeping, which reinforces this impression. See, for example, Rikhye, 1984; Bowett, 964; Foote (ed) 1962.

⁹⁵ Findlay, 2002, p.17. He notes that: ‘While both Egypt and Israel accepted the need for the deployment of UNEF I and II, it was hardly entirely voluntary: both had to be persuaded to accept it.

of force beyond a strict interpretation of self-defence was also implicitly authorized for all missions and, from at least 1973, this has been explicitly understood as an authorization to use force ‘in defence of the mission mandate.’⁹⁶

One reason for the gap between the UN’s own theory and practice in the ‘first phase’ of peacekeeping can be traced by to the ICJ’s Advisory Opinion on *Certain expenses*.⁹⁷ The ICJ ruled that the General Assembly had been given powers to take ‘measures’ to help preserve international peace and security, which could include the establishment of peacekeeping missions, but only so long as these did not intrude on the Chapter VII ‘enforcement’ powers reserved for the Security Council.⁹⁸ The lack of an explicit reference to peacekeeping in the Charter meant that even the Security Council had to rely on a broad interpretation of its ‘general powers’, particularly when resorting to Chapter VII.⁹⁹

Official statements about the ‘core principles’ of peacekeeping contained in UN reports and by senior UN officials should be seen in the context of the political paralysis of the Security Council and the controversies surrounding the deployment of the missions that did take place. In some cases this seems to have led to deliberate ambiguity or obfuscation, such as when the Brazilian representative on the UNEF consultative committee referred to ‘Chapter VI and-a-

The Congo mission was deployed without the consent of the Katangans and only reluctantly agreed to by Belgium, while the Congolese Government gave its consent only under the impression that it was to be a peace enforcement operation. The deployment of the UN Force in Lebanon (UNIFIL) was sought by Lebanon but shunned by Israel. Egypt had the right to ask UNEF I to leave—a right that it invoked in 1967.

⁹⁶ Simon Chesterman, *The use of force in UN peace operations*, External study for the Department of Peacekeeping Best Practices Unit, New York: DPKO, 2003, p.7.

⁹⁷ *Certain expenses of the United Nations (Article 17, paragraph 2, of the Charter)*, Advisory Opinion of 20 July 1962, ICJ Report 1962.

⁹⁸ ICJ Report 1962, p.177.

⁹⁹ Alexander Orakhelashvili, ‘The Legal basis of the United Nations Peacekeeping Operations’, *Virginia Journal of International Law*, Vol. 43, Winter 2003, pp.486-523. See also: Hilaire McCoubrey, and Nigel White, *The Blue Helmets: Legal Regulation of United Nations Military Operations*, Dartmouth: Dartmouth Pub Co, 1996; Christopher Joyner (ed), *The United Nations and International Law*, Cambridge: Cambridge University Press, 1997; Bruno Simma, *The Charter of the United Nations A Commentary Second Edition*, Oxford: Oxford University Press, 2002; Rosalind Higgins, *United Nations Peacekeeping 1946-1967: Documents and Commentary, Vol. III: Africa*, Oxford: Oxford University Press, 1980.

half’ operations.¹⁰⁰ As Orford notes, ‘when the UN was requested to intervene in Egypt and the Congo, both the requesting governments and the Secretary-General believed that the UN could operate as a neutral force to protect the interests of newly independent states and prevent the expansion of Cold War conflicts.’¹⁰¹ The ‘first phase’ of peacekeeping took place against a backdrop of the decline of the European Empires, and the rise of a new superpower rivalry, and this determined its historical specificity.¹⁰²

The challenges of the 1990s

UN peacekeeping forces were awarded the Nobel peace prize in 1988¹⁰³ and most accounts of the ‘first phase’ of peacekeeping operations consider them – Congo aside – to have generally been a success.¹⁰⁴ The main criticism of the UN was not when it acted, but when it failed to act, which was mainly a result of the polarised atmosphere in the Security Council during the cold war. In *Agenda for Peace*, published in 1992, Boutros Boutros-Ghali, the newly-appointed Secretary General, commented that:

Since the creation of the United Nations in 1945, over 100 major conflicts around the world have left some 20 million dead. The United Nations was rendered powerless to deal with many of these crises because of the vetoes – 279 of them – cast in the

¹⁰⁰ Kai Michael Kenkel (ed), *South America and Peace Operations: Coming of Age*, London: Routledge, 2013, p.98, citing M. Fröhlich, ‘Keeping Track of UN Peace-keeping: Suez, Srebrenica, Rwanda and the Brahimi Report’ in J. A. Frowein and R. Wolfrum, eds., *Max Planck Yearbook of United Nations Law* 5, New York: Kluwer Law International, 2001, footnote 82, p. 206. The original citation is attributed to the Brazilian representative in UN Archive documents UNA-DAG-1, 5.0.1.0., Box 1. The phrase is often wrongly attributed to Dag Hammarskjöld.

¹⁰¹ Anne Orford, *International Authority and the Responsibility to Protect*, Cambridge University Press, 2011, p.3.

¹⁰² Ibid.

¹⁰³ The Nobel Peace Prize 1988. Nobelprize.org.

http://www.nobelprize.org/nobel_prizes/peace/laureates/1988/ accessed 6 May 2013.

¹⁰⁴ Indarjit Rikhye; Michael Harbottle; and Bjorn Egge, *The Thin Blue Line: International Peacekeeping and Its Future*, New Haven Connecticut: Yale University Press, 1974; Rikhye, 1984; Ramesh Thakur, *International Peacekeeping in Lebanon: United Nations Authority and Multinational Force*, Boulder: Westview Press, 1987; Maurice Goulding, ‘The evolution of United Nations peacekeeping,’ *International Affairs* (Royal Institute of International Affairs 1944-) Vol. 69, No. 3, July 1993, pp. 451-464.

Security Council, which were a vivid expression of the divisions of that period. With the end of the cold war there have been no such vetoes since 31 May 1990, and demands on the United Nations have surged.¹⁰⁵

Boutros-Ghali claimed that: ‘Peace-keeping can rightly be called the invention of the United Nations.’¹⁰⁶ It was defined in the report as ‘the deployment of a United Nations presence in the field, *hitherto* with the consent of the all the parties concerned’.¹⁰⁷ [emphasis added] *Agenda for Peace* also noted that the recently adopted UN General Assembly on humanitarian assistance,¹⁰⁸ stressed ‘the need for access to those requiring humanitarian assistance’ and claimed that ‘a Government’s request for United Nations involvement, *or consent to it*, would not be an infringement of that State’s sovereignty or be contrary to Article 2, paragraph 7, of the Charter’.¹⁰⁹ [emphasis added] In a perversely prophetic passage, the report also stated that:

the basic conditions for success remain unchanged: a clear and practicable mandate; the cooperation of the parties in implementing that mandate; the continuing support of the Security Council; the readiness of Member States to contribute the military, police and civilian personnel, including specialists, required; effective United Nations command at Headquarters and in the field; and adequate financial and logistic support.¹¹⁰

¹⁰⁵ Boutros Boutros-Ghali, *Report of the Secretary-General An Agenda for Peace: Preventive Diplomacy, Peacemaking and Peacekeeping* UN Doc. A/47/277 - S/24111, 17 June 1992 [Hereinafter *Agenda for Peace* 1992]

¹⁰⁶ *Agenda for Peace*, 1992, para 46.

¹⁰⁷ *Ibid.*, para 20.

¹⁰⁸ *Ibid.*, para 30 and UN General Assembly Resolution 46/182, of 19 December 1991, para 1.3.

¹⁰⁹ *Ibid.* See also Additional Protocol I, Article 54, Additional Protocol II, Article 14. Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law*, Cambridge: Cambridge University Press, 2005, I, p.1479. This will be discussed further in Chapters Three and Four.

¹¹⁰ *Agenda for Peace* 1992, para 50.

In December 1991 the General Assembly adopted a resolution on ‘strengthening of the coordination of humanitarian emergency assistance of the United Nations’.¹¹¹ This established the Inter-Agency Standing Committee (IASC)¹¹² and also contained a set of principles relating to the distribution of humanitarian assistance.¹¹³ It 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.’¹¹⁴ It ‘stressed’ that humanitarian assistance should be provided ‘in accordance with the principles of humanity, neutrality and impartiality’.¹¹⁵ However, it also 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.¹¹⁶

This resolution was passed despite concerns expressed that the guidelines could be used to legitimize infringements on State sovereignty.¹¹⁷ Subsequent resolutions by both the General Assembly and Security Council have further codified the principles and set out a framework for humanitarian assistance.¹¹⁸ In early 1992 three new UN Departments: DPKO, the

¹¹¹ General Assembly Resolution 46/182, UN Doc. A/RES/46/182, 19 December 1991.

¹¹² *Ibid.*, para 38. The IASC includes UN agencies such as UNHCR, UN Development Programme (UNDP), WFP and UNICEF along with the World Health Organisation (WHO), Food and Agricultural Organisation (FAO), the International Organisation for Migration (IOM) the International Committee for the Red Cross (ICRC) and representatives of three INGO consortia: InterAction, International Council for Voluntary Agencies, and the Steering Committee for Humanitarian Response.

¹¹³ *Ibid.*, paras 1-12 .

¹¹⁴ *Ibid.*, para 3.

¹¹⁵ *Ibid.*, para 2.

¹¹⁶ *Ibid.*, paras 5 and 6.

¹¹⁷ Francis Kofi Abiew, *The Evolution of the Doctrine and Practice of Humanitarian Intervention*, The Hague: Kluwer Law International, 1999, p.141.

¹¹⁸ For a summary of these to 2009 see UN Office for the Coordination of Humanitarian Affairs (OCHA), *Compilation of United Nations resolutions on humanitarian assistance: Selected resolutions*

Department of Political Affairs (DPA) and the Department of Humanitarian Affairs (later to become the UN Office for the Coordination of Humanitarian Affairs - OCHA) were created in a major internal restructuring.¹¹⁹ UN agencies such as the UNHCR, the World Food Programme (WFP) and the UN Children's Fund (UNICEF) also significantly expanded their field presence from the start of the 1990s.¹²⁰ This means that UN agencies are increasingly providing direct humanitarian protection, relief and assistance to people in 'complex emergencies'.¹²¹

Some UN agencies, such as UNHCR, also acknowledge the potential operational role of NGOs in their Statute,¹²² and most implement projects in partnership with them through bilateral agreements. NGOs gained a direct input into the development of the UN's humanitarian policies and the co-ordination of operational activities through the IASC, whose mandated functions include 'advocacy of humanitarian issues with political organs, notably the Security Council'.¹²³ The UN Charter provides that its Economic and Social Council (ECOSOC) 'may make suitable arrangements for consultation with non-governmental organizations, which are concerned with matters within its competence.'¹²⁴ This has been implemented by successive ECOSOC resolutions that give NGOs various categories of

of the General Assembly, Economic and Social Council and Security Council Resolutions and Decisions, OCHA, 2009.

¹¹⁹ *Review of the efficiency of the administrative and financial functioning of the United Nations: Restructuring of the Secretariat of the Organization: Report of the Secretary General*, UN Doc. A/48/882, of 29 September 1992.

¹²⁰ For discussion see Andrew Natsios 'NGOs and the UN system in complex humanitarian emergencies: conflict or cooperation', in Thomas Weiss and Leon Gordenker (eds) *NGOs, the UN & Global Governance*, Boulder: Lynne Rienner Publishers, 1996.

¹²¹ *Ibid.*, p.67. Complex humanitarian emergencies are generally defined by: the deterioration or collapse of central government authority; conflict and widespread human rights abuses; food insecurity; macroeconomic collapse; and mass forced displacement of people.

¹²² Article 1 requires the High Commissioner to seek 'permanent solutions for the problem of refugees by assisting Governments and, subject to the approval of the Governments concerned, private organizations'. In accordance with Article 10, the High Commissioner 'shall administer any funds, public or private, which he/she receives for assistance to refugees, and shall distribute them among the private and, as appropriate, public agencies which he/she deems best qualified to administer such assistance.' For further discussion see Alexander Betts, Gil Loescher and James Milner, *UNHCR: the politics and practice of refugee protection, second edition*, Oxon and New York: Routledge, 2012 pp. 85-6; and Weiss and Gordenker, 1996, p.67.

¹²³ For details see *OCHA Homepage, 'What we do, advocacy'*, <http://www.unocha.org/about-us/who-we-are>, visited 6 March 2015.

¹²⁴ UN Charter, Article 71.

participatory status within the UN system.¹²⁵ As will be discussed further below, the influence of these agencies became particularly significant by the end of the 1990s due to their dual role as both implementers and advocates during humanitarian crises.¹²⁶

Agenda for Peace contained an ambitious set of proposals for how the UN should respond to the new environment¹²⁷ and its publication can be seen as marking the transition to the ‘second phase’ of peacekeeping operations. This saw a vast increase in the number of UN peacekeeping operations, along with increasing criticisms of the missions for their failure to protect civilians within the areas of their deployment.¹²⁸

Between 1988 and 1994 the UN mounted almost twice as many peace-keeping or ‘peace enforcement’¹²⁹ operations as it had done over the previous 40 years.¹³⁰ The upward trend

¹²⁵ UN Economic and Social Council Resolution 31, UN ESCOR, 49th Sess., Supp. No. 1, at 54, U.N. Doc. E/1996/96 (1996). This updates Economic and Social Council Resolution 1296 (XLIV) (1968) and Economic and Social Council Resolution 288 (X) of Feb. 27, 1950. For discussion see Karsten Nowrot, ‘Symposium The rule of law in the era of globalization: Legal Consequences of Globalization: The Status of Non-Governmental Organizations Under International Law’ *Indiana Journal of Global Legal Studies*, 6 Ind. J. Global Leg. Stud. 579, Spring 1999.

¹²⁶ For an overall discussion see Elizabeth G. Ferris, *The Politics of Protection: The Limits of Humanitarian Action*, Washington DC: Brookings Institution Press, 2011; Michael Barnett and Thomas G Weiss, *Humanitarianism in Question: politics, power, ethics*, Ithaca NY: Cornell University Press, 2008; Ian Smillie and Larry Minear, *The Charity of Nations: humanitarian action in a calculating world*, Bloomfield: Kumarian Press, 2004; and Niklaus Steiner, Mark Gibney and Gil Loescher (eds), *Problems of Protection: the UNHCR, refugees and human rights*, New York/London: Routledge, 2003. See also Antonio Donini, ‘The bureaucracy and the free spirits: stagnation and innovation in the relationship between the UN and NGOs’, in Weiss and Gordenker (eds), 1996, p.85; and Steve Charnovitz, ‘Two centuries of participation: NGOs and international governance’, *Michigan Journal of International Law*, Vol. 18, 1997, p.183-286.

¹²⁷ *Ibid.*, paras 38, 43 and 44. This included the re-establishment of the UNs Military-Staff Committee, the creation of ‘peace enforcement’ units and more States agreeing to accept the compulsory jurisdiction of the ICJ.

¹²⁸ Christine Gray, ‘Peacekeeping After the *Brahimi Report*: Is There a Crisis of Credibility for the UN?’, *Journal of Conflict and Security Law*, Oxford Journals, Vol. 6, Issue 2, 2001, pp. 267-288.

¹²⁹ *UN Peacekeeping Homepage*, ‘Peace Enforcement’, <http://www.un.org/en/peacekeeping/operations/peace.shtml>, accessed 12 March 2015. ‘Peace enforcement involves the application of a range of coercive measures, including the use of military force. It requires the explicit authorization of the Security Council. It is used to restore international peace and security in situations where the Security Council has decided to act in the face of a threat to the peace, breach of the peace or act of aggression. The Council may utilize, where appropriate, regional organizations and agencies for enforcement action under its authority and in accordance with the UN Charter.’

¹³⁰ Hugo Slim, ‘Military Humanitarianism and the New Peacekeeping: An Agenda for Peace?’, *The Journal of Humanitarian Assistance*, 22 September 1995. Slim notes that: ‘In 1992 there were a mere 12,000 military and police personnel operating as UN peacekeepers around the world. By the end of 1994 there were some 79,948 military and police personnel operating under UN auspices . . . Equally

has continued since, albeit at a reduced rate.¹³¹ The experiences of the missions themselves have been well-documented elsewhere, and the purpose of this section is to show how the UN coped with the challenges that these posed to the international legal framework governing their actions.¹³²

The first major operation in this ‘new phase’ was the ultimately disastrous UN mission to Angola, which was originally established in 1988.¹³³ This was followed by the UN Transition Group (UNTAG) deployed to Namibia in 1989 to supervise free and fair elections

striking is the fact that in the 40 years of the Cold War between 1948 and 1988, only 13 UN peacekeeping operations were launched. But in the six years between 1988-1994 there have been a total of 21 UN peacekeeping operations’.

¹³¹ Gray, 2008, pp.262 and 272. She states that there were 13 UN peacekeeping operations between 1948 and 1988, over 30 between 1988 and 1998 and 17 more between 1998 and 2008. See also Ronald Hatt, ‘From peacekeeping to peacebuilding: the evolution of the role of the United Nations in peace operations’, *International Review of the Red Cross*, Vol. 95 No. 891/892 Autumn/Winter 2013, p.496. Hatt notes that ‘Between 1988 and December 2012, the United Nations (UN) set up fifty-four operations to restore or maintain peace. If account is taken of the fact that in the first forty years of its existence it set up only fifteen such operations’. As discussed above, different writers count what constitutes a UN peacekeeping mission slightly differently, but the broad trend of the figures is clear.

¹³² For criticisms from a humanitarian perspective, see, for example, Alex De Waal, *Famine Crimes: Politics and the Disaster Relief Industry in Africa*, London: James Currey, 1997; David Rieff, *A bed for the night: humanitarianism in crisis*, London: Vintage, 2002; Fiona Terry, *Condemned to repeat? The paradox of humanitarian action*, Ithaca: Cornell University Press, 2002; Michael Barnett and Thomas G. Weiss (eds), *Humanitarianism in Question: Politics, Power, Ethics*, London: Cornell University Press, 2008; Michael Barnett, *Empire of Humanity: A History of Humanitarianism*, Ithaca, NY and London: Cornell University Press, 2011; William Shawcross, *Deliver Us from Evil: Peacekeepers, Warlords and a World of Endless Conflict*, London, Bloomsbury, 2001; Mark Duffield, *Development, Security and Unending War: Governing the World of Peoples*, Cambridge: Polity Press, 2007; Antonio Donini (ed), *The golden fleece, manipulation and independence in humanitarian action*, Sterling, Virginia: Stylus Publishing/Kumarian Press, 2012; Larry Minear, *The Humanitarian Enterprise, dilemmas and discoveries*, Bloomfield: Kumarian Press Inc., 2002; and Michael Barnett and Thomas Weiss, *Humanitarianism Contested: Where Angels Fear to Tread*, Oxford and New York: Routledge, 2011.

¹³³ For more discussion see: Tony Hodges, *Angola: From Afro-Stalinism to Petro-diamond Capitalism*, Bloomington, IN: James Curry & Indiana University Press, 2001; Michael Comerford, *The Peaceful face of Angola, Biography of a peace process*, Luanda: self-published, 2005; Paul Robson, (ed), *What To Do When the Fighting Stops, Challenges for Post-conflict Reconstruction in Angola*, Development Workshop Occasional Paper No. 7, 2006; Inge Amundsen and Cesaltina Abreu, *Civil Society in Angola: Inroads, Space and Accountability*, CHR Michelson, Institute, 2006. UNAVEM I was created in 1988 to monitor the withdrawal of Cuban troops from the country. It was replaced with UNAVEM II which was tasked with monitoring a cease-fire and supervising elections between 1991 and 1995. This was in turn replaced by UNAVEM III which lasted from 1995 to 1997. UNAVEM II failed to disarm the fighters and the civil war started again September 1992 after UNITA refused to accept the results of elections that month. Up to 300,000 people may have died in the fighting that followed – significantly more than in the wars in former Yugoslavia – until a new ceasefire was agreed in 1995. UNAVEM III also failed to disarm UNITA and the fighting resumed in 1998, after the mission ended, until the final death of Jonas Savimbi, UNITA’s leader, in February 2002. A senior UN official told this author, during an interview conducted in Luanda in March 2007, that ‘when they write the text books about UN peacekeeping they use UNAVEM as the example of how not to do it’.

and the transition to independence.¹³⁴ The UN Transitional Authority in Cambodia (UNTAC), established in 1992, was a similar operation, but also tasked with monitoring a ceasefire.¹³⁵ None of the three were deployed with Chapter VII authorization, although UNTAC's RoE provided for the use of force to prevent attacks on civilians as well as to carry out arrests of those suspected of human rights violations.¹³⁶ UNTAC created an office of the Special Prosecutor to try certain crimes, but the mission had no jail, requiring the establishment of the first UN 'detention facility', while flaws in the Cambodian criminal justice system meant it was unable to hand detainees over to the local courts.¹³⁷ For the most part, however, detention powers were rarely used and UNTAC and UNTAG confined themselves to less controversial tasks such as the distribution of aid, disarmament projects and human rights monitoring and training.¹³⁸ Two far more controversial operations – Operation Provide Comfort and Operation Restore Hope – were respectively launched in April 1991 and December 1992.

Operation Provide Comfort was established to protect the Kurds in northern Iraq following their failed uprising at the end of the first Gulf war.¹³⁹ Over two million Kurds had fled their homes fearing revenge attacks by the Iraqi military¹⁴⁰ and almost half a million people were

¹³⁴ UN Security Council Resolution 632 of 16 February 1989.

¹³⁵ UN Security Council Resolution 745 of 28 February 1992.

¹³⁶ United Nations, *The Blue Helmets: a review of United Nations peacekeeping, Third Edition*, New York: UN Department of Public Information, 1996, p.467. See also Michael W. Doyle, *UN Peacekeeping in Cambodia: UNTAC's Civil Mandate*, Boulder, CO: Lynne Rienner, 1995, p.47. Doyle notes that UNTAC's civilian police were not armed, and the mission's interpretation of its mandate was that it had no authority to exercise force for such a purpose.

¹³⁷ Michael W. Doyle, *UN Peacekeeping in Cambodia: UNTAC's Civil Mandate*, Boulder, CO: Lynne Rienner, 1995, p.47. The Cambodian Prime Minister, Hun Sen, was not prepared to prosecute his own supporters and could not guarantee the fair treatment of those from the other factions so the first two prisoners of the UN were held without *habeas corpus* and without trial.

¹³⁸ Chesterman, 2003, p.14.

¹³⁹ For further discussion see: Helena Cook, *The Safe Haven in Northern Iraq*, Essex Human Rights Centre and Kurdish Human Rights Project, 1995; and David McDowall, *The Kurds: A nation denied*, London: Minority Rights Group, 1992.

¹⁴⁰ Ibid. See also Marjoleine Zieck, *UNHCR and Voluntary Repatriation of Refugees: A Legal Analysis*, The Hague: Martinus Nijhoff Publishers, 1997, p.180. The genocidal chemical weapons attack at Halabji had taken place less than three years previously.

soon trapped on the border with Turkey, which refused to admit them.¹⁴¹ The operation was principally undertaken by troops from the US, Britain, France and the Netherlands in April 1991.¹⁴² Around 30 other countries contributed relief supplies and some 50 humanitarian agencies participated in this operation.¹⁴³ The military-humanitarian cooperation in the operation proved precedent-setting.¹⁴⁴ In his final report to the UN General Assembly, in September 1991, UN Secretary General, Perez de Cuellar, argued that such operations were reconfiguring the debate about international interventions to protect human rights.¹⁴⁵

It is now increasingly felt that the principle of non-interference within the essential domestic jurisdiction of States cannot be regarded as a protective barrier behind

¹⁴¹ Cook, 1995 p. 39-44; and Zieck, 1997, pp189-93. See also Lawrence Freedman and David Boren, 'Safe havens for Kurds in post-war Iraq', in Nigel, Rodley (ed) *To loose the bands of wickedness, international intervention in defence of human rights*, London: Brassey's 1992, p.48; Marc Weller, 'The US, Iraq and the use of force in a uni-polar world', *Survival*, Vol. 41, No. 4, 1999, p.81-100; and Karin Landgren, 'Safety zones and international protection: a dark grey area', *International Journal of Refugee Law*, Vol. 7, No. 3, Oxford University Press, 1995, pp.437-458. Although it proved impossible to seal the border entirely, Turkey would not permit the refugees to be processed or granted asylum. It obstructed the work of UNHCR, beat up and shot at refugees trying to cross and entered into Iraq to prevent them reaching the border. Turkey had ratified the 1951 Convention Relating to the Status of Refugees, but not the 1967 Protocol which extends the scope of the Convention beyond Europe and so the Iraqi Kurds were arguably not protected by this provision. Since the principle of *non-refoulement* may have *jus cogens* status, there is a strong argument that Turkey was acting in violation of its obligations under international law, but the establishment of the safe havens inside Northern Iraq diverted attention from this debate.

¹⁴² Zieck, 1997, pp.203-4. She estimates that by 10 May Allied troops were occupying 1,500 square miles including the northern cities of Batufa, Sirsenk, Al-Amadiyah, Deralock and Suriya. The Iraqi military withdrew from these areas without offering military resistance and had not returned three years later, when the author of this thesis visited in May 1994. UN officials, aid workers and the Kurds interviewed at the time all stated that it was the threat of US airpower, rather than the actual use of physical force that kept the Iraqi army out of the safe haven. The Turkish military, by contrast, made frequent military incursions into the area and dropped bombs near to a refugee camp outside Zhako during the author's visit.

¹⁴³ Fernando Teson, 'Collective Humanitarian Intervention' *Michigan Journal of International Law*, (17: 2), 1996, p.346-365.

¹⁴⁴ Thomas Weiss, and Cindy Collins, *Humanitarian challenges and intervention, Second Edition*, Boulder: Westview Press, 2000, p.79. They note that humanitarians attended regular military briefings and had access to military telecommunications and transportation, while heavily armed troops rode with the trucks on which displaced people were returning. The humanitarians 'perceived the international military as an ally in their efforts to assist a persecuted minority group'. See also Judith Randel 'Aid the military and humanitarian assistance: an attempt to identify recent trends' *Journal of International Development*, 6 (3), 1994, p.336; Jane Barry with Anna Jefferys, 'A bridge too far: aid agencies and the military in humanitarian response', *Humanitarian Practice Network*, Overseas Development Institute, January 2002; Abby Stoddard, Adele Harmer and Victoria Di Domenico, 'The use of private security providers and services in humanitarian operations', *Humanitarian Policy Group*, Overseas Development Institute, October 2008.

¹⁴⁵ *Report of the Secretary-General on the Work of the Organization*, UN General Assembly, 46th Sess., Supp. No. 1, UN Doc. A/46/1, 1991, p.5.

which human rights could be massively or systematically violated with impunity . . . We need not impale ourselves on the horn of a dilemma between respect for sovereignty and the protection of human rights . . . What is involved is not the right of intervention but the collective obligation of states to bring relief and redress in human rights emergencies.¹⁴⁶

The legal justification invoked for the military action was Security Council Resolution 688 of 5 April 1991, which was adopted by 10 votes to three over objections that it constituted interference in Iraq's domestic affairs.¹⁴⁷ The resolution was not adopted under Chapter VII but it did use similar language, describing the Iraqi government's actions, inside its own borders, as a threat to international peace and security.¹⁴⁸ A subsequent Memorandum of Understanding was signed between the UN and Iraq which 'welcomed humanitarian measures to avert new flows of refugees and displaced persons from Iraq.'¹⁴⁹ Lightly armed UN Guards replaced the coalition forces in July 1991 while allied aircraft remained stationed across the border in Turkey to enforce a no-fly zone and deter Iraq's armed forces from returning.¹⁵⁰

¹⁴⁶ Ibid.

¹⁴⁷ Security Council Resolution 688 of 5 April 1991. Cuba, Yemen and Zimbabwe voted against while China and India abstained.

¹⁴⁸ Ibid. 'The Security Council . . . (1) Condemns the repression of the Iraqi civilian population in many parts of Iraq, including most recently in Kurdish populated areas, the consequences of which threaten international peace and security in the region; (2) Demands that Iraq, as a contribution to remove the threat to international peace and security in the region, immediately end this repression and express the hope in the same context that an open dialogue will take place to ensure that the human and political rights of all Iraqi citizens are respected; (3) Insists that Iraq allow immediate access by international humanitarian organizations to all those in need of assistance in all parts of Iraq and to make available all necessary facilities for their operations'.

¹⁴⁹ Quoted in Guy Goodwin Gill, *The Refugee in International Law*, Second Edition, Clarendon, 1998, p. 286.

¹⁵⁰ Cook, 1995, pp.39-44. For a US military logistics account of this Operation see William J. Allen Crisis in Southern Iraq: Operation SOUTHERN WATCH, in Timothy Warnock (ed) *Short of War Major USAF Contingency Operations 1947-1997*, Air Force History and Museums Program in association with Air University Press, 2000, pp.189-96. The northern no-fly zone covered roughly half of the Kurdish autonomous area, north of Iraq's 36th parallel. This was followed by a smaller-scale no-fly zone, 'Operation Southern Watch' in Southern Iraq where the Shi'ite population was similarly threatened.

The no-fly zones were maintained until the invasion of Iraq in 2003.¹⁵¹ In 1993 the US, Britain and France launched air and missile attacks on facilities connected with Iraq's nuclear weapons programme.¹⁵² This was followed in 1998 by another massive series of air strikes in Operation Desert Fox, although the French had withdrawn from these operations in 1996 and subsequently questioned their legality.¹⁵³ Wills states that more cruise missiles were fired during the four day operation in 1998 than had been used during the whole of the first Gulf war and in 1999 alone the US and Britain used almost 2,000 bombs and cruise missiles against Iraq.¹⁵⁴

Russia and China repeatedly argued that there was no legal justification either for the no-fly zones or continued military strikes against Iraq as the 1990s wore on.¹⁵⁵ The US and Britain maintained, in response, that their actions were consistent with UN Security Council resolutions, 688 and 687, the latter of which had demanded that Iraq get rid of its weapons of mass destruction and establish an intrusive inspections regime as a condition of the ceasefire that marked the end of the first Gulf war.¹⁵⁶ Gray states that in 1999 the US and Britain extended the RoE of their aircraft, which were now permitted to take pre-emptive action against Iraq's air defences, on the basis of self-defence and that by 2003, the operations originally justified on the basis of 'protecting the Kurds' were being used to weaken up Iraq's defences in advance of the invasion.¹⁵⁷

Military action in Iraq also seems to have prompted Britain to revise its views on the legality of 'humanitarian interventions' discussed in the previous chapter. In 1992 its FCO legal

¹⁵¹ *BBC News*, 'No-fly zones: The legal position', 19 February 2001.

¹⁵² Gray, 2008, pp.35-9 and 162-3.

¹⁵³ *Ibid.*

¹⁵⁴ Wills, 2009, p.201.

¹⁵⁵ See for example, Security Council, Meeting, Friday, 17 December 1999, UN Doc. S/PV.4084.

¹⁵⁶ Security Council Resolution 687 of 3 April 1991, paras 7 – 12; and *CNN News*, Transcript: President Clinton explains Iraq strike, Wednesday, December 16, 1998. According to this argument, Iraq's failure to comply with these provisions had 'revived' the authority to use force contained in Security Council resolution 678.

¹⁵⁷ Gray, 2008, pp.38-9.

counsellor stated that while ‘not specifically mandated’ by the Security Council action had been taken by States ‘in exercise of the customary international law principle of humanitarian intervention’.¹⁵⁸ By 1998 the British government was arguing that although there was ‘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.’¹⁵⁹

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.’¹⁶⁰ After the invasion of Iraq, Blair argued that the definition of a ‘humanitarian intervention’ should be expanded to include these types of regime-change invasions.¹⁶¹ 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.¹⁶² Britain is in a minority in taking this position, but, as will be discussed below, the perceived reluctance of

¹⁵⁸ The expanding role of the United Nations and its implications for UK policy: minutes of evidence, hearing of the Foreign Affairs Committee of the House of Commons, 2 December 1992, para 84. Statement of Tony Aust, Foreign and Commonwealth Office Legal Counsellor.

¹⁵⁹ Parliamentary Under-Secretary of State, FCO, Written Reply in the House of Lords (16 Nov. 1998) in: HL Debs., vol. 594, WA 139-40. It also stated that such 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.’ Operation Comfort was justified on this basis as ‘the only means to avert an immediate and overwhelming humanitarian catastrophe’.

¹⁶⁰ Opinion of the Attorney General, “Iraq”, Attorney General’s Office, 7 March 2003.

¹⁶¹ Text of speech delivered by Prime Minister, Sedgefield, 5 March 2004. He argued that ‘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?’

¹⁶² Prime Minister’s Office, *Guidance, Chemical weapon use by Syrian regime: UK government legal position*, 29 August 2013, No. 10 Downing Street, London, <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> accessed 7 November 2014.

the Security Council to authorize forceful ‘humanitarian interventions’ came under increasing criticism at the end of the 1990s.

While the lack of Chapter VII authorization for Operation Provide Comfort means that its legality remains controversial, a case can be made that the refugee crisis created by Iraq’s military action against its Kurdish population had, in fact, created a threat to international peace and security in a volatile and strategically sensitive region.¹⁶³ Guerrillas of the Kurdish Workers Party (PKK) used the uprising as an opportunity to stage their own rebellion in south-east Turkey, seizing control of a number of towns near to the border.¹⁶⁴ It took the Turkish security forces several years of a counter-insurgency campaign, marked by serious violations of international human rights law and IHL to put down the rebellion.¹⁶⁵

Many Kurds remain convinced that the reason why their original rising did not receive western support was for fear of its de-stabilizing impact on the wider region, particularly given Turkey’s membership of NATO.¹⁶⁶ A case can also be made that the increasing expressed concern by US and British political leaders about the humanitarian situation facing the Kurds as the 1990s wore on may also have coincided with their increasing interest in promoting regime-change in Iraq.

Chapter VII and humanitarian crises

¹⁶³ Michael M. Gunter, ‘Turkey and Iran Face off in Kurdistan’, *Middle East Quarterly*, Vol. V, No. 1, March 1998, pp. 33-40.

¹⁶⁴ Sheri Laizer Martyrs, *Traitors and Patriots: Kurdistan after the Gulf War*, London: Zed Books, 1996, provides a first-hand, but partisan, account of the rising.

¹⁶⁵ Reidy, Hampson and Boyle, ‘The European Convention on Human Rights in the case of Turkey’, *Netherlands Human Rights Quarterly*, Vol. 15, No. 2, June 1997, p.161 – 173.

¹⁶⁶ *New Statesman & Society*, Conor Foley, ‘Letter from Kurdistan’, 24 June 1994. This comment is based on interviews carried out by the author with leading PKK activists and rank-and-file fighters in Diyarbakir, south east Turkey; refugee camps in Northern Iraq; and Belmarsh prison in London during 1994-5.

In Somalia, by contrast, controversy surrounded the Security Council's decision to authorise a Chapter VII intervention in the absence of such a clearly recognised threat to international peace and security.¹⁶⁷ In December 1992 the Security Council unanimously adopted a resolution stating that 'the magnitude of the human tragedy caused by the conflict in Somalia, further exacerbated by the obstacles being created to the distribution of humanitarian assistance, constitutes a threat to international peace and security.'¹⁶⁸ Acting under Chapter VII the resolution authorized the Secretary General and member States to 'use all necessary means to establish as soon as possible a secure environment for humanitarian relief operations.'¹⁶⁹ It also stated that 'impediments to humanitarian relief violated international humanitarian law', and that anyone interfering with distribution of relief assistance 'will be held individually responsible in respect of such acts.'¹⁷⁰ As UN Secretary General Kofi Anan has subsequently noted this was the first time ever that the Security Council had invoked its Chapter VII powers with respect to a purely internal conflict.¹⁷¹

In May 1993 around 37,000 troops were deployed to guard deliveries of humanitarian assistance and cut down on the theft of supplies from humanitarian organisations.¹⁷² Their

¹⁶⁷ For the UN's account of the mission see *UN Peacekeeping Homepage, past operations, UNOSOM II, Background*, <http://www.un.org/en/peacekeeping/missions/past/unosom2backgr2.html>, accessed 17 May 2013.

¹⁶⁸ UN Security Council Resolution 794 of 3 December 1992, preamble. See also UN Security Council Resolution 733 of 23 January 1992, which determined that the situation constituted a threat to peace and security and imposed an arms embargo under Chapter VII.

¹⁶⁹ *Ibid.*, para 10.

¹⁷⁰ *Ibid.*, para 5.

¹⁷¹ Kofi Annan, 'Peacekeeping and National Sovereignty', in Jonathan Moore, (ed) *Hard Choices, moral dilemmas in humanitarian intervention*, Maryland and Oxford: Rowman & Littlefield, 1998, p.60.

¹⁷² The mission mandate was set out in a *Report of the Secretary General on the United Nations and Somalia*, 3 March 1993, UN Doc S/25354, paras 56-8, which was subsequently endorsed by the Security Council in Resolution 814 (1993). See also UN Security Council Resolutions 733 of 23 January 1992, 746 of 17 March 1992, 751 of 24 April 1992, 767 of 24 July 1992, 775 of 28 August 1992 794 of 3 December 1992 and 814 of 26 March 1993. The original UN Operation in Somalia (UNOSOM I), had been established in April 1992 and consisted of 50 military observers, which was subsequently scaled-up to 500 peacekeeping soldiers in September. This was replaced by the US-led Unified Task Force (UNITAF) in December and this, in turn was transformed into UNOSOM II in May 1993. For various views of the mission see De Waal, 1997, pp.179-91. Al-Qaq, 2009, pp.70-96; Mark Bradbury and Robert Maletta, 'When state-building fails', in Donini (ed), 2012, pp.109-36; Ioan Lewis and James Mayall, 'Somalia', in Mats and Economides (eds), 2007. For an interesting personalized account written by a journalist based there at the time see Aidan Hartley, *The Zanzibar Chest*, London: Harper Collins, 2003. For a much less well-informed but more sensationalist account

mandate authorized them ‘to take such forceful action as may be required to neutralize armed elements that attack, or threaten to attack, such facilities and personnel, pending the establishment of a new Somali police force which can assume this responsibility.’¹⁷³ De Wet has argued that the lack of a functioning government in the country meant that the Security Council had to invoke Chapter VII since it was impossible to obtain formal host State consent for the mission.¹⁷⁴ Given that the defence of national sovereignty provided in Article 2(4) of the Charter presupposes a government exercising jurisdiction, however, it seems more likely that the Chapter VII authorization was simply to emphasize the mission’s authority to use force.¹⁷⁵ Kelly also notes that, in the absence of a functioning government, the Australian contingent in the mission decided to apply the law of occupation, as defined in the Fourth Geneva Convention in the areas of Somalia for which they were allocated responsibility.¹⁷⁶

In June 1993 a group of 24 UNOSOM Pakistani soldiers were killed and a further 56 soldiers injured – three of them American – in a clash with a militia group led by the prominent warlord Mohamed Farah Aidid.¹⁷⁷ UN Security Council Resolution 837 unanimously passed in response authorized the mission ‘to take all measures necessary to arrest and detain those responsible’ for carrying out such attacks.¹⁷⁸ This and subsequent resolutions expanded

by three UN staff members see Kenneth Cain, Heidi Postlewait and Andrew Thomson, *Emergency Sex and Other Desperate Measures: A True Story From Hell On Earth*, London: Random House, 2004.

¹⁷³ *Report of the Secretary General on the United Nations and Somalia*, 3 March 1993, UN Doc S/25354, paras 56-8. This wording came for the Secretary General’s report and was not contained in Resolution 814.

¹⁷⁴ Erika De Wet, *The Chapter VII powers of the United Nations Security Council*, Portland, Oregon: Hart Publishing, 2005, pp.155-8.

¹⁷⁵ As will be discussed in Chapters Three and Five, it is now widely accepted that the UN Security Council can define a humanitarian crisis or a purely internal conflict as a threat to international peace and security, which enables it provide missions with authority to use force for protective purposes. See, for example, *Report of the Secretary-General to the Security Council on the Protection of Civilians in Armed Conflict*, 29 May 2009, S/2009/277, para 3.

¹⁷⁶ For further discussion see Michael Kelly, *Restoring and Maintaining Order in Complex Peace Operations: The Search for a Legal Framework*, The Hague: Kluwer Law International, 1999.

¹⁷⁷ Human Rights Watch, *Somalia faces the future: Human rights in a fragmented society*, April 1995 Vol. 7, No. 2.

¹⁷⁸ UN Security Council Resolution 837 of 6 June 1993.

UNOSOM II's mandate, to include disarming the main militias, and pledging to bring to justice the perpetrators of acts of violence that were hampering the relief effort.¹⁷⁹

Over the next few months, hundreds of people were arbitrarily detained and several thousand killed or injured as the UN forces tried to hunt down Aidid.¹⁸⁰ In July 1993 Africa Rights published a report detailing atrocities committed by UN forces, including killing of unarmed people, the bombing of a hospital, beating civilians and theft.¹⁸¹ *Médecins sans Frontières* (MSF) published a further detailed *communiqué* on violations of IHL by UN troops that summer.¹⁸² Graphic photographs also subsequently emerged of UN soldiers torturing people.¹⁸³ Although these cases led to some criminal prosecutions of the Canadian and Belgian soldiers involved, most of these resulted in either acquittals or extremely light sentences.¹⁸⁴

¹⁷⁹ See also: Resolutions 865 of 22 September 1993; 878 of 29 October 1993; 886 of 18 November 1993; 897 of 4 February 1994; 923 of 31 May 1994; 946 of 29 September 1994; 953 of 31 October 1994; and 954 of 4 November 1994. Resolution 837 was probably the most 'interventionist' as subsequent resolutions saw a marked drift towards the search for an exit strategy.

¹⁸⁰ Amnesty International, *Peace-keeping and human rights*, AI Index IOR 40/01/94, January 1994; and Human Rights Watch, April 1995. According to HRW: 'After the June 5, 1993 ambush of U.N. peacekeepers . . . the humanitarian mission quickly degenerated. Defensive action and the guarding of convoys were rapidly transformed into special operations manhunts, days-long attacks with helicopter and fixed-wing gunships and an enormous toll of Somali civilian casualties.'

¹⁸¹ African Rights, *Somalia: human rights abuses by the United Nations forces*, African Rights, London, 1993. See also *The Independent*, 'UN soldiers accused of atrocities in Somalia: Human rights group urges adherence to Geneva Conventions', 30 July 1993. Amongst the most serious violations was one incident in which US helicopters attacked a house in which a group of Somali elders had gathered, killing 73 people and in another when they fired on a crowd killing 60.

¹⁸² Médecins sans Frontières, *Communication on the violations of humanitarian law in Somalia during UNSOM operations*, MSF, Paris, 23 July 1993.

¹⁸³ See *Village Voice* Front page cover 24 June 1997 and *Village Voice* 15 July 15 1997; *The Seattle Times*, 'U.N. Peacekeepers Accused Of Atrocities', 25 June 1997; and *Daily Telegraph*, 'Belgian UN Troops Admit to 'Roasting' Somali Boy,' June 14, 1997. These included two Belgian soldiers dangling a child over an open fire and another urinating on a dead body, Canadian soldiers posing beside the battered and bloody corpse of a boy with his hands tied behind his back, and Italian soldiers torturing a Somali boy and abusing and raping a girl. Other reported violations included a child being forced to eat pork and drink salt water, and then eat his own vomit, and another boy being placed in metal containers and left in the boiling sun for days without food or water where he died.

¹⁸⁴ De Waal, 1997, p.186. He notes that no Somali victims were brought to testify in the trials of the Belgian soldiers. The court accepted the account of the two accused of 'roasting' a child that they had merely been 'playing' with him. See *Reuters*, 'Belgian soldiers acquitted in Somalia trial', 30 June 1997. See also Sherene Razack, *Dark Threats and White Knights: The Somalia Affair, Peacekeeping and the New Imperialism*. 2004, which describes the actions of the Canadian soldiers and the subsequent official investigation which led to the disbandment of the regiment involved.

In October 1993 two US Black Hawk helicopters were shot down by Aidid's militia and 18 American soldiers were killed.¹⁸⁵ Over a thousand Somalis are thought to have died during the battle to rescue the surviving US troops.¹⁸⁶ Three days later US President Clinton publicly announced that all US forces would withdraw from Somalia no later than 31 March 1994.¹⁸⁷ Aggressive actions against Aidid's forces were halted and the formal end of UNOSOM II was declared in March 1995.¹⁸⁸ Aidid became the country's self-declared President the same year.¹⁸⁹

The 'Black Hawk Down' incident came two days before the Security Council discussed the size of the UN peacekeeping force to dispatch to Rwanda (UNAMIR) and it was scaled-back as a direct result.¹⁹⁰ At around the same time, another UN force, consisting of US and Canadian soldiers, was prevented from landing in Haiti to help restore the country's democratically elected president, Jean-Bertrand Aristide, by a mob of supporters of the military dictatorship.¹⁹¹ In May 1994 a US presidential directive sharply reduced US

¹⁸⁵ An incident, later famously documented in the film 'Black Hawk down'.

¹⁸⁶ *Frontline* 'Ambush in Mogadishu: interviews: Ambassador Robert Oakley', no date. Ambassador Oakley, the U.S. special representative to Somalia, is quoted as saying: 'My own personal estimate is that there must have been 1,500 to 2,000 Somalis killed and wounded that day, because that battle was a true battle . . . a deliberate war battle, if you will, on the part of the Somalis. And women and children were being used as shields and some cases women and children were actually firing weapons, and were coming from all sides . . . Helicopter gunships were being used as well as all sorts of automatic weapons on the ground by the U.S. and the United Nations. The Somalis, by and large, were using automatic rifles and grenade launchers and it was a very nasty fight, as intense as almost any battle you would find.' <http://www.pbs.org/wgbh/pages/frontline/shows/ambush/interviews/oakley.html>, accessed 13 May 2013.

¹⁸⁷ See *Key Events in the Presidency of William Jefferson Clinton 1993*, The Miller Center, American Presidents a reference source, <http://millercenter.org/president/keyevents/clinton>, accessed 15 May 2013.

¹⁸⁸ UNOSOM II Homepage, <http://www.un.org/en/peacekeeping/missions/past/unosom2.htm>, accessed 12 May. 2013. For a description of Somalia from the perspective an international aid worker/journalist after the end of UNOSOM II see John Burnett, *Where soldiers fear to tread*, London: Arrow books, 2007.

¹⁸⁹ *CNN News*, 'Mohamed Farah Aidid: Somali leader, 1935-1996, year.in.review/obituaries/politics, 1996. Aidid subsequently died of a heart attack after being hit by a stray bullet in August of the following year.

¹⁹⁰ Nicholas J. Wheeler, *Saving Strangers: Humanitarian Intervention in International Society*, Oxford University Press, 2000, p.215; Samantha Power, 'Bystanders to Genocide: Why the United States let the Rwandan tragedy happen', *The Atlantic Monthly*, September 2001.

¹⁹¹ Some contemporary reports of the above incident claim that the mob chanted Aidid's name to taunt the US soldiers. It has, however, also been argued that this event was actually staged with the connivance of elements within the CIA who were opposed to President Clinton's policy of restoring

participation in UN peacekeeping missions.¹⁹² The US Ambassador to Sierra Leone at the time notes that the US effectively withdrew from UN peacekeeping operations in Africa in the aftermath of these events.¹⁹³ It also resulted in a wild oscillation of US policy towards the conflicts in the former Yugoslavia as Clinton's administration opposed any settlement that legitimated 'ethnic cleansing', but refused to countenance deploying ground troops to strengthen the UN mission.¹⁹⁴

The UN Protection Force for the former Yugoslavia (UNPROFOR) was initially established in Croatia in February 1992.¹⁹⁵ Its mandate evolved as the conflict continued and the focus of its efforts shifted to Bosnia-Herzegovina.¹⁹⁶ In August 1992 the Security Council invoked its Chapter VII powers to demand that the parties to the conflict grant 'humanitarian access'¹⁹⁷ and in September UNPROFOR was authorized to use force 'in self-defence' to secure the delivery of humanitarian aid.¹⁹⁸ In April and May 1993 the Security Council used its Chapter

democracy to Haiti. See Peter Hallward, *Damming the flood: Haiti and the politics of containment*, London: Verso, 2010, p.49.

¹⁹² US Presidential Directive 25 (PPD 25), 3 May 1994, <http://www.fas.org/irp/offdocs/pdd/pdd-25.pdf>, accessed 12 May 2013.

¹⁹³ John Hirsch, *Sierra Leone: Diamonds and the struggle for democracy*, Boulder, CO: Lynne Rienner, 2001, p.63.

¹⁹⁴ Spyros Economides and Paul Taylor, 'Former Yugoslavia', in Berdal and Economides (eds), 2007, pp.65-108. The policy was sometimes dubbed 'fighting to the last Fijian'.

¹⁹⁵ UN Security Council Resolution 743 of 21 February 1992 was adopted unanimously. After reaffirming resolutions 713 (1991), 721(1991), 724 (1991), 727 (1992) and 740 (1992), and considering that the situation in the Socialist Federal Republic of Yugoslavia constitutes a threat to international peace and stability, the Council established a peacekeeping mission in the country, with the aim of reaching a peaceful political settlement in the region. For an overview of the conflict see: Misha Glenny, *The Fall of Yugoslavia*, London: Granta, 1992; Misha Glenny, *The Balkans 1804 – 1999, Nationalism, War and the Great Powers*, Granta, 2000, p.641-642. There are many, far more partisan accounts, including: Marko Attila Hoare, *How Bosnia Armed*, London: Saqui books, 2004; Adam LeBor, *Complicity with Evil, the United Nations in the age of modern genocide*, New Haven: Yale University Press, 2006, pp.1-132; David Gibbs, *First do no harm: humanitarian intervention and the destruction of Yugoslavia*, Nashville: Vanderbilt University Press, 2009.

¹⁹⁶ Security Council Resolution 758, of 8 June 1992, authorized the Secretary General to deploy military observers and other personnel. It also condemned all parties responsible for the violation of the ceasefire, urging them to comply with a ceasefire and urged all parties to guarantee the safety of humanitarian workers and the delivery of aid to Sarajevo and other areas in Bosnia and Herzegovina.

¹⁹⁷ Security Council Resolution 770, of 13 August 1992 was adopted by twelve votes to none, with three abstentions from China, India and Zimbabwe. For discussion see Gray, 2008, pp.282-6.

¹⁹⁸ Security Council Resolution 776 of 14 September 1992, para 2. 'Authorizes, in implementation of paragraph 2 of resolution 770 (1992), the enlargements of UNPROFOR's mandate and strength in Bosnia and Herzegovina recommended by the Secretary-General in that report to perform the functions outlined in the report, including the protection of convoys of released detainees if requested by the

VII powers to declare a number of besieged towns to be ‘safe areas’.¹⁹⁹ In June a further Chapter VII resolution authorised UNPROFOR to:

deter attacks against the safe areas . . . promote the withdrawal of military or paramilitary units . . . occupy some key points on the ground, in addition to participating in the delivery of humanitarian relief . . . acting in self-defence, to take the necessary measures, including the use of force, in reply to bombardments against the safe areas by any of the parties or to armed incursion into them or in the event of any deliberate obstruction in or around those areas to the freedom of movement of UNPROFOR or of protected humanitarian convoys.²⁰⁰

The actual delivery of humanitarian assistance was primarily carried out by UNHCR, which became the *de facto* lead humanitarian agency during the conflict. Its relief effort was unprecedented in scope and scale,²⁰¹ but it often had to choose between either arranging the evacuation of civilians from areas in which their lives were threatened – which made it an agent of ‘ethnic cleansing’ – or sustaining populations in places where they could not be protected.²⁰² Criticism grew that aid was being used as ‘a palliative, an alibi, an excuse to cover the lack of political will to confront the reality of war.’²⁰³ The *New York Times* famously described the Bosnians as ‘well-fed dead’, asking: ‘What good will it do for them to have food in their stomachs when their throats are slit?’²⁰⁴

International Committee of the Red Cross.’ See also Security Council Resolutions 779 and 780 of 6 October 1992 and 787 of 16 November 1992.

¹⁹⁹ Security Council Resolution 819 of 16 April 1993 and 824 of 6 May 1993.

²⁰⁰ Security Council Resolution 836 of 4 June 1993, paras 5 and 9. See also Haidi Willmot and Ralph Mamiya, ‘Mandated to Protect: Security Council Practice on the Protection of Civilians’, in Marc Weller (ed), *The Oxford Handbook on the Use of Force in International Law*, Oxford: Oxford University Press 2014; and Findlay, 2002, pp. 221-231.

²⁰¹ David Reiff, *A bed for the night*, Vintage 2002, p.138. It is estimated that UNHCR provided assistance to 2.7 million people out of Bosnia-Herzegovina’s pre-war total of 4.5 million, spending up to \$1 million a day airlifting supplies into besieged areas and organizing land convoys between the conflict’s front lines

²⁰² Landgren, 1995, pp.437-458.

²⁰³ The High Commissioner’s Special Representative for former Yugoslavia. Quoted in Goodwin Gill, 1997, p. 289.

²⁰⁴ *New York Times*, ‘The Well-Fed Dead in Bosnia’, 15 July 1992.

UNPROFOR's concept of operations (CONOPS), approved by the Security Council, was to provide 'protective support' to UNHCR's humanitarian convoys.²⁰⁵ Commanders were initially given little guidance as to what this meant in practice. One British commander, Colonel Alistair Duncan, initially saw his task as simply to:

provide an escort to the convoys from the UNHCR through our area of operations at their request. In addition we were to provide assistance to endangered people as required. That was all. There was no further close direction either from the UN or from the British Government or military.²⁰⁶

Duncan stated that his forces opened fire on 69 occasions killing over 30 people and establishing himself as the 'most powerful man in Central Bosnia'.²⁰⁷ He soon, however, recognized the limitations of 'upping the ante' through the use of force and subsequently devised his own CONOPS, to 'create the conditions whereby aid could be delivered' in his force's area of responsibility.²⁰⁸ This concept has been developed further in subsequent missions and the authorization to 'facilitate the delivery' of humanitarian assistance is now often interpreted far more widely as creating conditions conducive to its delivery.²⁰⁹

²⁰⁵ UN Security Council Resolution 836 of 4 June 1993. See also Findlay, 2002, p.139.

²⁰⁶ *IBRU Boundary and Security Bulletin*, Colonel Alistair Duncan, 'Operating in Bosnia', International Boundaries Research Unit, University of Durham, Vol. 2, No. 3, October 1994, p. 47. https://www.dur.ac.uk/resources/ibru/publications/full/bsb2-3_duncan.pdf, accessed 9 May 2014

²⁰⁷ *Ibid.* He noted that 'there was no backlash whatsoever' over these killings, either from the local commanders or the British public 'who did not mind me shooting a few of the Bosnian locals'. While he regretted the killings they were 'necessary to show robustness and a positive attitude'.

²⁰⁸ *Ibid.*, p.48.

²⁰⁹ *Draft DPKO/DFS Operational Concept on the Protection of Civilians in United Nations Peacekeeping Operations, 2009*, para 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.'

In February 1994, the UN Secretary General formally requested NATO to carry out air strikes against Bosnian Serb artillery which had been used to shell civilians in Sarajevo.²¹⁰ In the months that followed UNPROFOR also increasingly called on NATO for close air support.²¹¹ The Serbs responded by kidnapping UNPROFOR soldiers and holding them hostage against attacks.²¹² This combination of factors along with the ambiguous wording of the UN resolution and a failure to demilitarise the 'safe areas',²¹³ meant that when the Serbs eventually attacked Srebrenica, in July 1995, UNPROFOR did not defend it and thousands of civilians were massacred in the resulting genocide.²¹⁴ In the aftermath of this attack NATO began a more determined bombing campaign against the Bosnian Serb forces, which eventually helped to bring the war to an end in October 1995.²¹⁵

The genocide in Srebrenica came a year after similar massacres of civilians killed up to 800,000 civilians in Rwanda, again despite the presence of a UN peacekeeping force, which failed to protect them.²¹⁶ UNAMIR had originally been deployed as a Chapter VI mission to monitor a ceasefire agreed between Hutu-dominated Rwanda's army and the largely-Tutsi

²¹⁰ For discussion see Marc Weller, Daniel Bethlehem (eds), *The Yugoslav Crisis in International Law*, Cambridge: Cambridge University Press, 1997.

²¹¹ *New York Times*, 'US Hits Bosnian Serb target in air raid', 6 August 1994. This was the first such action in Sarajevo and was described by Lieut. General Sir Michael Rose, as a 'pinprick air strike'.

²¹² For further discussion see Weller and Bethlehem, 1997.

²¹³ For contrasting views of the UN's failure to de-militarize the 'safe areas', see LeBor, 2006, pp.23-111 and Landgren, 1995, pp.437-458. Srebrenica was regularly used as a base for attack on Serb-held villages in the surrounding Naser Orić the commander of the Bosnian forces in Srebrenica was subsequently sentenced to two years imprisonment for war crimes by ICTY, although the Appeals Chamber reversed this conviction on 3 July 2008.

²¹⁴ *Report of the Secretary-General pursuant to General Assembly resolution 53/35, The fall of Srebrenica*, A/54/549, 15 November 1999.

²¹⁵ Operation Deliberate Force was carried out between 30 August and 20 September 1995, involving 400 aircraft and 5,000 personnel from 15 nations. Commentators differ in assessing whether it was this external intervention or the increasing effectiveness of the Bosnian armed forces which proved decisive. Hoare, 2004, pp.102-28 provides a detailed, although partisan pro-Bosnian, account. Gibbs, 2009, covers similar ground from an 'anti-imperialist' perspective.

²¹⁶ For further discussion see: Linda Melvern, *Conspiracy to Murder: The Rwandan Genocide*, Verso: New York, 2004, Linda Melvern, *A People Betrayed: The Role of the West in Rwanda's Genocide*, London: Zed Books, 2000; Mahmood Mamdani, *When Victims Become Killers: Colonialism, Nativism, and the Genocide in Rwanda*, Princeton University Press, 2002; Romeo Dallaire, *Shake hands with the devil, The Failure of Humanity in Rwanda*, Boston: Da Capo Press, 2004; Samantha Power, *A problem from hell, America and the age of genocide*, London/New York: Harper Collins, 2007; Philip Gourevitch, *We Wish to Inform You That Tomorrow We Will Be Killed with Our Families: Stories from Rwanda*, New York: Picador, 1999; Human Rights Watch, *Leave None to Tell the Story: Genocide in Rwanda*, 1 April 2004; and Meredith, 2006, pp.485-523.

Rwandan Patriotic Front (RPF).²¹⁷ Its RoE did provide authority for the use of force to protect civilians, but its commander, Romeo Dallaire, was repeatedly denied authority to use force except in self-defence.²¹⁸ The genocide began on 6 April 1994 and was only effectively brought to an end by the RPF's victory in June.²¹⁹ Amongst its first victims were 10 Belgian UNAMIR troops, who were gruesomely tortured to death.²²⁰ This led Belgium to withdraw its 400 soldiers, who had been the key component of the UNAMIR force.²²¹ On 21 April the Security Council further reduced UNAMIR to a token force of 270 soldiers.²²² UNAMIR is credited with saving the lives of several thousand civilians who sought shelter in its bases, although many others died when it either failed to defend them or evacuated.²²³ In one case when Belgian soldiers abandoned 2,000 civilians sheltering in a school, these begged the peacekeepers to shoot them rather than leave them to the militia's machetes.²²⁴ UNAMIR's soldiers did not open fire on any occasion during the genocide.²²⁵

On 17 May the Security Council voted to increase UNAMIR to 5,500 soldiers and mandated it to 'contribute to the security and protection of displaced persons, refugees and civilians at

²¹⁷ Ibid. See also Dallaire, 2003, pp.12, 229 and 233. During the crisis, General Dallaire argued that UNAMIR should be able to protect civilians based on the idea that the principle of 'self-defence' included the 'defence of the mandate'.

²¹⁸ Ibid.

²¹⁹ Ibid. The RPF was a force mainly composed of Tutsi exiles that had fled from Rwanda to escape a previous genocide 30 years beforehand. These had been integrated into the Ugandan armed forces after Yoweri Museveni seized power in his country's civil war. Around 4,000 RPF members left the Ugandan army to participate in an invasion of Rwanda in 1990, taking their uniforms and weapons with them. The invasion, in 1990, prompted France to intervene militarily in support of the Rwandan President Habyarimana. Rwanda's armed forces rapidly expanded and its government unleashed a wave of repression against its internal opponents. The RPF was initially beaten back, but, under Paul Kagame's leadership transformed itself into an effective guerrilla force using hit-and-run tactics.

²²⁰ *Guardian*, 'UN troops stand by and watch carnage', 12 April 1994.

²²¹ Bruce Jones, 'Rwanda' in Berdal and Economides (eds), 2007, p.155. One Rwandan official subsequently explained that the decision to mutilate the corpses, whose genitalia were hacked off and stuffed in their mouths, was inspired by the effect that the Black Hawk down incident had been shown to have on western resolve. 'We watch CNN too you know', he is said to have commented.

²²² Security Council Resolution 912 of 21 April 1994.

²²³ For an overview see *Report of the Independent Inquiry into the actions of the United Nations during the 1994 Genocide in Rwanda*, S/1999/1257, 16 December 1999.

²²⁴ *Guardian*, 'What's the point of peacekeepers when they don't keep the peace?', 17 September 2015.

²²⁵ Dallaire, 2003. Also interviews conducted by the author with Brent Beardsley, Dallaire's chief of staff, in Montevideo in September 2012 and Washington DC in April 2013. Dallaire was apparently a terrible shot and so his staff frequently emptied the bullets from his revolver, without his knowledge, in case he lost his temper and shot someone by accident.

risk in Rwanda, including through the establishment and maintenance, where feasible, of secure humanitarian areas'.²²⁶ This force was not given a Chapter VII mandate and did not in fact arrive in Rwanda until after the killing had ended, so the meaning of the term 'secure humanitarian areas' was never tested. On 22 June the Security Council passed a Chapter VII resolution, creating a new French-led force, Operation Turquoise.²²⁷ This 'blue hatted' a French military intervention and was vigorously opposed by both the new Rwandan government and Dallaire who viewed the French as allies of the previous regime.²²⁸ One consequence was to facilitate the escape of most of the regime leadership and Hutu power militias into neighbouring Zaire (as the Congo was then known).²²⁹

The reluctance of the UN to describe the situation in Rwanda as genocide until the end of May 1994²³⁰ has been much debated,²³¹ with most observers agreeing that this was mainly because of concern by the US, in particular, that it would lead to increased pressure for a more forceful intervention.²³² As discussed previously, the ICJ subsequently stated in *Bosnia Genocide*, in 2007 that there is a test of 'due diligence' by which State conduct should be

²²⁶ Security Council Resolution 918 of 17 May 1994, paras 3 and 5. Para 4 'recognize[d] that UNAMIR may be required to take action in self-defence against persons or groups who threaten protected sites and populations, UN and other humanitarian personnel or the means of delivery and distribution of humanitarian relief.'

²²⁷ Security Council Resolution 929 of 22 June 1994.

²²⁸ Human Rights Watch, *Leave None to Tell the Story: Genocide in Rwanda*, 1 April 2004.

²²⁹ *Report of the Independent Inquiry into the actions of the United Nations during the 1994 Genocide in Rwanda*, S/1999/1257, 16 December 1999.

²³⁰ *Secretary General's Report on the situation in Rwanda*, UN Doc. S/1994/640, 31 May 1994: 'on the basis of evidence that has emerged there can be little doubt that [the situation in Rwanda] constitutes genocide'.

²³¹ See, for example, Samantha Power, 'Bystanders to Genocide: Why the United States let the Rwandan tragedy happen', *The Atlantic Monthly*, September 2001. Power quotes Susan Rice, then a senior official in the US National Security Council as asking during an inter-agency telephone conference 'if we use the word "genocide" and are seen as doing nothing, what will be the effect on the November election?'. Rice has stated that she does not remember uttering the sentence. See also *Foreign Policy*, 'Exclusive: Rwanda Revisited. Former President Clinton said he never knew the extent of suffering during Rwanda's genocide. But America's diplomats on the ground knew exactly what was happening -- and they told Washington', 5 April 2015.

²³² Dallaire, 2003, pp.333 and 339 notes that UNAMIR itself was describing the killings as genocide from mid-April as were NGOs such as Oxfam. On 10 May the newly appointed UN High Commissioner for Human Rights reported on a fact-finding mission which said that genocide was taking place. *Médecins sans Frontières* also took out newspaper adverts in France saying that 'one cannot stop a genocide with doctors'.

assessed even when applied to a third country²³³ and that when a State ‘manifestly failed to take all measures to prevent genocide which were within its power, and which might have contributed to preventing the genocide’ then it could be held accountable for the resulting consequences.²³⁴

In July 2014 a Dutch court partially upheld the claimants in the *Mothers of Srebrenica and the Netherlands* case ruling that the Dutch State was responsible for the deaths of 300 civilians sheltering inside the Dutch Battalion compound during the genocide in Srebrenica in 1995.²³⁵ Both Dutch domestic courts and the European Court of Human Rights had previously rejected a similar challenge to the UN’s failure to protect the inhabitants of the UN ‘safe haven’.²³⁶ In this case, however, the Court ruled that the Dutch Battalion still exercised ‘effective control’ over its own compound at the point that a decision was made to expel this group of civilians, while absolving the Battalion of responsibility for the acts that were taking place outside.²³⁷ The Court relied heavily on the fact that the Dutch government was preparing to withdraw its forces from Bosnia-Herzegovina when it made the decision to evacuate from Srebrenica and this gave it ‘effective control’ of its compound for the purposes of allocation of responsibility.²³⁸ In 2010 a Belgium domestic court similarly ruled in *Mukeshimana-Ngulinzira* that a decision by Belgium troops to abandon a *de facto* IDP camp

²³³ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, 26 February 2007, ICJ Report 2007, para 430.

²³⁴ *Ibid.*

²³⁵ *Mothers of Srebrenica v. the Netherlands* ECLI:NL:RBDHA:2014:8748 (The Hague District Court), 2014.

²³⁶ *Stichting Mothers of Srebrenica and others v. Netherlands*, Appl. No. 65542/12, Admissibility Decision, 11 June 2013. See also *Mothers of Srebrenica/Netherlands and United Nations*, District Court of the Hague, De Rechtspraak BD6795 (Neth.), 10 July 2008; and Judgment of the Supreme Court of the Netherlands, in the case of the *Mothers of Srebrenica*, First Division 10/04437, EV/AS, 13 April 2012. For further discussion see *Asser Institute, Centre for International and European Law*, http://www.asser.nl/default.aspx?site_id=36&level1=15248&level2=&level3=&textid=39956, accessed 8 March 2013.

²³⁷ For an unofficial translation of the Court’s reasoning on its own website see *Mothers of Srebrenica against the State. Effects of the fall of Srebrenica. Unlawful act on behalf of the State; international law; attribution of actions of the State?; unlawful acts of the State?; the law applicable to torts*, <http://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:RBDHA:2014:8748>, accessed 20 November 2014.

²³⁸ *Ibid.*, para 5.18. For discussion see Paolo Palchetti, ‘The allocation of responsibility for internationally wrongful acts committed in the course of multinational operations’, *International Review of the Red Cross*, Vol. 95. No. 891/892 Autumn/Winter 2013, pp.727-42.

that they had been guarding during the Rwandan genocide was attributable to Belgium rather than the UN mission.²³⁹

The implications of these rulings for the future of peacekeeping have been the subject of considerable debate.²⁴⁰ One observer has noted that the Dutch verdict ‘might result in a visible decline in the willingness of States to contribute troops to international peacekeeping missions’.²⁴¹ Another has argued it was wrong to consider the Dutch soldiers to have been responsible for the deaths when the rest of the world just ‘stood watching’.²⁴² The ruling also highlights the confusion of events during the Serbian advance on the town as the Dutch Battalion repeatedly requested – and was denied – air support up the UN chain of command and the legal ambiguity that this created about who was really in effective control of the area as the situation unfolded. Although the Court tried to use the notion of ‘effective control’ to limit the Dutch Battalion’s responsibility, both geographically and temporally, the UN’s exclusion from the proceedings meant that it could not address the most important underlying questions about whether or not the inhabitants of Srebrenica could really have been saved from the unfolding genocide. Questions surrounding UN accountability and attribution of conduct will be discussed further in Chapter Five of this thesis.

Humanitarian interventionism

²³⁹ *Mukeshimana-Ngulinzira and Others v Belgium and Others*, Court of First Instance Judgment, RG No 04/4807/A, 07/15547/A, ILDC 1604 (BE 2010) 8th December 2010.

²⁴⁰ *Ibid.* See also: *Opinio Juris*, ‘Mothers of Srebrenica Decision: Dutch Court holds The Netherlands Responsible for 300 Deaths in 1995 Massacre’, Kirsten Boon, 17 July 2014, <http://opiniojuris.org/2014/07/17/mothers-srebrenica-decision-dutch-high-court-holds-netherlands-responsible-300-deaths-1995-massacre/>, accessed 20 November 2014; and *E-international relations*, ‘Mothers of Srebrenica v the Netherlands: The Law as Constraint for Peacekeeping?’, Lenneke Sprik, September 2014, <http://www.e-ir.info/2014/09/24/mothers-of-srebrenica-v-the-netherlands-the-law-as-constraint-for-peacekeeping/>, accessed 20 November 2014.

²⁴¹ *Ibid.*

²⁴² *Opinio Juris*, ‘Emerging Voices: Responsibility of the Netherlands for the Genocide in Srebrenica—The Nuhanović and Mothers of Srebrenica Cases Compared’, Otto Spijkers, 23 July 2014, <http://opiniojuris.org/2014/07/23/emerging-voices-responsibility-netherlands-genocide-srebrenica-nuhanovic-mothers-srebrenica-cases-compared/>, accessed 20 November 2014.

The well-publicised failures of the UN's peacekeeping missions in the mid-1990s led to a serious crisis of legitimacy for the Organization.²⁴³ A *Supplement to Agenda for Peace* was published in January 1995, restating the 'core principles' of traditional peacekeeping and asserting that 'peace-keeping and the use of force (other than in self-defense) should be seen as alternative techniques and not as adjacent points on a continuum, permitting easy transition from one to the other.'²⁴⁴ Others, however, drew the opposite conclusion and criticism of both the UN and 'traditional' peacekeeping grew, particularly amongst liberal western opinion.²⁴⁵

The prominent French philosophers Glucksman and Levy, for example, launched scathing attacks on the small unarmed UN observer mission to East Timor in 1999, that had helped to oversee a referendum. Glucksman wrote: 'The UN lured the Timorese into an ambush: it offered them a free referendum, they vote under its guarantee, it delivers them to the militias knives . . . the UN knows, the UN keeps quiet, the UN withdraws'.²⁴⁶ Levy concluded that: 'The time of the UN has passed. We have to finish off this macabre farce that the UN has become.'²⁴⁷ Robertson, a high-profile British human rights lawyer, also stated that the bloodshed in East Timor 'was all the UN's doing' and made a scornful reference to how the mission, headed by a former Secretary General of Amnesty International, had

²⁴³ For an overview of the debate about the UN's legitimacy regarding its Chapter VII powers see Justin Morris and Nicholas Wheeler, *The Security Council's Crisis of Legitimacy and the Use of Force*, London: Palgrave Macmillan, 2007; and Michael Matheson, *Council Unbound: the growth of UN decision-making on conflict and post-conflict issues after the Cold War*, Washington: US Institute for Peace, 2006. For critical accounts of the particular crisis faced at the end of the 1990s regarding 'humanitarian interventions' see, for example: Chesterman, 2001; Wheeler, 2000; *Survival* Gareth Evans, 'When is it Right to Fight?', 2004; *Foreign Affairs* Lee Feinstein and Anne Marie Slaughter, 'A Duty to Prevent', January/February 2004; and *Foreign Affairs*, Michael Glennon, 'Why the Security Council Failed', May/June 2003.

²⁴⁴ United Nations, *Supplement to an Agenda for Peace: Position Paper of the Secretary-General on the Occasion of the Fiftieth Anniversary of the United Nations*, A/50/60 – S/1995/1, 25 January 1995, paras 6-7 and 9.

²⁴⁵ See for example: Frederick Fleitz, *Peacekeeping Fiascos of the 1990s*, Westport: Praeger, 2002; Nicholas Wheeler, *Saving Strangers: humanitarian intervention in International Society*, Oxford: Oxford University Press, 2000; Geoffrey Robertson, *Crimes Against Humanity, the struggle for global justice, third edition*, London: Penguin books, 2006, pp.470-477; and JL Holzgrefe, and Robert Keohane, (eds), *Humanitarian Intervention: ethical, legal and political dilemmas*, Cambridge: Cambridge University Press, 2003.

²⁴⁶ *L'Éxpress*, 'Impardonnable ONU', 23 September 1999.

²⁴⁷ *Le Point*, 'Le bloc-notes de Bernard Henri-Lévy', 24 September 1999.

‘quickly evacuated itself to Darwin’ when the violence started.²⁴⁸ In fact sixteen of the UN’s local staff were massacred by the militias and, despite this, a group of the UN’s international staff refused to be evacuated unless provision was made to protect 1,500 East Timorese civilians who had sought shelter in their compound.²⁴⁹

Many western-based NGOs also stepped up their advocacy in public campaigns for military interventions. CARE, for example, lobbied hard for military intervention in Somalia in 1992²⁵⁰ and MSF ran a campaign implicitly calling for more forceful military intervention in Rwanda in 1994.²⁵¹ After the fall of Srebrenica in 1995, World Vision and Human Rights Watch called for military strikes against the Serb forces besieging the remaining ‘safe havens’.²⁵² Oxfam urged military intervention in Eastern Zaire in 1996,²⁵³ Kosovo in 1998²⁵⁴ and in Sierra Leone in 2000.²⁵⁵ As well as lobbying through the UN’s own decision-making structures, they were able to mobilise their membership in letter-writing campaigns and their visible – and often unprotected – presence in many crises was able to generate significant media coverage.

²⁴⁸ Robertson, 2006, p.498.

²⁴⁹ Samantha Power, *Chasing the flame: Sergio Vieira de Mello and the fight to save the world*, London: Penguin Books, 2008, pp.292-7. See also Conor Foley *The Thin Blue Line: how humanitarianism went to war*, London: Verso, 2010, pp.138-44, which is based on interviews conducted at the time with mission staff. Led by Ian Martin, the mission stayed during the height of the violence until 14 September, by which time the Indonesian government had agreed to accept the presence of a multinational peace-keeping force.

²⁵⁰ See De Waal, 1997, p.181-185 and Abiew, 1998, p.260. CARE was particularly influential in this debate partly because the President of CARE USA was seconded to the UN head an emergency assistance programme at the time. His comment that, in order to deliver assistance ‘we may have to fight the Somalis themselves’, led to the mission being dubbed ‘Operation shoot-to-feed’ by its critics.

²⁵¹ MSF famously ran adverts stating that ‘One cannot stop a genocide with Doctors’. See MSF USA Home page video on Rwanda, <http://www.doctorswithoutborders.org/news-stories/video/rwanda-doctors-cant-stop-genocide>, accessed 6 March 2015.

²⁵² *Washington Post*, ‘Coalition calls for action in Bosnia: groups want more allied military force to stop genocide’, 1 August 1995.

²⁵³ *Statement on the crisis in Eastern Zaire*, Oxfam UK and Ireland, 5 November 1996.

²⁵⁴ For discussion see, Tony Vaux, *The Selfish Altruist, Relief Work in Famine and War*, London: Earthscan, 2001. Vaux, a senior Oxfam official, notes that the call was framed obliquely as ‘action to enforce a ceasefire’.

²⁵⁵ *Letter to Robin Cook British Foreign Secretary*, Oxfam 9 May 2000.

The humanitarian crises of the early 1990s had led to a significant increase in humanitarian relief funding,²⁵⁶ which grew by an estimated six-fold over a decade.²⁵⁷ The upward trend has continued reaching a record \$22 billion in 2013.²⁵⁸ While development assistance is often provided for overtly political projects and disaster relief has traditionally come ‘without strings’, humanitarian aid was traditionally given on conditions of strict neutrality.²⁵⁹ As Françoise Bouchet-Saulnier, the former legal advisor to MSF, has noted, however, these distinctions have narrowed in the last few decades as the world has entered ‘a period of chronic crisis and conflict in which emergency humanitarian action has become the only available form of political expression’.²⁶⁰ She warns that whatever its short-term benefits, the use of humanitarian assistance to influence a given military confrontation ‘distorts the very meaning of these actions and imperils the presence of humanitarian actors in the field’.²⁶¹

Many NGOs, however, are involved in both humanitarian and development work and often implement projects such as ‘peace-building’ and for the promotion and protection of human rights, even though this may compromise their strict neutrality.²⁶² Anderson argues that while humanitarian aid workers try to be neutral, they should recognise that ‘the impact of their aid is not neutral regarding whether conflict worsens or abates’.²⁶³ Assistance should,

²⁵⁶ Andrew Natio in, Weiss and Gordenker (eds), 1996, p.71. Natio notes that the combined budgets of three of the largest humanitarian NGOs – CARE, World Vision and the Catholic Relief Service (CRS) – exceeded \$1 billion in the mid-1990s and NGO spending on humanitarian relief operations often surpasses both the total provided by the UN directly and its spending in some countries. See also *Office of Foreign Disaster Assistance Annual Reports 1991 2000*, 2001.

²⁵⁷ Fiona Fox, *The politicisation of humanitarian aid, a discussion paper for Caritas Europa*, Internal discussion paper, Cafod, June 2000, p.5. See also *Office of Foreign Disaster Assistance Annual Reports 1991 2000*, Washington DC: Government Printing Office, 2001. This shows that in 1993 the USA was channelling 17 per cent of its Overseas Development Assistance through NGOs. This had increased to 30 per cent by 1995 and 50 per cent by 2001.

²⁵⁸ *Global Humanitarian Assistance Report*, Bristol: Development Initiatives, 2014.

²⁵⁹ Denise Plattner, ‘ICRC neutrality and neutrality in humanitarian assistance’, *International Review of the Red Cross*, 30 April 1996, No. 311, pp.161-179. See also Daniel Warner, ‘The politics of the political/humanitarian divide’, *International Review of the Red Cross*, No. 83, 1999, pp.109-118.

²⁶⁰ Françoise Bouchet-Saulnier, *The practical guide to humanitarian law*, MSF and Rowman & Littlefield, 2002, p.6.

²⁶¹ *Ibid.*, pp.6-7.

²⁶² See, for example, *Humanitarian Protection DG ECHO’s funding guidelines*, European Commission, Brussels, 21 April 2009.

²⁶³ Mary Anderson, *Do No Harm: supporting local capacities for peace through aid*, Cambridge Mass.: The Collaborative for Development Action Inc., 1996, p.1.

therefore explicitly be provided in ways that contribute to ‘justice, peace and reconciliation.’²⁶⁴ Ignatieff has similarly observed that ‘the doctrine of neutrality has become steadily more controversial as the new politics of human rights has entered the field.’²⁶⁵ UN Secretary General Boutros Boutros-Ghali noted in 1996 that NGOs had often helped to mobilise western public opinion to ‘clear the way’ for ‘humanitarian interventions’.²⁶⁶ The original R2P report, in 2001, even tentatively suggested that humanitarian agencies could be integrated into the process of deciding when military interventions for ‘protective purposes’ would be justified.²⁶⁷

Kosovo and East Timor

It was against this background of disenchantment with the UN’s ability to intervene effectively during humanitarian crises that, in March 1999, NATO took action in Kosovo without Security Council approval. NATO forces subsequently became the core of KFOR, which was mandated to provide security in Kosovo by the same resolution that established the UN Mission to Kosovo (UNMIK).²⁶⁸ KFOR remained under NATO command and control and the forces that had initially launched military action without UN Security Council authorization were essentially ‘blue hatted’ by this resolution.²⁶⁹

²⁶⁴ Ibid.

²⁶⁵ Michael Ignatieff, *The warrior’s honour: ethnic war and the modern conscience*, Chatto & Winduss, 1998, p.119.

²⁶⁶ Boutros Boutros-Ghali, in Weiss and Gordenker (eds) 1996, p.10. ‘I know that it is sometimes difficult to convince states to commit themselves to essential peace-keeping activities. For them to commit personnel, materiel and money in the service of peace and in the framework of UN activities, it is often necessary for national public opinion to lead the way. Nongovernmental organizations in most cases have often helped to clear the way.’

²⁶⁷ ICISS Report, 2001, see paras 8.22 noting 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’ and para 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.’

²⁶⁸ UN Security Council Resolution 1244 of 10 June 1999.

²⁶⁹ For a brief description of how NATO sees its own operation see *NATO Homepage*, ‘Nato’s role in Kosovo’, http://www.nato.int/cps/en/natolive/topics_48818.htm, accessed 15 March 2015.

In September 1999, an Australian-led, UN-authorized, International Force for East Timor (INTERFET) force was deployed to East Timor, to supervise the country's transition to independence.²⁷⁰ INTERFET was deployed to East Timor with the formal consent of the Indonesian government, but was considered by many Indonesians as an invasion.²⁷¹ The force was deliberately not put under UN command and had instructions to 'seize and hold' positions if it encountered resistance from the Indonesian army.²⁷² INTERFET initially provided military support to the new UN Transitional Administration in East Timor (UNTAET),²⁷³ until this assumed sole responsibility for security in the territory.

Both UNTAET and UNMIK were clearly intervening in matters that were 'essentially within the domestic jurisdiction' of their territorial States.²⁷⁴ Both were also confronted with the dilemma of administering territories whose ultimate constitutional status was still in flux and so were given executive powers for the transitional period. The Security Council resolutions establishing them contained extensive references to international human rights law.²⁷⁵ The Security Council resolution creating the UNMIK specified that its responsibilities would include 'protecting and promoting human rights',²⁷⁶ while one of the earliest regulations of UNTAET stated that 'all persons undertaking public duties or holding public office in East

²⁷⁰ Security Council Resolution 1246 of 11 June 1999 established a small unarmed observer mission to oversee a referendum on what became the issue of East Timor. The resolution specified that the Indonesian police and army were responsible both for its safety and for the preservation of law and order during the campaign. Its mandate was twice extended before the referendum, but the widespread violence and destruction in the aftermath of the vote prompted the Security Council to adopt Resolution 1264 on 15 September 1999 authorising the establishment of INTERFET.

²⁷¹ Alan A. Lachica, 'Humanitarian intervention in East Timor: An analysis of Australia's leadership role', *Peace and Conflict Review*, University of Peace, Costa Rica: UN University, Spring 2011.

²⁷² David Kilcullen, *The accidental guerrilla, fighting small wars in the midst of a big one*, London: Hurst & Co., 2009, pp.186-208. Kilcullen, who subsequently played a key role designing the US 'surge' in Iraq in 2007, was one of the first Australian officers to enter Dili as part of INTERFET in 1999. He informed the officers that he met that he was there to accept their 'transfer of control' using an Indonesian word which also translates as 'surrender'.

²⁷³ UNTAET was established by UN Security Council resolution 1272 of 25 October 1999.

²⁷⁴ UN Charter, Article 2.7.

²⁷⁵ The UN mission in Kosovo (UNMIK) was established by Security Council Resolution 1244 of 10 June 1999; the UN Transitional Administration in East Timor (UNTAET), established by Security Council Resolution 1272 of 25 October 1999.

²⁷⁶ UN Security Council Resolution 1244, 10 June 1999, Article 11 (j).

Timor shall observe internationally recognized human rights standards'.²⁷⁷ Both missions were also granted immunity in line with the UN's standard practice.²⁷⁸

UNMIK was authorized to deploy an 'international civil presence in Kosovo in order to provide an interim administration for Kosovo under which the people of Kosovo can enjoy substantial autonomy within the Federal Republic of Yugoslavia [FRY], and which will provide transitional administration' pending the establishment of 'democratic self-governing institutions'.²⁷⁹ Mandated tasks included 'maintaining civil law and order, including establishing local police forces and meanwhile through the deployment of international police personnel to serve in Kosovo'.²⁸⁰ FRY's continuing sovereignty over the province was explicitly recognized and the resolution even stated that 'an agreed number of Yugoslav and Serb military and police personnel will be permitted to return to Kosovo'.²⁸¹ In practice though most Serbs fled the province and never returned,²⁸² while the minority that stayed suffered a campaign of continual terrorist attacks, which depleted them further.²⁸³

Confronted with considerable ongoing discrimination and violence against Kosovo's non-Albanian ethnic minorities and a weak judicial system, widely seen as politically biased and pliant, UNMIK and KFOR frequently resorted to using Executive Orders to overturn judicial

²⁷⁷ UNTAET Regulation No. 1999/1.

²⁷⁸ UNMIK promulgated regulation UNMIK/REG/47/2000, 18 August 2000, which defined the privileges and immunities of its staff. UNTAET relied directly on the general rules contained within the Convention on Immunities and Privileges. All UNTAET officials enjoyed immunity from proceedings in local courts, which could only be waived if individual staff members were involved in serious human rights violations or other serious crimes.

²⁷⁹ UN Security Council Resolution 1244 of 10 June 1999, preamble and Article 10.

²⁸⁰ *Ibid.*, Article 11 (i).

²⁸¹ *Ibid.*

²⁸² For further discussion see William O'Neill, *Kosovo: an unfinished peace*, New York: *International Peace Institute, Occasional Paper Series 2001*; John Cerone, 'Minding the Gap: outlining KFOR accountability in post-conflict Kosovo', *European Journal of International Law*, Vol. 12, No. 3, 2001, pp.469-88; European Commission for Democracy Through Law, Opinion on Human Rights in Kosovo, Opinion No. 280/2004, CDL-AD (2004) 033 (Oct. 8-9, 2004) available at [http://www.venice.coe.int/docs/2004/CDL-AD\(2004\)033-e.asp](http://www.venice.coe.int/docs/2004/CDL-AD(2004)033-e.asp), accessed 14 February 2014; The Secretary-General, *Report of the Secretary General on the United Nations Interim Administration Mission in Kosovo*, U.N. Doc. S/1999/779, 12 July 1999 (interpreting U.N. Security Council Resolution 1244, establishing the Kosovo administration, and requiring the administration to be guided by international human rights law in the exercise of its authority).

²⁸³ *Ibid.*

decisions, particularly in relation to detentions.²⁸⁴ One observer, who served in the mission, noted that its civilian and military components ‘declared themselves above regulation, overturning even the most basic of human rights laws, that of requiring all detention to be by order of a judge.’²⁸⁵ Two others commented that: ‘UNMIK’s and KFOR’s executive actions have clearly contravened human rights standards but remained beyond any legal challenge.’²⁸⁶

Amnesty International claims that both UNMIK police and the Kosovo national police, whom they were mentoring, contravened international standards on the use of force by beating and tear-gassing peaceful demonstrators, and shooting people dead in circumstances that were not properly investigated.²⁸⁷ Both KFOR and UNMIK police failed to protect minority communities and the Kosovo national police may have actually participated in some violent attacks against them.²⁸⁸ On one occasion UNMIK police shot dead two civilians and

²⁸⁴ Ibid. The author of this thesis also served as a UNHCR Protection Officer in Kosovo from 2000-1 and was a member of the Juvenile Justice Task Force, which tracked the detention of juveniles by KFOR and UNMIK Police.

²⁸⁵ Clive Baldwin, *Minority Rights in Kosovo under International Rule*, Minority Rights Group International, 2006, p.3.

²⁸⁶ David Marshall and Shelly Inglis, ‘The Disempowerment of Human Rights-Based Justice in the United Nations Mission in Kosovo’, *Harvard Journal of International Law*, Vol. 16, (2003), p.96. See also Linda Reiff, *Ombudsman, Good Governance, and the International Human Rights System*, The Hague/London/Boston: Martinus Nijhoff, 2004; *Kosovo: The human rights situation and fate of persons displaced from their homes: Report by Mr Alvaro Gil-Robles*, 16 October 2003, Council of Europe Doc CommDH (2002); Ombudsman Institution in Kosovo, *Second Annual Report, 2001-2*; Ralph Wilde, ‘Understanding the International Territorial Administration Accountability Deficit: Trusteeship and the Legitimacy of International Organizations’, in Jan Wouters, Eva Brems, Stefaan Smis and Pierre Schmitt (eds), *Accountability for human rights violations of international organizations*, Cambridge: Intersentia, 2010.

²⁸⁷ Amnesty International, *The UN in Kosovo: A legacy of impunity*, AI Index: EUR 70/015/2006; Amnesty International, *Kosovo: KFOR and UNMIK fail to uphold human rights standards in Mitrovica*, AI Index: EUR 70/14/00, 13 March 2000. See also Amnesty International, *The Balkans: Summary of Amnesty International’s Concerns in the Region January–June 2007*, AI Index EUR 05/003/2007, 5 September 2007 (criticizing the failure to convene the successor to the institution of Ombudsperson in Kosovo, i.e., the Human Rights Advisory Panel that had been provided for by U.N. Security Council Resolution in 2006 but was not set up until two years later); Bernard Knoll, ‘The Human Rights Advisory Panel in Kosovo: Too Little Too Late’, 7 *European Human Rights Law Review*, 534, 2007.

²⁸⁸ Ibid.

seriously wounded two others with plastic bullets so hardened with age that they penetrated the skulls of their victims.²⁸⁹

In August 2001 a Detention Review Commission was established to review Executive Orders of detention, but this fell significantly below international standards required by international human rights law.²⁹⁰ It consisted of three members appointed directly by the head of UNMIK, whose actions they were supposed to review, who only served for a limited period and who only came to Kosovo to deal with a limited number of specific cases.²⁹¹ UNMIK also established an Ombudsman Institution whose mandate included dealing with ‘cases involving the international security presence’.²⁹² National KFOR contingents proved reluctant to cooperate with this body, however,²⁹³ and dealt with complaints using their own domestic legal systems, which varied considerably in their timeliness and effectiveness.²⁹⁴ In a report published in 2001 the Ombudsman criticised ‘the blanket lack of accountability’ over KFOR and UNMIK, noting that immunity was being granted to what was an effective surrogate State.²⁹⁵ As will be discussed further in Chapter Five, challenges before the European Court of Human Rights were deemed inadmissible because the Court declared it

²⁸⁹ Thorsten Benner, Stephan Mergenthaler and Philipp Rotmann, *The New World of UN Peace Operations, learning to build peace*, Oxford: Oxford University Press, 2011, p.81. They note that the use of plastic bullets had been banned by a previous UNMIK police commissioner in 2002, but the ban had been rescinded and that the bullets used were 13 years old. Following these deaths DPKO issued a general ban on the use of plastic bullets in all missions, but some missions ignored this ban.

²⁹⁰ UNMIK Regulation 2001/18.

²⁹¹ For further discussion see Gjylbehare Bella Murati ‘The Ombudsperson Institution vs. the United Nations Mission in Kosovo (UNMIK)’, in Jan Wouters, Eva Brems, Stefaan Smis and Pierre Schmitt (eds) *Accountability for Human Rights Violations by International Organisations*, Antwerp: Intersentia, 2010, pp. 373-398.

²⁹² UNMIK Regulation 38/2000, Section 1.1 and Section 3.

²⁹³ UNMIK Regulation 47/2000, On the Status, Privileges and Immunities of KFOR and UNMIK and their personnel in Kosovo, 18 August 2000, Section 6.2. This noted that ‘Requests to waive jurisdiction over KFOR personnel shall be referred to the respective commander of the national element of such personnel for consideration’, giving them an effective veto on cooperation.

²⁹⁴ For discussion see Margaret Cordial, Legal Analyst for the OSCE Mission in Kosovo, Department of Human Rights, ‘Background paper on Kosovo’, in Alexandre Faite and Jérémie Labbé Grenier, (eds), *Report on Expert Meeting on Multinational Peace Operations: Applicability of International Humanitarian Law and International Human Rights Law on UN mandated forces*, Geneva, 11-12 December 2003.

²⁹⁵ Ombudsperson Institution in Kosovo, *Special Report No.1 on the Compatibility with Recognized International Standards of UNMIK Regulation No. 2000/47 on the Status, Privileges and Immunities of KFOR and UNMIK and Their Personnel in Kosovo (18 August 2000) and on The Implementation of the Above Regulation*, no date

could not review cases where alleged violations of Convention rights were attributable to subsidiary organs of the UN.²⁹⁶

In 2006 the Kosovo Human Rights Advisory Panel was established to investigate individual complaints of alleged human rights violations committed by or attributable to UNMIK.²⁹⁷

Although this can only issue advisory opinions, it has provided for some scrutiny over UNMIK's record. In February 2016, for example, it ruled that UNMIK had failed 'to comply with the applicable human rights standards in response to the adverse health condition caused by lead contamination' in camps it established on toxic wasteland for Roma people displaced from their homes in 2000, which poisoned a number of children and were eventually demolished in 2010.²⁹⁸ The advisory panel called on UNMIK to make a 'public apology' to those affected and take 'appropriate steps toward payment of adequate compensation,' without specifying how this should be calculated.²⁹⁹

The Security Council resolution that established UNTAET noted that that the East Timorese people had 'expressed their clear wish to begin a process of transition under the authority of the United Nations towards independence, which it regards as an accurate reflection of the views of the East Timorese people'.³⁰⁰ Nevertheless it specified that the mission would be 'endowed with overall responsibility for the administration of East Timor and will be empowered to exercise all legislative and executive authority, including the administration of

²⁹⁶ *Behrami and Behrami v. France* (Appl. No. 71412/01) 31 May 2007 (Grand Chamber) Decision on Admissibility and *Saramati v. France, Germany and Norway* (Appl. No. 78166/01), (Grand Chamber) Decision on Admissibility, 2 May 2007; *Kasumaj v. Greece*, Appl. No. 6974/05 Decision on Admissibility, 5 July 2007; *Gajić v. Germany*, Appl. No. 31446/02 Decision on Admissibility, 28 August 2007; *Berić and others v. Bosnia and Herzegovina*, Appl. Nos. 36357/04; 36360/04; 38346/04; 41705/04; 45190/04; 45578/04; 45579/04; 45580/04; 91/05; 97/05; 100/05; 101/05; 1121/05; 1123/05; 1125/05; 1129/05; 1132/05; 1133/05; 1169/05; 1172/05; 1175/05; 1177/05; 1180/05; 1185/05; 20793/05; 25496/05, Decision on Admissibility, 16 October 2007.

²⁹⁷ *The Kosovo Human Rights Advisory Panel, International Law Meeting Summary*, Chatham House, 26 January 2012.

²⁹⁸ Kosovo Human Rights Advisory Panel, *N.M. and Others v. UNMIK Case No. 26/08*, Opinion 26 February 2016.

²⁹⁹ *New York Times*, 'Roma poisoned at UN camps in Kosovo may get apology and compensation', 7 April 2016.

³⁰⁰ Security Council Resolution 1272 of 25 October 1999, preamble.

justice'.³⁰¹ These transitional arrangements seemed modelled on the one that created UNMIK, where the constitutional position was far from defined, and caused outrage amongst the East Timorese resistance leaders as well as considerable unease amongst UN staff.³⁰² At the same time, increasing concern began to be expressed at the human rights situation.³⁰³ An Amnesty International report published in July 2001, for example, noted that:

Detainees have gone for weeks or even months before having access to legal counsel . . . At the same time, the UN Civilian police (Civpol), currently responsible for law enforcement in East Timor, have not always responded effectively where civil disturbances have occurred and in some cases its members have committed violations themselves in their efforts to prevent such disturbances . . . illegal detention and torture . . . have not been effectively addressed.³⁰⁴

UNTAET came to an end in May 2002, with most of its functions being handed over to the new government. A new UN Mission of Support to East Timor was also created with far more limited powers.³⁰⁵ In February 2008 Kosovo's parliamentary assembly unilaterally

³⁰¹ Ibid., para 1.

³⁰² For further discussion see Markus Benzing, 'Midwifing a New State: The United Nations in East Timor', *Max Planck Yearbook of United Nations Law*, Volume 9, 2005, pp.295-372; Jacob Bercovitch, Karl DeRouen Jr, *Unravelling Internal Conflicts in East Asia and the Pacific: Incidence*, Maryland: Lexington books, 2011; Oisín Tansey, *Regime-Building : Democratization and International Administration*, Oxford: Oxford University Press, 2009, pp. 61-101. See also Power, 2008, pp.300-22. She notes that Lakhdar Brahimi, a senior UN official turned down an offer to lead the mission telling Annan 'I know nothing about either Kosovo or Timor, but the one thing that I am absolutely certain of is that they are not the same place.' The post was instead filled by Sergio Vieira de Mello, UNMIK's first head who brought many of his key staff with him from Kosovo.

³⁰³ Anthony Goldstone, 'UNTAET with Hindsight: The Peculiarities of Politics in an Incomplete State', *Global Governance: A Review of Multilateralism and International Organizations*: January–March 2004, Vol. 10, No. 1, pp.83-98; Ian Martin and Alexander Mayer-Rieckh, 'The United Nations and East Timor: From Self-Determination to State-Building', *International Peacekeeping*, Vol.12, No.1, Spring 2005, pp.125–145.

³⁰⁴ Amnesty International, *East Timor: Justice past, present and future*, AI Index: ASA 57/001/2001, July 2001. See also *Timor-Leste's Displacement Crisis*, International Crisis Group, March 2008 and *Resolving Timor-Leste's Crisis*, International Crisis Group, October 2006; *Timor-Leste: Time for the UN to Step Back*, International Crisis Group, December 2010.

³⁰⁵ Security Council Resolution 1410 of 17 May 2002. See also *Timor-Leste's Displacement Crisis*, International Crisis Group, March 2008 and *Resolving Timor-Leste's Crisis*, International Crisis Group, October 2006. The country has since suffered a serious internal conflict in 2006 and an attempted *coup d'état* in 2008, which have left it weak and unstable.

proclaimed their State's independence³⁰⁶ and UNMIK 'significantly modified' its functions to take on a monitoring, information-exchanging and advisory role.³⁰⁷

Conclusions

This chapter provided an overview of the evolution and conceptual development of UN peacekeeping and the protection of civilians, showing how the two have become increasingly and more explicitly intertwined. It discussed how peacekeeping developed first in the context of the decolonization and cold war era and then in the humanitarian crises of the 1990s. The failure of missions to protect people from genocide in Bosnia-Herzegovina and Rwanda led to a crisis of credibility in the organization and this provides the background to the adoption of the first POC resolution in 1999, which will be discussed in the next chapter.

Some, such as Bellamy and Williams, dismiss the 'core principles' of peacekeeping as a 'holy trinity' associated with an outdated deference to national sovereignty.³⁰⁸ They argue that the UN has moved from a 'Westphalian conception of peace' to a 'post-Westphalian' one, in which the primary purpose of peace operations is to build 'liberal democratic regimes and societies'.³⁰⁹ The experiences of UNMIK and UNTAET in taking on executive powers and governance functions was not, however, generally seen as successful and the UN has subsequently opted for a much 'lighter footprint' approach in all missions.³¹⁰

³⁰⁶ *International Court of Justice, Accordance with international law of the unilateral declaration of independence in respect of Kosovo (Request for Advisory Opinion)*, 22 July 2010, ICJ Reports 2010. The Court found that Kosovo's declaration of independence did not violate general international law or UN Security Council resolutions.

³⁰⁷ UN Peacekeeping Homepage, 'UNMIK, United Nations Interim Administration. Mission in Kosovo, Background',

<http://www.un.org/en/peacekeeping/missions/unmik/background.shtml>, accessed 5 May 2015.

³⁰⁸ Bellamy and Williams, 2011, pp.194-7.

³⁰⁹ *Ibid.* pp.4-6, 9, 13-14, 28-9, 30-3, 36, 39-41, 67, 93, 100, 179, 190-1, 194-7, 212-4, 220, 227-9, 254, 277, 280, 283, 381, 383, 395, 398-9 and 401.

³¹⁰ Speech by Lakhdar Brahimi, State building in crisis and post-conflict countries, 7th Global Forum on Reinventing Government Building Trust in Government, Vienna, Austria 26-29 June 2007. 'A golden principle for international assistance should be that everyone shall do everything possible to work him or herself out of a job as early as possible. This is, in very simple terms, the principle of a

A variety of sovereignty-intruding tasks, such as ‘peace-building’, ‘peace support operations’ and ‘stabilization’, have, however, now entered the peacekeeping discourse and are sometimes used synonymously with the concept of ‘protection’.³¹¹ Most missions that have taken on POC mandates remain ‘traditional’ in the sense that they were originally set up to monitor ceasefires in the aftermath of armed conflicts. The UN has also repeatedly reaffirmed the centrality of the ‘core principles’ of peacekeeping in guiding its operations. Nevertheless, POC mandates do raise questions relating to accountability over the use of force and arrest and detention powers, as well as the negative and positive obligations of UN peacekeeping missions, which will be discussed further in subsequent chapters.

“light footprint”. For further discussion see: Thorsten Benner, Stephan Mergenthaler and Philipp Rotmann, *The New World of UN Peace Operations, learning to build peace*, Oxford: Oxford University Press, 2011; Mats Berdal and Spyros Economides (Eds), *United Nations interventionism 1991 – 2004*, Cambridge University Press, 2007; Simon Chesterman, *Just War or Just Peace? Humanitarian Intervention and International Law*, Oxford: Oxford University Press, 2001; Steven Jermy *Strategy for Action: Using force wisely in the 21st Century*, London: Knightstone, 2011; and Francis Kofi Abiew, *The Evolution of the Doctrine and Practice of Humanitarian Intervention*, The Hague: Kluwer Law International, 1999; and Mats Berdal, *Whither UN peacekeeping? An analysis of the changing military requirements of UN peacekeeping with proposals for its enhancement*, Adelphi Paper No. 281, London: International Institute for Strategic Studies, 1993.

³¹¹ See, for example, *United Nations Peacekeeping Operations, Principles and Guidelines* [Hereinafter Capstone Doctrine 2008], New York: Department of Peacekeeping Operations, 2008; *The New Horizon Initiative, Progress Report No. 2*, Department of Peacekeeping Operations and Department of Field Support, New York, December 2011; Simon Bagshaw and Diane Paul, *Protect or Neglect? Toward a More Effective United Nations Approach to the Protection of Internally Displaced Persons*, Washington, DC: The Brookings-SAIS Project on Internal Displacement and the UN Office for the Coordination of Humanitarian Affairs, November 2004.

Chapter Three:

Competing conceptions: the protection of civilians in UN peacekeeping operations

Introduction

This chapter describes the emergence of POC as a normative doctrine and its integration into the mandated tasks of UN peacekeeping missions. The vast majority of UN personnel currently deployed are in missions that have POC mandates.¹ The integration of POC tasks into peacekeeping missions has been an incremental and reactive process, much like the original development of peacekeeping itself. POC has been driven forward through a succession of Security Council resolutions, which have themselves been largely based on the experiences of its missions in the field. These resolutions have normative significance because they represent the endorsement by the Security Council of practices that are significantly transforming the ‘traditional’ understanding of UN peacekeeping.² A number of independent reviews have, however, been sharply critical of the progress to date.³ The High Level Panel Report on Peace Operations of 2015, for example, noted that despite a vast increase in resources, research and policy guidelines, and specialized personnel these have ‘yet to transform reality on the ground, where it matters.’⁴

¹ OIOS Protection Evaluation 2014, para 5 notes that in 2014 nine missions had POC mandates and these comprised 97 per cent of all uniformed peacekeepers. The High Level Panel Report 2015, para 88 states that: ‘More than 98 percent of military and police personnel deployed in UN peacekeeping missions today have a mandate to protect civilians, as part of integrated mission-wide efforts.’

² See, for example, UN Security Council Resolution 2086 of 21 January 2013. The preamble of this reaffirms ‘that respect for the basic principles of peacekeeping, including consent of the parties, impartiality, and non-use of force, except in self-defence and defence of the mandate, is essential to the success of peacekeeping Operations’. It also notes, however, that ‘peacekeeping ranges from traditional peacekeeping missions, which primarily monitor ceasefire, to complex multidimensional operations, which seek to undertake peacebuilding tasks and address root causes of conflict’ It encourages ‘further progress on a comprehensive, coherent and integrated approach to the maintenance of international peace and security by preventing conflicts, preventing relapse and building sustainable peace through effective preventive diplomacy, peacemaking, peacekeeping and peacebuilding strategies’.

³ Victoria Holt and Glyn Taylor, *Protecting civilians in the context of UN peacekeeping operations*, New York: United Nations, 2009; and OIOS Protection Evaluation 2014.

⁴ High Level Panel Report on Peace Operations of 2015, para 82.

It will be argued that while many of the difficulties relate to lack of resources and political will, these have been exacerbated by a lack of clarity about the international legal framework governing POC. Peacekeeping missions have been given Chapter VII authority to use force to protect civilians from grave violations of IHL and international human rights law while at the same time remaining bound by the ‘core principles’ of traditional peacekeeping: host state consent, neutrality and minimum use of force. Most existing guidance suggests that IHL will provide the appropriate legal framework governing their Rules of Engagement (RoE) although international human rights law appears *prime facie* to provide a more appropriate framework, unless they become a party to the conflict that they were sent to resolve. The term ‘protection’ itself is also understood differently by different actors within missions. The result is often confusion about how and when to use force for protective purposes.

The first protection of civilians mandate

On 12 February 1999, one month before NATO began military action in Kosovo, the UN Security Council held an open meeting on the protection of civilians in armed conflict.⁵ This 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.’⁶ 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.’⁷ In welcoming its

⁵ Statement by the President of the Security Council, S/PRST/1999/6, 12 February 1999. The Council had also considered two Secretary General’s reports, the previous year, which addressed the issue indirectly. See *The causes of conflict and the promotion of durable peace and sustainable development in Africa*, S/1998/883, 13 April 1998; and *Protection of humanitarian assistance to refugees and others*, S/1988/883, 22 September 1998.

⁶ *Ibid.*

⁷ *Report of the Secretary-General to the Security Council on the Protection of Civilians in Armed Conflict*, S/1999/957, 8 September 1999. See also *Report of the Secretary-General on the protection of civilians in armed conflict*, S/2001/331, 30 March 2001; *Report of the Secretary-General on the*

publication, the Security Council adopted the first in a series of resolutions on the Protection of Civilians in Armed Conflict.⁸

The first resolution noted, in its preamble, 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’.⁹ More specifically it expressed its ‘willingness to consider how peacekeeping mandates might better address the negative impact of armed conflict on civilians’¹⁰ and requested the Secretary General ‘to ensure that United Nations personnel involved in peace-making, 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 Mission to Sierra Leone (UNAMSIL), which included the following mandate:

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

protection of civilians in armed conflict, S/2002/1300, 26 November 2002; Report of the Secretary-General on the protection of civilians in armed conflict, S/2004/431, 28 May 2004; Report of the Secretary-General on the protection of civilians in armed conflict, S/2005/740, 28 November 2005; Report of the Secretary-General on the protection of civilians in armed conflict, S/2007/643, 28 October 2007; Report of the Secretary-General to the Security Council on the Protection of Civilians in Armed Conflict, 29 May 2009, S/2009/277; Report of the Secretary-General to the Security Council on the Protection of Civilians in Armed Conflict, 11 November 2010, S/2010/579; Report of the Secretary-General on the protection of civilians in armed conflict, S/2012/376, 22 May 2012; Report of the Secretary-General on the protection of civilians in armed conflict, S/2013/689, 22 November 2013.

⁸ UN Security Council Resolution 1265 of 17 September 1999. See also 1296 of 19 April 2000; 1502 of 26 August 2003; 1612 of 26 July 2005; 1674 of 28 April 2006; 1882 of 4 August 2009; 1894 of 11 November 2009; 1998 of 12 July 2011. See also 2068 of 19 September 2012 on children and armed conflict; and 1325 of 31 October 2000; 1820 of 19 June 2008; 1888 of 30 September 2009; 1889 of 5 October 2009; 1960 of 16 December 2010; and 2106 of 24 June 2013 on women, peace and security.

⁹ UN Security Council Resolution 1265 of 17 September 1999, preamble.

¹⁰ *Ibid.*, para 11.

¹¹ *Ibid.*, para 14.

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 debate that led to the POC 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 atrocities being committed against children by rebel groups.¹⁴ He was followed by the representative of the government of Sierra Leone who noted that the previous UN Observer Mission in Sierra Leone (UNOMSIL) ‘was not equipped to deal with certain situations’ in the country and stated that:

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

Russia chaired the debate, so 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,

¹² Security Council Resolution 1270 of 22 October 1999, para. 14. The resolution also refers to the role of ECOMOG, which is discussed below.

¹³ UN Security Council, 4054th Meeting, Friday, 22 October 1999, S/PV.4054.

¹⁴ UN Security Council, 4054th Meeting, Friday, 22 October 1999, S/PV.4054, pp.2-5.

¹⁵ *Ibid.*, p.6.

Gambia, the Netherlands, Brazil, Argentina, Canada and Bahrain. This represented an extremely broad range of support for what was understood at the time to be a significant policy development within the UN.¹⁶ China's representative spoke of the 'many rounds of consultations' that had gone into agreeing a draft.¹⁷ Argentina described the resolution as introducing 'a new, fundamental political, legal and moral dimension' that showed 'the Council . . . will not remain indifferent to indiscriminate attacks against the civilian population'.¹⁸ Brazil said that it 'augured well' for creating the conditions for 'vigorous peacekeeping involvement of the United Nations in other conflicts in Africa'.¹⁹

The conflict in Sierra Leone had started in March 1991 as a spill-over from neighbouring Liberia.²⁰ The two countries had long suffered similar problems of misgovernment and the two civil wars also took place in parallel.²¹ In August 1990 a group of West African States, led by Nigeria, had announced a peacekeeping mission to Liberia, at the invitation of its

¹⁶ For further discussion see Christine Gray, 'The Use of Force for Humanitarian Purposes' in Nigel White and Christian Henderson (eds) *Research Handbook On International Conflict And Security Law: Jus ad Bellum, Jus in Bello and Jus post Bellum*, Cheltenham: Edward Elgar Publishing, 2013. 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'.

¹⁷ UN Security Council, 4054th Meeting, Friday, 22 October 1999, S/PV.4054, p.14.

¹⁸ *Ibid.*, p.15.

¹⁹ *Ibid.*, p.15.

²⁰ For a more detailed discussion on Sierra Leone's civil war see: Ibrahim Abdullah, *Between Democracy and Terror: The Sierra Leone Civil War*. Dakar: Council for the Development of Social Science Research in Africa, 2004; David Keen, *Conflict and Collusion in Sierra Leone*. Oxford: James Currey 2005; and Brett Sillinger, *Sierra Leone: Current Issues and Background*. New York: Nova Science Publishers, 2003.

²¹ For a more detailed discussion on Liberia's civil war see: Stephen Ellis, *The mask of anarchy: the destruction of Liberia and the religious dimension of an African civil war*, London: Hurst and Co., 2001; Adebajo Adekeye *Liberia's Civil War: Nigeria, ECOMOG, and Regional Security in West Africa*. Boulder, CO: Lynne Rienner Publishers, 2002; Martin, Meredith, *The State of Africa, a history of fifty years of independence*, Johannesburg and Cape Town: Jonathan Ball Publishers, 2006, pp.545-74; and Robert Kaplan, *The ends of the earth: a journey to the frontiers of anarchy*, New York: Random House, 1996, pp.32-70. Charles Taylor had been a student radical who subsequently served in the finance ministry of President Samuel Doe. He fled the country having allegedly embezzled \$1 million and was imprisoned in the United States on corruption charges. He escaped from prison, possibly with the help of the US intelligence services, in 1985. In 1989 he mounted an invasion of Sierra Leone from Côte d'Ivoire with an initial force of 100 soldiers. This had swelled to several thousand by the time it reached the capital Monrovia, mainly through the recruitment of child soldiers. Taylor was elected President of Liberia in 1997, with election slogans that included: 'He killed my ma, he killed my pa, I will vote for him.' Ellis states the election was the fairest ever held in Liberia and Taylor's overwhelming victory was partly due to fear that the war would restart if he lost and partly due his cultivation of a 'strong man' image.

government and under the aegis of the Economic Community of West African States (ECOWAS) Monitoring Group (ECOMOG).²² ECOMOG had no Security Council authorisation and some viewed it as an attempt to keep the previous government in power.²³ It also soon became notorious for its corruption and looting.²⁴ Both countries were devastated in the fighting that followed, with civilians bearing the brunt of well-publicised atrocities that included the use of child soldiers, cannibalism, slave labour and the common practice of hacking off people's limbs.²⁵

Sierra Leone suffered two military coups, in 1992 and 1997, during the second of which the country's armed forces formed an alliance with the Revolutionary United Front (RUF), led by Foday Sankoh, who captured the capital Freetown.²⁶ ECOMOG forces re-took Freetown, in March 1998, but the RUF launched another assault on the city in January 1999, expressively entitled Operation No Living Thing.²⁷ More than 7,000 civilians were killed along with over 100 Nigerian ECOMOG soldiers.²⁸ ECOMOG forces were also accused of committing widespread violations against civilians during the fighting.²⁹ In May 1999 Nigeria began withdrawing its forces from ECOMOG, which was costing it around \$1 million US dollars a day and had by now claimed the lives of hundreds of Nigerian soldiers.³⁰ This forced the

²² See Human Rights Watch, *Waging War to Keep the Peace: The ECOMOG Intervention and Human Rights*, June 1993. ECOMOG forced Taylor to retreat from the capital, Monrovia, but he remained in control of most of the rest of the country and retaliated by sponsoring an invasion of Sierra Leone, which had been ECOMOG's rear base, by a 100 rebels and mercenaries who styled themselves the Revolutionary United Front (RUF). The RUF leader Foday Sankoh – a former Corporal in Sierra Leone's army – had first met Taylor in a Libyan training camp.

²³ Human Rights Watch, *Liberia: The Cycle of Abuse, Human Rights Abuses Since the November Cease-Fire*, October 1991; *Liberia: A Human Rights Disaster, Violations of the Laws of War by All Sides to the Conflict*, October 1990; *Flight From Terror, Testimony of Abuses in Nimba County, May 1990*; and Human Rights Watch, *World Report 1993*, p. 20-25.

²⁴ Foley, 2010, p.191. Anecdotal evidence based on working in Liberia in 2006. ECOMOG, for example, gained the nickname 'Every Car Or Moving Object Gone'.

²⁵ See, for example, Ishmael Beah, *A Long Way Gone: Memoirs of a Boy Soldier*, New York: Macmillan/Sarah Crichton Books, 2008.

²⁶ Human Rights Watch, *Getting Away with Murder, Mutilation, Rape: New Testimony from Sierra Leone*, July 1999.

²⁷ *Ibid.*

²⁸ Adekey Adebajo and David Keen, 'Sierra Leone', in Berdal, Mats and Economides, Spyros (eds), *United Nations Interventionism 1991 – 2004*, Cambridge: Cambridge University Press, 2007, pp.246-73.

²⁹ *Ibid.*

³⁰ *Ibid.*

government of Sierra Leone to sue for peace that July.³¹ Sankoh became Vice-President and chairman of a commission that oversaw Sierra Leone's diamond mines, in return for which he agreed to demobilize his forces through a Disarmament, Demobilization and Reintegration (DDR) process under UN supervision.³²

UNAMSIL was originally created to monitor adherence to the ceasefire and peace agreement, as well as supervising the disarmament process and securing the delivery of humanitarian assistance.³³ It initially consisted of 6,000 military personnel, including 260 military observers,³⁴ replacing a far smaller observer force established in June 1998.³⁵ Its strength was gradually increased to 17,500 soldiers by March 2001.³⁶ An over-hasty attempt to forcibly disarm RUF fighters led to four peacekeeping soldiers being killed while 500 were taken hostage in May.³⁷ Rebel forces advanced on Freetown and a British expeditionary force was deployed, with air support, ostensibly to evacuate foreign nationals.³⁸

The British refused to integrate their forces into UNAMSIL but did help to secure Freetown.³⁹ British forces were only involved in one direct clash with the rebel forces and

³¹ For details see Abdullah, 2004; Keen, 2005; Sillinger, 2003; Ellis, 2001; Adekeye 2002; Adebajo and Keen, 2007. The Lomé Peace Accord was signed on 7 July 1999 in Togo between Sankoh, as leader of the RUF and President Ahmad Tejan Kabbah, representing the government of Sierra Leone. It repeated many of the provisions of the Abidjan Peace Accord of November 1996. As well as granting Sankoh a position in the transitional government it also gave an amnesty for him and all combatants. The UN representative, Francis Okelo, also signed the agreement with the caveat that the UN would not recognize amnesty for acts of genocide, crimes against humanity, war crimes, and other serious violations of international humanitarian law.

³² Ibid.

³³ Security Council Resolution 1270 of 22 October 1999, para 8.

³⁴ UNAMSIL, United Nations Mission in Sierra Leone, Accessed from UN Peacekeeping homepage, <http://www.un.org/en/peacekeeping/missions/past/unamsil/index.html>, accessed 29 August 2013.

³⁵ Security Council resolution 1171, of 5 June 1998.

³⁶ Security Council Resolution 1346, of 30 March 2001. Resolution 1289, of 7 February 2000 increased it from 6,000 to 11,000, while Resolution 1299, of 19 May 2000 brought this up to 13,000.

³⁷ Adebajo and Keen, 2007, p.261; and Thorsten Benner, Stephan Mergenthaler and Philipp Rotmann, *The New World of UN Peace Operations, learning to build peace*, Oxford: Oxford University Press, 2011, p.173.

³⁸ Paul Williams, 'Fighting for Freetown: British military intervention in Sierra Leone' *Contemporary Security Policy*, Vol. 22, Issue 3, pp.2001, 140–168. A total of 4,500 British military personnel were deployed, including an aircraft carrier and harrier jump-jets. The arrival of these forces coincided with a decision by a group of Kenyan UNAMSIL soldiers to fight their way out of a siege by rebel forces.

³⁹ Ibid.

one with a militia group notionally allied to the government.⁴⁰ UNAMSIL was also quite reticent about interpreting its POC mandate proactively. An informal poll revealed that contingents would return fire if attacked, but considered themselves under no obligation even to rescue other contingents' soldiers.⁴¹ One significant operation was, however, undertaken to rescue UN personnel taken hostage, which might have helped to check a further RUF advance through a show of force.⁴²

Sankoh was taken into custody after soldiers guarding his house opened fire on civilian protesters and a new UN Security Council resolution helped to cut the RUF's funding by tackling the trade of illicit diamonds.⁴³ The Guinean air force made cross-border bombing raids against RUF-controlled villages and a Sierra Leonean 'self-defence' militia, the Kamajors, launched attacks on their weakened forces, which were finally defeated in January 2002.⁴⁴ President Charles Taylor of Liberia, who had sponsored the RUF, was ousted from power the following year and, in April 2012, he became the first head of State since the

⁴⁰ Adebajo and Keen, 2007, p.258. The West Side Boys, which consisted mainly of ex-soldiers and criminals, captured 11 British soldiers in August 2000. A British rescue operation freed them all and killed several militia members, which was believed to have sent out a strong signal of resolve to use military force when necessary.

⁴¹ International Crisis Group, 'Sierra Leone: time for a new military and political strategy', ICG Africa Report no. 28, Freetown, London and Brussels, 11 April 2001.

⁴² Ibid., See also The Official Website of the Indian Air Force, *IAF Contingent 2000, to UNAMSIL, Special Achievements, Rescue Operation Khukri*, http://indianairforce.nic.in/show_page.php?pg_id=137#special, accessed 30 August 2013. Operation Khukri was a multinational military operation to rescue a group of Indian UNAMSIL soldiers who had been surrounded by rebel forces.

⁴³ UN Security Council Resolution 1306, adopted unanimously on 5 July 2000.

⁴⁴ For details see Abdullah, 2004; Keen, 2005; Sillinger, 2003; Ellis, 2001; Adekeye 2002; Williams, 2001; and Adebajo and Keen, 2007. The Kamajors were a group of traditional hunters from the south and east of Sierra Leone, who were originally employed by local chiefs. Under the leadership of Samuel Hinga Norman, a government minister, the force was expanded to over 20,000 men. The Kamajors fought alongside ECOMOG to recapture Freetown in 1998 and to defend it the following year. A number of Kamajor leaders, including Norman were indicted before the Special Court for Sierra Leone in 2003.

Nuremburg trials to be convicted by an international or hybrid tribunal of war crimes or crimes against humanity.⁴⁵

Protection and the ‘third phase’ of UN peacekeeping

In the same year that the UN adopted its first POC resolutions it also published two reports on the failure of its missions to prevent genocide in Rwanda⁴⁶ and Srebrenica.⁴⁷ 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.’⁴⁸

In August 2000 the UN published the Report of the Panel on United Nations Peace Operations, chaired by Lakhdar Brahimi, (the *Brahimi Report*).⁴⁹ This listed the logistical and resources-based challenges that the UN faced in deploying peace-keeping troops in sufficient time and number and contained a series of recommendations designed to remedy these problems. It argued that ‘the Secretariat must tell the Security Council what it needs to know, not what it wants to hear, when formulating or changing mission mandates.’⁵⁰ It stated that UN peacekeepers ‘who witness violence against civilians should be presumed to be

⁴⁵ Human Rights Watch, *Sierra Leone: 50-Year Sentence for Charles Taylor*, 30 May 2012. Taylor had been indicted by the Special Court for Sierra Leone whilst still in power in Liberia. In 2006, he was extradited from Nigeria, where he had been living in exile and he was found guilty in 2012 of all charges levied against him and sentenced to 50 years in prison. The only previous head of State to be convicted was Karl Dönitz who became Adolph Hitler’s successor after the latter’s suicide on 30 April 1945 and ordered Germany’s surrender a week later. Dönitz was convicted at Nuremburg and sentenced to 10 years imprisonment.

⁴⁶ *Report of the Independent Inquiry into the actions of the United Nations during the 1994 Genocide in Rwanda*, S/1999/1257, 16 December 1999.

⁴⁷ *Report of the Secretary-General pursuant to General Assembly resolution 53/35, The fall of Srebrenica*, A/54/549, 15 November 1999.

⁴⁸ UN Security Council Resolution 1296, of 19 April 2000, para. 15.

⁴⁹ *Report of the Panel on United Nations Peace Operations*, A/55/305–S/2000/809, 21 August 2000.

⁵⁰ *Ibid.*, para 64(d).

authorized to stop it', but that 'operations given a broad and explicit mandate for civilian protection must be given the specific resources needed to carry out that mandate.'⁵¹ It also noted that there '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.'⁵² Nevertheless, it argued that: 'Once deployed, United Nations peacekeepers must be able to carry out their mandate professionally and successfully . . . 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 protect.'⁵³ 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.⁵⁴

The publication of these set of reports is widely seen as marking the start of the 'third phase' of UN peacekeeping.⁵⁵ In the light of Brahimi's recommendations, in 2002, the UN revised its rules on the use of force to permit all missions, regardless of their mandate to use force 'to

⁵¹ Ibid., para 62.

⁵² Ibid., para 63.

⁵³ Ibid., para 49.

⁵⁴ Ibid., para 1.

⁵⁵ See Alex Bellamy and Paul Williams, *Understanding Peacekeeping*, Second Edition, Polity Press, 2011; Siobhán Wills, *Protecting Civilians, the obligations of peacekeepers*, Oxford: Oxford University Press, 2009; Christine Gray, *International law and the use of force, Third Edition*, Oxford: Oxford University Press, 2008, pp. 254 – 249; Peter Danchin and Horst Fischer, (eds), *United Nations reform and the new collective security*, Cambridge: Cambridge University Press, 2010; Elizabeth G. Ferris, *The Politics of Prevention: The Limits of Humanitarian Action*, Washington DC: Brookings Institution Press, 2011; Thomas G Weiss, *Humanitarian Intervention: War and Conflict in the Modern World*, Cambridge: Cambridge University Press, 2007; William Durch, Victoria Holt, Caroline Earle and Moira Shanahan, *The Brahimi Report and the Future of Peace Operations*, Washington, DC: The Henry L. Stimson Center, December 2003.

defend any civilian person who is in need of protection'.⁵⁶ Missions have also become increasingly multi-dimensional. 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.'⁵⁷ It states that:

Most 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 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.⁵⁸

This reasonably describes what UN missions often do. However, it uses the same term 'protection' to include actions by the military and police where there is an 'imminent threat of physical violence' as well as a 'broad', but undefined, range of activities by UN humanitarian agencies and NGOs. The High Level Panel Report on Peace Operations of 2015 also urged UN missions to 'harness or leverage' the capabilities of humanitarian organizations to 'support the creation of a protective environment.'⁵⁹ Much of the current discourse on

⁵⁶ United Nations Master List of Numbered ROE, Guidelines for the Development of ROE for UNPKO, Provisional Sample ROE, Attachment 1 to FGS/0220.001, United Nations, April 2002, Rule 1.8. This authorises the use of force 'up to, and including deadly force, to defend any civilian person who is in need of protection against a hostile act or hostile intent, when competent local authorities are not in a position to render immediate assistance'.

⁵⁷ *Capstone Doctrine* 2008, p.24.

⁵⁸ *Ibid.*

⁵⁹ High Level Panel Report on Peace Operations of 2015, para 87. 'Humanitarian organizations play essential roles in protecting civilians. Where appropriate, timely coordination between missions with humanitarian actors is indispensable in pursuing unarmed strategies as these partners often work closely with communities, especially internally displaced persons. Many non-governmental

‘stabilization’ adopts a similar approach.⁶⁰ As will be discussed below this can lead to considerable confusion about who is to be protected, from what, by whom, to what extent and until when.

POC’s normative significance

Although the Security Council was aware of the significance of the POC tasks that it had inserted into UNAMSIL’s mandate, this does not seem to have been considered a significant separate task within the mission at the operational or tactical level.⁶¹ The first mission report

organizations, national and international, also ensure protection by their civilian presence and commitment to non-violent strategies for protection. Missions should make every effort to harness or leverage the non-violent practices and capabilities of local communities and non-governmental organizations to support the creation of a protective environment

⁶⁰ There is a vast and growing literature on the latter concepts. See for example: Robert Muggah, (ed), *Stabilization operations, security and development: states of fragility*, London and New York: Routledge, 2014; Oliver Ramsbotham, Hugh Miall, Tom Woodhouse, *The Dilemmas of Statebuilding: Confronting the Contradictions of Post War Peace Operations*, Abingdon: Routledge, 2009; Ronald Hatto, ‘From peacekeeping to peacebuilding: the evolution of the role of the United Nations in peace operations’, *International Review of the Red Cross*, Multinational operations and the law, Volume 95 Number 891/892 Autumn/Winter 2013, pp.495–515; Beth Cole and Emily Hsu, *Guiding Principles for Stabilization and Reconstruction*, Washington: United States Institute for Peace, 2009; OECD-DAC *Supporting Statebuilding in Situations of Conflict and Fragility: Policy Guidance*, DAC Guidelines and Reference Series, Paris: OECD, 2011; Craig Cohen, *Measuring Progress in Stabilization and Reconstruction*, Washington DC: United States Institute of Peace, 2009; Michael W. Doyle and Nicholas Sambanis, *Making War and Building Peace: United Nations Peace Operations*, New Jersey: Princeton University Press, 2006; Michael Barnett, ‘Building a Republican Peace: Stabilizing States after War’, *International Security*, Spring 2006, Vol. 30, No. 4, pp.87-112; Alex J. Bellamy and Paul D. Williams, ‘Who’s Keeping the Peace? Regionalization and Contemporary Peace Operations’, *International Security*, Spring 2005, Vol. 29, No. 4, pp.157-195; Philip Wilkinson, *The Military Contribution to Peace Support Operations, Joint Warfare Publication (JWP) 3-50, Second Edition*, Shrivenham: Ministry of Defence, 2004; Robert B. Oakley, Michael J. Dziedzic, Eliot M. Goldberg (eds), *Policing The New World Disorder: Peace Operations And Public Security*, Washington DC: National Defense University Press, 1998.

⁶¹ For the UN’s distinction between Strategic, Operational and Tactical levels, see *Authority, Command and Control in United Nations Peacekeeping Operations*, United Nations Department of Peacekeeping Operations Department of Field Support Ref. 2008.4, Policy February 2008. The management of a peacekeeping operation at UN Headquarters level in New York is considered to be the strategic level. The Security Council provides the legal authority, high-level direction and political guidance for all UN peacekeeping operations, which is then vested in the Secretary-General and delegated to the Under Secretary-General for Peacekeeping Operations (USG DPKO). The field-based management of a peacekeeping operation is considered to be the operational level and includes: the Head of Mission, Head of Police and Military components, Deputy Special Representative(s) of the Secretary-General (DSRSG); and Director of Mission Support/Chief of Mission Support (DMS/CMS). The management of military, police and civilian operations below the level of Mission Headquarters and the supervision of individual personnel is considered to be at the tactical level and is exercised by Brigade, Regional, Sector Commanders for the military and the management of the mission’s regional/sector/field offices by the civilian heads of offices.

to the Security Council, in December 1999, contained no references to POC, although it did have separate sections on the security situation, DDR, human rights and humanitarian issues.⁶² The language of the reports suggests that it was assumed that the protection of civilians would be accomplished through the success of the mission's overall objectives. A report in March 2001, for example, stated that:

The main objectives of UNAMSIL in Sierra Leone remain to assist the efforts of the Government of Sierra Leone to extend its authority, restore law and order and stabilize the situation progressively throughout the entire country, and to assist in the promotion of a political process which should lead to a renewed disarmament, demobilization and reintegration programme and the holding, in due course, of free and fair elections.⁶³

The notion that the best means of protecting civilians is to bring an end to the conflict in which they are suffering and so the success of the mission's overall political objectives should take priority over specific mandated tasks remains a strong.⁶⁴ The reports of the Special Committee for Peacekeeping Operations (C34) to the UN General Assembly continue to stress the importance of missions supporting 'comprehensive peace processes' while abiding strictly to the 'core principles' of peacekeeping: host state consent, impartiality and minimum use of force.⁶⁵ These principles are also restated in the High Level Panel Report on

⁶² *First Report of the Secretary General on the United Nations Mission in Sierra Leone*, S/1999/1223, 6 December 1999.

⁶³ *Ninth report of the Secretary General on the United Nations Mission in Sierra Leone*, S/2001/228, 14 March 2001, paras 57-8.

⁶⁴ See, for example, the High Level Panel Report on Peace Operations of 2015, Executive Summary and para 37. '*First, politics must drive the design and implementation of peace operations.* Lasting peace is achieved not through military and technical engagements, but through political solutions. Political solutions should always guide the design and deployment of UN peace operations. When the momentum behind peace falters, the United Nations, and particularly Member States, must help to mobilize renewed political efforts to keep peace processes on track.' [emphasis in original]

⁶⁵ See, for example, Report of the Special Committee on Peacekeeping Operations 2012 substantive session (New York, 21 February-16 March and 11 September 2012), UN Doc. A/66/19, paras 21 and 24-7.

Peace Operations of 2015, the *Capstone Doctrine* and other recent policy documents.⁶⁶

References to POC have gradually entered into the reports of the C34 as a mandated task since 2009, although with very little discussion of the direct physical protection that peacekeeping soldiers can provide.⁶⁷

The cautious wording of the original UNAMSIL mandate has been repeated many times since and mission staff members sometimes emphasize the caveats and limitations contained in the original resolution.⁶⁸ Nevertheless, the Security Council is becoming increasingly detailed in spelling out the POC tasks of UN peacekeeping missions, drawing on their field experiences.

The first Secretary General's report on POC in 1999 included a recommendation that 'regional or international military forces' must be 'prepared to take effective measures to

⁶⁶ High Level Panel Report 2015, paras 121-5; Capstone Document 2008, p.31. See also *The New Horizon Initiative, Progress Report No. 2*, New York: Department of Peacekeeping Operations and Department of Field Support, December 2011; *Early Peace building Strategy*, New York: Department of Peacekeeping Operations and Department of Field Support, June 2011; and *Draft Operational Concept on the Protection of Civilians in United Nations Peacekeeping Operations*, New York: Department of Peacekeeping Operations–Department of Field Support, 2010.

⁶⁷ *Report of the Special Committee on Peacekeeping Operations 2012 substantive session* (New York, 21 February-16 March and 11 September 2012), UN Doc. A/66/19, paras; 191-205; *Report of the Special Committee on Peacekeeping Operations 2011 substantive session* (New York, 22 February-18 March and 9 May 2011) UN Doc. A/65/19, paras 172-83; Adopted by UN General Assembly Resolution 65/310; *Report of the Special Committee on Peacekeeping Operations 2010 substantive session* (New York, (22 February-19 March 2010), UN Doc. A/64/19, paras 145-51, Adopted by UN General Assembly Resolution 64/266; *Report of the Special Committee on Peacekeeping Operations 2009 substantive session* (New York, 23 February-20 March 2009), UN Doc. A/63/19, paras 127-8, Adopted by UN General Assembly Resolution 63/280. POC was not mentioned at all in the *Report of the Special Committee on Peacekeeping Operations 2008 substantive session* (New York, 10 March-4 April and 3 July 2008), UN Doc. A/62/19.

⁶⁸ Interview in November 2013 with Séverine Autesserre, a former aid worker and author of *The trouble with the Congo: local violence and the failure of international peacebuilding*, Cambridge: Cambridge University Press, 2010, which is based on hundreds of interviews carried out in the DRC between 2004 and 2007. She notes that some mission staff stress that the mandate's use of the word 'may' indicates that the Chapter VII authorization is discretionary. The phrase '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' is also sometimes interpreted sequentially. The mission will first ensure its own security and freedom of movement, then that of international humanitarian aid workers and only after that will it consider protecting local people. These views also reflect the author's own observations of some UN staff in missions with POC mandates.

protect civilians. Such measures could include compelling disarmament of the combatants or armed elements'.⁶⁹ It also recommended that the Security Council:

Establish, as a measure of last resort, temporary security zones and safe corridors for the protection of civilians and the delivery of assistance . . . subject to a clear understanding that such arrangements require the availability, prior to their establishment, of sufficient and credible force to guarantee the safety of civilian populations making use of them, and ensure the demilitarization of these zones and the availability of a safe-exit option.⁷⁰

The two subsequent reports on POC, published in 2001 and 2002, however, failed even to mention the role of internationally-mandated forces in protecting civilians against violence.⁷¹

They instead emphasised the primary responsibility of governments to protect their own people, with the role of the UN limited to advocating that these fulfil their responsibilities.⁷²

The only 'direct protection' tasks envisaged for missions were coordinating and facilitating the delivery of humanitarian aid and negotiating access to vulnerable populations.⁷³ An *Aide Memoire*, published in December 2003, followed much the same approach.⁷⁴

The Secretary General's report, published in 2004, more assertively stated that 'the stronger protection focus in peacekeeping mandates has been complemented by swifter deployments of peacekeeping troops when needed to avert an immediate crisis of protection and to restore

⁶⁹ *Report of the Secretary-General to the Security Council on the Protection of Civilians in Armed Conflict*, S/1999/957, 8 September 1999, para 35.

⁷⁰ *Ibid.*, para 39.

⁷¹ *Report of the Secretary-General on the protection of civilians in armed conflict*, S/2001/331, 30 March 2001; and *Report of the Secretary-General on the protection of civilians in armed conflict*, S/2002/1300, 26 November 2002.

⁷² For example, *Report of the Secretary-General on the protection of civilians in armed conflict*, S/2001/331, 30 March 2001, paras 9-13 contained a list of 'measures to enhance protection', which were: Prosecutions of violations of international criminal law, Denial of amnesty for serious crimes, Impact of criminal justice, Importance of national jurisdictions and Truth and Reconciliations efforts.

⁷³ *Ibid.*, paras 14-25.

⁷⁴ *Annex to Statement of the President of the Security Council, Protection of civilians in armed conflict, Aide Memoire*, S/PRST/2003/27, 15 December 2003.

order', making specific to the UN mission to the DRC.⁷⁵ UN peacekeeping forces were said to be 'holding local militias in check and maintaining the peace in a precarious situation'.⁷⁶ The 2005 report noted that UN peacekeepers 'can provide the necessary security environment to prevent displacement and facilitate an early return' and 'may also be the only means of ensuring that the civilian character of camps for displaced populations is maintained by preventing the infiltration of armed elements and combatants'.⁷⁷

The 2007 report again referred to the UN's DRC mission (MONUC) as illustrating the 'critical role that peacekeepers can play in protecting civilians, through a concept of operations that prioritizes the provision of security by a deterrent military presence and direct involvement to prevent and end violations of human rights and humanitarian law'.⁷⁸ When the Security Council revised MONUC's mandate the same year, it stated that 'the protection of civilians must be given a priority in decisions about the use of available capacity and resources'.⁷⁹ The Council also established an Informal Expert Group on the Protection of Civilians, in the same year to consider a wide range of protection issues, based on briefings by relevant UN agencies and departments.⁸⁰

⁷⁵ *Report of the Secretary-General on the protection of civilians in armed conflict*, S/2004/431, 28 May 2004, para 9.

⁷⁶ *Ibid.*

⁷⁷ *Report of the Secretary-General on the protection of civilians in armed conflict*, S/2005/740, 28 November 2005, para 23.

⁷⁸ *Report of the Secretary-General on the protection of civilians in armed conflict*, S/2007/643, 28 October 2007, para 14.

⁷⁹ Security Council Resolution 1794 of 21 December 2007, para 5.

⁸⁰ For further details see UN OCHA Home Page, Thematic Areas: Protection, <http://www.unocha.org/what-we-do/policy/thematic-areas/protection>, accessed 5 August 2015. See, also, *Security Council Report, Cross-Cutting Report, Protection of Civilians in Armed Conflict*, May 2015, pp.2 and 4. The group was established in response to a recommendation in the Secretary-General's 2007 report on the Protection of Civilians. It is Chaired by the United Kingdom and serviced by the UN Office for the Coordination of Humanitarian Affairs (OCHA). It includes experts from Security Council Members with inputs from relevant UN Secretariat departments, agencies, Humanitarian Coordinators, and non-governmental organizations. It met 10 times in 2012, 11 times in 2013 and 9 times in 2014. Since 2013 representatives from other UN entities have also been invited to address these meetings.

The following year POC was made MONUC's highest priority.⁸¹ The resolution also removed the reference to 'without prejudice to the responsibility to the government' and mandated 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'.⁸² [emphasis added] In 2009 the Security Council stressed, for all missions, that 'mandated protection activities must be given priority in decisions about the use of available capacity and resources, including information and intelligence resources, in the implementation of mandates' and recognized, that POC 'requires a coordinated response from all relevant mission components'.⁸³

In 2011 the Security Council mandated the UN mission to Côte d'Ivoire to 'prevent the use of heavy weapons against the civilian population'⁸⁴ In 2013 the Security Council created a Force Intervention Brigade to conduct 'targeted offensive operations' against rebel groups which threatened civilians.⁸⁵ In 2014 the word 'imminent' was removed from the formulation in the DRC mission's mandate.⁸⁶ Guidance produced by the DPKO and OCHA in 2010 and 2011 stated that while the protection of civilians is primarily the responsibility of the host government and the mission is deployed to assist and build the capacity of the government in the fulfilment of this responsibility:

in cases where the government is unable or unwilling to fulfil its responsibility,
Security Council mandates give missions the authority to act independently to protect

⁸¹ Security Council Resolution 1856 of 22 December 2008, para 2: 'Requests MONUC to attach the highest priority to addressing the crisis in the Kivus, in particular the protection of civilians, and to concentrate progressively during the coming year its action in the eastern part of the Democratic Republic of the Congo.'

⁸² *Ibid.*, para 3 (a).

⁸³ Security Council Resolution 1894 of 11 November 2009, para 19.

⁸⁴ Security Council Resolution 1975 of 30 March 2011, para 6.

⁸⁵ Security Council Resolution 2098, 28 March 2013, para 12(b).

⁸⁶ Security Council Resolution 2147, of 28 March 2014, para 4 (a) (i)

civilians [meaning that] missions are authorized to use force against any party, *including elements of government forces.*⁸⁷ [emphasis added]

The Secretary General's report on POC in 2009 hailed 'ten years of normative progress'⁸⁸ and stated that it had 'increasingly permeated the country-specific deliberations and decisions of the Council', which had resulted in 'concrete proposals and decisions' to improve the protection of victims of conflicts.⁸⁹ While a decade previously 'members of the Security Council questioned whether situations of internal armed conflict constituted a threat to international peace and security', this was now 'firmly recognized' by all.⁹⁰ The report identified five core challenges: enhancing compliance with international law; enhancing compliance by non-state armed groups; enhancing protection through more effective and better resourced peacekeeping missions; enhancing humanitarian access; and enhancing accountability for violations.⁹¹ It also warned, however, that POC 'remains largely undefined as both a military task and as a mission-wide task. Each mission interprets its protection mandate as best it can in its specific context.'⁹² There was a need for a 'broader policy framework that includes clear direction as to possible courses of action, including in situations where the armed forces of the host State are themselves perpetrating violations against civilians, as well as indicative tasks and the necessary capabilities for their implementation.'⁹³

⁸⁷ UN Office for the Coordination of Humanitarian Affairs, *Framework for Drafting Comprehensive Protection of Civilians (POC) Strategies in UN Peacekeeping Operation*, UN OCHA, 2011. See also *Draft Framework for Drafting Mission-wide Protection of Civilians Strategies in UN Peacekeeping Operations*, UN DPKO, 2010

⁸⁸ *Report of the Secretary-General to the Security Council on the Protection of Civilians in Armed Conflict*, 29 May 2009, S/2009/277, paras 8-13.

⁸⁹ *Ibid.*

⁹⁰ *Ibid.*, para 3.

⁹¹ *Ibid.*, para 26. For an elaboration of these see paras 27-73.

⁹² *Ibid.*, para 52.

⁹³ *Ibid.*

In 2009 UN DPKO and OCHA commissioned an independent review whose report marked a significant milestone in the mainstreaming of POC into peacekeeping.⁹⁴ This found that while progress had been made over the previous decade, ‘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’.⁹⁵ In 2010 a concept note by DPKO stated 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 . . . has contributed to the disconnect between expectations and resources. . . . 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.⁹⁶

At a workshop on the use of force in UN peace operations held in 2004, several former UN Force commanders stated that ‘protection’ often ‘requires pre-emptive or preventive actions, yet they are often prohibited from acting except in response to opposing forces’ actions.’⁹⁷ At another, in 2010, participants complained that the Security Council had ‘started mandating the use of force to protect civilians, however they do not authorise sufficient resources and

⁹⁴ Victoria Holt and Glyn Taylor, *Protecting civilians in the context of UN peacekeeping operations*, New York: United Nations, 2009.

⁹⁵ *Ibid.*, p.5.

⁹⁶ *DPKO/DFS Draft Operational Concept on the Protection of Civilians in Peace Operations*, UN DPKO/DFS, 2010, paras 4 and 9.

⁹⁷ Victoria Holt and Tobias Berkman, *The Impossible Mandate? Military Preparedness, the Responsibility to Protect and Modern Peace Operations*, The Stimson Center, 2006, p.53.

instead caveat the activity with the unclear phrases ‘within the areas of deployment’ and ‘within capabilities’.⁹⁸

In 2010 DPKO produced its first Operational Concept on the Protection of Civilians and this has been used as the basis for subsequent mission-specific protection strategies.⁹⁹ This noted that the term protection was understood differently by different actors, but that for ‘the purposes of this operational concept, it is not necessary to fully reconcile these paradigms.’¹⁰⁰

POC was conceived as encompassing three ‘tiers’ of activities: (i) protection through political process; (ii) protection from physical violence; and (iii) establishment of a protective environment.¹⁰¹ The Three Tiers concept has now been integrated into the protection strategies of other missions and is also frequently used in the structure of mission reports.

The concept paper noted that it:

rests on the understanding that POC tasks undertaken by UN peacekeeping missions must reflect and uphold the principles of UN peacekeeping, namely, consent of the host government and the main parties to the conflict, impartiality, and the non-use of force except in self-defense and defense of the mandate. It also recognizes that the protection of civilians is primarily the responsibility of the host government.¹⁰²

⁹⁸ Scott Sheeran (Research Director), *UN Peacekeeping and The Model Status of Forces Agreement*, United Nations Peacekeeping Law Reform Project, School of Law, University of Essex, 20011, p.16.

⁹⁹ *Draft Operational Concept on the Protection of Civilians in United Nations Peacekeeping Operations*, New York: Department of Peacekeeping Operations–Department of Field Support, 2010. Much the same language appears in the UNOCI, MONUSCO, UNAMID and UNMISS protection strategies produced between 2010 and 2012, which are on file with the author of this thesis. See also *Policy on the Protection of Civilians in United Nations Peacekeeping*, Department of Peacekeeping Operations / Department of Field Support, Ref. 2015.07, 1 April 2015; and *Protection of Civilians: Implementing Guidelines for Military Components of United Nations Peacekeeping Missions*, Department of Peacekeeping Operations / Department of Field Support, February 2015.

¹⁰⁰ *Ibid.*, paras 9 and 11.

¹⁰¹ *Ibid.*, para 2.

¹⁰² *Ibid.*, para 7.

The tasks listed in Tiers I and III were described as ‘well-established activities in UN peacekeeping’.¹⁰³ Activities listed in Tier II included ‘preventive measures, such as political engagement with parties to the conflict by senior mission leadership, preventive tactical deployments of the peacekeeping force in areas where civilians are potentially at risk, as well as direct use of force in situations where serious international humanitarian law and human rights violations are underway, or may occur.’¹⁰⁴ It was stressed that protection of civilians from physical violence should not just been seen as a military task and that other mission components and activities contributed to this.¹⁰⁵ Only when a threat of physical violence was apparent and all measures had been exhausted should the deployment ‘of police and/or direct military action . . . be considered as an option, such as the interposition of peacekeepers between a vulnerable population and hostile elements or the use of force as a last resort when the population is under imminent threat of physical violence.’¹⁰⁶

The pacific assumptions underlying this operational strategy are in marked contrast both to other guidance, referred to in this chapter and to statements and UN Security Council resolutions in relation to the Force Intervention Brigade in the DRC, that will be discussed further in Chapter Six. Guidance in 2015, did not refer to the ‘interposition’ of forces and stated that: ‘peacekeepers will act to prevent, deter, pre-empt or respond to threats of physical violence in their areas of deployment, no matter the scale of the violence and irrespective of the source of the threat’ as well as repeating that force could be used against government soldiers threatening civilians.¹⁰⁷ It also stated that missions could undertake ‘credible deterrence actions or engaging in offensive operations to prevent violence against civilians.’¹⁰⁸

¹⁰³ Ibid., para 13.

¹⁰⁴ Ibid.

¹⁰⁵ Ibid.

¹⁰⁶ Ibid., para 19.

¹⁰⁷ *Policy on the Protection of Civilians in United Nations Peacekeeping*, Department of Peacekeeping Operations / Department of Field Support, Ref. 2015.07, 1 April 2015, p.6-7.

¹⁰⁸ Ibid., p.11.

These apparent differences in emphasis may reflect divergent views within the UN. It may also, however, be based on a dichotomous approach to the use of force for POC purposes: that missions must either maintain the traditional ‘core principles’ of peacekeeping or become a party to the conflict that they were sent to help resolve. As Holt and Berkman have noted, “‘protection’ is often vague and undefined, particularly in the more challenging, non-permissive environments where mass killing is likely to occur . . . 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.”¹⁰⁹ The High Level Panel Report on Peace Operations of 2015 also stated that there was a growing expectation on UN missions to protect civilians, but that while these ‘have at times responded with conviction to prevent such threats from materializing or worsening, and to provide safety to civilians, at other times, they have failed to show sufficient resolve and action’¹¹⁰

In March 2014 a report by the UN Office of Internal Oversight Services (OIOS) stated that while POC mandates create a ‘legal obligation’ on missions to ‘use force, including deadly force . . . within their capabilities when civilians are in imminent physical danger or actually being attacked in their areas of deployment’¹¹¹ they routinely avoided doing so, intervening in only 20 percent of cases and that ‘force is almost never used to protect civilians under attack.’¹¹² Only four missions indicated that they had ever fired a warning shot, and only

¹⁰⁹ Holt and Berkman, 2006, pp.5 and 50.

¹¹⁰ High Level Panel Report on Peace Operations of 2015, para 27.

¹¹¹ OIOS Protection Evaluation 2014, para 55.

¹¹² Ibid. para 19: ‘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 its 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.’

three indicated that they had ever fired a shot with lethal intent.¹¹³ It also noted that: ‘Interviews revealed widespread understanding in missions concerning the host Government’s primary responsibility to protect civilians, but less understanding concerning the mission’s legal obligation to act, including with force, when host Governments cannot or will not do so.’¹¹⁴

Interviewees also referred to gaps at the tactical level on the issue of how to respond to complex and ambiguous situations that might require the use of force. They included issues 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. Guidance, official documents, including Rules of Engagement, and training, despite considerable efforts, including scenario-based training, do not seem to adequately address such situations.¹¹⁵

DPKO responded to the OIOS report by regretting ‘that the approach of the report over emphasizes one element of military action and devalues the importance of political solutions and other aspects of the comprehensive approach peacekeeping operations take in implementing their protection mandate.’¹¹⁶ The High Level Panel Report of 2015 also emphasised that lasting peace is ‘achieved not through military and technical engagements,

¹¹³ Ibid., para 25.

¹¹⁴ Ibid., para 40.

¹¹⁵ Ibid., para 52.

¹¹⁶ Ibid. Annex I, Comments on the draft report received from the Department of Peacekeeping Operations and the Department of Field Support, para 4.

but through political solutions. Political solutions should always guide the design and deployment of United Nations peace operations.¹¹⁷

The first Security Council resolution on POC, in 1999, had highlighted the importance of ‘conflict prevention’ and the ‘need to address the causes of armed conflict’ by ‘promoting economic growth, poverty eradication, sustainable development’ and ‘good governance, democracy, the rule of law and respect for and protection of human rights’.¹¹⁸ Since 2010 DPKO has produced a variety of policy papers and guidance that stress the need for advocacy with the national authorities and capacity-building of state institutions to enhance the protection of civilians.¹¹⁹ Clearly protection through political process and the creation of a protective environment are key POC tasks and mission reports often stress these activities, sometimes as an apparent counter-weight to their reluctance to use force for protective purposes. The monitoring and advocacy activities of UN missions with POC mandates often overlap with what is often referred to as humanitarian ‘rights-based’ protection, but as the next two sections of this chapter will discuss the two should in fact be clearly distinguished from one another.

POC and humanitarian ‘rights-based’ protection

¹¹⁷ High Level Panel Report on Peace Operations 2015, p.10.

¹¹⁸ UN Security Council Resolution 1265 of 17 September 1999, preamble.

¹¹⁹ *DPKO/DFS Draft Operational Concept on the Protection of Civilians in Peace Operations*, UN Department of Peacekeeping Operations /Department of Field Support, 2010; *Lessons Learned Note on the Protection of Civilians*, UN Department of Peacekeeping Operations, 2010; *Draft Matrix of Resources and Capability Requirements for Implementation of Protection of Civilians Mandates in UN Peacekeeping Operations*, Department of Peacekeeping Operations, 2010; *Guidelines for Protection of Civilians for Military Components of UN Peacekeeping Missions*, UN Department of Peacekeeping Operations, 2010; *Draft Framework for Drafting Mission-wide Protection of Civilians Strategies in UN Peacekeeping Operations*, UN Department of Peacekeeping Operations, 2010; and *MONUC Protection Strategy Narrative – Draft 8*, March 31 2009 – MONUC ODSRSG; UN Organization Mission in the Democratic Republic of Congo (MONUC) & UN High Commissioner for Refugees, ‘UN System-Wide Strategy for the Protection of Civilians in the Democratic Republic of the Congo’, January 2010 [Hereinafter MONUC Protection Strategy 2010]. See also Kyoko Ono, *Actions Taken by MONUC to Implement the Security Council Mandate on Protection of Civilians*, UN DPKO, Peacekeeping Best Practices Section, June 2008; and *Lessons Learned Note on the Protection of Civilians*, UN Department of Peacekeeping Operations, 2010; and *MONUC Protection Strategy Narrative – Draft 8*, March 31 2009 – MONUC ODSRSG (all on file with author).

Humanitarian agencies tend to use the term ‘protection’ in its broadest sense of ‘protecting all rights’ in the applicable bodies of international law.¹²⁰ There are, however, three crucial distinctions between POC and humanitarian ‘rights-based’ protection. The first is that UN peacekeeping missions with POC mandates have both the military capability and legal authority to use force for protective purposes, while humanitarian aid workers do not. The second is that the right of access to humanitarian assistance provided in international law specifies that its distribution is a strictly humanitarian responsibility, to be conducted according to humanitarian principles.¹²¹ UN missions with POC mandates, by contrast, have developed ‘protection strategies’ with overtly political objectives, such as bolstering peace processes, and, as will be discussed further in Part III of this thesis, some missions may have even become a party to the armed conflicts that they were sent to try and help to resolve.

The third distinction concerns how UN peacekeeping missions and humanitarian agencies confront the dilemma of whether or not to investigate and speak out against egregious violations of IHL and international human rights law if this may jeopardize their operational presence. Humanitarian aid agencies provide life-saving assistance and so a denial of access to affected populations can have catastrophic consequences. Some, nevertheless, seek to

¹²⁰ ICRC *Strengthening Protection in War: A Search for Professional Standards*, Geneva: International Committee of the Red Cross, 2001. See also Ashley Jackson, *Protecting civilians: the gap between norms and practice*, Humanitarian Policy Group, Policy Brief 56, London: Overseas Development Institute, April 2014; Norah Niland, Riccardo Polastro, Antonio Donini, and Amra Lee, *Independent Whole of System Review of Protection in the Context of Humanitarian Action*, Norwegian Refugee Council, May 2015, [Hereinafter Whole of System Review of Protection 2015], pp.31-3; and Bellamy and Williams, 2011, pp.337-58.

¹²¹ *The Fundamental Principles of the International Red Cross and Red Crescent Movement, 1986*. These were proclaimed by the 20th International Conference of the Red Cross (ICRC), Vienna, 1965 and subsequently incorporated into the Statutes of the International Red Cross and Red Crescent Movement, adopted by the 25th International Conference of the Red Cross, Geneva, 1986. The principles are: humanity, impartiality, neutrality, independence, voluntary service, unity and universality. See also Jean Pictet, *The Fundamental Principles of the Red Cross*, Henri Dunant Institute, Geneva, 1979; and *Case Concerning Military and Paramilitary Activities in and against Nicaragua* (Nicaragua v. United States of America). Merits, Judgment. ICJ Report, 1986, para 243. The ICRC specifies that the principle of neutrality means that: ‘In order to continue to enjoy the confidence of all, the Movement may not take sides in hostilities or engage at any time in controversies of a political, racial, religious or ideological nature.’

‘bear witness’ to egregious violations, while others argue that the ‘humanitarian imperative’ may sometimes require more discretion.¹²² UN authorized missions with POC mandates can face a similar dilemma in maintaining host state consent to the mission’s deployment if these forces are responsible for the violations. It will be argued in this thesis, however, that UN missions should consider that they have a duty to investigate and report on violations as an integral part of a POC mandate.

Both IHL and international human rights law contain clear ‘positive obligations’ on the appropriate authorities to investigate and report on violations, which is quite different from the ‘protection monitoring’ carried out by humanitarian agencies.¹²³ These provisions will be discussed in more detail in Chapter Four of this thesis and it will be argued in Chapter Five, that the core provisions of this legal framework are potentially applicable to the conduct of UN peacekeeping missions. Conflating the concepts of POC and humanitarian ‘rights-based’ protection risks compromising the neutrality of those engaged in delivering humanitarian assistance, while weakening the rigour with which missions should be required to investigate and report on egregious violations of IHL and international human rights law.

As discussed in the previous chapter, UNHCR became the lead UN humanitarian agency, providing ‘protection and assistance’, in a number of complex emergencies during the 1990s. By 2014 it estimated that it was helping around 46.3 million of the more than 51 million uprooted people worldwide.¹²⁴ In 2005, as part of a wider process of humanitarian reform,

¹²² Bearing witness to violations is closely associated with *Médecins sans Frontières* (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 see MSF USA Homepage ‘The founding of MSF’ <http://www.doctorswithoutborders.org/about-us/history-principles/founding-msf>, accessed 7 March 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*, October 1996, ICRC publication No. 314, p.512-531.

¹²³ United Nations High Commissioner for Refugees, *ExComm Note on International Protection*, UN Doc. A/AC.96/989, 3 July 1998, para 47.

¹²⁴ *UNHCR Home Page, History of UNHCR*, <http://www.unhcr.org/pages/49c3646cbc.html>, accessed 16 April 2016. This includes 13 million refugees, 26 million internally displaced people, 1.7 million

UNHCR established the Global Protection Cluster (GPC), as an inter-agency forum for standard and policy setting as well as collaboration and coordination of activities.¹²⁵ UNHCR often convenes Protection Working Groups (PWGs) at the field level to coordinate ‘protection-related’ activities.¹²⁶ UNHCR’s definition of ‘protection’, however, derives from its humanitarian mandate, which it clearly distinguishes from human rights work. As a Note on International Protection stressed in 1998:

While human rights monitoring missions must investigate and encourage prosecution of human rights violations, action in support of refugees and returnees is essentially humanitarian, encouraging confidence-building and creation of conditions conducive to peace and reconciliation.¹²⁷

Recent years have seen a growing number of attacks on humanitarian aid workers as these are often deliberately targeted in many places, partly because attempts have been made to use aid delivery for political tasks such as ‘stabilization’.¹²⁸ Attacks on humanitarian aid workers more than quadrupled between 2003 and 2013¹²⁹ and most agencies have concluded that

returnees, 3.5 million stateless people, more than 1.2 asylum-seekers and 752,000 other people of concern.

¹²⁵ *Global Protection Cluster*, <http://www.globalprotectioncluster.org>, accessed 20 January 2014. See also Inter-Agency Standing Committee, *The Centrality of Protection in Humanitarian Action*, Statement by the Inter-Agency Standing Committee (IASC) Principals Endorsed by the IASC Principals on 17 December 2013.

¹²⁶ *Ibid.* UNHCR often provides direct support to projects such as legal aid services and ‘protection monitoring’. Protection Working Groups often also 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.

¹²⁷ United Nations High Commissioner for Refugees, *ExComm Note on International Protection*, UN Doc. A/AC.96/989, 3 July 1998, para 47.

¹²⁸ For further discussion see: Mark Duffield, *Development, Security and Unending War: Governing the World of Peoples*, Cambridge: Polity Press, 2007; Sarah Collinson and Mark Duffield, *Paradoxes of presence: risk management and aid culture in challenging environments*, Humanitarian Policy Group, Overseas Development Institute, March 2013; Larissa Fast, *Aid in danger: the perils and promise of humanitarianism*, Pennsylvania: University of Pennsylvania, 2014; and Tennant, Doyle and Mazou, *Safeguarding Humanitarian Space: A Review of Key Challenges for UNHCR*, Geneva: UN High Commissioner for Refugees, 2010.

¹²⁹ See, for example, The Aid Worker Security Database, ‘Major attacks on aid workers 2003-13’, <https://aidworkersecurity.org/incidents/report/summary>, accessed 23 June 2015. In 2003 there were a total of 63 attacks and 143 victims of whom 87 were killed, 49 injured and seven kidnapped. By 2013 the number of incidents had increased to 264 and the victims to 474 of whom 155 were killed, 178 injured and 141 kidnapped.

maintaining a policy of strict neutrality is the best means of maintaining the acceptance of the communities that they serve.¹³⁰ Humanitarian agencies have become increasingly cautious about anything that may jeopardize this, including efforts by the UN to ‘integrate’ its humanitarian and political mandates.¹³¹

The views of humanitarian actors about what constitutes ‘rights-based’ protection also appear to be in considerable flux.¹³² A review of protection in the context of humanitarian action, published in 2015, noted that ‘notwithstanding significant effort to make protection concerns central to humanitarian decision-making, there is very little common understanding as to what that means in practice.’¹³³ A paper published by the Humanitarian Policy Group (HPG)

¹³⁰ *Operational Security Management in Violent Environments, Good Practice Review*, Humanitarian Policy Group of the Overseas Development Institute, 2010; Shaun Bickley, *Safety First: A safety and security handbook for aid workers*, Save the Children UK, 2010; Inter-Agency Standing Committee, *Civil–Military Guidelines and Reference for Complex Emergencies*, Geneva: IASC, 2008; Sue McCready, *International Alert Security Manual*, International Alert, August 2013; *UN Guidelines on the Use of Foreign Military and Civil Defence Assets in Disaster Relief*, Geneva: UN OCHA, 2007; Abby Stoddard, Adele Harmer and Victoria Domenico, *The Use of Private Security Providers and Services in Humanitarian Operations*, Humanitarian Policy Group, Overseas Development Institute, 2008; David Lloyd Roberts, *Staying Alive: Safety and Security Guidelines for Humanitarian Volunteers in Conflict Areas*, Geneva: ICRC, 2006; Larissa Fast, *Aid in danger: the perils and promise of humanitarianism*, Pennsylvania: University of Pennsylvania, 2014; International Committee of the Red Cross, *Safer Access: A Guide For All National Societies*, Geneva: ICRC; *The Acceptance Toolkit, A practical guide to understanding, assessing, and strengthening your organization’s acceptance approach to NGO security management*, Save the Children and USAID, 2011.

¹³¹ Victoria Metcalfe, Alison Giffen and Samir Elhawary, *UN Integration and Humanitarian Space: An Independent Study Commissioned by the UN Integration Steering Group* London and Washington: Overseas Development Institute, Humanitarian Policy Group (HPG) /Stimson Center, December 2011. See also: Marit Glad, *A Partnership at Risk? The UN-NGO Relationship in Light of UN Integration*, Norwegian Refugee Council, 2012; Espen Barth Eide, Anja Therese Kaspersen, Randolph Kent and Karen von Hippel, *Report on Integrated Missions: Practical Perspectives and Recommendations–Independent Study for the Expanded UN ECHA Core Group*, May 2005.

¹³² 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; Victoria Metcalfe, *Protecting civilians? The interaction between international military and humanitarian actors*, HPG Working Paper, London: Overseas Development Institute, August 2012; Cedric De Coning, Walter Lotze and Andreas Øien Stensland, *Mission-Wide Strategies for the Protection of Civilians, A Comparison of MONUC, UNAMID and UNMIS*, Norwegian Institute of International Affairs 2011; Jane Barry with Anna Jefferys, ‘A bridge too far: aid agencies and the military in humanitarian response’, *Humanitarian Practice Network*, Overseas Development Institute, January 2002; Hugo Slim, *Military intervention to protect human rights: the humanitarian agency perspective*, International Council on Human Rights Policy, March 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*, ICRC, Geneva, 2000; Amnesty International, *Peace-keeping and human rights*, AI Index IOR 40/01/94.

¹³³ Whole System Review of Protection 2015, pp.22-8.

in 2011 stated 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’.¹³⁴ Four years previously, however, an HPG paper had stated that humanitarian agencies were seeking to develop ‘more accessible working definitions which emphasise safety rather than rights . . . Put simply, protection is about seeking to assure the safety of civilians from acute harm.’¹³⁵

Others have questioned the usefulness of the concept itself. Marc DuBois of MSF, for example, argues that the ‘obsession with protection’ has become a ‘sort of self-flagellation in the humanitarian community over the death and destruction of our beneficiaries.’¹³⁶ 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’ amount to ‘delusions of grandeur’, since 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’.¹³⁷ He concluded that ‘the protection of civilians during periods of violent crisis (in the sense of providing physical safety) is not our job’.¹³⁸ His MSF colleague Bouchet-Saulnier, by contrast, argues that:

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

¹³⁴ Victoria Metcalfe, *Protecting civilians? The interaction between international military and humanitarian actors*, HPG Working Paper, London: Overseas Development Institute, August 2012. This cited the conclusions of a round-table discussion: HPG and ICRC ‘The Concept of Protection: Towards a Mutual Understanding’, Roundtable Summary Note, Geneva, 12 December 2011.

¹³⁵ Sorcha O’Callaghan and Sara Pantuliano, *Protective action: incorporating civilian protection into humanitarian response*, HPG Policy Brief 29, London: Overseas Development Institute, December 2007.

¹³⁶ Marc DuBois, ‘Protection: fig-leaves and other delusions’, *Humanitarian Exchange Magazine*, Issue No. 46 March 2010.

¹³⁷ *Ibid.* [emphasis in original]

¹³⁸ *Ibid.*

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.¹³⁹

A position paper by CARE International, in 2006, seems to straddle both positions. It stated that: ‘Agency staff must know the basics of human rights law and IHL. Staff must know who is protected, and the threats from which they are protected.’¹⁴⁰ The advice on what staff should do when they see violations, however, is fatally ambiguous:

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 time as a Country Director determines that speaking out will endanger staff or other program commitments).¹⁴¹

A study, in relation to Darfur, the following year similarly noted that: ‘Advocacy by operational aid actors is frequently juxtaposed with programming, with speaking out weighed against potential costs to programmes, staff and beneficiaries.’¹⁴² The implication of this position, that agencies might need to stop denouncing violations once they reach a certain level of severity, was graphically highlighted by the experiences of those working in Sri Lanka, at the end of its long-running civil war, in the spring of 2009.¹⁴³ There was no UN

¹³⁹ Bouchet-Saulnier, Françoise, *The practical guide to humanitarian law*, Maryland/ Oxford: MSF and Rowman & Littlefield, 2002, p.308.

¹⁴⁰ Dan Maxwell, *Humanitarian Protection: Recommendations towards Good Practice for Non-Mandated Organizations*, CARE, April 2006.

¹⁴¹ Ibid.

¹⁴² *Humanitarian advocacy in Darfur: the challenge of neutrality*, HPG Policy Brief 27, Overseas Development Institute, October 2007.

¹⁴³ For details see *Report of the Secretary General’s panel of experts on accountability in Sri Lanka*, United Nations, 31 March 2011; International Crisis Group, *War Crimes in Sri Lanka*, 17 May 2010; ‘Sri Lanka’s Killing Fields: war crimes unpunished’, *Channel 4*, first broadcast 14 March 2012; and *Promoting reconciliation, accountability, and human rights in Sri Lanka*, UN Doc.

peacekeeping mission in the country, but there was a UN Country Team and a substantial number of UN and NGO humanitarian agencies, most of which failed to speak out publicly while government forces killed somewhere between 40,000 and 70,000 people – most of them civilians – in the closing months of the conflict.¹⁴⁴ 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.’¹⁴⁵ Some UN agencies even cooperated in the construction of ‘closed camps’ into which the survivors were herded for screening.¹⁴⁶ As the UN report noted:

civilians emerging from the conflict zone were severely malnourished, traumatized, exhausted, and often seriously injured. The security forces, attempting to identify LTTE [Liberation Tigers of Tamil Eelam] 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. . . . 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

A/HRC/25/L.1/Rev.1, 26 March 2014, para 2. The latter resolution called on the Sri Lankan government ‘to conduct an independent and credible investigation into allegations of violations of international human rights law and international humanitarian law, as applicable; to hold accountable those responsible for such violations; to end continuing incidents of human rights violations and abuses in Sri Lanka and to implement the recommendations made in the reports of the Office of the High Commissioner.’

¹⁴⁴ Ibid. The author of this thesis was also working in Sri Lanka between February and April 2009 and witnessed the strong campaign of harassment and threats by the Sri Lankan authorities during this period. One senior national staff member of the organization that he was working for was detained without trial on security grounds. Another was shot dead while working in the conflict zone. See Conor Foley, *Guardian*, ‘Dire times in Sri Lanka’s war zone’, 19 March 2009; Conor Foley, *Guardian*, ‘What really happened in Sri Lanka’, 16 July 2009; and *Guardian*, Conor Foley, ‘Sri Lanka’s human rights disaster’, 7 January 2010.

¹⁴⁵ Memorandum of 12 April 2011 from the Panel of Experts to the Secretary-General.

¹⁴⁶ Ibid. The author of this thesis also visited the camps in March 2009 and interviewed senior staff in UNHCR and other humanitarian agencies about the reasons why they were building them.

through camps that were operating in violation of international standards. The UN chose to support the camps.¹⁴⁷

An internal review of the performance of the UN's performance in Sri Lanka subsequently concluded that there had been a 'systemic failure' to protect the civilian population.¹⁴⁸ In November 2013, the UN launched Human Rights Up Front (HRUF), based on lessons learnt from this experience to 'place the protection of human rights and of people at the heart of UN strategies and operational activities'.¹⁴⁹ The initiative states that 'human rights and the protection of civilians' should be seen as a 'system-wide core responsibility' and that the UN should 'take a principled stance' and 'act with moral courage to prevent serious and large-scale violations.'¹⁵⁰

The review of protection in humanitarian action in 2015 noted that HRUF is still 'widely seen as a UN headquarters agenda' and there is little knowledge or buy-in to it in the field.¹⁵¹ It

¹⁴⁷ *Report of the Secretary-General's Internal Review Panel, on United Nations action in Sri Lanka*, New York: United Nations, November 2012, para 32.

¹⁴⁸ *Report of the Secretary-General's Internal Review Panel, on United Nations action in Sri Lanka*, New York: United Nations, November 2012.

¹⁴⁹ Human Rights Up Front, <http://www.un.org/sg/rightsupfront/>, accessed 30 July 2015. This was launched by the UN Secretary-General in November 2013. Its purpose is 'to ensure the UN system takes early and effective action, as mandated by the Charter and UN resolutions, to prevent or respond to large-scale violations of human rights or international humanitarian law. It seeks to achieve this by realizing a cultural change within the UN system, so that human rights and the protection of civilians are seen as a system-wide core responsibility. It encourages staff to take a principled stance and to act with moral courage to prevent serious and large-scale violations, and pledges Headquarters support for those who do so.'

¹⁵⁰ Rights Up Front Action Plan, May 2014. <http://www.un.org/sg/rightsupfront/doc/RuFAP-summary-General-Assembly.htm>, accessed 5 December 2014 and 30 July 2015. The UN is based around six sets of actions: Integrating human rights into the lifeblood of the UN so all staff understand their own and the Organization's human rights obligations; Providing Member States with candid information with respect to peoples at risk of, or subject to, serious violations of human rights or humanitarian law; Ensuring coherent strategies of action on the ground and leveraging the UN System's capacities to respond in a concerted manner; Clarifying and streamlining procedures at Headquarters to enhance communication with the field and facilitate early, coordinated action; Strengthening the UN's human rights capacity, particularly through better coordination of its human rights entities; Developing a common UN system for information management on serious violations of human rights and humanitarian law. See also UN Office for the High Commissioner of Human Rights and the UN High Commissioner for Refugees, *The Protection of Human Rights in Humanitarian Crises*, Geneva: OHCHR/UNHCR, 8 May 2013; and Gerrt Kurtz *With Courage and Coherence: The Human Rights up Front Initiative of the United Nations*, Global Public Policy Institute (GPPi), July 2015.

¹⁵¹ Whole of System Review of Protection 2015, pp.35-6.

also stated that the ‘all-encompassing nature of the formal definition [of protection] fuels confusion’, which ‘can give rise to unhelpful illusions that anything and everything can be deemed to be protective . . . [this] works against sound needs assessments, strategic prioritisation, coordination and the ability to monitor and evaluate programme implementation including outcomes.’¹⁵² The report argued that the ‘rhetoric’ and ‘confusion’ about what the term ‘protection’ actually means had ‘created major expectations among all stakeholders, including, importantly, at-risk groups.’

From the Tamils besieged on Mullaitivu beach in 2009, to Haitians trapped under fallen masonry after the 2010 earthquake, to the South Sudanese who fled to the bases of the UN Mission in South Sudan when hostilities erupted in December 2013, or the Yazidis stranded on a barren mountain top in Iraq in August 2014, there is evidence of the increasing expectation that those facing imminent risks will be rescued.¹⁵³

Such an expectation is not in fact unreasonable for a UN peacekeeping mission with a POC mandate, which should be required to take measures within the scope of its powers that, judged reasonably, might be expected to provide such protection. As will be discussed in Chapter Seven of this thesis the UN has defended civilians sheltering in its bases in South Sudan. Protection in this sense may include the use of force and so missions need to be clear about the applicable legal framework governing such actions and this will be briefly discussed in the final section of this chapter. Humanitarians may also decide to ‘bear witness’ to such violations or decide that the ‘humanitarian imperative’ requires them to remain silent. As the following section of this chapter shows, there is a clear right of humanitarian access in international law, but this is contingent on the observance of

¹⁵² Ibid., p.23.

¹⁵³ Ibid.

humanitarian principles such as neutrality, which is quite clearly different from a Three Tier POC strategy.

The right of humanitarian access

The right of humanitarian access is firmly established in IHL and international human rights law. The Geneva Conventions and both Additional Protocols prohibit the use of starvation as a weapon of war against civilian populations.¹⁵⁴ Attacks on objects indispensable to the survival of the civilian population are prohibited.¹⁵⁵ If the civilian population of a territory, that is either occupied or otherwise under the control of a party to the conflict, is not adequately provided with food, medical attention and other necessary materials the party must agree to allow the free passage of relief supplies which are purely for humanitarian purposes.¹⁵⁶ Humanitarian organizations have the right to offer their assistance to parties to a conflict, without this being construed as an unfriendly act.¹⁵⁷ States must also not interpret the Conventions in such a way as to create obstacles to genuine humanitarian activity.¹⁵⁸

¹⁵⁴ For further discussion see Jelena Pejic, 'The right to food in situations of armed conflict: The legal framework', *International Review of the Red Cross*, Vol. 83, No. 844, December 2001, pp.1097-1109; and Heike Spieker, 'The right to give and receive humanitarian assistance', in Hans-Joachim Heintz and Andrej Zwitter (eds), *International Law and Humanitarian Assistance*, Berlin: Springer, 2011, pp.7-18.

¹⁵⁵ Protocol I, Article 54; Protocol II, Article 14.

¹⁵⁶ Geneva Convention IV, Articles, 55, 56, 59-61 and 142; and Protocol I, Articles 69, 70 and 71. The occupying power has the obligation to maintain the material living conditions of the population at a reasonable level and is obliged to ensure supplies essential for the survival of the population as well as objects necessary for religious worship. This includes an obligation to import such relief goods as are necessary and to maintain public health and hygiene, in cooperation with local authorities and medical establishments. Both obligations are limited by the proviso that this should be to the 'fullest extent of the means available'. The occupying power also has a duty to agree to the delivery of humanitarian assistance provided by outside actors if necessary. This must be provided without adverse distinction – other than on medical or humanitarian grounds – and the occupying power retains some discretion to control and supervise the deliveries as well as to approve the participation of personnel in operations. The occupying power cannot, as a rule, change the destination of this assistance, except on emergency grounds in the interests of the population, and the assistance should, as a rule, be exempt from charges, taxes or duties.

¹⁵⁷ Common Article 3 of the four Geneva Conventions, Geneva Convention III, Article 9, Geneva Convention IV, Article 10, Additional Protocol I, Article 70, Protocol II Article 18 .

¹⁵⁸ Geneva Convention III, Article 9; Geneva Convention IV, Articles 10; Protocol I, Article 75.8.

The ICRC's right of 'humanitarian access' in international armed conflicts is explicitly acknowledged.¹⁵⁹ Its core functions include working to 'provide humanitarian help for people affected by conflict and armed violence and to promote the laws that protect the victims of war'.¹⁶⁰ This includes visiting prisoners of war and civilian internees in international conflicts as well as carrying out independent humanitarian evaluations on the situation and needs of people in occupied territory.¹⁶¹ The use of the phrase 'such as' in the Geneva Conventions¹⁶² shows that the ICRC is not the only agency whose humanitarian mandate may be recognized and this was also recognised by the ICJ's ruling in *Nicaragua*.¹⁶³

The IHL treaty provisions relating to the delivery of humanitarian assistance in a non-international armed conflict are much weaker.¹⁶⁴ Additional Protocol II states that starving civilians as a method of combat is prohibited¹⁶⁵ and recognizes the right of humanitarian initiative,¹⁶⁶ but it also emphatically restates the prohibition on interference in a State's internal affairs.¹⁶⁷ All relief activity is 'subject to the consent of the High Contracting Party concerned'¹⁶⁸ and can only take place 'whenever circumstances permit'.¹⁶⁹ In its study on customary IHL, however, the ICRC has stated that:

The fact that consent is required does not mean that the decision is left to the discretion of the parties. If the survival of the population is threatened and a humanitarian organization fulfilling the required conditions of impartiality and non-

¹⁵⁹ The role of the ICRC is referred to in Common Article 3 of the four Geneva Conventions as well as a number of individual articles of the four Conventions and Additional Protocols I and II.

¹⁶⁰ ICRC website, 'About the International Committee of the Red Cross', <http://www.icrc.org/eng/who-we-are/index.jsp>, accessed 8 May 2014.

¹⁶¹ Geneva Convention IV, Articles 30 and 143.

¹⁶² Common Article 3 of the four Conventions. Geneva Convention IV, Articles 10, 59 and 61 also specifically refer to other 'impartial humanitarian' organisations or bodies.

¹⁶³ *Case Concerning Military and Paramilitary Activities in and against Nicaragua*, Judgment, of 27 June 1986, ICJ Reports 1986, para 242.

¹⁶⁴ These are found in Common Article 3 to the four Geneva Conventions and Protocol II.

¹⁶⁵ Additional Protocol II, Article 14.

¹⁶⁶ Additional Protocol II, Article 18.

¹⁶⁷ Additional Protocol II, Article 3.

¹⁶⁸ Additional Protocol II, Article 18(2).

¹⁶⁹ Additional Protocol II, Article 8.

discrimination is able to remedy this situation, relief actions must take place . . . The authorities responsible for safeguarding the population in the whole of the territory of the State cannot refuse such relief without good grounds . . . as the population would be left deliberately to die of hunger without any measure being taken.¹⁷⁰

A report by the UN Secretary General in 1998 also noted that a right of humanitarian access should be regarded as ‘an essential subsidiary or ancillary right that gives meaning and effect to the core rights of protection and assistance.’¹⁷¹ Such access should ‘not be regarded as interference in the armed conflict or as an unfriendly act so long as it is undertaken in an impartial and non-coercive manner.’¹⁷² The ICJ has also affirmed the applicability of economic, social and cultural rights obligations in a situation to which IHL is applicable.¹⁷³ The ICESCR does not contain an individual petition mechanism and so individuals may not complain to it directly, but the Committee that oversees it has made a number of General Comments, suggesting a ‘right to humanitarian assistance’ can be read into its provisions.¹⁷⁴ It has, for example, affirmed that States have a core obligation to address survival requirements of their populations including water and ‘essential foodstuffs’ and must demonstrate that they have made a maximum effort to use all the resources at their disposal to ensure that these minimum needs are met.¹⁷⁵ It has also stated that ‘the prevention of access to humanitarian food aid in internal conflicts or other emergency situations’ is ‘necessarily a

¹⁷⁰ Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law*, Cambridge: Cambridge University Press, 2005, I, p. 1479. See also John B. Bellinger III, and William J. Haynes II, A US government response to the International Committee of the Red Cross study Customary International Humanitarian Law, *International Review of the Red Cross*, Vol. 89 No. 866 June 2007, which makes a number of criticisms of this study and re-emphasizes the necessity of humanitarian aid workers obtaining state consent.

¹⁷¹ *Report of the Secretary-General on protection for humanitarian assistance to refugees and others in conflict situations*, UN Doc. S/1998/883, 22 September 1998, paras 15 and 16.

¹⁷² *Ibid.*

¹⁷³ ICJ Report 2004, paras. 107–112.

¹⁷⁴ David Fisher ‘The Right to Humanitarian Assistance’, in Walter Kälin, Rhodri C. Williams, Khalid Koser and Andrew Solomon, *Incorporating the Guiding Principles on Internal Displacement into Domestic Law: Issues and Challenges*, The American Society of International Law The Brookings Institution – University of Bern, Project on Internal Displacement Studies in Transnational Legal Policy, No. 38, Washington, DC, 2010, pp.47-128.

¹⁷⁵ Committee on Economic, Social and Cultural Rights, General Comment 3, ‘The nature of States parties obligations’, UN Doc. E/1991/23, para 10.

violation' of the right to adequate food.¹⁷⁶ In its General Comment on the right to health the Committee has stated that:

States parties have a joint and individual responsibility, in accordance with the Charter of the United Nations and relevant resolutions of the United Nations General Assembly and of the World Health Assembly, to cooperate in providing disaster relief and humanitarian assistance in times of emergency, including assistance to refugees and internally displaced persons.¹⁷⁷

The text of the ICECSR makes clear that State parties are required 'to take steps, individually and through international assistance and co-operation . . . with a view to achieving progressively the full realization of the rights.'¹⁷⁸ This suggests that while there is an immediate obligation on States to provide *access* to international humanitarian assistance, if this is the only way of alleviating widespread suffering, the actual obligation to provide the assistance itself is a progressive one that requires States to work together over time for its realization.¹⁷⁹ The physical delivery of aid may also require the exercise of rights such as freedom of movement,¹⁸⁰ freedom of expression,¹⁸¹ freedom of assembly,¹⁸² and the right to privacy and private property.¹⁸³ It can, therefore, be argued that preventing a humanitarian aid organization from delivering aid, by placing unjustified restrictions on its activities

¹⁷⁶ Committee on Economic, Social and Cultural Rights, General Comment 12, The Right to Adequate Food, 6, UN Doc E/C.12/1999/5, para 19

¹⁷⁷ Committee on Economic, Social and Cultural Rights, General Comment 14, The Right to Highest Attainable Standard of Health, 43(b)-(c), UN Doc. E/C.12/2000/4 (2000), para 38.

¹⁷⁸ ICESCR, Article 2.

¹⁷⁹ Rohan Hardcastle and Adrian Chua, 'Humanitarian Assistance: towards a right of access to victims of natural disasters' *International Review of Red Cross and Red Crescent*, December 1998 ICRC publication No. 325, pp.589-609.

¹⁸⁰ Article 13 of the UDHR; Article 12 of the ICCPR; Protocol 4, Article 2 of the ECHR; Article 22 of the ACHR; Article 12 of the African Charter.

¹⁸¹ Articles 18 and 19 of the UDHR; Articles 18 and 19 of the ICCPR; Articles 9 and 10 of the ECHR; Articles 12 and 13 of the ACHR; Articles 8 and 9 of the African Charter.

¹⁸² Article 20 of the UDHR; Article 22 of the ICCPR; Article 11 of the ECHR; Article 15 of the ACHR; Article 11 of the African Charter.

¹⁸³ Articles 12 (privacy); and 17 (private property) of the UDHR; Article 17 of the ICCPR (privacy); Article 8 (private and family life) and Protocol 1, Article 1 (private property) of the ECHR; Articles 11 (privacy) and 21 (private property) of the ACHR; Article 14 (property) of the African Charter

amounts to a violation of more fundamental rights such as the rights to life and physical integrity of the affected population.

From 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.¹⁸⁴ A series of UN General Assembly resolutions have expressed similar views.¹⁸⁵ This has led to a growing body of resolutions on the importance of ensuring that access to such assistance is not arbitrarily prevented.¹⁸⁶ 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 to make available, as far as possible, all necessary facilities for their operations’.¹⁸⁷

¹⁸⁴ See for example, UN Security Council Resolution 794 (1992), preamble in relation to Somalia; UN Security Council Resolution 770, of 13 August 1992 and UN Security Council Resolution 836 of June 1993, paras 5 and 9 in relation to Bosnia-Herzegovina; Resolution 1216 of 21 December 1998 on the crisis in Guinea-Bissau; UN Security Council Resolution 1265 (1999); Security Council Resolution 1296 of 19 April 2000; and Security Council Resolution 1674 of 28 April 2006; Security Council Resolution 1738 of 23 December 2006, all of which were adopted under the thematic heading of Protection of Civilians; and UNSC Resolution 1502 adopted on 26 August 2003, para 6, in relation to Iraq.

¹⁸⁵ See for example, UN General Assembly Resolutions A/RES/49/139 (1994); A/RES/51/194 (1996); A/RES/54/233 (1999); A/RES/58/114 (2003); A/RES/59/141(2004); A/RES/60/124 (2005); A/RES/61/134 (2006); A/RES/62/94 (2007); A/RES/63/141 (2008); A/RES/63/139 (2008); A/RES/63/138 (2008); A/RES/63/137 (2008); and 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. For example, UN General Assembly Resolution 63/139, paras 25 and 26, on *Strengthening of the coordination of emergency humanitarian assistance of the United Nations*, passed in 2008 ‘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 19 August as World Humanitarian Day in memory of the UN staff killed in the bombing of Baghdad in 2003.

¹⁸⁶ *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.

¹⁸⁷ Security Council Resolution 1502 of 26 August 2003, para 6.

In 2011, the UN Security Council authorizing military intervention in Libya also demanded ‘that the Libyan authorities comply with their obligations under international law, including international humanitarian law, human rights and refugee law and take all measures to protect civilians and meet their basic needs, and to ensure the rapid and unimpeded passage of humanitarian assistance’¹⁸⁸ In August 2014, it condemned violence and intimidation against those involved in humanitarian operations in Syria, urged States to ensure accountability for crimes against humanitarian workers and asked the Secretary General to include information on the safety and security of humanitarian workers in his reports on country-specific situations.¹⁸⁹ The fact resolutions usually demand access not only from the respective governments, but from ‘all parties concerned’, reflects a growing acceptance that non-state actors are obliged under customary international law to grant access for humanitarian assistance.¹⁹⁰ The first DPKO concept note on POC in 2009 also 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.¹⁹¹

Clearly, though, as the ICJ’s ruled in *Nicaragua*, only organizations that accept humanitarian principles – such as neutrality – have a right of humanitarian access and the delivery of assistance itself should take place on a purely needs-based criterion.¹⁹² As discussed above,

¹⁸⁸ Security Council Resolution 1973, of 17 March 2011, para 3.

¹⁸⁹ Security Council Resolution 2175, of 29 August 2014.

¹⁹⁰ Gregor Schotten and Anke Biehler, ‘The Role of the UN Security Council in Implementing International Humanitarian Law and Human Rights Law’, in Roberta Arnold & Noelle Quéniwet (eds) *International Humanitarian Law and Human Rights Law*, Leiden and Boston: Martin Nijhof, 2008.

¹⁹¹ *Draft DPKO/DFS Operational Concept on the Protection of Civilians in United Nations Peacekeeping Operations, 2009*, para 13.

¹⁹² ICJ Reports 1986, para 242.

while some ‘protection monitoring and advocacy’ activities carried out by humanitarian agencies might overlap with the POC tasks of a UN mission there are good grounds for also distinguishing between them. Guidance from DPKO in 2015 also stresses that:

‘Humanitarian actors rely upon their neutrality, impartiality and operational independence (the “humanitarian principles”) for their acceptance by all actors and thus their security and ability to access those in need to deliver assistance. Consequently, maintaining a clear distinction between the role and function of humanitarian actors from that of political and military actors, particularly in conflict and post-conflict settings, is a key factor in creating an operating environment in which humanitarian organisations can discharge their mandate effectively and safely.’¹⁹³

The rest of this chapter will briefly discuss the legal framework that UN missions consider themselves to be subject to when using force for protective purposes and the particular provisions relating this will be discussed in more detail in Part II of this thesis.

Rules of engagement, IHL and international human rights law

In 1999 a UN Secretary General’s Bulletin stated that: ‘The fundamental principles of international humanitarian law are applicable to UN forces when in situations of armed conflict they are actively engaged therein as combatants, to the extent and for the duration of their engagement. They are accordingly applicable in enforcement actions *or in peacekeeping operations when the use of force is permitted in self-defence.*’¹⁹⁴ [emphasis added] This was confirmed by the *Capstone Doctrine* in 2008, which stated that UN

¹⁹³ *Policy on the Protection of Civilians in United Nations Peacekeeping*, Department of Peacekeeping Operations / Department of Field Support, Ref. 2015.07, 1 April 2015, p.7.

¹⁹⁴ UN Secretary General, *UN Secretary General’s Bulletin, Observance by UN Forces of International Humanitarian Law*, ST/SGB/1999/13, 6 August 1999.

peacekeepers ‘must have a clear understanding of the principles and rules of international humanitarian law and observe them in situations where they apply.’¹⁹⁵

Some argue that because UN mandated multinational forces are operating on behalf of the international community as a whole and bound by ‘peacekeeping principles’, they could never be considered a party to an armed conflict. Kouchner, for example, stated, as French Foreign Minister in 2008, that France was not engaged in armed conflict in Afghanistan, because its troops were operating under a UN Security Council resolution.¹⁹⁶ Norway’s Prime Minister similarly stated that Norwegian soldiers participating in NATO operations in Libya, in 2011, could not be considered legitimate targets because they were on a UN mandated mission.¹⁹⁷ A Canadian court ruled, in 1996, that a soldier accused of aiding and abetting the torturing to death of a Somali boy had no legal obligation to ensure the safety of his prisoner because IHL did not apply to a peacekeeping mission.¹⁹⁸ A Belgian military court similarly concluded that IHL did not apply to its UN soldiers in both Somalia and Rwanda.¹⁹⁹

The ICRC has, however, consistently maintained that IHL can be applicable to all UN peacekeeping forces and has urged UN member states to ‘use their influence’ to ensure its provisions are applied.²⁰⁰ During the Korean War, for example, in which troops under UN

¹⁹⁵ Capstone Doctrine 2008, p. 15.

¹⁹⁶ Tristan Ferraro, ‘The applicability and application of international humanitarian law to multinational forces’, *International Review of the Red Cross*, Volume 95 Number 891/892 Autumn/Winter 2013, pp.560-612.

¹⁹⁷ Ibid.

¹⁹⁸ *Her Majesty the Queen v. Private DJ Brocklebank*, Court Martial Appeal Court of Canada, Court File NO. CMAc-383; 2 April 1996.

¹⁹⁹ Judgment of the Belgian Military Court regarding violations of IHL committed in Somalia and Rwanda Nr 54 AR 1997, 20 November 1997, published in *Journal des Tribunaux*, 4 April 1998, p.286. For further discussion see Ray Murphy, *UN Peacekeeping in Lebanon, Somalia and Kosovo: Operational and Legal Issues*, Cambridge: Cambridge University Press, 2007 p.274.

²⁰⁰ See International Committee of the Red Cross, *Statement made in the Fourth Committee, UN General Assembly*, New York: ICRC, 31 October 2013. ‘The applicability of IHL to UN forces, just as to any other forces, is determined solely by the circumstances prevailing on the ground and by specific legal conditions stemming from the relevant provisions of IHL, irrespective of the international mandate assigned to the forces by the Security Council.’

command were engaged in active combat, their commander agreed to abide by the humanitarian provisions of the Geneva Conventions following lobbying by the ICRC.²⁰¹ The ICRC has also noted that while ‘the mandate and legitimacy of a UN mission’ are issues which fall within the scope of the UN Charter, these ‘have no bearing on the applicability of IHL to peacekeeping operations’.²⁰² It is also a well-recognised principle of IHL that the determination of whether or not an armed conflict exists, and who is a party to it, is based solely on an analysis of the facts on the ground and not to the subjective views of the parties themselves.²⁰³ There is, therefore, now widespread – although not universal – acceptance that IHL does apply to situations in which UN forces are fighting as combatants.²⁰⁴ The applicability of IHL to UN peacekeeping missions, which are not party to a conflict, however, is more complex. In 1961 the ICRC reminded governments providing contingents to the UN Force in the Congo (ONUC) of their positive obligations under IHL.²⁰⁵ In 1993 it expressed concern that the UN had not issued a formal statement on the applicability of IHL

<https://www.icrc.org/eng/resources/documents/statement/2013/united-nations-peacekeeping-2013-10-31.htm>, accessed 5 May 2015.

²⁰¹ See, for example, Zwanenburg, Marten, ‘United Nations and International Humanitarian Law,’ in *Max Planck Encyclopaedia of Public International Law*, <http://www.grotiuscentre.org/page11731058.aspx>, accessed 24 March 2015. For an overview of this debate, see Daphna Shrager and Ralph Zacklin, ‘The Applicability of International Humanitarian Law to United Nations Peacekeeping Operations: Conceptual, Legal and Practical Issues’, Report to the Symposium on Humanitarian Action and Peacekeeping Operations, 22–24 June 1994, ICRC, Geneva, 2004, pp. 39–48. These describe the debate about the various positions without endorsing this particular argument.

²⁰² ICRC, *Statement made in the Fourth Committee, UN General Assembly*, 31 October 2013.

²⁰³ ICTY, *The Prosecutor v. Boškovski*, Case No. IT-04-82-T, Judgment (Trial Chamber II), 10 July 2008, para. 174; ICTR, *The Prosecutor v. Rutaganda*, Case No. ICTR-96-3-T, Judgment (Trial Chamber I), 6 December 1999, para. 92; ICTY, *The Prosecutor v. Limaj et al.*, Case No. IT-03-66-T, Judgment (Trial Chamber II), 30 November 2005, para. 90. See also Jean Pictet, *Commentary on the Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*, ICRC, Geneva, 1952, p. 32: ‘any difference arising between two States and leading to the intervention of armed forces is an armed conflict within the meaning of Article 2, even if one of the Parties denies the existence of a state of war. It makes no difference how long the conflict lasts, or how much slaughter takes place.’ For a summary see *How is the Term "Armed Conflict" Defined in International Humanitarian Law?*, Geneva: International Committee of the Red Cross (ICRC) Opinion Paper, March 2008.

²⁰⁴ For discussion see Jeremie Labbe and Arthur Boutellis, ‘Peace operations by proxy: implications for humanitarian action of UN peacekeeping partnerships with non-UN security forces’, *International Review of the Red Cross*, Vol. 95 No. 891/892 Autumn/Winter 2013, pp.539-60; Umesh Palwankar, ‘Applicability of international humanitarian law to United Nations peacekeeping force’, *International Review of the Red Cross*, No. 294, 30 June 1993 and Daphna Shrager, ‘The Secretary-General’s Bulletin on the Observance by United Nations Forces of International Humanitarian Law: a decade later’, *Israel Yearbook on Human Rights*, Vol. 39, 2009, p. 357.

²⁰⁵ Umesh Palwankar, ‘Applicability of international humanitarian law to United Nations peacekeeping force’, *International Review of the Red Cross*, No. 294, 30 June 1993.

rules to its forces in Yugoslavia and Cambodia.²⁰⁶ It also criticized the ‘*ad hoc*’ application of IHL to UN operations in Somalia and Haiti in the 1990s.²⁰⁷

In 1972 the UN Secretariat had stated that it was ‘not substantively in a position to become a party to the 1949 Geneva Conventions, which contain many obligations that can only be discharged by the exercise of administrative and judicial powers’.²⁰⁸ Clauses stating that the UN forces ‘shall observe the principles and spirit of the general international conventions applicable to the conduct of military personnel’ were, however, included in the regulations for the UN Emergency Force in the Middle East (UNEF),²⁰⁹ the UN Mission in the Congo (ONUC)²¹⁰ and the UN Peacekeeping Force in Cyprus (UNFICYP).²¹¹ Similar clauses, which specifically refer to the four Geneva Conventions and two Additional Protocols, were included in the model agreements between the UN and mission hosting and personnel contributing States in 1990 and 1991.²¹²

A report of the United Nations Secretary General in 1996 stated that: ‘The applicability of international humanitarian law to United Nations forces *when they are engaged as combatants in situations of armed conflict* entails the international responsibility of the Organization and its liability in compensation for violations of international humanitarian law

²⁰⁶ Ibid.

²⁰⁷ Michael H. Hoffman, ‘Peace-enforcement actions and humanitarian law: emerging rules interventional armed conflict’, *International Review of the Red Cross*, No. 837, 31 March 2000.

²⁰⁸ Marten Zwanenburg, *Accountability Of Peace Support Operations*, The Hague/London/Boston: Martinus Nijhoff, 2005, p.164. See also Marten Zwanenburg, ‘International humanitarian law interoperability in multinational operations’, *International Review of the Red Cross*, No.891/892, 31 December 2013, pp.681-705.

²⁰⁹ *Regulations for the United Nations Emergency Force*, ST/SGB/UNEF/1, 20 February 1957, Regulation 44.

²¹⁰ *Regulations for the United Nations Force in the Congo*, ST/SGB/ONUC/1, 15 July 1963, Regulation 43.

²¹¹ *Regulations for the United Nations Force in Cyprus*, ST/SGB/UNFICYP/1 25 April 1964, Regulation 40.

²¹² *Model Agreement between the United Nations and Member States Contributing Personnel and Equipment to United Nations Peace-Keeping Operations: Report of the Secretary-General*, 23 May 1991, (A/46/185) para. 28; Report of the Secretary General on the Model Status of Forces Agreement for Peacekeeping Operations, UN Doc. A/45/594, 9 October 1990, Annex 1, Paragraph 12.

committed by members of United Nations forces.²¹³ [emphasis added] The UN Safety Convention of 1994,²¹⁴ which makes it a crime under international law to attack UN staff and associated personnel, specifies that this is in all cases except when they ‘are engaged as combatants against organized armed forces and to which the law of international armed conflict applies’.²¹⁵

While it is clear from the Secretary General’s 1999 Bulletin that IHL will be applicable to UN peacekeeping missions with POC mandates, it is not clear whether this means that its peacekeeping soldiers have civilian or military status. Since UN peacekeepers will not generally be engaged in an armed conflict as combatants, their legal status under IHL would seem to be that of civilians.²¹⁶ As such they are protected from attack except when taking a direct part in hostilities.²¹⁷ Clearly they lose this protection when engaged in an armed conflict as combatants, but it is less clear what their status will be when using force in ‘self-defence’, which, as previously discussed, is understood to include ‘defence of their mandates’.²¹⁸ For example, during the post-election crisis in Côte d’Ivoire in 2011, the UN claimed that its peacekeeping mission (UNOCI) was not a party to the conflict on the same

²¹³ Cited by Keiichiro Okimato, ‘Violations of International Law by United Nations forces and their legal consequences’, in Timothy McCormack, Avril McDonald (eds), *Yearbook of International Humanitarian Law – 2003*, The Hague: TMC Asser Press, 2006, p.223.

²¹⁴ Convention on the Safety of UN and Associated Personnel, New York, 9 December 1994.

²¹⁵ *Ibid.*, Article 2. For further discussion of some of the weaknesses of the Convention see Dieter Fleck ‘The legal status of personnel involved in United Nations peace operations’, *International Review of the Red Cross*, Volume 95 Number 891/892 Autumn/Winter 2013, pp.613-36. Very few States have ratified this Convention but its main provisions are often referred to in status of forces agreements (SOFAs) or status of mission agreements (SOMAs) between the UN and host States.

²¹⁶ Rule 33 of the ICRC study on customary international humanitarian law states that: ‘Directing an attack against personnel and objects involved in a peacekeeping mission in accordance with the Charter of the United Nations, as long as they are entitled to the protection given to civilians and civilian objects under international humanitarian law is prohibited’. See also Rome Statute of the International Criminal Court, Articles 8.2(b) (iii) and 8.2(e) (iii) which makes it a war crime to attack personnel involved in a peace-keeping mission ‘as long as they are entitled to the protection given to civilians or civilian objects under the international law of armed conflict’.

²¹⁷ Common Article 3 to the Four Geneva Conventions.

²¹⁸ For further discussion see Alexandre Faite and Jérémie Labbé Grenier, (eds), *Report on Expert Meeting on Multinational Peace Operations: Applicability of International Humanitarian Law and International Human Rights Law on UN mandated forces*, Geneva, 11-12 December 2003; Christopher Greenwood, ‘Protection of peacekeepers’, 7 *Duke Journal of Comparative and International Law* 185 (1996-1997); Katarina Grenfell, ‘Perspective on the applicability and application of international humanitarian law: the UN context’, *International Review of the Red Cross*, July 2014, pp.645-52.

day that its helicopters were firing missiles at the besieged forces of President Gbagbo.²¹⁹ Nevertheless, in November 2012, UNOCI soldiers allegedly refused to defend an IDP camp from an armed mob on the basis that their RoE did ‘not allow them to open fire if civilians are attacking other civilians’, which implies they believed they were operating within an IHL paradigm.²²⁰ Similar controversy has surrounded the actions of the UN mission in the DRC and these will be discussed further in Chapters Six.²²¹

The assumption that IHL will always provide the appropriate legal framework regulating the use of force by UN peacekeeping missions is reflected in much of the UN’s existing guidance. A Security Council Resolution in 2009, marking the tenth anniversary of the first POC mandate, for example, refers to IHL as constituting ‘the basis for the legal framework for the protection of civilians in armed conflict’.²²² The UN *Infantry Battalion Manual*, published in 2012, states that the rules of engagement (RoE) of peacekeeping missions:

are governed by the purposes of the Charter of the United Nations and relevant principles of international law, including the Law of Armed Conflict. Military personnel are required to comply with International Law, including the Law of Armed Conflict, and to apply the ROE in accordance with those laws. UN peacekeepers are also expected at all times to make a clear distinction between civilians and combatants and between civilian objects and military objects. Under

²¹⁹ *Guardian*, ‘Ivory Coast: Laurent Gbagbo under siege’, Tuesday 5 April 2011. See also Secretary General Statement, expressing concern over violence in Côte d’Ivoire, informing that the United Nations has undertaken military operation to prevent heavy weapons use against civilians, Office of the Secretary General 4 April 2011.

²²⁰ *Inner-City News*, ‘UN Peacekeepers Inaction on IDP Killings in Cote d’Ivoire Due to DPKO Rules?’, 23 October 2012.

²²¹ Security Council Resolution 2098 of 28 March 2013, established the Intervention Brigade, a special combat force, as part of MONUSCO, which consisted of three infantry battalions, one artillery and one Special force and Reconnaissance company, which was mandated ‘to carry out targeted offensive operations . . . to prevent the expansion of all armed groups, neutralise these groups, and to disarm them’.

²²² Security Council Resolution 1894 of 11 November 2009, preamble refers to the Geneva Conventions of 1949, which together with their Additional Protocols constitute the basis for the legal framework for the protection of civilians in armed conflict’.

International Humanitarian Law, civilians are ‘protected persons’ – they cannot be targeted and their life and dignity must be respected.²²³

There are far fewer references to international human rights law in this manual and these are much less specific. Numerous mission-specific SOFAs have references to IHL, but not to international human rights law²²⁴ and public statements by senior DPKO staff refer to IHL but not international human rights law.²²⁵ As previously discussed, however, this appears to be changing and guidance from DPKO issued in 2015 now refers to both bodies of law.²²⁶

The practical implications of this distinction are considerable. Holt and Berkman, for example, argue for a POC strategy that would seem only to be permissible if the peacekeeping force was prepared to become an active party to the conflict:

²²³ *United Nations Infantry Battalion Manual Volume I*, Department of Peacekeeping Operations/ Department of Field Support, August 2012, p.50. See also p.102 which specifies that: ‘battalion commanders need to be aware of and, if needed, inform parties about the political consequences that come with specific violations of international humanitarian law (sexual violence, child recruitment, attacks on schools and hospitals, killing and maiming of children, etc.)’.

²²⁴ Scott Sheeran, (Research Director), *Background Paper Prepared for the Experts’ Workshop, 26 August 2010, London, UK, Hosted by the New Zealand High Commission*, United Nations Peacekeeping Law Reform Project, School of Law, University of Essex, 2010, p33. For example, in UNMIS (2004), para 6(a)(b), MONUC(2000), para 6(a)(b), UNMISSET (2002), para 6(a) and (b), the following provision has appeared: ‘Without prejudice to the mandate of [name of mission] and its international status: (a) The United Nations shall ensure that [name of mission] shall conduct its operations in the territory with full respect for the principles and rules of the general conventions applicable to the conduct of military personnel. These international conventions include the Four Geneva Conventions of 12 August 1949 and their Additional Protocols of 8 June 1977 and the UNESCO Convention of 14 May 1954 on the Protection of Cultural Property in the event of armed conflict; (b) The Government undertakes to treat at all times the military personnel of [name of mission] with full respect for the principles and rules of the general international conventions applicable to the treatment of military personnel. These international conventions include the Four Geneva Conventions of 12 April 1949 and their additional Protocols of 8 June 1977. Less detailed references to respecting the ‘principles and spirit’ of IHL can be found in earlier mission SOFAs from the 1990s, that predated the UN Secretary General’s 199 Bulletin.

²²⁵ See, for example, ‘Interview with Lieutenant General Babacar Gaye United Nations Military Adviser for Peacekeeping Operations’, *International Review of the Red Cross*, Vol. 95 No. 891/892 Autumn/Winter 2013, p.490, in which he stated that: ‘It is no longer possible to engage in peacekeeping operations without having a clear idea of the body of rules contained in the law of war’.

²²⁶ *Policy on the Protection of Civilians in United Nations Peacekeeping*, Department of Peacekeeping Operations / Department of Field Support, Ref. 2015.07, 1 April 2015; and *Protection of Civilians: Implementing Guidelines for Military Components of United Nations Peacekeeping Missions*, Department of Peacekeeping Operations / Department of Field Support, February 2015.

If a force charged with protection reacts to an attack on civilians after the fact . . . it will already have failed in its goal of providing protection . . . success will often require taking aggressive action prior to the use of violence. This requirement shifts the burden from reacting to a defined state (e.g., an attack) to reacting to a threat for which there may not be a clear trigger or definition. It could require direct action targeting bad actors or preventing such actors from operating in the first place.²²⁷

Kelly similarly maintains that where ‘armed actors’ have ‘demonstrated a determination to attack civilians as part of their pattern of operations, the threat they represent to the population does not dissipate between specific incidents.’²²⁸ They, therefore, remain ‘an imminent threat until they lack either the intent or capacity to inflict violence against the civilian population . . . UN PKOs may use force proactively to address such threats, including through offensive operations.’²²⁹ The UN *Infantry Battalion* manual contains similar language and this guidance is also provided in DPKO’s pre-deployment training to all mission staff.²³⁰

A threat of violence against a civilian is considered ‘imminent’ from the time it is identified as a threat, until such a time the mission can determine that the threat no

²²⁷ Victoria Holt and Tobias Berkman, *The Impossible Mandate? Military Preparedness, the Responsibility to Protect and Modern Peace Operations*, The Stimson Center, 2006, p.54.

²²⁸ Max Kelly, *Protecting Civilians, Proposed Principles for Military Operations*, Washington DC: Stimson Center, May 2010, pp.40-1. He states that this was: ‘First explicitly elaborated by the Eastern Division Headquarters of MONUC in 2005, the approach has also been applied in other UN PKOs, notably MINUSTAH.’ The Rules of Engagement (ROE) for the Military Component of the United Nations Organisation Mission in the Democratic Republic of the Congo (MONUC): Annex B – Definitions (MPS/0651) (10 February 2009) state the following: ‘The threat of imminent and direct use of force, which is demonstrated through an action or behaviour which appears to be preparatory to a hostile act. Only a reasonable belief in the hostile intent is required, before the use of force is authorized. Whether or not hostile intent is being demonstrated must be judged by the on-scene commander, on the basis of one or a combination of the following factors: a. The capability and preparedness of the threat; b. The available evidence which indicates an intention to attack; c. Historical precedent within the Mission’s Area of Responsibility.’

²²⁹ Ibid.

²³⁰ See ‘UN Tactical Level Protection of Civilians Training Modules’, Peacekeeping Resources Hub, <http://peacekeepingresourcehub.unlb.org/pbpb/Pages/Public/viewdocument.aspx?id=2&docid=1368>, accessed 10 March 2014.

longer exists. Peacekeepers with a POC mandate are authorized to use force in any circumstance in which they believe that a threat of violence against civilians exists.²³¹

In October 2014 Lieutenant General Dos Santos Cruz, MONUSCO's Force Commander, stated that UN troops 'should not wait for armed groups to come and terrorize communities; it should not give them freedom of movement' and the 'assumption that military action may create collateral damage should not prevent us from taking the necessary action.'²³² The OIOS Protection Evaluation 2014 also welcomed MONUSCO's 'targeted offensive operations'.²³³

According to Findlay, writing in 2002, the use of military force by UN peacekeepers 'is subject to certain conditions which have been codified by international law and practice. The most significant of these are necessity and proportionality. Force must only be used in self-defence when absolutely necessary, as a last resort and in proportion to the threat.'²³⁴ He states, however, that 'in an ideal peace operations world . . . all missions involving armed military personnel would receive a Chapter VII mandate, [which] should make it explicit that the United Nations is obliged to protect civilians at risk of human rights abuses or other forms of attack'.

A Chapter VII operation, in contrast to a Chapter VI operation, may therefore be authorized to use force beyond self-defence for enforcement purposes. This understanding was confirmed by the International Court of Justice (ICJ) in July 1962 when it ruled that, while the UN has an inherent capacity to establish, assume

²³¹ *United Nations Infantry Battalion Manual Volume I*, Department of Peacekeeping Operations/ Department of Field Support, August 2012.

²³² UN Security Council debate on UN Peacekeeping Operations, S/PV.727, 9 October 2014, pp.2-3.

²³³ OIOS Protection Evaluation 2014, para 28

²³⁴ Findlay, 2002, pp.14 and 16.

command over and employ military forces, these may only exercise ‘belligerent rights’ when authorized to do so by the Security Council acting under Chapter VII.²³⁵

The ICJ *Certain Expenses* case did not in fact refer either to IHL or ‘belligerent rights’. The sentences on which the above interpretation is based read that: ‘the operations of ONUC did not include a use of armed force *against a State* which the Security Council, under Article 39, determined to have committed an act of aggression or to have breached the peace. The armed forces which were utilized in the Congo were not authorized to take military action *against any State*. The operation did not involve ‘preventive or enforcement measures’ *against any State* under Chapter VII’.²³⁶ [emphasis added]

Given that the original concept of ‘threats to international peace and security’, was primarily based on inter-state conflicts, it is understandable why it would be assumed that a Chapter VII mandated operation would be conducted against a State within the IHL rules relating to international armed conflict.²³⁷ For IHL rules to be applicable, in a non-international armed conflict, however, first of all there must be a level of organised violence sufficient to categorize the situation as an armed conflict and secondly the rules will only be binding on recognized parties to that conflict.²³⁸ If these two preconditions are not satisfied then IHL will not be the applicable legal framework.²³⁹

²³⁵ Ibid., p.8, citing International Court of Justice, ‘*Certain expenses of the United Nations (Article 17, para. 1), Advisory Opinion of 20 July 1962*’, ICJ Reports 1962.

²³⁶ Ibid., p.177.

²³⁷ Additional Protocol II to the Geneva Conventions, which sets out the IHL rules applying to non-international armed conflict, was not negotiated until several years later.

²³⁸ Tadic, IT-94-1-T, Decision of 2 October 1995, para 70. See also *How is the Term “Armed Conflict” Defined in International Humanitarian Law?*, Geneva: International Committee of the Red Cross (ICRC) Opinion Paper, March 2008. This notes that: International humanitarian law distinguishes two types of armed conflicts, namely: international armed conflicts, opposing two or more States, and non-international armed conflicts, between governmental forces and nongovernmental armed groups, or between such groups only. IHL treaty law also establishes a distinction between non-international armed conflicts in the meaning of common Article 3 of the Geneva Conventions of 1949 and non-international armed conflicts falling within the definition provided in Art. 1 of Additional Protocol II. Legally speaking, no other type of armed conflict exists.’

²³⁹ For further discussion see Noam Lubell, *Extraterritorial Use of Force Against Non-State Actors*, Oxford: Oxford University Press, 2010, pp.105-11.

There have been cases where UN-mandated forces have very clearly become parties to a conflict,²⁴⁰ but, as will be discussed in Chapter Six, the situation has been more ambiguous or disputed in others.²⁴¹ Chesterman has noted, in a report for DPKO, that the UN has often been ‘confronted with situations of internal armed conflict that were in significant part policing rather than military problems.’²⁴² The UN *Infantry Battalion* manual also notes that: ‘The tasks of the UN military components have become increasingly complex because conflicts in which they intervene no longer involve national military forces alone but irregular forces, guerrilla factions and even armed criminal gangs.’²⁴³

The High Level Panel Report on Peace Operations of 2015 concluded that: ‘UN peacekeeping missions, due to their composition and character, are not suited to engage in military counter-terrorism operations. They lack the specific equipment, intelligence, logistics, capabilities and specialized military preparation required, among other aspects.’²⁴⁴ The report also noted that it was ‘the prerogative of the Security Council to authorize UN peacekeeping operations to undertake enforcement tasks, including targeted offensive operations, and that it has done so in the past as in Somalia in 1993 and in the Democratic Republic of the Congo in 2013.’²⁴⁵ It urged ‘extreme caution’ about such operations, however, as these involved ‘a shift from tactical decisions around the proactive and pre-emptive use force to protect civilians and UN personnel from threats, to a fundamentally different type of posture that uses offensive force to degrade, neutralize or defeat an

²⁴⁰ The Korean war of 1950 and the first Gulf war of 1991 are the most often cited examples.

²⁴¹ For discussion see Christine Gray, *Use of Force in International Law, Third Edition*, Oxford: Oxford, University Press, 2008, pp. 281-302 and 327-66.

²⁴² Simon Chesterman, *The use of force in UN peace operations*, External study for the Department of Peacekeeping Best Practices Unit, New York: DPKO, 2003, p.2. He also states that ‘the absence of a deployable civilian police capacity led to a reliance on the military to undertake responsibility for emergency law and order, but this reliance has often been implicit rather than explicit.’

²⁴³ *United Nations Infantry Battalion Manual Volume I*, Department of Peacekeeping Operations/ Department of Field Support, August 2012, p.57.

²⁴⁴ High Level Panel Report on Peace Operations of 2015, para 116.

²⁴⁵ *Ibid.*, para 118. It further stated that: ‘Such operations should be undertaken by the host government or by a capable regional force or an ad hoc coalition authorized by the Security Council.’

opponent.²⁴⁶ It noted that such operations must be conducted in ‘full respect’ of IHL, but that these could also ‘make the UN forces, and the mission as a whole, a party to the conflict and require attention to the humanitarian and other consequences that invariably flow from the sustained use of force.’²⁴⁷ In his response to the report the UN Secretary General noted that: ‘a United Nations peace operation is not designed or equipped to impose political solutions through sustained use of force. It does not pursue military victory.’²⁴⁸

If the conduct of UN peacekeeping operations is not governed by IHL then it would seem, *prime facie*, that the appropriate legal framework governing the use of force would be international human rights law as it is employed in the context of law enforcement operations.²⁴⁹ As will be discussed further in Chapter Four of this thesis, there may also be occasion when the two bodies of law are concurrently applicable and, since international human rights law can be applied extraterritorially, it could impose obligations on military forces deployed in other countries.

The extent to which the UN considers its operations to be bound by these provisions, however, is much less clear and this will be discussed further in Chapter Five.²⁵⁰ The first UN Security Council resolution on POC ‘requested the Secretary-General to ensure that United Nations personnel involved in peacemaking, peacekeeping and peace-building activities . . . [received] appropriate training in international humanitarian, human rights and

²⁴⁶ Ibid., paras 118-9.

²⁴⁷ Ibid.

²⁴⁸ *The future of United Nations peace operations: implementation of the recommendations of the High-level Independent Panel on Peace Operations, Report of the Secretary-General, A/70/357-S/2015/682*, 2 September 2015, para 15.

²⁴⁹ See, for example, Lubell, 2010, p.236. ‘If . . . measures are occurring outside the context of an armed conflict then the regulation of forcible measures must be in accordance with their interpretation in human rights law and the rules of law enforcement.’

²⁵⁰ Frederic Megret & Florian Hoffman, ‘The UN as a Human Rights Violator? Some Reflections on the UN’s Changing Human Rights Responsibilities’ (2003) 25(2) *Human Rights Quarterly* pp. 314–334. These suggest there are three different ways in which the UN could be bound by human rights obligations: through customary law (an external conception), by its obligation under the Charter to promote human rights (an internal conception) and by virtue of its members own human rights commitments (a hybrid conception).

refugee law.²⁵¹ The *Capstone Doctrine* also refers to human rights as ‘an integral part of the normative framework of peace operations’ and asserts that peacekeeping operations ‘*should* be conducted in full respect of human rights’ that UN personnel ‘*should* act in accordance with international human rights law’ and ‘*should strive to ensure* that they do not become perpetrators of human rights abuses’. Those that commit abuses ‘*should* be held accountable’²⁵² [emphasis added]. All new personnel who participate in a UN peacekeeping mission are supposed to receive a short brochure ‘We are United Nations Peacekeepers’, which informs them of their obligation to comply with ‘the applicable portions of the Universal Declaration on Human Rights’.²⁵³ The text is also annexed to the model Memorandum of Understanding between the UN and personnel contributing States, which specifies that all members of national contingents must comply with UN standards of conduct.²⁵⁴

These general statements, however, fail to clarify the different legal regimes governing the use of lethal force, arrest and detention powers, and the negative and positive obligations of international human rights law and IHL respectively, which will be discussed more fully in Chapter Four. The European Union (EU), by contrast, has stated that: ‘When IHL does not apply, the EU primarily looks towards human rights law as the appropriate standard for the conduct of EU military operations (furthermore, human rights may be relevant when IHL does apply as both regimes may apply concurrently).’²⁵⁵ The ICRC has also stressed that when UN troops perform law enforcement tasks they must abide by international human

²⁵¹ UN Security Council Resolution 1265 of 17 September 1999, para 14.

²⁵² *Capstone Doctrine* 2008, p.60.

²⁵³ *UN Peacekeeping Homepage, We are United Nations Peacekeepers*, http://www.un.org/en/peacekeeping/documents/un_in.pdf, accessed 6 March 2013 and 31 July 2015.

²⁵⁴ *Letter dated 22 February 2008 from the Chairman of the 2008 Working Group on Contingent-Owned Equipment to the Chairman of the Fifth Committee*, 29 January 29, 2009, (A/C.5/63/18) Chapter 9, Article 7 bis, p. 165.

²⁵⁵ Frederik Naert ‘Observance of international humanitarian law by forces under the command of the European Union’, *International Review of the Red Cross*, Vol. 95 No. 891/892 Autumn/Winter 2013, pp.639-40.

rights law.²⁵⁶ Security Council resolutions have also called on some UN-authorized operations, such as the missions in Somalia and Mali, to comply with international human rights law,²⁵⁷ although there is no such requirement on other operations, including the four case-study missions that will be discussed in Part III of this thesis.

In April 2015 new DPKO guidance on POC specified that: ‘When using force peacekeeping operations must abide by customary international law, including international human rights and humanitarian law, where applicable. They must also abide by the mission-specific military rules of engagement (ROE) and the police Directive on the Use of Force (DUF), including the principles of distinction between civilians and combatants, proportionality, the minimum use of force and the requirement to avoid and, in any event, minimize collateral damage.’²⁵⁸ As was discussed in the previous chapter, on the two occasions in which the UN established administrations with executive powers over their respective territories,²⁵⁹ the regulations establishing the applicable law explicitly included references to international

²⁵⁶ See International Committee of the Red Cross, *Statement made in the Fourth Committee, UN General Assembly*, New York: ICRC, 31 October 2013. ‘UN peacekeepers – troops and police alike – may well have to perform law enforcement tasks in the course of their mission. The ICRC considers it important that UN personnel involved in law enforcement operations are fully aware of and adhere scrupulously to the rules and standards applicable to these situations, in particular human rights law’, <https://www.icrc.org/eng/resources/documents/statement/2013/united-nations-peacekeeping-2013-10-31.htm>, accessed 5 May 2015.

²⁵⁷ See, for example, Security Council Resolution 2100 of 25 April 2013, para 24. ‘Reiterates that the transitional authorities of Mali have primary responsibility to protect civilians in Mali, further recalls its resolutions 1265 (1999), 1296 (2000), 1674 (2006), 1738 (2006) and 1894 (2009) on the protection of S/RES/2039 (2012) 10 12-24771 civilians in armed conflict, its resolutions 1612 (2005), 1882 (2009), 1998 (2011) and 2068 (2012) on Children And Armed Conflict and its resolutions 1325 (2000), 1820 (2008), 1888 (2009), 1889 (2009), and 1960 (2010) on Women, Peace and Security and calls upon MINUSMA and all military forces in Mali to take them into account and to abide by international humanitarian, human rights and refugee law, and recalls the importance of training in this regard.’ [emphasis added] See also Security Council Resolution 2093 of 6 March 2013, para 12, on Somalia, ‘Requests AMISOM to ensure that any detainees in their custody are treated in strict compliance with AMISOM’s obligations under international humanitarian law and human rights law’.

²⁵⁸ *Policy on the Protection of Civilians in United Nations Peacekeeping*, Department of Peacekeeping Operations / Department of Field Support Ref. 2015.07, 1 April 2015, pp.5-6.

²⁵⁹ The UN mission in Kosovo (UNMIK) and the UN Transitional Administration in East Timor (UNTAET),

human rights law.²⁶⁰ As was also shown, however, these formal statements proved of little value without effective mechanisms of accountability.

Conclusions

This chapter has described the emergence of POC as a new normative doctrine that is being increasingly integrated into UN peacekeeping. As Willmot and Mamiya have observed: ‘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.’²⁶¹ POC was once dubbed the ‘impossible mandate’ to implement,²⁶² but it now appears that the UN accepts that its peacekeeping missions do have a responsibility to protect civilians from grave violations of IHL and international human rights law. It has been noted that no POC mandate has ever been lifted during a mission’s lifetime.²⁶³ The record of missions in actually implementing their mandates has been mixed, however, and will be discussed further in Part III of this thesis. The next two chapters will discuss in more detail the inter-relationship between the different bodies of law that are potentially relevant to peacekeeping missions with POC mandates and the difficulties of using them to hold missions to account.

²⁶⁰ UNMIK Regulation No. 1999/24 on the Law Applicable in Kosovo (Dec. 12, 1999) UNTAET Regulation No. 1999/1, 27 December 1999, on the Authority of the Transitional Administration in East Timor, 9 November 2010.

²⁶¹ For details see Haidi Willmot and Ralph Mamiya, ‘Mandated to Protect: Security Council Practice on the Protection of Civilians’, in Marc Weller (ed), *The Oxford Handbook on the Use of Force in International Law*, Oxford: Oxford University Press, 2014.

²⁶² Holt and Berkman, 2006.

²⁶³ OIOS Protection Evaluation, 2014, para 15.

**PART TWO: THE APPLICABLE LEGAL FRAMEWORK GOVERNING THE USE
OF FORCE FOR PROTECTIVE PURPOSES**

Chapter 4:

Relevant provisions of international humanitarian, human rights and refugee law

Introduction

This chapter discusses the provisions in three bodies of international law that are potentially most relevant to UN peacekeeping missions with mandates from the Security Council to use force for protective purposes: IHL, international human rights law and refugee law. As was previously discussed, UNHCR has played a leading role in many humanitarian crises where UN missions with POC mandates are present. UN Security Council resolutions and other documents on POC often refer to refugee law and this chapter will briefly consider the attempts to draw up a ‘doctrine of protection specifically tailored to the needs of the internally displaced.’¹ Most of the provisions of most relevance to the use of force, however, can be found in international human rights law and IHL, which will be the main focus of the discussion of this chapter. It will be argued that in most situations the negative and positive obligations of international human rights law provide the most comprehensive and relevant guidance for UN peacekeeping missions with POC mandates.

It is now widely agreed that the traditional paradigm by which international human rights law governed relations between States and their own citizens in times of peace, while IHL primarily regulated the conduct of international armed conflicts is outdated.² It is also

¹ *Report of the Representative of the Secretary-General on Internally Displaced Persons, Commission on Human Rights*, UN Doc. E/CN.4/1994/44, 22 February 1996.

² For further discussion of the historical evolution of this debate see, for example, Jean Pictet, *Humanitarian Law and the Protection of War Victims*, Geneva: Henri Dunant Institute, 1975, p.15; Gerald Irving Anthony Dare Draper, in Michael Meyer and Hilary McCoubrey, *Reflections on law and armed conflicts: the selected works on the laws of war by the late Professor Colonel G.I.A.D. Draper, OBE*, The Hague: Kluwer Law International, 1998; and Gerd Oberleitner, *Human Rights in Armed Conflict: law, practice, policy*, Cambridge: Cambridge University Press, 2015, pp.9-77.

increasingly recognised that IHL and international human rights law may be concurrently applicable.³ While there is continuing debate about the extent of international human rights law's extraterritorial application, it is widely accepted that States are under an obligation to respect and ensure respect for its provisions to anyone within their power or effective control, even if not situated within their territory.⁴ International human rights law is, therefore, potentially applicable to peacekeeping soldiers and this chapter will discuss its provisions relating to arrest and detention and the use of lethal force in more detail. The next chapter will discuss the specific problems of applying international human rights law to UN Security Council authorized operations.

Relevant provisions of IHL

IHL prohibits attacks on civilians and civilian objects, while permitting combatants in an international armed conflict to directly engage in hostilities without this being considered a criminal act.⁵ In order to ensure respect for this provision: 'Parties to the conflict shall at all times distinguish between the civilian population and combatants and between civilian objects and military objectives'.⁶ The term 'civilian' is defined negatively as anyone who is not a member of the armed forces or of an organized military group belonging to a party to

³ *Legality or Threat of Use of Nuclear Weapons*, Advisory Opinion of 8 July 1996, ICJ Reports 1996; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion of 9 July 2004, ICJ Reports 2004; *Armed activity on the territory of the Congo (Democratic Republic of the Congo v. Uganda)*, Judgment of 19 December 2005 ICJ Reports 2005. See also General Comment No. 31 on the Nature of the General Legal Obligation Imposed on State Parties to the Covenant, CCPR/C/21/Rev.1/Add.13, 26 May 2004, para 1.

⁴ *Al-Skeini and Others v. UK*, Appl. No. 55721/07, Judgment (Grand Chamber) 7 July 2011. See also *Bankovic v. Belgium and 16 Other Contracting States*, Appl. No. 52207/99, (Grand Chamber), Decision on Admissibility 19 December 2001, para 37 and 43-57; and Human Rights Committee, General Comment No. 31, para 10.

⁵ For further discussion see International Committee of the Red Cross, 'International humanitarian law and the challenges of contemporary armed conflicts Document prepared by the International Committee of the Red Cross for the 30th International Conference of the Red Cross and Red Crescent, Geneva, Switzerland, 26–30 November 2007', *International Review of the Red Cross*, Vol. 89 No. 867 Geneva: ICRC, September 2007. These provisions can be found in Common Article 3 to the Four Geneva Conventions and in Additional Protocol II, Articles 13-18.

⁶ Additional Protocol I, Article 48.

the conflict.⁷ Additional Protocol I of the Geneva Conventions states that: ‘In case of doubt whether a person is a civilian that person shall be considered a civilian’.⁸

The provisions of IHL will only be relevant to situations of armed conflict. An armed conflict has been defined as existing whenever ‘there is *resort to armed force* between States or *protracted armed violence* between governmental authorities and organized armed groups or between such groups within a State.’⁹ [emphasis added] There is an obvious difference between these two thresholds and IHL will only apply in non-international conflicts when the second one has been reached. Additional Protocol II of the Geneva Conventions, which regulates conduct in non-international armed conflicts, specifies that it ‘shall not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature, as not being armed conflicts.’¹⁰

The four Geneva Conventions and Additional Protocol I all apply to international armed conflicts. Common Article 3 of these Conventions and Additional Protocol II apply to non-international armed conflicts. The ICC’s statute also contains two separate lists of war crimes, those committed in international and those in non-international conflicts.¹¹ The treaty provisions relating to IHL in non-international armed conflict are much less extensive than in those relating to international armed conflicts but, have been ‘enriched and upgraded’ by decisions of the Security Council and the case law of international criminal tribunals.¹² The

⁷ ICTY: *Prosecutor v. Galic*, Trial Chamber, Case No. IT-98-29-T, 5 December 2003, para 47.

⁸ Additional Protocol I, Article 50.

⁹ ICTY: *Prosecutor v. Dusko Tadic*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, Case No. IT-94-1-AR72, 2 October 1995, para 70; *Prosecutor v. Ramush Haradinaj et al.* Case No. IT-04-84-T, Judgment of 3 April 2008, paras 49 and 60. See also *ICRC Commentary on the Four Geneva Conventions of 1949*, Commentary - Art. 2. Chapter I: General provisions. ‘Any difference arising between two States and leading to the intervention of members of the armed forces is an armed conflict within the meaning of Article 2, even if one of the Parties denies the existence of a state of war. It makes no difference how long the conflict lasts, or how much slaughter takes place. The respect due to the human person as such is not measured by the number of victims.’ <https://www.icrc.org/ihl/COM/365-570005?OpenDocument>, accessed 22 August 2015.

¹⁰ Additional Protocol II, Article 1.

¹¹ ICC Rome Statute, Article 8.

¹² Paper by Robert Kolb, ‘Applicability of international humanitarian law to forces under the command of an international organization’, in Alexandre Faite and Jérémie Labbé Grenier, (eds), *Report on*

ICRC states that most of the treaty provisions governing IHL in international conflicts can also be considered to be customary law in non-international conflicts.¹³

While there is some debate about the applicability of some of these provisions,¹⁴ there is no doubt that the ‘elementary considerations of humanity’ contained in Common Article 3 are of customary nature.¹⁵ ICTY has also stated that principles of customary international law applicable in internal armed conflict exist independently of common Article 3 and Additional Protocol II and that:

In the area of armed conflict the distinction between interstate wars and civil wars is losing its value as far as human beings are concerned. Why protect civilians from belligerent violence or ban rape, torture or the wanton destruction of hospitals, churches, museums or private property as well as proscribe weapons causing unnecessary suffering when two sovereign States are engaged in war, and yet refrain

Expert Meeting on Multinational Peace Operations: Applicability of International Humanitarian Law and International Human Rights Law on UN mandated forces, Geneva, 11-12 December 2003, p.68. See also Françoise J. Hampson, ‘The relationship between international humanitarian law and human rights law from the perspective of a human rights treaty body’, *International Review of the Red Cross*, Vol. 90 No. 871 September 2008, pp.549-72.

¹³ Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law*, Cambridge: Cambridge University Press, 2005, I. This is available online at *Customary International Humanitarian Law Database – ICRC*, <http://www.icrc.org/customary-ihl/eng/docs/home>, first accessed 11 December 2012.

¹⁴ John B. Bellinger III, and William J. Haynes II, ‘A US government response to the International Committee of the Red Cross study Customary International Humanitarian Law’, *International Review of the Red Cross*, Vol. 89 No. 866, June 2007, pp.443-71. These made detailed criticism of four rules: Rule 31 (protection of humanitarian relief personnel), Rule 45 (prohibition on causing long-term, widespread and severe damage to the environment), Rule 78 (prohibition of the use of anti-personnel exploding bullets) and Rule 157 (right to establish universal jurisdiction over war crimes). They also expressed concern ‘about the methodology used to ascertain rules and about whether the authors have proffered sufficient facts and evidence to support those rules’ and accused them of an over-reliance of policies set out in training manuals and of failing ‘to pay due regard to the practice of specially affected States. For a rebuttal of these criticism see Jean-Marie Henckaerts, ‘Customary International Humanitarian Law: a response to US Comments’, *International Review of the Red Cross*, Vol. 89 No. 866 June 2007, pp.473-88.

¹⁵ *Case Concerning Military and Paramilitary Activities in and against Nicaragua*, Judgment, of 27 June 1986, ICJ Reports 1986, para 221. See also *Corfu Channel Case (UK v. Albania)*, Judgment of 9 April 1949, ICJ Reports 1949 para 215.

from enacting the same bans or providing the same protection when armed violence has erupted ‘only’ within the territory of a sovereign State? ¹⁶

IHL ‘must set forth realistic rules governing the use of deadly force’, given the nature of armed conflicts.¹⁷ It specifies that, in international armed conflicts, ‘precautions should be taken to try and ensure’ that civilians are not killed or injured in attacks on military targets, without expressly forbidding them.¹⁸ Military commanders are also required to ‘consider the impact that their actions may have on civilians’ and to apply the principle of ‘proportionality’ when considering whether or not to attack a particular military target.¹⁹ Civilians may, however, be forcibly displaced from their homes and property may be seized or destroyed on grounds of military necessity.²⁰ Food can be requisitioned for use by the occupation forces, and administrative personnel, although this should be subject to fair payment and only if the requirements of the civilian population have been taken into account.²¹

The ICRC has argued that the principles of military necessity and humanity may require an attempt to detain rather than kill combatants in certain circumstances,²² because ‘it would defy basic notions of humanity to kill an adversary or to refrain from giving him or her an opportunity to surrender where there manifestly is no necessity for the use of lethal force’.²³ Others believe that ‘a reasonable military commander would not order an attack against an isolated fighter who is at home asleep, if a capture appears to be possible in the circumstances

¹⁶ ICTY: *Prosecutor v. Dusko Tadic*, October 1995, paras 96-127.

¹⁷ Kenneth Watkin, ‘Controlling the Use of Force: A Role for Human Rights Norms in Contemporary Armed Conflict’, *American Journal of International Law*, Vol. 98:1, 34 (2004). See also Robert Kolb and Gloria Gaggioli, (eds), *Research Handbook on Human Rights and Humanitarian Law*, Edward Elgar, Cheltenham Glos. and Northampton, Massachusetts: Edward Elgar, 2013; and Françoise J. Hampson, ‘Direct participation in hostilities and the interoperability of the law of armed conflict and human rights law,’ *International Law Studies*, Vol. 87, US Naval War College, 2011, p.192.

¹⁸ Additional Protocol I, Article 48.

¹⁹ Additional Protocol I, Articles 48-57.

²⁰ Geneva Convention IV, Articles 49 and 53 and Additional Protocol II, Article 17(1).

²¹ Geneva Convention IV, Article 55.

²² Nils Melzer, *Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law*, Geneva: International Committee of the Red Cross, 2009, pp.77-82.

²³ *Ibid.*, p.82.

without additional risk to the armed forces.²⁴ A debate remains, however, about whether this is a matter of law or merely policy.²⁵

Combatants in an international armed conflict are entitled to prisoner of war (POW) status upon capture.²⁶ Conversely, while civilians enjoy protection from attack so long as they do not directly engage in hostilities, should they do so they will lose this protection and may also be prosecuted under the relevant domestic law.²⁷ There are no equivalent provisions for combatants in the treaty provisions relating to IHL in non-international armed conflict, since such acts will almost certainly be offences under the relevant domestic criminal law.

According to the ICRC ‘practice is ambiguous as to whether members of armed opposition

²⁴ International Committee of the Red Cross, *Expert Meeting: The use of force in armed conflicts: Interplay between the conduct of hostilities and law enforcement paradigms*, Geneva: ICRC, 2013, [Hereinafter ICRC Expert Meeting, 2013] p.59.

²⁵ For further discussion see Noam Lubell, *Extraterritorial Use of Force Against Non-State Actors*, Oxford: Oxford University Press, 2010 p.161. Lubell argues that it ‘portrays what is only a potentially desirable policy as existing law, which it is not’. See also W. Hays Parks, ‘Part IX of the ICRC ‘Direct Participation in Hostilities’ Study: No Mandate, No Expertise, and Legally Incorrect,’ *New York University Journal of International Law and Politics*, Vol. 42, No. 3, Spring 2010, pp. 769-830; Nils Melzer, ‘Keeping the Balance between Military Necessity and Humanity: A Response to Four Critiques of the ICRC’s Interpretive Guidance on the Notion of Direct Participation in Hostilities’, *New York University Journal of International Law and Politics*, Vol. 42, No. 3, Spring 2010, pp. 831-916.

²⁶ For details see *ICRC Prisoners of War and Detainees*, <http://www.icrc.org/eng/war-and-law/protected-persons/prisoners-war/> accessed 23 April 2014. The rules protecting prisoners of war (POWs) are specific and were first detailed in the 1929 Geneva Convention. They were refined in the third 1949 Geneva Convention, following the lessons of World War II, as well as in Additional Protocol I of 1977. POWs are usually members of the armed forces of one of the parties to a conflict who fall into the hands of the adverse party. POWs cannot be prosecuted for taking a direct part in hostilities. Their detention is not a form of punishment, but only aims to prevent further participation in the conflict. They must be released and repatriated without delay after the end of hostilities. The detaining power may prosecute them for possible war crimes, but not for acts of violence that are lawful under IHL. POWs must be treated humanely in all circumstances. They are protected against any act of violence, as well as against intimidation, insults, and public curiosity. IHL also defines minimum conditions of detention covering such issues as accommodation, food, clothing, hygiene and medical care.

²⁷ Additional Protocol I, Article 51.3. ICRC Resource Centre, *The relevance of IHL in the context of terrorism*, 1 January 2011. This states that ‘if civilians directly engage in hostilities they are considered “unlawful” or “unprivileged” combatants or belligerents.’ However, the treaties of humanitarian law do not expressly contain these terms. See also *Amicus Curiae brief submitted by Professors Françoise Hampson and Noam Lubell in the case of Hassan v. United Kingdom*, Appl. No. 29750/09, Human Rights Centre, University of Essex, 2013, para 29: ‘when attempting to detain a civilian who does not pose a direct threat at that precise moment, in an area under the complete control of the military and in which they can operate unhindered. In such circumstances, even if the individual may have lost civilian protection under LOAC/IHL due to rules on participation in hostilities, human rights law may require a graduated use of force rather than direct lethal force.’

groups are considered members of armed forces or civilians'.²⁸ It notes that persons taking a 'direct part in hostilities' in non-international armed conflicts 'are sometimes labelled "combatants" . . . However, this designation is only used in its generic meaning and indicates that these persons do not enjoy the protection against attack accorded to civilians, but this does not imply a right to combatant or prisoner-of-war status, as applicable in international armed conflicts.'²⁹

IHL contains extensive provisions relating to detention during international armed conflicts, principally in the Third and Fourth Geneva Conventions and Additional Protocol I.³⁰ The Third Geneva Convention defines the rights of POWs, while the Fourth provides protection for civilians, including those who have been interned during an international armed conflict.³¹ Additional Protocol I refers to both POWs and civilians.³²

²⁸ *ICRC Customary IHL Rule 3, Definition of Combatants*, http://www.icrc.org/customary-ihl/eng/docs/v1_cha_chapter1_rule3, accessed 12 December 2012.

²⁹ *Ibid.* See also Melzer, 2009. Although the existing rules suggest that individuals fighting against the state in a non-international armed conflict should be classified as civilians, but lose their protection while taking a 'direct part' in hostilities, the ICRC has proposed a third category of persons who are 'members of organised groups belonging to a non-state party to the conflict' and who 'cease to be civilians for as long as they remain members by virtue of their continuous combat function'. For further discussion see Lubell, 2010, p.148.

³⁰ The four Geneva Conventions contain more than 175 provisions regulating detention. The main ones are in Articles 13-77 of Geneva Convention III; Articles 79-135 in Geneva Convention IV; and Additional Protocol I, Articles 43-7 and 75, the latter of which is considered to reflect customary international law.

³¹ Geneva Convention IV, Articles 41, 42, 64 and 78 provide a legal basis for the internment of civilians, but only if justified by imperative reasons of security. Detention on these grounds, while permissible, cannot be used as a form of punishment. This means that each interned person must be released as soon as the reasons which necessitated his or her internment no longer exist. The treatment of internees in such circumstances is dealt with by Section IV of Geneva Convention IV and there are 52 articles that deal with various aspects of treatment such as places of internment, health and hygiene of internees, religious and intellectual activities, administration and discipline, and relations with the exterior. Article 147 of Geneva Convention IV defines the 'unlawful confinement of a protected person', to be a grave breach of the Convention. Additional Protocol I, Article 73 extends the definition of protected persons to include refugees or stateless persons. Article 75 establishes fundamental guarantees that detained people should be treated humanely. Articles 76-78 consider the specific rights and vulnerabilities of women and children.

³² For an overview see Jelena Pejic, 'Procedural principles and safeguards for internment/administrative detention in armed conflict and other situations of violence', *International Review of the Red Cross*, Vol. 87 No. 858 June 2005, pp.375-91.

The Fourth Geneva Convention specifies that detentions can only be made as ‘an exceptional measure and only if necessitated by imperative reasons of security’.³³ Unlawful confinement of protected persons is a grave breach of the Fourth Convention.³⁴ Detentions must also be subject to review ‘as soon as possible by an appropriate court or administrative board designated by the Detaining Power for that purpose’.³⁵ Decisions must be made according to a ‘regular procedure’ prescribed by law and detained individuals must be permitted to appeal against the decision ‘with the least possible delay’.³⁶ The reviewing body ‘must operate under the guarantees of independence and impartiality’, but it could be a military administrative board rather than a civilian court.³⁷ Neither the Fourth Convention nor Additional Protocol I provide details about the procedural rights of internees, nor the legal framework that a detaining authority must implement.³⁸ Protocol I states, however, that its provisions relating to ‘treatment of persons in the power of a party to the conflict’ are ‘additional’ to the rules contained in the Fourth Convention, ‘as well as to other applicable rules of international law relating to the protection of fundamental human rights during international armed conflict’.³⁹ International human rights law can, therefore, be utilised to ‘fill the gaps’ in the detention regime.⁴⁰

The provisions relating to detention in non-international armed conflicts are much less extensive. Treaty law does not expressly contain a power to detain, although it assumes that

³³ Geneva Convention IV, Article 78.

³⁴ Geneva Convention IV, Article 147.

³⁵ Geneva Convention IV, Article 43.

³⁶ Geneva Convention IV, Article 78.

³⁷ ICRC Commentary to Articles 43 and 78. For further discussion see Hampson and Lubell, 2013, para 39. They note that this is one of the few areas regarding detention where there may be a prime facie clash between international human rights law and IHL.

³⁸ Pejic, 2005, p.377. See also Jakob Kellenberger, ‘Official Statement of ICRC: Strengthening Legal Protection for Victims of Armed Conflicts’, *International Review of the Red Cross*, Vol. 92, No. 879, September 2010; and ‘Remarks by Knut Dormann, head of the legal division at the ICRC informal meeting of legal advisers, United Nations, New York, 24 October 2011’, 3 November 2011, ICRC Website, <http://www.icrc.org/eng/resources/documents/statement/31-international-conference-ihl-statement-2011-11-03.htm>, accessed 7 May 2014.

³⁹ Additional Protocol I, Article 72.

⁴⁰ For further discussion see Hampson and Lubell, 2013, paras 38-40.

detention occurs and regulates certain aspects of it.⁴¹ Common Article 3 and Additional Protocol II simply state that detainees must ‘be treated humanely, without any adverse distinction’.⁴² The ICRC has stated, however, that the prohibition of arbitrary detention is ‘a norm of customary international law applicable in both international and non-international conflicts’ since it is not compatible with the requirement of humane treatment.⁴³ The obligation to ‘protect’ persons and objects on which IHL prohibits attacks is also considered by the ICRC to be a part of customary international law.⁴⁴

Common Article 1 of the four Geneva Conventions requires States to ‘respect and ensure respect’ for the Conventions in ‘all circumstances’.⁴⁵ This means that they have an obligation

⁴¹ Pejic, 2005, pp.375-7. See also *Serdar Mohammed v. Secretary of State for Defence*, Case No: HQ12X03367, [2014] EWHC 1369 (QB), 2 May 2014, para 243-5; and *Just Security*, Jonathan Horowitz and Christopher Rogers, ‘Does IHL Need Human Rights Law?: The Curious Case of NIAC Detention’, 5 May 2014, <http://justsecurity.org/2014/05/05/guest-post-ihl-human-rights-law-curious-case-niac-detention-serdar-mohammed/>, accessed 15 May 2014. See also *Georgia v. Russia (II) 38263/08 Amicus Curiae brief submitted by Professor Françoise Hampson and Professor Noam Lubell*, Human Rights Centre, University of Essex, 2014, para 35. The English High Court stated that there is ‘nothing in the language’ of the IHL articles relating to a non-international armed conflict ‘to suggest that those provisions are intended to authorise or themselves confer legality on any such detentions.’ However, as Hampson and Lubell note ‘It would indeed be strange if international law allowed certain people to be killed (those taking a direct part in hostilities) but did not allow them to be detained. The ground of detention in a NIAC is presumably that the detainee represents a serious security threat to the armed forces and/or the civilian population.’

⁴² International Committee of the Red Cross, *Strengthening Legal Protection for Persons deprived of their Liberty in relation to Non-International Armed Conflict, Regional Consultations 2012-13, Background Paper*, Geneva: ICRC, January 2014, p3. ‘In spite of the attention that IHL gives to deprivation of liberty, the most superficial examination of existing law reveals a substantial disparity between the robust and detailed provisions applicable in international armed conflicts, and the very basic rules that have been codified for non-international armed conflict.’ For all of the background papers and statements see, *ICRC, Strengthening Legal Protection for Victims of Armed Conflict*, <http://www.icrc.org/eng/what-we-do/other-activities/development-ihl/strengthening-protection-victims-armed-conflict.htm>, accessed 7 May 2014.

⁴³ *ICRC Customary IHL Rule 99, Arbitrary deprivation of liberty is prohibited*, https://www.icrc.org/customary-ihl/eng/docs/v1_cha_chapter32_rule99?OpenDocument&highlight=fundamental,guarantees, accessed 8 April 2015

⁴⁴ *ICRC Customary IHL, Rule 151 Individual Responsibility*, http://www.icrc.org/customary-ihl/eng/docs/v1_cha_chapter43_rule151?OpenDocument&highlight=151; accessed 5 February 2014. This notes that the ICRC’s appeals in relation to the conflict in Rhodesia/Zimbabwe in 1979 and to the Iran-Iraq War in 1983 and 1984 involved calls to ensure respect for rules not found in the Geneva Conventions but in the Additional Protocols (bombardment of civilian zones and indiscriminate attacks) and the parties alleged to have committed these attacks were not party to the Protocols. It also notes that these appeals were addressed to the international community, that no State objected to them and that several States not party to the Additional Protocols supported them.

⁴⁵ For further discussion see Marko Divac Öberg, ‘The absorption of grave breaches into war crimes law’, *International Review of the Red Cross*, Vol. 91 No. 873 March 2009, pp.163-83.

to criminalize certain violations of IHL, investigate allegations of such violations and to punish those responsible through their national courts if they occur.⁴⁶ Military commanders must also act both proactively and reactively to ensure compliance with the law, and exert their influence to stop violations by third parties through, for example, investigating violations and prosecuting perpetrators.⁴⁷ This obligation to examine and investigate alleged violations is not restricted merely to the nationals and service personnel of a party to a conflict, but applies to every State in relation to every person present in its territory who is suspected of having committed such violations.⁴⁸ It includes the adoption of penal or disciplinary sanctions, usually through the enactment of criminal legislation, and also searching for, trying and punishing convicted perpetrators of serious violations.⁴⁹

The ICRC states that these positive obligations are customary in nature and apply to international and non-international conflicts.⁵⁰ The ICJ stated in *Nicaragua* that the duty to respect and ensure respect for humanitarian law does not solely derive from the Geneva Conventions, but from the general principles of humanitarian law to which the Conventions merely give specific expression'.⁵¹ UN Security Council and General Assembly resolutions have also stressed the importance of 'ensuring' that IHL's rules are universally upheld.⁵²

⁴⁶ Geneva Convention I, Article 52; Geneva Convention II, Article 53; Geneva Convention III, Article 132; Geneva Convention IV, Articles 146 and 149; and Additional Protocol I, Article 85.

⁴⁷ Additional Protocol I, Article 87.

⁴⁸ Geneva Convention I, Article 49; Geneva Convention II, Article 50; Geneva Convention III, Article 129; Geneva Convention IV, Article 146; Additional Protocol I, Articles 85 and 86(1).

⁴⁹ *Ibid.*

⁵⁰ *ICRC Customary IHL, Rule 151 on Individual Responsibility*, http://www.icrc.org/customary-ihl/eng/docs/v1_cha_chapter43_rule151?OpenDocument&highlight=151; and *Rule 144 Ensuring Respect for International Humanitarian Law Erga Omnes*, http://www.icrc.org/customary-ihl/eng/docs/v1_rule144, both accessed 5 February 2014.

⁵¹ ICJ Reports 1986, para 221.

⁵² For example UN Security Council Resolution 681, of 20 December 1990, paras 4 and 5. 'Urges the Government of Israel to accept de jure applicability of the Fourth Geneva Convention of 1949, to all the territories occupied by Israel since 1967, and to abide scrupulously by the provisions of the said Convention; Calls on the high contracting parties to the Fourth Geneva Convention of 1949 to ensure respect by Israel, the occupying Power, for its obligations under the Convention in accordance with article 1 thereof.' See also UN General Assembly Resolutions 32/91; 37/123; 38/180; and 43/21.

The Fourth Geneva Convention also obliges ‘occupying powers’ to ‘maintain the orderly government of the territory’ and ensure ‘the effective administration of justice’.⁵³ The ICJ ruled in *Armed Activities* that this imposed on Uganda a responsibility to ‘take measures to respect and ensure respect for human rights and international humanitarian law’ and to ‘take all measures in its power to restore, and ensure as far as possible, public order and safety in the occupied area, to protect the inhabitants of the occupied territory against acts of violence and not to tolerate such violence by any third party’.⁵⁴ It is, therefore, widely accepted that international human rights law is applicable during a military occupation.⁵⁵

Once a conflict has started, IHL will continue to apply beyond the cessation of hostilities until a general conclusion of peace has been reached or, in the case of a non-international armed conflict, until a peaceful settlement has been achieved, whether or not actual combat takes place there.⁵⁶ IHL will, therefore, be applicable in situations where an armed conflict exists, including situations in which UN peacekeeping missions have been deployed to monitor ceasefire agreements or peace processes. As discussed in the previous chapter, if such a mission becomes a party to the conflict it will then be directly bound by IHL’s provisions.⁵⁷ It will also lose the protection that IHL provides to civilians⁵⁸ as well as the

⁵³ Geneva Convention IV, Article 64.

⁵⁴ ICJ Reports 19 December 2005, para 345 and 178. See also ICJ Reports 1996, para 25; and ICJ Reports 2004, para 106.

⁵⁵ For further discussion see Tom Ruys and Sten Verhoeven, ‘DRC v. Uganda: The Applicability of International Humanitarian Law and Human Rights Law in Occupied Territories’ and Ralph Wilde, ‘Triggering State Obligations Extraterritorially: The Spatial Test in Certain Human Rights Treaties’, in Roberta Arnold and Noelle Quénivet (eds), *International Humanitarian Law and Human Rights Law*, Leiden and Boston: Martin Nijhof, 2008; and Noam Lubell, ‘Human rights obligations in military occupation’, *International Review of the Red Cross*, Vol. 94 No. 885 Spring 2012, pp.317-37.

⁵⁶ ICTY: *Prosecutor v. Dusko Tadic*, October 1995, para 70.

⁵⁷ UN Secretary General, *UN Secretary General’s Bulletin, Observance by UN Forces of International Humanitarian Law*, ST/SGB/1999/13, 6 August 1999.

⁵⁸ *ICRC Customary IHL Rule 33, Personnel and Objects Involved in a Peacekeeping Mission* https://www.icrc.org/customary-ihl/eng/docs/v1_rul_rule33, accessed 5 September 2015. ‘Directing an attack against personnel and objects involved in a peacekeeping mission in accordance with the Charter of the United Nations, as long as they are entitled to the protection given to civilians and civilian objects under international humanitarian law is prohibited’.

specific protections provided to UN personnel by both the UN Safety Convention of 1994⁵⁹ and the ICC.⁶⁰

If the situation to which a UN peacekeeping mission has been deployed has not reached the threshold of an armed conflict, or no longer fulfils this criteria, then it is difficult to see how IHL could be the appropriate legal framework regulating the tactical use of force.⁶¹ Even if such a conflict exists, if the UN is not a party to it and enjoys legal protection against attack from its parties, then it cannot simultaneously enjoy the ‘belligerent rights’ of IHL, since this would contradict a basic principle of reciprocity on which *jus in bello* rests.⁶² Some have argued that the responsibilities of a UN peacekeeping mission may be analogous to those of an occupying power as defined in the Fourth Geneva Convention.⁶³ This would severely stretch the concept of ‘belligerent occupation’, however, since peacekeeping missions are deployed with host state consent and the authority of the Security Council.⁶⁴

Where UN peacekeeping missions are authorized to use force in pursuant of a POC mandate, but have not become a party to an armed conflict, then the provisions of international human

⁵⁹ Convention on the Safety of UN and Associated Personnel, New York, 9 December 1994, Article 2, which makes it a crime under international law to attack UN staff and associated personnel, specifies that this is in all cases except when they ‘are engaged as combatants against organized armed forces and to which the law of international armed conflict applies’.

⁶⁰ Rome Statute of the International Criminal Court, Articles 8.2(b)(iii) and 8.2(e)(iii) which makes it a war crime to attack personnel involved in a peace-keeping mission ‘as long as they are entitled to the protection given to civilians or civilian objects under the international law of armed conflict’.

⁶¹ For further discussion see: Bruce ‘Ossie’ Oswald, ‘*The Law on Military Operations: Answering the Challenges of Detention during Contemporary Peace Operations*’ *Melbourne Journal of International Law*, Vol. 8, 2007, pp.1-16; and Chris Faris, ‘*The Law of Occupation and Human Rights: Which Framework Should Apply to United Nations Forces?*’, *Australian International Law Journal*, Vol. 12, 2005, pp.6.

⁶² See, for example, *Max Planck Encyclopaedia of Public International Law*, Marten Zwanenburg, ‘United Nations and International Humanitarian Law,’ in <http://www.grotiuscentre.org/page11731058.aspx>, accessed 27 March 2014; and François Bugnion, ‘Just Wars, Wars of Aggression and International Humanitarian Law’, *International Review of the Red Cross*, Vol. 84, No. 847, September 2002, pp.523-546.

⁶³ Siobhán Wills, *Protecting Civilians*, Oxford: Oxford University Press, 2009. See Chapter Four, ‘The Applicability of Occupation Law to Peacekeeping and other Multinational Forces’, pp.171-245.

⁶⁴ For further discussion see Simon Chesterman, *You, the People: The United Nations, Territorial Administration, and State-Building*, Oxford: Oxford University Press, 2004, pp.152- 239; and Steve Ratner, ‘Foreign Occupation and International Territorial Administration: The Challenges of Convergence’ *European Journal of International Law*, Vol.16, No. 4, 2005, pp.695-719.

rights law as it applies to a criminal law enforcement paradigm would seem to provide a more appropriate legal framework than IHL. Chapter Five will discuss the potential applicability of this legal framework to UN peacekeeping missions with POC mandates in more detail. The rest of this chapter will first outline the provisions of international human rights law that could be of most relevance in places where such a mission might be deployed. It will then consider international human rights law's inter-relationship with IHL and the scope of its extraterritorial applicability. This will be followed by a brief discussion of the potential relevance of refugee law to people internally displaced within their own country by a conflict.

Relevant provisions of international human rights law

International human rights law applies to all human beings at all times in all places within a State's jurisdiction.⁶⁵ It imposes both 'negative' and 'positive' obligations. A 'negative' obligation is a duty to 'respect', or not to directly violate, a particular right. A 'positive' obligation is a duty to 'ensure' its protection.⁶⁶ For example, Article 1 of the ECHR obliges contracting parties to 'secure to everyone within their jurisdiction the rights and freedoms' contained in the Convention, while Article 1 of the American Convention on Human Rights (ACHR) obliges State parties to 'undertake to respect the rights and freedoms recognized herein and to ensure to all persons subject to their jurisdiction.'⁶⁷ It is also now generally accepted that States may be held accountable for acts carried out by private individuals if it supports or tolerates them, or fails in other ways to provide effective protection in law against

⁶⁵ The Secretary-General, *Report of the Secretary-General on Respect for Human Rights in Armed Conflicts*, 25, UN Doc. A/8052 (1970); 'Vienna Declaration and Programme of Action', World Conference on Human Rights, Vienna, A/CONF.157/23, 14-25 June 1993.

⁶⁶ For further discussion see Dinah Shelton and Ariel Gould, 'Positive and Negative Obligations', in Dinah Shelton (ed) *The Oxford Handbook of International Human Rights Law*, Oxford: Oxford University Press, December 2013.

⁶⁷ *Ibid.* The American Declaration does not contain an explicit jurisdictional provision; however the Inter-American Commission has applied the same principles of 'authority and control'.

them.⁶⁸ This can include ‘in certain well-defined circumstances a positive obligation on the authorities to take preventive operational measures to protect an individual’ from threats to their life and physical integrity.⁶⁹

It is also widely accepted that some of the most basic human rights have attained the status of *jus cogens*, which is a ‘peremptory norm’⁷⁰ of general international law that can only be overridden by another peremptory norm.⁷¹ The use of *jus cogens* as a means of resolving legal disputes by national or international courts and tribunals has actually been quite rare⁷² and

⁶⁸ In *L.C.B. v. UK*, Appl. No. 14/1997/798/100, Judgment 9 June 1998, para 36, the European Court stated that ‘the first sentence of Article 2.1 enjoins the State not only to refrain from the intentional and unlawful taking of life, but also to take appropriate steps to safeguard the lives of those within its jurisdiction’ and that the task of the Court was ‘to determine whether, given all the circumstances of the case, the State did all that could have been required of it to prevent the applicant’s life from being avoidably put at risk’. See also: *Calvelli and Ciglio v. Italy*, Appl. No. 32967/96, (Grand Chamber) Judgment 17 January 2002; *Erikson v. Italy*, Appl. No. 37900/97, Decision on Admissibility 26 October 1999; *Edwards v UK*, Appl. No. 46477/99, 2002, paras 55-64; *Alex Menson and others v. UK*, Appl. No. 47916/99, Decision on Admissibility 6 May 2003; *Shanaghan v. UK*, Appl. No. 37715/97, Judgment 4 May 2001; *Mahmut Kaya v. Turkey*, Appl. No. 22535/93, Judgment 28 March 2000; *Kontrova v. Slovakia*, Appl. No. 7510/04, Judgment (Grand Chamber) 31 May 2007; *Kayak v. Turkey*, Appl. No. 60444/08, Judgment 10 July 2012.

⁶⁹ *Osman v UK*, Appl. No. 23452/94, Judgment 28 October 1998, paras 115-6. The case concerned a teacher who stalked and eventually attacked a former pupil and killed his father. The Court did not find a violation of the right to life, but did rule that the policy forbidding legal challenges to cases where the police had allegedly failed in their ‘protection responsibilities’ was a violation of the right to a fair trial. For further discussion see Ewan McKendrick, ‘Negligence and human rights: reconsidering Osman’, in Daniel Friedmann and Daphne Barak-Erez (eds), *Human Rights in Private Law*, Oxford and Portland Oregon: Hart Publishing, 2001. See also Inter-Am. Ct HR *Velásquez Rodríguez Case*, Judgment 29 July 1988, Inter-Am. Ct HR Series C, No. 4. This case which involved an abduction and ‘disappearance’ allegedly carried out by members of the Honduran armed forces.

⁷⁰ Vienna Convention on the Law of Treaties, 1969, Article 53. For further discussion see Prosper Weil, ‘Towards Relative Normativity in International Law’, *American Journal of International Law*, Vol. 77, No. 3, July 1983, pp.413-42.

⁷¹ Human Rights Committee, General Comment 24 (52), General comment on issues relating to reservations made upon ratification or accession to the Covenant or the Optional Protocols thereto, or in relation to declarations under article 41 of the Covenant, UN Doc. CCPR/C/21/Rev.1/Add.6 (1994), para 10. The Committee on the Elimination of Racial Discrimination, in its Statement on racial discrimination and measures to combat terrorism, has confirmed that the prohibition of racial discrimination is a norm of *jus cogens*, Official Records of the General Assembly, Fifty-seventh Session, Supplement No. 18 (A/57/18), chap. XI, sect. C, para. 4. See also, International Criminal Tribunal for the former Yugoslavia, *Prosecutor v Delalic and Others*, Case IT-96-21-T, Judgment 16 November 1998, paras 452, 454; *Prosecutor v Furundzija*, Case IT-95-17/1-T, Judgment 10 December 1998, paras 139 and 143; *Prosecutor v Kunarac and Others*, Case IT-96-23-T & IT-96-23/I-T, para 466.

⁷² For discussion see Alexander Orakhelashvili, ‘The Impact of Peremptory Norms on the Interpretation and Application of United Nations Security Council Resolutions’, *European Journal of International Law*, Vol. 16 No.1, 2005, pp.59–88; and Orakhelashvili, Alexander, ‘State Immunity and Hierarchy of Norms: Why the House of Lords Got It Wrong’, *European Journal of International Law*, Vol. 18, No. 5, 2008, pp.955–970. See also Marko Milanovic, ‘Norm Conflict in International Law: whither human rights?’, *Duke Journal of Comparative & International Law*, Vol. 20, 2009, p.71, who cites Ian Brownlie in Antonio Cassese and Joseph Weiler (eds) *Change and Stability in International*

there is still considerable discussion about exactly which basic international human rights and IHL rules have attained this status.⁷³ It is widely agreed, however, that the prohibitions on aggression, genocide, slavery, systematic racial discrimination, crimes against humanity, torture and apartheid as well as the right to self-determination are *jus cogens*.⁷⁴ Some argue that the right to a fair trial and the prohibition of prolonged arbitrary detention also have *jus cogens* status.⁷⁵

During a ‘public emergency which threatens the life of the nation’, it is possible for States to derogate from certain rights, but each derogation, for each right, must be justified by the extent that is strictly required by the exigencies of the situation.⁷⁶ Some rights are considered so fundamental that they are *non-derogable*. These include protections against torture, the

Law-making, Berlin: De Gruyter, 1988 in describing *jus cogens* as ‘like a car which has never left the garage.’

⁷³ For an overview of the debate about which rights contained in the Universal Declaration of Human Rights reflect customary international law see Helen Duffy, *The ‘war on terror’ and the framework of international law*, Cambridge: Cambridge University Press, 2006, p.278. She cites Richard Lilich, ‘Civil Rights’, in T Merron (ed) *Human Rights in International Law*, Oxford: Oxford University Press, 1988; and O Schachter, *International Law in Theory and Practice*, Dordrecht, 1991. Lilich argues that a ‘substantial’ number have attained this status, while Schachter maintains it is a more limited list of ‘slavery, genocide, torture and other cruel, inhuman and degrading treatment.’ Duffy argues that ratification of human rights treaties is now so widespread that the significance of this debate is diminishing. See also Malcolm Shaw, *International Law, Sixth Edition*, Cambridge: Cambridge University Press, 2008, pp.123-7.

⁷⁴ See ILC Commentaries to Articles on State Responsibility, Introductory Commentary to Part Two, Chapter III; Human Rights Committee, General Comment 24 (52), General comment on issues relating to reservations made upon ratification or accession to the Covenant or the Optional Protocols thereto, or in relation to declarations under article 41 of the Covenant, UN Doc. CCPR/C/21/Rev.1/Add.6 (1994), para 10. In *Kadi v. Council & Comm’n*, 2005 E.C.R. II-3649 the Court of First Instance stated that the right to property was also a *jus cogens* norm, although this decision has been widely criticized. See, for example, Gráinne De Burca, ‘The European Court of Justice and the International Legal Order After Kadi’, *Harvard International Law Journal*, Vol. 51, No. 1, Winter 2010.

⁷⁵ Human Rights Committee, General Comment No. 29 States of emergency, CCPR/C/21/Rev.1/Add.11 31 August 2001, para 11; and Human Rights Committee, General Comment 24 (52), General Comment on issues relating to reservations made upon ratification or accession to the Covenant or the Optional Protocols thereto, or in relation to declarations under article 41 of the Covenant, UN Doc. CCPR/C/21/Rev.1/Add.6 (1994), para 10.

⁷⁶ Article 4 of the ICCPR; Article 15 of the ECHR; and Article 27 of the ACHR provide, in certain strictly defined circumstances, that States may derogate from certain specified obligations, to the extent that is strictly required by the exigencies of the situation. The African Charter contains no emergency clause and therefore allows no such derogation. Ireland, the UK and Turkey and have derogated in relation to violence arising out of the situations in Northern Ireland and South East Turkey. See ECtHR *Lawless v. Ireland*, Appl. No. 332/57, Judgment 1 July 1961; *Ireland v UK*, Appl. No. 5310/71, Judgment 18 January 1978; *Brogan and others v. UK*, Appl. No. 11209/84, Judgment 29 November 1988; *Brannigan and MacBride v. UK*, Appl. No.14553-4/89, Judgment 24 May 1993; *Aksoy v. Turkey*, Appl. No. 21987/93, Judgment 18 December 1996.

right to life, the right not to be held in slavery, freedom of conscience and the right to non-discrimination.⁷⁷ Other rights have a potentially *non-derogable* core.⁷⁸ For example, while the right to liberty⁷⁹ is potentially *derogable*, the right to challenge the lawfulness of a detention may be *non-derogable*.⁸⁰ The UN Human Rights Committee has stated that:

principles of legality and the rule of law require that fundamental requirements of fair trial must be respected during a state of emergency. . . In order to protect non-derogable rights, the right to take proceedings before a court to enable the court to decide without delay on the lawfulness of detention, must not be diminished by a State Party's decision to derogate from the Covenant.⁸¹

The Human Rights Committee has noted that *non-derogable* rights are 'related to, but not identical with' the peremptory norms of international law and under no circumstances can a State ever cite a national emergency as a justification 'for acting in violation of humanitarian law or peremptory norms of international law, for instance by taking hostages, by imposing collective punishments, through arbitrary deprivations of liberty or by deviating from fundamental principles of fair trial, including the presumption of innocence.'⁸² The ILC lists the prohibitions of aggression, genocide, slavery, and racial discrimination, crimes against humanity, torture, apartheid, the basic rules of IHL and the right to self-determination as

⁷⁷ Article 4 of the ICCPR also includes prohibition of imprisonment because of inability to fulfil a contractual obligation, the principle of legality in the field of criminal law, and the recognition of everyone as a person before the law.

⁷⁸ Human Rights Committee, General Comment No. 29 States of emergency, CCPR/C/21/Rev.1/Add.11 31 August 2001.

⁷⁹ Article 9 of the UDHR; Article 9 of the ICCPR; Article 5 of the ECHR; Article 7 of the ACHR; Article 6 of the African Charter.

⁸⁰ ECtHR *Aksoy v. Turkey*, Appl. No. 21987/93, Judgment 18 December 1996; Inter-Am Ct HR, Habeas Corpus in Emergency Situations (American Convention on Human Rights Arts 27(2), 25(1) and 7(6)), Advisory Opinion OC-8/87. 30 January 1987, (Ser. A) No. 8 (1987). See also ECtHR *Brogan and others v. UK*, Appl. No. 11209/84, Judgment 29 November 1988; and *Brannigan and MacBride v. UK* Appl. No. 14553-4/89, Judgment 24 May 1993.

⁸¹ General Comment No. 29, para. 16.

⁸² Human Rights Committee, General Comment No. 29 States of emergency, CCPR/C/21/Rev.1/Add.11 31 August 2001, para 11.

being generally accepted as norms from which no derogation is permitted.⁸³ These obligations are, therefore, binding on States at all times.⁸⁴

For the purposes of this discussion, the most relevant provisions for a UN peacekeeping mission with a POC mandate will relate to the use of force and detention powers and the rights of those deprived of their liberty. Human rights law also contains ‘positive obligations’ towards people in detention, often referred to as a ‘duty of care’⁸⁵ and these standards have been elaborated in greater detail by a variety of ‘soft-law’ instruments.⁸⁶

Prisoners retain all of their human rights except those which are specifically forfeited as a consequence of the deprivation of their liberty and there is a corresponding obligation on the

⁸³ See ILC Commentaries to the 2001 Articles on Responsibility of States for Internationally Wrongful Acts, Introductory Commentary to Part Two, Ch. III.

⁸⁴ The Committee on the Elimination of Racial Discrimination, in its Statement on racial discrimination and measures to combat terrorism, has also confirmed that the prohibition of racial discrimination is a norm of *jus cogens*, Official Records of the General Assembly, Fifty-seventh Session, Supplement No. 18 (A/57/18), chap. XI, sect. C, para. 4. See also, ICTY *Prosecutor v Delalic and Others*, Case IT-96-21-T, Judgment 16 November 1998, paras 452, 454; *Prosecutor v Furundzija*, Case IT-95-17/1-T, Judgment 10 December 1998, paras 139 and 143; *Prosecutor v Kunarac and Others*, Case IT-96-23-T & IT-96-23/I-T, para 466. For further discussion see Kjetil Mujezinovic Larsen, *The Human Rights Treaty Obligations of Peacekeepers*, *Cambridge Studies in International and Comparative Law*, Cambridge: Cambridge University Press, 2012, p.330.

⁸⁵ For example, ICCPR, Articles 7 and 10(1); ACHR, Article 5; CRC, Article 37; CEDAW, Article 1; Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women, Articles 2 and 4. See also Human Rights Committee, General Comment 21, Article 10 (Forty-fourth session, 1992), *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, U.N. Doc. HRI/GEN/1/Rev.1 at 33 (1994), para. 3.

⁸⁶ These include: the UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment - Adopted by General Assembly Resolution 43/173 of 9 December 1988; the UN Code of Conduct for Law Enforcement Officials - Adopted by General Assembly Resolution 34/169 of 17 December 1979; the UN Standard Minimum Rules for the Treatment of Prisoners (SMR), Adopted by the First United Nations Congress on the Prevention of Crime and the Treatment of Offenders, held at Geneva in 1955, and approved by the Economic and Social Council by its resolutions 663 C (XXIV) of 31 July 1957 and 2076 (LXII) of 13 May 1977; the Basic Principles for the Treatment of Prisoners, Adopted and proclaimed by General Assembly Resolution 45/111 of 14 December 1990; the Basic Principles on the Use of Force and Firearms by Law Enforcement Officials, Adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, 27 August to 7 September 1990; the UN Principles of Medical Ethics relevant to the Role of Health Personnel, particularly Physicians, in the Protection of Prisoners and Detainees against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Adopted by General Assembly Resolution 37/194 of 18 December 1982; The Declaration on the Protection of All Persons from Enforced Disappearance, Adopted by UN General Assembly Resolution 47/133, 18 December 1992; and the UN Guidelines for Action on Children in the Criminal Justice System - Recommended by Economic and Social Council resolution 1997/30 of 21 July 1997.

State to ‘respect, protect and fulfil’ these rights.⁸⁷ The UN Human Rights Committee has noted that States cannot claim a lack of material resources or financial difficulties as a justification for inhumane treatment.⁸⁸ The European Court of Human Rights has stated that deprivation of liberty in conditions which do not meet these basic standards can amount to inhuman or degrading treatment in contravention of international human rights law.⁸⁹ Both the Human Rights Committee and the Inter-American Court have spelled out the obligations on States to provide all detainees and prisoners with services that will satisfy their essential needs, including adequate food and recreational facilities in a number of cases.⁹⁰

⁸⁷ For further discussion see: Nigel Rodley with Matt Pollard, *The treatment of prisoners under international law, Third Edition*, Oxford: Oxford University Press, 2011; Association for the Prevention of Torture, *Optional Protocol: A Manual for Prevention*, Geneva: APT 2005; Association for the Prevention of Torture *Establishment and Designation of National Preventive Mechanisms*, Geneva: APT 2006; Malcolm Evans and Rod Morgan, *Preventing Torture: A study of the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment*, Oxford: Oxford University Press, 1998; Penal Reform International, *Making Standards Work: an international handbook on good prison practice* (2nd edn), London: PRI, 2001; *Istanbul Protocol: Manual on Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, United Nations, 2004; Conor Foley, *Protecting Brazilians Against Torture*, London and Brasilia: International Bar Association and Brazilian Ministry of Justice, 2013.

⁸⁸ Human Rights Committee General Comment 21, para 4.

⁸⁹ ECtHR: *Kalashnikov v Russia*, Appl. No. 47095/99, Judgment 15 July 2002 and *Peers v Greece*, Appl. No. 28524/95, Judgment 19 April 2001.

⁹⁰ See, for example, Human Rights Committee: *Kelly v Jamaica* (1991) UN Doc CCPR/C/41/D/253/1987; *Brown v Jamaica* (1999) UN Doc CCPR/C/65/D/775/1997, paras 6.5 and 6.13; *Lantsova v Russian Federation* (2002) UN Doc CCPR/C/74/D/763/1997, paras 8.2–9.3; *Kennedy v Trinidad and Tobago*, (2002) UN Doc CCPR/C/74/D/845/1998; *Mulezi v Democratic Republic of Congo*, (2004) UN Doc CCPR/C/81/D/962/2001; *Elahie v Trinidad and Tobago* (1997) UN Doc CCPR/C/60/D/533/1993, para 8.3; *Lewis v Jamaica* (1997) UN Doc CCPR/C/60/D/708/1996, para 8.5; *Blaine v Jamaica* (1997) UN Doc CCPR/C/60/D/696/1996, para 8.4; *Hill v Spain* (1997) UN Doc CCPR/C/59/526/1993, para 13; *Cabal and Pasini Bertran v Australia* (2003) UN Doc CCPR/C/78/D/1020/2001; *Vargas Mas v Peru* (2005) UN Doc CCPR/C/85/D/1058/2002, paras 3.3–6.3; *Gorji-Dinka v Cameroon* (2005) UN Doc CCPR/C/83/D/1134/2002, para 5.2; *Sextus v Trinidad and Tobago* (2001) UN Doc CCPR/C/72/D/818/1998, paras 2.1, 2.4, 3.6; *Xavier Evans v Trinidad and Tobago* (2003) UN Doc CCPR/C/77/D/908/2000, para 6.4; *Arutyunyan v Uzbekistan* (2004) UN Doc CCPR/C/80/D/917/2000, para 6.2; *Lobban v Jamaica* (2004) UN Doc CCPR/C/80/D/797/1998, para 8.2; *Francesco Madafferi v Australia* (2004) UN Doc CCPR/C/81/D/1011/2001, para 9.3; *Abdelhamid Benhadj v Algeria* (2007) UN Doc CCPR/C/90/D/1173/2003, para 8.5. See also the following cases taken to the Inter-American Court of Human Rights: *Suarez-Rosero v Ecuador*, Series C No. 35, para 91; *Tibi v Ecuador* (2004) Series C No. 114, para 150; *Bulacio v Argentina* (2003) Series C No. 100, para 126; *Cantoral-Benavides v Peru* (2000) Series C No. 69, paras 85–9; *Loayza-Tamayo v Peru* (1997) Series C No. 33 [Merits], para 58; *Lori Berenson-Mejia v Peru* (2004) Series C No. 119, paras 106–109; *Montero-Aranguren et al. (Detention Center of Catia) v Venezuela* (2006) Series C No. 150, paras 85–104 [citing also ECPT standards on cell size]; *Yvon Neptune v Haiti* (2008) Series C No. 180, paras 127–39; *Raxcaco-Reyes v Guatemala* (2005) Series C No. 133, paras 99–102.

The Human Rights Committee has also stressed that the protection of the detainee requires prompt and regular access be given to doctors and lawyers⁹¹ and that ‘all persons arrested must have immediate access to counsel’ for the more general protection of their rights.⁹² The European Court has expressed concern that the denial of access to legal advice during an extended detention may violate the right to a fair trial,⁹³ but that access to a lawyer is also a ‘basic safeguard against abuse’ during periods of extended detention.⁹⁴ The absence of such safeguards during an extended detention would leave a detainee ‘completely at the mercy of those detaining him.’⁹⁵ The Inter-American Commission on Human Rights considers that a basic safeguard against torture is that a detained person should be interrogated only in the presence of his or her lawyer or a Judge⁹⁶ and that the right to counsel applies on the first interrogation.⁹⁷ A number of soft-law guidelines, such as the Basic Principles on the Role of Lawyers, also stress that ‘all persons arrested or detained, with or without a criminal charge, shall have prompt access to a lawyer’⁹⁸ and this point has also been emphasized by UN Special Rapporteurs.⁹⁹

⁹¹ General Comment No. 20: Article 7 (Prohibition of Torture, or Other Cruel, Inhuman or Degrading Treatment or Punishment) Adopted at the Forty-fourth Session of the Human Rights Committee, on 10 March 1992, para 11.

⁹² *Concluding Observations of the Human Rights Committee: Georgia*, UN Doc. CCPR/C/79/Add.74, 9 April 1997, para 28; and *Concluding Observations of the Human Rights Committee: Israel*, UN Doc CCPR/CO/78/ISR, 5 August 2003, para 13.

⁹³ ECtHR: *Murray v UK*, Appl. No. 30054/96, Judgment 8 February 1996, para 72.

⁹⁴ ECtHR: *Brannigan and MacBride v UK*, Appl. No. 14553-4/89, Judgment 26 May 1993, para 66.

⁹⁵ ECtHR: *Aksoy v Turkey*, Appl. No. 21987/93, Judgment 18 December 1996, para 83.

⁹⁶ Inter-Am Com HR *Report on the Situation of Human Rights of a Segment of the Nicaraguan Population of Miskito Origin*, OEA Ser.L/V/11.62, doc.10, rev. 3, 1983, at 100.

⁹⁷ *Ibid.* See also *Annual Report of the Inter-American Commission*, 1985-1986, OEA/Ser.L/V/II.68, doc. 8 rev. 1, 1986, El Salvador, p. 154.

⁹⁸ Basic Principles on the Role of Lawyers 1990, principle 7. See also The UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment 1988, principle 13; and *The European Committee for the Prevention of Torture and Inhuman and Degrading Treatment or Punishment, General Report*, Council of Europe, October 2001, CPT/Inf/E (2002) 1, p.6, para. 38. The CPT considers that this is a right which must exist from the very outset of detention that is from the first moment that a person is obliged to remain with the police, and that this includes ‘in principle, the right for the person concerned to have the lawyer present during interrogation.’

⁹⁹ The UN Special Rapporteur on the Independence of Judges and Lawyers has recommended that ‘it is desirable to have the presence of an attorney during police interrogation as an important safeguard to protect the rights of the accused. The absence of legal counsel gives rise to the potential for abuse.’ See *Report on the Mission of the Special Rapporteur to the United Kingdom*, UN Doc. E/CN.4/1998/39/add.4, para 47, 5 March 1998. See also *Report of the Special Rapporteur on Torture*, UN Doc. A/56/156, July 2001, para 39(f). ‘In exceptional circumstances, under which it is contended that prompt contact with a detainee’s lawyer might raise genuine security concerns, and

The right to challenge the legality of detention applies to all persons deprived of their liberty and not just to those suspected of committing a criminal offence.¹⁰⁰ Decisions by the Human Rights Committee, the European Court and the African Commission on Human and Peoples' Rights have established that the authority in question must be a formally constituted court or tribunal with power to order the release of the detainee.¹⁰¹ It must be impartial and independent from the body making the decision to detain the person and must also make its decision without delay.¹⁰² The Inter-American Court has stated that if a Judge is not officially informed of a detention, or is informed only after significant delay, the rights of a detainee are not protected.¹⁰³ The African Commission has stated that denying detainees the opportunity to appeal to national courts violates the African Charter.¹⁰⁴ The European Court has stated that the review of the lawfulness of the detention must ensure that the detention is authorized and carried out according to procedures established by national law, as well as not being arbitrary according to international standards.¹⁰⁵

Detainees may only be held in officially recognized places of detention¹⁰⁶ and records of all detentions must be kept up to date and be made available to courts and other competent

where restriction of such contact is judicially approved, it should at least be possible to allow a meeting with an independent lawyer, such as one recommended by a bar association.'

¹⁰⁰ Human Rights Committee, General Comment 8, Article 9 (Sixteenth session, 1982), Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. HRI/GEN/1/Rev.1 at 8 (1994), para.1.

¹⁰¹ ECtHR: *Brincat v Italy*, Appl. No. 13867/88, Judgment 26 November 1992; and *De Jong, Baljet and van den Brink*, Appl. No. 8805/79; 8806/79; 9242/81, Judgment 22 May 1984. See also *Concluding Observations of the Human Rights Committee: Belarus*, UN Doc. CCPR/C/79/Add.86, 19 November 1997, para. 10; and *Rencontre Africaine pour la défense de droits de l'homme v Zambia*, (71/92), 10th Annual Report of the African Commission, 1996 -1997, ACHPR/RPT/10th.

¹⁰² HRC *Vuolanne v. Finland* (1989) UN Doc CCPR/C/35/D/265/1987; *Torres v Finland*, (1990), UN Doc CCPR/C/38/D/291/1988, para.7; ECtHR: *Chahal v UK*, Appl. No. 22414/93, Grand Chamber Judgment 15 November 1996 ; and *Navarra v. France*, Appl. No. 13190/87, Judgment 23 November 1993.

¹⁰³ Inter-Am Com HR, *Second Report on the Human Rights Situation in Surinam*, OEA/Ser. L/V/II.66, doc. 21 rev. 1, 1985, p. 24.

¹⁰⁴ *Rencontre Africaine pour la défense de droits de l'homme v Zambia*, (71/92), 10th Annual Report of the African Commission, ACHPR/RPT/10th, 1996 -1997.

¹⁰⁵ ECtHR: *Navarra v France*, Appl. No. 13190/87, Judgment 23 November 1993, para. 26; and ECtHR: *Storck v Germany* Appl. No. 61603/00, Judgment 16 June 2005, para 102.

¹⁰⁶ Human Rights Committee, General Comment 20, para 11: 'to guarantee the effective protection of detained persons, provisions should be made for detainees to be held in places officially recognized as

authorities, the detainee, or his or her family.¹⁰⁷ Places of detention must also be visited regularly by qualified, experienced and independent monitors, who have the right to communicate freely and in full confidentiality with the detainees.¹⁰⁸ While international human rights law does not expressly prohibit incommunicado detention, the Human Rights Committee has found that the practice of incommunicado detention is conducive to torture and should be avoided.¹⁰⁹

The European Court has stated that ‘where an individual is taken into police custody in good health but is found to be injured at the time of release, it is incumbent on the State to provide a plausible explanation as to the cause of the injury.’¹¹⁰ Complaints must be investigated promptly, independently, thoroughly and impartially by competent authorities, with a reasonable amount of transparency.¹¹¹ This should include the taking of witness statements

places of detention and for their names and places of detention, as well as for the names of persons responsible for their detention, to be kept in registers readily available and accessible to those concerned, including relatives and friends.’

¹⁰⁷ ECtHR *Çakici v Turkey*, Appl. No. 23657/94, Judgment 8 July 1999, paras 302 and 104. See also The UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, Principle 12. The authorities must keep and maintain up-to-date official registers of all detainees, both at each place of detention and centrally.

¹⁰⁸ UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, Principle 29. A number of human rights treaties and the mandates of some international and regional bodies provide for access to persons deprived of their liberty. For example, the UN Subcommittee on the Prevention of Torture as well as the National Preventive Mechanism established under the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, or the European Committee for the Prevention of Torture created by the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment.

¹⁰⁹ *Preliminary Observations of the Human Rights Committee: Peru*, UN Doc. CCPR/C/79/Add.67, 25 July 1996, paras 18 and 24; and Human Rights Committee General Comment 20, para 11.

¹¹⁰ ECtHR: *Aksoy v Turkey*, Appl. No. 21987/93, Judgment 18 December 1996, para 61. See also: *Assenov and others v Bulgaria* 28 October 1998, *Kurt v Turkey* Appl. No. 15/1997/799/1002 Judgment 25 May 1998; *Çakici v Turkey*, Appl. No. 23657/94, Judgment of 8 July 1999, *Akdeniz and others v Turkey*, Appl. No. 25165/94, Judgment 31 May 2001; and Inter-Am Ct HR, *Case of the Rochela Massacre v Colombia* Series C No. 163, 2007, paras 195 and 295.

¹¹¹ ECtHR: *Yeşil and Sevim v. Turkey* Appl. No. 34738/04, Judgment 5 June 2007; *Cafer Kurt v. Turkey* Appl. No. 56365/00, Judgment 24 July 2007; *Fazıl Ahmet Tamer and Others v. Turkey* Appl. No. 19028/02, Judgment 24 July 2007; *Cobzaru v Romania* Appl. No. 48254/99, Judgment 26 July 2007; *Maslova and Nalbandov v. Russia* Appl. No. 839/02, Judgment 24 January 2008; *Khashiyev and Akayeva v. Russia* Appl. Nos. 57942/00 and 57945/00, Judgment 24 February 2005, paras 156–66, 178–80. See also Human Rights Committee, General Comment 31, para 15; Committee against Torture: *Nikoli and Nikoli v Serbia and Montenegro* (2005) UN Doc CAT/C/35/D/174/2000, and *Khaled M’Barek (re: Faisal Baraket) v Tunisia* (1999) UN Doc CAT/C/23/D/60/1996; Human Rights Committee, *Rajapakse v Sri Lanka* (2006) UN Doc CCPR/C/87/D/1250/2004, paras 9.4–9.5; and *Blanco Abad v Spain* (1998) UN Doc CAT/C/20/D/59/1996.

and the gathering of forensic evidence capable of leading to the identification and punishment of those responsible.¹¹² States must also hold those responsible to account for such acts whether the involvement has been through ‘encouraging, ordering, tolerating or perpetrating’ them.¹¹³

International human rights law also obliges States to carry out investigations of torture and other forms of ill-treatment, even if there has not been a formal complaint, and to provide individuals with a right to complain, to have their complaints investigated and to be offered protection against any consequent threats or ill-treatment.¹¹⁴ The absence of an adequate investigation has itself been found to constitute a violation of the corresponding articles of the European and American Conventions by their respective courts.¹¹⁵

As discussed above, IHL provisions relating to ‘treatment of persons in the power of a party to the conflict’ expressly acknowledge the applicability of international human rights law.¹¹⁶ All detainees are entitled to protection from torture or other ill-treatment and so the detailed safeguards set out here in international human rights law would also apply to those being detained under IHL provisions. As will be discussed later in this chapter, it is now generally agreed that that detainees, by virtue of their detention, are brought under the jurisdiction of

¹¹² Ibid. See also ECtHR, *Sevtap Veznedaroglu v. Turkey*, Appl. No. 32357/96, Judgment 11 April 2000; and *Kelly and Others v. UK*, Appl. No. 30054/96, Judgment 4 May 2001.

¹¹³ Human Rights Committee General Comment No. 7: Article 7, Prohibition of Torture or Cruel, Inhuman or Degrading Treatment or Punishment, Adopted at the Sixteenth Session of the Human Rights Committee, on 30 May 1982, para 1; Human Rights Committee General Comment no. 20: Torture or cruel, inhuman or degrading treatment or punishment’ (1992), paras 13 and 14. See also *Rodriguez Veiga v. Uruguay* (1994) UN Doc CCPR/C/51/D/487/1992 .

¹¹⁴ UN Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment Articles 12, 13 and 16.

¹¹⁵ ECtHR: *Aydın v. Turkey*, Appl. No. 23178/94 Judgment (Grand Chamber) 25 September 1997, para 103; *Assenov v. Bulgaria*, Appl. No.24760/94, Judgment 29 October 1998, para 102; *Labita v. Italy* Appl. No. 26772/95, Judgment 6 April 2000, para 131; *İlhan v Turkey* Appl. No. 22277/93, Judgment 27 June 2000, paras 89–93; *Bekos and Koutropoulos v Greece* Appl. No. 15250/02, 13 December 2005, paras 45–55; *Corsacov v Moldova* Appl. No. 18944/02, Judgment 4 April 2006, paras 66–82; *H.L.R. v France*, Appl. No. 24573/94, Judgment 29 April 1997; *D. v UK*, Appl. No. 30240/96, Judgment 2 May 1997. See also Inter-American Court of Human Rights: *Velásquez-Rodríguez v. Honduras* (1988) Series C No. 4 [Merits], paras 159–88 and 194; and *Bueno-Alves v. Argentina* (2007) Series C No. 164, paras 88–90 and 108.

¹¹⁶ Additional Protocol I, Article 72.

the detaining State – even if this happens in another country. There are, however, uncertainties about some aspects of the legal regime applicable to such detentions when carried out during international military operations, including peacekeeping missions and these will be discussed further in Chapter Five.

Under international human rights law, lethal force is only permissible in circumstances where it is ‘absolutely necessary’ for certain specified purposes.¹¹⁷ After some initial reluctance¹¹⁸ a series of cases at the European Court relating to Northern Ireland, Cyprus, south-east Turkey, Chechnya and the Caucasus have established a considerable jurisprudence on alleged violations of the right to life in conflict-related situations. The first of these was *McCann and Others v UK*, in 1995, where the Court narrowly ruled that the overall planning of an anti-terrorist operation that killed three members of the Irish Republican Army (IRA) in Gibraltar had resulted in a violation of their right to life.¹¹⁹ The Court found that the soldiers, acting ‘in obedience to superior orders . . . honestly believed, in the light of the information that they had been given . . . that it was necessary to shoot the suspects’.¹²⁰ It held that the allegation that the killings were ‘premeditated or the product of a tacit agreement amongst those involved’ was ‘unsubstantiated’.¹²¹ However, since the authorities had received prior

¹¹⁷ While the ICCPR and the IACHR simply prohibit ‘arbitrary’ killings, the European Convention contains a very specific list of the permitted grounds in which the deadly use of force can be exercised. ECHR, Article 2 (2). ‘Deprivation of life shall not be regarded as inflicted in contravention of this Article when it results from the use of force which is no more than absolutely necessary: (a) in defence of any person from unlawful violence; (b) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained; (c) in action lawfully taken for the purpose of quelling a riot or insurrection.’ Similar provisions and restrictions can be found in the Report on the Basic Principles on the Use of Force and Firearms by Law Enforcement Officers 1990.

¹¹⁸ *Stewart v. UK*, Appl. No. 10044/82, Decision on Admissibility, 10 July 1984. In this case the Court simply deferred to the domestic court’s acceptance of the circumstances in which British soldiers justified the shooting dead of a 13 year old boy in Belfast.

¹¹⁹ *McCann and others v. UK*, Appl. No. 18984/91, (Grand Chamber) Judgment of 5 September 1995.

¹²⁰ *Ibid.*, para 184.

¹²¹ *Ibid.*, para 200. See also paras 179-80 where the Court said that ‘it would need to have convincing evidence before it could conclude that there was a premeditated plan, in the sense developed by the applicants . . . the Court does not find it established that there was an execution plot at the highest level of command in the Ministry of Defence or in the Government, or that Soldiers A, B, C and D had been so encouraged or instructed by the superior officers who had briefed them prior to the operation, or indeed that they had decided on their own initiative to kill the suspects irrespective of the existence of any justification for the use of lethal force and in disobedience to the arrest instructions they had received. Nor is there evidence that there was an implicit encouragement by the authorities or hints and innuendoes to execute the three suspects.’

notification of the attack and had placed the three under close observation, the decision not to arrest them as they entered Gibraltar could only have been based either on prior knowledge that they did not have a bomb or else ‘a serious miscalculation by those responsible for controlling the operation.’¹²² Having rejected the first hypothesis, the Court found a violation due to the second.¹²³

In *Ergi v. Turkey*, in 1998, the Court found a violation in relation to the death of a woman whose relatives claimed she had been killed in an attempted ambush by government forces, while the Turkish government insisted she had been killed in cross-fire with guerrillas of the PKK.¹²⁴ Unable to rule who had fired the fatal shots, the Court used similar reasoning to that in *McCann* when it stated that a State’s responsibility for violations of the right to life may be engaged where its agents ‘fail to take all feasible precautions in the choice of means and methods of a security operation mounted against an opposing group with a view to avoiding and, in any event, to minimising, incidental loss of civilian life.’¹²⁵

In *Albekov v. Russia*, in 2009, the Court found that it was not necessary to determine who had laid anti-personnel mines around a village in Chechnya, which subsequently killed and injured several people, since the government did not deny that it was aware of them and therefore had a positive obligation to either clear or mark the site.¹²⁶ In *Matzarakis v. Greece* the Court found that deficiencies in the domestic legal framework on the use of lethal – or potentially lethal – force or in the training and instructions given to law enforcement officials

¹²² *Ibid.*, para 205.

¹²³ *Ibid.*, para 206-8. According to the Court: ‘A number of key assessments were made. . . . [all of which] turned out to be erroneous. . . . it might have been thought unlikely that they would have been prepared to explode the bomb, thereby killing many civilians, as Mr McCann and Ms Farrell strolled towards the border area since this would have increased the risk of detection and capture It might also have been thought improbable that at that point they would have set up the transmitter in anticipation to enable them to detonate the supposed bomb immediately if confronted. . . . a series of working hypotheses were conveyed to Soldiers A, B, C and D as certainties, thereby making the use of lethal force almost unavoidable’.

¹²⁴ ECtHR: *Ergi v. Turkey*, Appl. No. 23818/94, Judgment 28 July 1998.

¹²⁵ *Ibid.*, para 79.

¹²⁶ ECtHR: *Albekov v. Russia*, Appl. No. 68216/01, Judgment 6 April 2009, paras 85-6.

can, in themselves, amount to a violation of the right to life.¹²⁷ In *Gorovenky and Bugara v. Ukraine*¹²⁸ and *Sašo Gorgiev v. the Former Yugoslav Republic of Macedonia*¹²⁹ the Court found violations because the authorities had not vetted police officers to ensure that they were fit to be issued with weapons. In *Hamiyet Kaplan and others v. Turkey*, the Court found a violation because security force officers attempting to arrest armed PKK members in a house raid did not have non-lethal weapons and were not trained in non-lethal methods of arrest.¹³⁰

A series of cases have also found violations due to a lack of an effective investigation into the circumstances surrounding the use of lethal force by the security forces followed by appropriate remedies.¹³¹ In *Kelly and Others v. UK*,¹³² in 2001, the Court found a procedural violation because inquests in Northern Ireland cannot apportion blame, the victims' relatives had been denied access to relevant documents, and due to the excessive delays, in holding the hearings.¹³³ The Court has ruled that official investigations into the use of lethal force must

¹²⁷ *Matzarakis v. Greece*, Appl. No. 50385/99 Judgment (Grand Chamber) 20 December 2004. See also *Putintseva v. Russia*, Appl. No. 33498/04, Judgment 10 May 2012; *Nachova and Others v. Bulgaria*, Appl. No. 43577/98, Judgment (Grand Chamber), 6 July 2005; *Soare and Others v. Romania*, Appl. No. 24329/02, Judgment 22 February 2011.

¹²⁸ ECtHR: *Gorovenky and Bugara v. Ukraine*, Appl. Nos. 36146/05 and 42418/05, Judgment 12 January 2012.

¹²⁹ ECtHR: *Sašo Gorgiev v. the Former Yugoslav Republic of Macedonia*, Appl. No. 49382/06 Judgment 19 April 2012.

¹³⁰ ECtHR: *Hamiyet Kaplan and others v. Turkey*, Appl. No. 36749/97, Judgment 13 September 2005.

¹³¹ ECtHR: *McCann and others v. UK*, Appl. No. 18984/91, 5 September 1995, para 161. The Court stated that: 'a general legal prohibition of arbitrary killing by the agents of the State would be ineffective, in practice, if there existed no procedure for reviewing the lawfulness of the use of lethal force by State authorities. The obligation to protect the right to life under this provision, read in conjunction with the State's general duty under Article 1 of the Convention to "secure to everyone within their jurisdiction the rights and freedoms defined in [the] Convention", requires by implication that there should be some form of effective official investigation when individuals have been killed as a result of the use of force by, *inter alios*, agents of the State.' See also ECtHR: *Kashiyev and Akayeva v. Russia*, Appl. Nos. 57492 and 57945/00, Judgment 24 February 2005; *Yaşa v. Turkey*, Appl. No. 22495/93, Judgment of 2 September 1998; *Wasilewska and Kalucka v. Poland*, Appl. Nos. 28975/04 and 33406/04, Judgment 23 February 2010; *Finogenov and Others v. Russia* Appl. Nos. 18299/03 and 27311/03, Judgment 20 December 2011. Human Rights Committee, General Comment 6, Article 6 (Sixteenth session, 1982), Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, UN Doc HRI/GEN/1/Rev.1 at 6 (1994), para 4; *Herrero Rubio v. Colombia*, HRC 2 November 1987, UN Doc. A/43/40, 190, para 10.3; *Bautista de Arellana v. Columbia*, HRC 27 October 1995, UN Doc. A/51/40, Vol.II, 132, para 8.2, 10.

¹³² ECtHR: *Kelly and Others v. UK*, Appl. No. 30054/96, Judgment 4 May 2001. This concerned the killing of eight IRA members and one uninvolved civilian, as a result of what the claimants alleged was a shoot to kill ambush, based on prior information received from an informant.

¹³³ *Ibid.*, paras 119-134. See also *Guardian*, 'Delay, delay, delay: Northern Ireland troubles inquests still outstanding', 14 April 2014, reporting that some 70 inquests into disputed killings in the province remain to be completed, with many delayed for several decades.

be pro-active, independent, prompt, effective, allow for an element of public scrutiny and involve the next of kin of the victim ‘to the extent necessary to safeguard his or her legitimate interests’.¹³⁴ Similar provisions requiring an obligation to investigate can be found in ‘soft law’ instruments.¹³⁵

The obligation to investigate may also include cases where killings have been carried out by non-state actors. In *Velásquez Rodríguez* the Inter-American Court found that even when a killing had been carried out by a private individual there was a duty on the State ‘to use the means at its disposal to carry out a serious investigation of violations committed within its jurisdiction, to identify those responsible, to impose the appropriate punishment and to ensure the victim adequate compensation.’¹³⁶ In *Finucane v. UK* the European Court also found a violation because the authorities had ‘failed to provide a prompt and effective investigation into the allegations of collusion by security personnel’ with loyalist paramilitaries that resulted in the killing of a lawyer who had been prominently involved in challenging alleged shoot-to-kill operations by the security forces.¹³⁷ The Human Rights Committee has also stated that: ‘A failure by a State Party to investigate allegations of violations could in and of itself give rise to a separate breach of the Covenant.’¹³⁸

¹³⁴ *Öğur v. Turkey*, Appl. No. 21594/93, Judgment 20 May 1999, para 92; *Seidova and Others v. Bulgaria*, Appl. No. 310/04, Judgment 18 November 2010; *Ergi v. Turkey*, Judgment of 28 July 1998, paras 83-84; *Kaya v. Turkey*, Judgment 19 February 1998, para 87; *Salman v. Turkey*, Judgment 27 June 2000, para 106; *Tanrikulu v. Turkey*, Judgment (Grand Chamber) 8 July 1999, para 109; *Yaşa v. Turkey*, Judgment 2 September 1998, paras 102-104; *Cakıcı v. Turkey*, Judgment 8 July 1999, paras 80, 87 and 106; *Tanrikulu v. Turkey*, Judgment 8 July 1999, para 109; *Mahmut Kaya v. Turkey*, Judgment 28 March 2000, paras 106-107; *Ertak v. Turkey*, Judgment 9 May 2000; *Kılıç v. Turkey*, Judgment 28 March 2000; *Anguelova v. Bulgaria*, Appl. No. 38361/97, Judgment 13 June 2002, para 137; *Jasinskis v. Latvia*, Appl. No. 45744/08, Judgment 21 December 2010, para 72; *Paul and Audrey Edwards v. UK*, Appl. No. 46477/99, Judgment 14 March 2002; *Kolevi v. Bulgaria*, Appl. No. 1108/02, Judgment 5 November 2009; *Ognyanova and Choban v. Bulgaria*, Appl. No. 46317/99, Judgment 23 February 2006.

¹³⁵ For example, the UN Basic Principles, Use of Force and Firearms 1990, Article 22; and the Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions, Article 9..

¹³⁶ Inter American Court of Human Rights *Velásquez-Rodríguez v. Honduras* (1988) Series C No. 4 [Merits].

¹³⁷ ECtHR: *Finucane v UK*, Appl. No. 29178/95, Judgment, 1 July 2003, para 84. See also *Osmanoglu v. Turkey* Appl. No. 488804/99, Judgment 24 January 2008, para 75; and *Koku v. Turkey*, Appl. No. 27305/95, Judgment 31 May 2005, para 132.

¹³⁸ General Comment 31 of the Human Rights Committee, paras 15 and 18.

In a series of cases brought in relation to alleged abductions carried out by military forces in Chechnya the European Court has stated that: ‘it is sufficient for the applicants to make a *prima facie* case of abduction by servicemen, showing that their relatives fell within the control of the authorities, and it is then for the Government to discharge their burden of proof . . . by providing a satisfactory and convincing explanation of how the events in question occurred.’¹³⁹ In *Al-Skeini v. UK* the Court emphasized that ‘the procedural obligation under Article 2 continues to apply in difficult security conditions, including in a context of armed conflict’.¹⁴⁰ In *Kaya v. Turkey* it stated that:

Neither the prevalence of violent armed clashes nor the high incidence of fatalities can displace the obligation under Article 2 to ensure that an effective, independent investigation is conducted into deaths arising out of clashes involving the security forces.¹⁴¹

In some cases the Court has found violations due to the direct use of excessive force. For example, in *Gulec v. Turkey*, in 1998, in which a 15 year old boy was shot dead when members of the security forces used machine gun fire to break up a demonstration¹⁴² and in *Gul v. Turkey*, in 2000, where the security forces had deliberately fired a long burst of machine gun fire into a door behind which they knew the victim was standing.¹⁴³ In *Isayeva*,

¹³⁹ ECtHR: *Malika Yusupova and Others v. Russia*, Appl. Nos. 14705/09, 4386/10, 67305/10, 68860/10 and 70695/10, Judgment 15 January 2015, para 176. See also *Aslakhonova and Others v. Russia*, Appl. Nos. 2944/06 and 8300/07, 50184/07, 332/08, 42509/10, Judgment 18 December 2012, para 99; *Tovsultanova v. Russia*, Appl. No. 26974/06, Judgment 17 June 2010, paras 77-81; *Movsayevy v. Russia*, Appl. No. 20303/07, Judgment 14 June 2011, para 76; and *Shafiyeva v. Russia*, Appl. No. 49379/09, Judgment, 3 May 2012, para 71.

¹⁴⁰ ECtHR: *Al-Skeini and Others v. UK*, Appl. No. 55721/07, Judgment (Grand Chamber) 7 July 2011, para 164.

¹⁴¹ ECtHR: *Kaya v. Turkey*, Appl. No. 22729/93, Judgment 19 February 1998, para 9. See also *Jularić v. Croatia*, Appl. No. 20106/06, Judgment 20 January 2011 and *Skendžić and Krznarić v. Croatia*, Appl. No. 16212/08, Judgment 20 January 2011 both of which related to a lack of proper investigations during the conflict in Croatia.

¹⁴² ECtHR: *Güleç v. Turkey*, Appl. No. 21593/93, Judgment of 27 July 1998, para 82.

¹⁴³ ECtHR: *Gul v. Turkey*, Appl. No. 22676/93, Judgment of 14 December 2000, para 93.

Yusupova and Bazayeva v. Russia, the Court found a violation on the facts of the case, noting ‘an insurmountable discrepancy’, ‘incomplete accounts’ and a general lack of credibility in the government’s evidence.¹⁴⁴ However, it also stated that:

The Court accepts that the situation that existed in Chechnya at the relevant time called for exceptional measures on behalf of the State in order to regain control over the Republic and to suppress the illegal armed insurgency. These measures could presumably include employment of military aviation equipped with heavy combat weapons.¹⁴⁵

It has been argued that some of the cases on which the European Court of Human Rights has based its decisions may have constituted non-international armed conflict, but that the States concerned were reluctant publicly to admit this for political reasons.¹⁴⁶ For example, in *McCann* the Court was faced with choosing between accepting the British government’s official explanation, which had already been significantly undermined by investigative journalists,¹⁴⁷ or the appellants’ claim that there was an undeclared non-international armed conflict between the IRA and Britain’s security forces.¹⁴⁸ Even though it rejected this claim,

¹⁴⁴ ECtHR: *Isayeva, Yusupova and Bazayeva v. Russia*, Appl. No. 57947-49/00, Judgment 24 February 2005, para 179.

¹⁴⁵ *Ibid.*, para 178.

¹⁴⁶ Hampson, 2008, p.555 and 561 lists south-east Turkey, Chechnya and Northern Ireland at certain points during the troubles. See also Reidy, Hampson and Boyle, ‘The European Convention on Human Rights in the case of Turkey’, *Netherlands Human Rights Quarterly*, Vol. 15, No. 2, June 1997, p.161-173; Aisling Reidy, ‘The Approach of the European Commission and Court of Human Rights to International Humanitarian Law’, *International Review of the Red Cross*, No. 324, 30 September 1998, pp.513-30; and Oberleitner, 2015, pp.295-309.

¹⁴⁷ For example, *Thames Television* broadcast a documentary ‘Death on the Rock’, on 28 April 1988, which included interviews with witnesses who claimed that the three had either been shot without warning or had tried to surrender and had also been shot at point-blank range while lying on the ground. The television station came under sustained criticism from Conservative politicians in the wake of this broadcast and was forced to close after losing its licence two years later. See *Independent*, ‘Sudden death and the long quest for answers’, 28 September 1995; and *Open Democracy*, ‘Death on the Rock: 21 years later and still the official version lives on’, 23 November 2009.

¹⁴⁸ For differing perspectives on the nature of the conflict and the status of those imprisoned as a result of it see David Beresford, *Ten Men Dead*, London: Grafton Books, 1987; and Padraig O’Malley, *Biting at the grave, the Irish hunger strikes and the politics of despair*, Boston: Beacon Press, 1991. Mairead Farrell who was killed in Gibraltar, had been the commander of the women prisoners in Armagh Gaol during protests against the ‘criminalisation’ policy of the British government, which had

the Court's judgment was extremely controversial¹⁴⁹ and resulted in a Joint Dissenting Opinion by nine judges who found no violation.¹⁵⁰ Gearty has speculated that the Court was prepared to accept 'a tale of appalling professional incompetence and official stupidity', rather than accuse the British government of operating a shoot-to-kill policy for this reason.¹⁵¹ In a similar vein, Hampson has noted that in *Özkan*,¹⁵² a young girl killed by the Turkish security forces during an assault against a village, the Court accepted that a decision by the security forces 'to open intensive fire' on a village 'was "absolutely necessary" for the purposes of protecting life', but found a violation because Turkey had failed to take sufficient measures subsequently to search for and assist civilian casualties.¹⁵³

The European Court has long been 'reluctant' to label situations as 'armed conflicts in IHL terms', in order 'to avoid unnecessary controversy – especially where the States parties do not themselves qualify the situation as an armed conflict.'¹⁵⁴ In *Cyprus v. Turkey*, in 1976, for

withdrawn 'special category status' from imprisoned republicans in 1976, and which culminated in the hunger strike of 1981.

¹⁴⁹ See, for example, *Independent*, 'Tory anger as European Court condemns Gibraltar killings', 28 September 1995, in which Michael Hesseltine the Deputy Prime Minister stated when asked how his government would respond to the judgment: 'We shall do nothing. We will pursue our right to fight terrorism to protect innocent people where we have jurisdiction, and we will not be swayed or deterred in any way by the ludicrous decisions of the Court.'

¹⁵⁰ *McCann and others v. UK*, Appl. No. 18984/91, 5 September 1995, Joint dissenting opinion of Judges Ryssdal, Bernhardt, Thór Vilhjálmsson, Gölcüklü, Palm, Pekkanen, Sir John Freeland, Baka and Jambrek.

¹⁵¹ *London Review of Books*, Conor Gearty, 'After Gibraltar', 16 November 1995. He notes that: 'All the contradictions and inconsistencies in this sequence of events would be instantly resolved if it had been the British intention all along to execute the three potential bombers. The loose ends and inadequate explanations that litter the official story would be transformed by the existence of such a plot into coherent aspects of a rational plan of action.'

¹⁵² ECtHR: *Özkan and others v. Turkey*, Appl. No. 21689/93, 6 April 2004, paras 305-8.

¹⁵³ Written statement by Françoise Hampson, 'The case-law of the European Court of Human Rights and the Use of Force', in International Committee of the Red Cross, *Expert Meeting: The use of force in armed conflicts: Interplay between the conduct of hostilities and law enforcement paradigms*, Geneva: ICRC, 2013, p.74. Hampson notes that: 'The Court appears to have wanted to ensure that the State was held responsible for her death but was perhaps nervous of getting into a detailed analysis of the facts of the assault against the village. The applicant's lawyer argued that she died as a result of the indiscriminate use of force. Instead the Court focused on what happened when the security forces entered the village. . . The security forces asked if anyone needed medical treatment but did not go round inspecting each individual. The little girl's mother did not say anything, which is perhaps not surprising in the circumstances. Had the security forces not asked if there was a need for medical treatment or if they had not provided any treatment necessary, that would appropriately be a Convention issue. They did ask however.'

¹⁵⁴ Summary of the presentation by Olga Chernishova, Head of Legal Division, Registry of the European Court of Human Rights, 'Recent Developments in the Case-Law of the European Court of Human Rights Related to the Issue of the Use of Force', in ICRC Expert Meeting, 2013, p.89.

example, a majority of the European Commission found that since Turkey had neither derogated nor invoked the law of armed conflict, its detention of prisoners was unlawful under the Convention,¹⁵⁵ although a minority argued that IHL may be applicable on factual grounds.¹⁵⁶

The Human Rights Committee has followed a similar approach. In the *Guerrero* case it ruled that disproportionate force had been used against unarmed guerillas in Colombia who were ambushed by the police outside their house in Bogota and shot dead without being given an opportunity to surrender.¹⁵⁷ In its Concluding Observations on Israel, in 2003, the Committee stated that: ‘before resorting to the use of deadly force, all measures to arrest a person suspected of being in the process of committing acts of terror must be exhausted.’¹⁵⁸ In 2010 it reiterated its concern that Israel had ‘targeted and extra-judicially executed 184 individuals in the Gaza Strip, resulting in the collateral unintended death of 155 additional individuals’.¹⁵⁹ In both observations it stated that ‘the applicability of the regime of international humanitarian law during an armed conflict does not preclude the application of the Covenant.’¹⁶⁰

¹⁵⁵ *Cyprus v. Turkey*, Appl. No. 6780/74 & 6950/75, Report of the Commission, adopted on 10 July 1976, paras 527-8, where it stated that ‘in any case, Art. 15 requires some formal and public act of derogation, such as a declaration of martial law or state of emergency, and that, where no such act has been proclaimed by the High Contracting Party concerned, although it was not in the circumstances prevented from doing so, Art. 15 cannot apply’ and para 313 where it noted that both Cyprus and Turkey were parties to the Third Geneva Convention and that Turkey had provided the ICRC with access to detainees who had been granted POW status so the Commission did not ‘find it necessary to examine the question of a breach of Art. 5 of the European Convention on Human Rights with regard to persons accorded the status of prisoners of war.’

¹⁵⁶ Ibid. Dissenting Opinion of Mr. G. Sperduti, joined by Mr. S. Trechsel, paras 5 and 6. For further discussion see Hampson, Françoise J. ‘The relationship between international humanitarian law and human rights law from the perspective of a human rights treaty body’, *International Review of the Red Cross*, Vol. 90, No. 871 September 2008, pp.549-72.

¹⁵⁷ *Camargo and Suarez de Guerrero v. Colombia*, 31 March 1982, UN Doc. CCPR/C/15/D/45/1979.

¹⁵⁸ *Concluding Observations: Israel*, 21 August 2003, UN Doc. CCPR/CO/78/ISR, para 15.

¹⁵⁹ *Concluding Observations: Israel*, 3 September 2010, UN Doc. CCPR/C/ISR/CO/3, para 10.

¹⁶⁰ *Concluding Observations: Israel*, 21 August 2003, UN Doc. CCPR/CO/78/ISR, para 11. *Concluding Observations: Israel*, 3 September 2010, UN Doc. CCPR/C/ISR/CO/3, para 5.

In its Concluding Observations to the Philippines in 2003 the HRC called on the State Party to ‘take urgent measures to ensure the protection of civilians in areas affected by military operations in accordance with its human rights obligations.’¹⁶¹ In its Concluding Observations to Uganda in 2004 the Committee regretted: ‘that the State Party has not taken sufficient steps to ensure the right to life and the right to liberty and security of persons affected by armed conflict in northern Uganda, in particular Internally Displaced Persons currently confined to camps’.¹⁶² In its Concluding Observations to the Democratic Republic of Congo in 2006 it restated that, ‘the provisions of the Covenant and all the obligations thereunder apply to the territory in its entirety’, while acknowledging that the government did not effectively control part of the eastern regions of the country due to the armed conflict.¹⁶³ In its Concluding Observations to Sudan in 2007 the Committee expressed concern about ‘widespread and systematic serious human rights violations’ that were being committed ‘particularly in the context of armed conflict’.¹⁶⁴ In none of these cases did the Committee make any statement which suggested that it thought that IHL qualified or replaced in anyway the obligations of international human rights law.¹⁶⁵

The inter-relationship of international human rights law and IHL

The demarcation point between a state of emergency, which might justify derogation from some human rights obligations, and the moment at which an armed conflict can be said to have broken out is sometimes blurred, making it ‘difficult to assess when consideration of human rights norms should end and the application of IHL norms should begin’.¹⁶⁶ There

¹⁶¹ *Concluding Observations: Philippines*, 1 December 2003, UN Doc. CCPR/CO/79/PHL, para 15.

¹⁶² *Concluding Observations: Uganda*, 4 May 2004, UN Doc. CCPR/CO/80/UGA, para 12.

¹⁶³ *Concluding Observations: Democratic Republic of Congo*, 26 April 2006, UN Doc. CCPR/C/COD/CO/3, para 4.

¹⁶⁴ *Concluding Observations: Sudan*, 29 August 2007, UN Doc. CCPR/C/SDN/CO/3, para 9.

¹⁶⁵ Larsen, 2012, p.288: ‘the Committee takes IHL into consideration when making observations about state compliance with the Covenant only to a limited extent, if at all.’

¹⁶⁶ Kenneth Watkin, ‘Controlling the Use of Force: A Role for Human Rights Norms in Contemporary Armed Conflict’, *American Journal of International Law*, Vol. 98, No. 1, 2004, p.26. For further discussion see Christopher Greenwood, ‘Protection of Peacekeepers: The Legal Regime’, in *Duke Journal of Comparative & International Law*, Vol. 7, 1996, pp. 199–200; Roberta Arnold & Noelle

will also be situations where the two paradigms overlap.¹⁶⁷ As the ICRC has noted: ‘For example, in a non-international armed conflict, when a State is using force against fighters, it may be considered as simultaneously conducting hostilities and maintaining law and order (since fighters are also frequently criminals under domestic law).’¹⁶⁸ There may also be situations in which civilians are present alongside fighters, for example during a riot, or where civilian unrest escalates into an armed conflict in which the rules regarding the use of lethal force will be different depending on which legal framework is considered applicable.¹⁶⁹

Many violations of international human rights law are also violations of IHL. For example, ‘the deliberate killing of civilians, the wanton destruction of civilian property and looting, the use of civilians as human shields, the destruction of infrastructure vital to civilian populations survival, rape and other forms of sexual violence, torture and the carrying out of indiscriminate attacks are violations of both sets of law.’¹⁷⁰ However, as Lubell observes, the two bodies of law take an entirely different approach to the use of lethal force and also treat concepts such as ‘necessity’ and ‘proportionality’ very differently.¹⁷¹

Quénivet (eds) *International Humanitarian Law and Human Rights Law*, Leiden and Boston: Martin Nijhof, 2008; ICRC Expert Meeting, 2013; Noam Lubell, ‘Challenges in Applying Human Rights Law to Armed Conflict,’ *International Review of the Red Cross*, Vol. 87, No. 737, December 2005; Lubell, 2010, pp.25-63 and 85 -131; Duffy, 2005, pp.151-61; Wills, 2009, pp.113-170 and 236-47; Larsen, 2012, pp.243-96; Oberleitner, 2015, pp.131-41 and 169-83.

¹⁶⁷ Ibid. See also Robert Kolb and Gloria Gaggioli, (eds), *Research Handbook on Human Rights and Humanitarian Law*, Edward Elgar, Cheltenham Glos. and Northampton, Massachusetts: Edward Elgar, 2013; Daniel Bethlehem, Sandesh Sivakumaran, Noam Lubell, Philip Leach, and, Elizabeth Wilmschurst, *Classification of Conflicts: The Way Forward, International Law Meeting Summary*, Chatham House, 1 October 2012; and Françoise J. Hampson, ‘Direct participation in hostilities and the interoperability of the law of armed conflict and human rights law,’ *International Law Studies*, Vol. 87, US Naval War College, 2011, p.192.

¹⁶⁸ ICRC Expert Meeting, 2013.

¹⁶⁹ Ibid.

¹⁷⁰ *Increasing Respect for Civilians in Non-International Conflicts*, Geneva: International Committee of the Red Cross, 2008.

¹⁷¹ Lubell, 2010, p.7: ‘Under international humanitarian law this [the shooting of an unarmed soldier] would generally be considered a lawful – and indeed common – act of war’; and pp.64-6: ‘In the context of law enforcement, under international human rights law, the proportionality principle requires that the force being used should be proportionate to the sought objective (eg not to fire a lethal weapon to prevent someone evading a parking ticket) In the laws of armed conflict principle of proportionality one is required to measure the direct and concrete military advantage against the expected harm to civilians and civilian objects.’ See also Noam Lubell, ‘Human rights obligations in military occupation’, *International Review of the Red Cross*, Vol. 94 No. 885 Spring 2012, pp.317-37.

IHL permits troops to launch a surprise attack on an enemy military base even if this involves ‘collateral damage’ to civilians and civilian objects proportional to the military benefit, and a soldier may shoot an enemy soldier, so long as he is not *hors de combat*, even if he or she is unarmed and does not pose an ‘immediate threat’ at that particular point.¹⁷² Similarly, while international human rights law requires an effective investigation into the circumstances surrounding the use of lethal force, in all circumstances, IHL only requires investigations of potential war crimes.¹⁷³ While IHL does require ‘immediate’ investigations into the death of prisoners and internees, it contains very little detail about the nature of the investigation required.¹⁷⁴ IHL also does not contain the express provisions found in international human rights law for providing victims of its violations with the right to an effective remedy.¹⁷⁵ Meron has noted that:

¹⁷² Additional Protocol I, Article 41 (2), A person is ‘*hors de combat*’ if: (a) he is in the power of an adverse Party; (b) he clearly expresses an intention to surrender; or (c) he has been rendered unconscious or is otherwise incapacitated by wounds or sickness, and therefore is incapable of defending himself; provided that in any of these cases he abstains from any hostile act and does not attempt to escape.

¹⁷³ ICRC Expert Meeting, 2013, p.55. ‘There is no doubt, under both IHL and human rights law, that if there is a suspicion of a war crime, a criminal investigation must be conducted. However, not every civilian killed in an armed conflict raises *prima facie* a suspicion of criminal behaviour. On the other hand, even the killing of enemy fighters or combatants can be a war crime if they were *hors de combat* when killed. The key questions are then the following: when are there sufficient elements to believe that the use of force raises issues under criminal law? Does a credible allegation of war crime suffice? How many facts does the allegation have to put forth in order to be credible?’ See also Jacob Turkel, *The Public Commission To Examine the Maritime Incident of 31 May 2010 (Turkel Commission), Second Report: Israel’s Mechanisms for Examining and Investigating Complaints and Claims of Violations of the Laws of Armed Conflict According to International Law*, Government of Israel, February 2013, p.99. This states that all potential war crimes require an investigation, while other violations required ‘some form of examination’.

¹⁷⁴ See Geneva Convention III, Article 121 and Geneva Convention IV, Article 131, which contain identical provisions requiring an immediate ‘official inquiry by the Detaining Power’ into deaths or serious injuries of POWs or detainees and, if this indicates guilt, the prosecution of those responsible.

¹⁷⁵ The right to an effective remedy can be found in ECHR, Article 13, Article 6 (access to court) and Article 41 (reparations); ICCPR Article 2.3; Article 14 (fair trial); ACHR, Article 1 and Article 25 (judicial protection); African Charter, Article 7 (fair trial). See also Human Right Committee General Comment No. 31 - Nature of the General Legal Obligation Imposed on States Parties to the Covenant, paras 15-17. Although IHL does not contain similar provisions, the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, New York, 16 December 2005 refer to violations of both bodies of law and the Statute of the International Criminal Court, in Article 75, also provides for the possibility of reparations payable to victims.

Unlike human rights law, the law of war allows, or at least tolerates, the killing and wounding of innocent human beings not directly participating in an armed conflict, such as civilian victims of lawful collateral damage. It also permits certain deprivations of personal freedom without convictions in a court of law. It allows an occupying power to resort to internment and limits the appeal rights of detained persons. It permits far-reaching limitations of freedoms of expression and assembly.¹⁷⁶

While Dennis maintains that during periods of armed conflict, IHL, as the *lex specialis*, should always be awarded primacy over international human rights law,¹⁷⁷ others argue that the increasing complexity of international law is leading to greater overlap between its various branches.¹⁷⁸ Prud'homme, for example, insists that the 'coordination' of the two bodies of law 'is vital to ensure adequate protection during armed conflict' and that IHL should be considered 'as *lex specialis complementa* (complementary) and not *derogata* (derogatory) of human rights law.'¹⁷⁹ This is supported by the UN Human Rights Committee, which, has stated that the ICCPR:

applies in situations of armed conflict to which the rules of international humanitarian law are applicable. While, in respect of certain Covenant rights, more specific rules of humanitarian law may be specially relevant for the purposes of the

¹⁷⁶ Theodor Meron, 'The Humanization of Humanitarian Law', *American Journal of International Law*, Vol. 94, No.2, April 2000, p.240. See also Colonel Gerald Irving Anthony Dare Draper, 'The relationship between the human rights regime and the law of armed conflict', *Israeli Yearbook of Human Rights*, Vol. 1, 1971, p.205 in which he describes 'the law of war as a derogation from the normal regime of human rights.'

¹⁷⁷ Michael J. Dennis, 'Application of Human Rights Treaties Extraterritorially in Times of Armed Conflict and Military Occupation', *The American Journal of International Law*, Vol. 99, No. 1, January 2005, pp. 119-141

¹⁷⁸ Nancie Prud'homme, 'Lex specialis: oversimplifying a more complex and multifaceted relationship?' *Israel Law Review*, Vol. 40, No. 2, 2007, pp. 355-95; Oberleitner, 2015, pp.83-107; and Hans-Joachim Heintz, 'Convergence between human rights law and international humanitarian law', in Hans-Joachim Heintz and Andrej Zwitter (eds), *International Law and Humanitarian Assistance*, Berlin: Springer, 2011.

¹⁷⁹ Prud'homme, 2007, p.395.

interpretation of Covenant rights, both spheres of law are complementary, not mutually exclusive.¹⁸⁰

A UN General Assembly resolution on basic principles for the protection of civilian populations in armed conflict, overwhelmingly adopted in 1970, specifically states that ‘fundamental human rights, as accepted in international law and laid down in international instruments, continue to apply fully in situations of armed conflict.’¹⁸¹ There are numerous examples of the UN condemning violations of human rights committed in the context of armed conflicts.¹⁸² As previously discussed, the derogation clauses of some human rights treaties expressly state that they remain applicable in ‘time of war’.¹⁸³

The ICJ has attempted to deal with this inter-relationship in three cases. In *Legality or Threat of Use of Nuclear Weapons*, in 1996, the Court observed that human rights protection ‘does not cease in times of war’, and remains applicable, subject to any derogations that States may make.¹⁸⁴ However, the test of what is an arbitrary deprivation of life ‘can only be decided by reference to the law applicable in armed conflict’, rather than human rights law, since IHL is the ‘applicable *lex specialis*’.¹⁸⁵ It repeated much of this formulation in its *The Legal*

¹⁸⁰ General Comment No. 3, para 1.

¹⁸¹ UN General Assembly Resolution, 2675 (XXV) 9 December 1970, Adopted by 109 votes in favour, none against and 8 abstentions. See also International Conference on Human Rights, Teheran, Resolution XXIII, 12 May 1968; and UN General Assembly Resolution, 2444 (XXIII) 19 December 1968.

¹⁸² For example, UN General Assembly Resolution, 52/145, 12 December 1997 (in relation to Afghanistan); UN Commission on Human Rights, Resolution 1992/60, 3 March 1992 (in relation to Iraq); UN Commission on Human Rights, Resolution 1996/73, 23 April 1996 (in relation to Sudan); UN Commission on Human Rights, Resolution 2000/58, 25 April 2000 (in relation to Chechnya); UN Commission on Human Rights, Resolution 1998/75, 22 April 1998 (in relation to Uganda); and UN Security Council Resolution 1019, of 9 November 1995; UN Security Council Resolution 1034 of 21 December 1995; UN General Assembly Resolution 50/193, 22 December 1995; UN Commission on Human Rights, Resolution 1996/71, 23 April 1996 (all in relation to former Yugoslavia). As is discussed throughout this thesis, references to human rights also now regularly appear in Security Council resolutions mandating POC tasks to UN missions.

¹⁸³ ECHR Article 15 refers to ‘war or other public emergency threatening the life of the nation’. IACHR, Article 27 refers to ‘war, public danger, or other emergency that threatens the independence or security of a State Party’. ICCPR, Article 4 applies in time of a ‘public emergency which threatens the life of the nation and the existence of which is officially proclaimed’.

¹⁸⁴ ICJ Reports, 8 July 1996, para. 25.

¹⁸⁵ *Ibid.*

Consequences of the Construction of a Wall in the Occupied Palestinian Territory (the Wall), in 2004, but stated that while both bodies of law continued to apply, ‘some rights may be exclusively matters of international humanitarian law; others may be exclusively matters of human rights law; yet others may be matters of both these branches of international law.’¹⁸⁶ The Court, therefore, had ‘to take into consideration both these branches of international law, namely human rights law and, as *lex specialis*, international humanitarian law.’¹⁸⁷ In *Armed activity on the territory of the Congo* the ICJ made no reference to IHL as the *lex specialis* and simply concluded that both branches of international law ‘would have to be taken into consideration.’¹⁸⁸

As Hampson and Lubell have observed, the decisions of the ICJ show that the applicability of IHL to a particular factual situation ‘does not displace the jurisdiction of a human rights body’ since human rights law remains applicable in all circumstances.¹⁸⁹ While the ICJ is free to find violations of both bodies of law, however, a human rights body only has the competence to find a violation within this legal framework. They argue that where IHL is applicable, ‘a human rights body has two choices.’ It must either apply human rights law through the lens of IHL or it must blend the two bodies of law together, given that IHL contains guidance on issues such as necessary precautions when carrying out attacks on military targets or the rules governing aerial bombardment, which international human rights law is not equipped to provide.¹⁹⁰

While the European Court and UN Human Rights Committee have mainly continued to rely exclusively on international human rights law in making its judgments, the Inter-American

¹⁸⁶ ICJ Reports, 9 July 2004, para. 106.

¹⁸⁷ Ibid.

¹⁸⁸ ICJ Reports, 19 December 2005, para 216.

¹⁸⁹ Hampson and Lubell, 2013, paras 16-17

¹⁹⁰ Hampson and Lubell, 2013, paras 26-7 They argue that in some circumstances, it would seem that a human rights monitoring body could only find a violation of international human rights law if there had been a violation of IHL. For further discussion see ICRC Expert Meeting, 2013.

Commission and Court have ruled that they can use IHL as an interpretive tool in certain situations.¹⁹¹ In *Neira Alegria v. Peru*, the Court ruled that the authorities had acted disproportionately in demolishing a prison during the course of a riot, basing its decision solely on international human rights law, even though most of the detainees who were killed were members of a rebel group, involved in a non-international armed conflict.¹⁹² In *Abella v. Argentina*, however, the Commission concluded:

the American Convention contains no rules that either define or distinguish civilians from combatants and other military targets, much less, specify when a civilian can be lawfully attacked or when civilian casualties are a lawful consequence of military operations. Therefore, the Commission must necessarily look to and apply definitional standards and relevant rules of humanitarian law as sources of authoritative guidance in its resolution of this and other kinds of claims alleging violations of the American Convention in combat situations.¹⁹³

The Commission and Court have arrived at similar conclusions in a number of other cases.¹⁹⁴

In *Bámaca Velásquez v. Guatemala*, it stated that although it lacked competence to declare

¹⁹¹ For discussion see: Emiliano J. Buis, 'The Implementation of International Humanitarian Law by Human Rights Courts: The Example of the Inter-American Human Rights System', Oberleitner, 2015, pp.271-91; and Jean-Marie Henckaerts, 'Concurrent Application of International Humanitarian Law and Human Rights Law: A Victim Perspective', in Roberta Arnold & Noelle Quéniwet (eds) *International Humanitarian Law and Human Rights Law*, Leiden and Boston: Martin Nijhof, 2008.

¹⁹² Inter-Am Ct HR, *Neira Alegria v. Peru*, 19 January 1995, para. 74: 'Article 4(1) of the Convention states that '[n]o one shall be arbitrarily deprived of his life.' Although it appears from arguments previously expressed in this judgment that those detained in the Blue Pavilion of the San Juan Bautista Prison were highly dangerous and, in fact armed, it is the opinion of this Court, those do not constitute sufficient reasons to justify the amount of force used in this and other prisons where riots had occurred. The incident was understood as a political confrontation between the Government and the real or alleged terrorists of Sendero Luminoso [...], a confrontation which probably led to the demolition of the Pavilion and all of its consequences; among them the death of inmates who would have eventually surrendered, the clear negligence in the search for survivors and, later, in the recovery of the bodies.'

¹⁹³ Inter-Am Com HR, *Abella v. Argentina*, Case 11.137, Report No. 55/97, OEA/Ser.L./V/II.9, doc. 6 rev. P 161 (1998).

¹⁹⁴ Inter-Am Com HR: *Arturo Ribón Avilán v. Colombia*, Report No. 26/97, Case 11.142, 444, OEA Ser. L/V/II.98, Doc. 6 Rev. (1998); *Hugo Bustíos Saavedra v. Peru*, Report No. 38/97, Case 10.548, 753, OEA Ser. L/V/II.98, Doc. 6 Rev. (1998); *Lucio Parada Cea et al. v. El Salvador*, Report No. 1/99, Case 10.480, 531, OEA Ser. L/V/II.102, Doc. 6 Rev. (1999); *Ignacio Ellacuria, S.J. et al. v. El Salvador*, Report No. 136/99, Case 10.488, 608, OEA Ser. L/V/II.106, Doc. 3 Rev. (1999); *Monsignor*

that a State was responsible for the violation of a treaty over which it had no jurisdiction it could ‘observe that certain acts or omissions that violate human rights . . . also violate other international instruments for the protection of the individual, such as the 1949 Geneva Conventions and, in particular, common Article 3.’¹⁹⁵ In *Franklin Guillermo Aisalla Molina*, the Commission noted that international human rights law and IHL ‘share a common core of *non-derogable* rights and the mutual goal of protecting the physical integrity and dignity inherent in the human being’ and that they ‘may influence and reinforce each other’.¹⁹⁶

Although the other UN and regional human rights bodies have yet to develop a comprehensive theory concerning their relationship, there is general agreement that international human rights law is applicable concurrently with IHL in an armed conflict.¹⁹⁷ In *Hassan v. UK*, in 2014, the European Court found that although the applicant’s detention by the British army in Iraq, in 2003, brought him within the UK’s extra-territorial jurisdiction the otherwise unauthorized detention of suspected combatants, was in compliance with IHL provisions in the context of international armed conflict.¹⁹⁸ An inter-state case arising out of the conflict between Russia and Georgia in 2008, may also lead the European Court to address the issue as well.¹⁹⁹ Hampson and Lubell have concluded that while there is ‘no general, top-down principle which can be applied to establish if an issue should be handled

Oscar Amulfo Romero y Galdámez v. El Salvador, Report No. 37/00, Case 10.481, 671, OEA Ser. L/V/II.106, Doc. 3 Rev. (1999); *José Alexis Fuentes Guerrero v. Colombia*, Report No. 61/99, Case 11.519, 466, OEA Ser. L/V/II.106, Doc. 7 Rev. (1999); *Riofrío Massacre (Colombia)*, Report No. 62/01, Case 11.654, 758, OEA Ser. L/V/II.111, Doc. 20 Rev. (2000); *Las Palmeras Case*, (2000), (Ser. C) No. 67 [Preliminary Objection]; *Case of the ‘Mapiripán Massacre’ v. Colombia* (2005) Series C No. 134; *Serrano-Cruz Sisters v. El Salvador*, (2004), (ser. C) No. 118.

¹⁹⁵ Inter-Am CtHR: *Bámaca-Velásquez v Guatemala* (2000) Series C No. 70 [Merits].

¹⁹⁶ Inter-Am Com HR *Franklin Guillermo Aisalla Molina. (Ecuador – Colombia)*, Report No. 112/10 (Admissibility), Inter-state Petition IP-02, October 21, 2010, paras 117-121.

¹⁹⁷ For further discussion see: Office for the High Commissioner of Human Rights, *International Legal Protection of Human Rights in Armed Conflict*, OHCHR, 2011; and UN Office for the High Commissioner of Human Rights, *Protection of Human Rights and Fundamental Freedoms while Countering Terrorism*, 28, OHCHR UN Doc. E/CN.4/2005/103, 7 February 2005.

¹⁹⁸ *Hassan v. United Kingdom*, Appl. No. 29750/09, Judgment (Grand Chamber), 16 September 2014.

¹⁹⁹ Georgia brought two inter-state cases against Russia arising out of the conflict between the two countries in 2008. In the first of these, *Georgia v. Russia*, Appl. No 13255/07, Judgment (Grand Chamber) 3 July 2014, the Court found a violation arising out of the mass detention and expulsion of Georgian nationals by the Russian authorities in the period leading up the conflict. The second case – *Georgia v. Russia II*, Appl. No. 38263/08, 13 was declared admissible in December 2011 and referred to the Grand Chamber in April 2012. For further discussion see Hampson, and Lubell, 2014.

one way or an-other’, the issues involving the conduct of hostilities appear to be more appropriate for determination through IHL, while issues involving the protection of victims are more likely to involve ‘a blend’ of the two bodies law.²⁰⁰

Extra-territorial application of international human rights law

For international human rights law to be of relevance to States contributing troops to UN peacekeeping missions with POC mandates, however, it must also be applicable extraterritorially. Two countries have long-standing objections to the propositions that international human rights law can apply extraterritorially and remains applicable during armed conflicts,²⁰¹ but, as Hampson notes, this position is isolated by the ‘overwhelming weight of international legal opinion and state practice’.²⁰²

The ICESCR explicitly contains an extra-territorial obligation, requiring States to work together to realise its rights.²⁰³ While the text of the ICCPR appears to suggest that the rights would only apply to an individual who fulfilled both criteria of being within a State’s territory *and* subject to its jurisdiction,²⁰⁴ [emphasis added] the UN Human Rights Committee

²⁰⁰ Hampson and Lubell, 2013, para 26.

²⁰¹ For Israel’s position see Second periodic report of Israel, UN Doc. CCPR/C/ISR/2001/2, para 8. For the HRC’s response see UN Doc. CCPR/C/79/Add.93, para 10; and Concluding Observations of the Human Rights Committee: Israel, 5 August 2003, para 11, UN Doc CCPR/CO/78/ISR (2003). For the US position see HRC CCPR/C/USA/3, 28 November 2005, Annex 1, pp.109-111. See also UN Doc. CCPR/C/SR. 1405, para. 20 (1995) para 20; CCPR/C/USA/CO/3/Rev.1, 18.12.2006, para 10; CCPR/C/USA/CO/3/Rev.1, Add.1, p.3; and Concluding Observations on the United States, CCPR/C/USA/CO/4 para 4 (2014).

²⁰² Hampson, 2008, p.551. For further discussion see: Oberleitner, 2015, pp.144-65; Ralph Wilde, ‘Legal “Black Hole”? Extraterritorial State Action and International Treaty Law on Civil and Political rights’, *Michigan Journal of International Law*, Vol. 26, 6 June 2005, pp.739-804; John, Cerone, *Out of Bounds? Considering the Reach of International Human Rights Law*, Center for Human Rights and Global Justice, New York University School of Law, Working Paper No. 5, 2006.

²⁰³ ICESCR, Article 2.

²⁰⁴ ICCPR, Article 2.1. ‘Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.’

has repeatedly stated that this interpretation is too restrictive.²⁰⁵ In its General Comment on Article 2, for example the Human Rights Committee states the wording:

means that a State Party must respect and ensure the rights laid down in the Covenant to anyone within the power or effective control of that State Party, even if not situated within the territory of the State Party . . . This principle also applies to those within the power or effective control of the forces of a State Party acting outside its territory, regardless of the circumstances in which such power or effective control was obtained, such as forces constituting a national contingent of a State Party assigned to an international peace-keeping or peace-enforcement operation.²⁰⁶

There is clear agreement that States have a duty to protect people from potential violations of their rights by not deporting or extraditing someone to a country where he or she may suffer torture or threats to his or her life.²⁰⁷ There is broad agreement amongst the human rights

²⁰⁵ For further discussion on this debate see: Marko Milanovic, *Extraterritorial Application of Human Rights Treaties: Law, Principles, and Policy*, Oxford: Oxford University Press, 2011; Fons Coomans and Menno Kamminga, (eds), *Extraterritorial application of human rights treaties*, Antwerp: Intersentia Publishing, 2004; Lubell, 2010, pp.193-232; and Larsen, 2012, pp.177-85.

²⁰⁶ Human Rights Committee, General Comment No. 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant (Article 2) [2004] UN Doc. CCPR/C/74/CRP.4/Rev.6, para 10. The Committee has also described it as ‘unconscionable’ to ‘interpret the responsibility under the . . . Covenant as to permit a State Party to perpetrate violations of the Covenant on the territory of another State, which violations it could not perpetrate on its own territory’. See also HRC *Lopez Burgos v Uruguay*, UN Doc. CCPR/C/13/D/52/1979; *Celiberti de Casariego v Uruguay*, UN Doc. CCPR/C/13/D/56/1979; *Montero v Uruguay*, UN Doc. CCPR/C/18/D/106/1981; and Concluding Observations of the Human Rights Committee: United States of America, UN Doc. CCPR/C/79/Add.50 (1995) para 19.

²⁰⁷ For example: ECtHR: *Soering v UK*, Appl. No. 14038/88, Judgment 7 July 1989; *Cruz Varas v. Sweden*, Appl. No. 15576/89, Judgment 20 March 1991; *Vilvarajah and Others v UK*, Appl. Nos. 13163/87; 13164/87; 13165/87; 13447/87; 13448/87, Judgment 30 October 1991; *H.L.R. v France*, Appl. No 24573/94, Judgment 29 April 1997; *D. v UK*, Appl. No 30240/96, Judgment 2 May 1997; *Jabari v UK*, 2000, Appl. No. 40035/98, Judgment 11 November; *Ahmed v. Austria*, Appl. No. 25964/94, Judgment 27 November 1996; and Human Rights Committee, General Comment 2, Reporting guidelines (Thirteenth session, 1981), Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. HRI\GEN\1\Rev.1 at 3 (1994) para 3; Human Rights Committee, General Comment 20, para 9; *Haitian Centre for Human Rights et al v. United States*, Inter-American Commission on Human Rights, 1997, Case 10675, Report No. 51/96 OEA/Ser.L/V/II.95 Doc 7 rev. para 27; African Commission on Human and People’s Rights *John K Modise v. Botswana*, (2000) Comm. 97/93 para 91. Such cases obviously do not involve extraterritorial application, since the individual concerned is located within the territory of the extraditing State.

treaty-monitoring bodies that if a State controls a foreign territory as a result of military occupation, all of the provisions in the human rights treaties to which it is a party are applicable in that territory.²⁰⁸ It is also widely agreed that if a State abducts or detains people on foreign territory then the relevant human rights treaties will be applicable.²⁰⁹ It is less clear, however, whether this extends to all other uses of force.

The African Commission on Human and Peoples' Rights has held that the rights contained in the Charter are applicable in situations of military occupation of foreign territory.²¹⁰ The ICJ has taken a similar approach, observing that 'while the jurisdiction of States is primarily territorial, it may sometimes be exercised outside the national territory.'²¹¹ In its Advisory Opinion on the *Wall*, it also ruled that States can be bound by their human rights obligations in relation to activities they conduct outside their own national territory.²¹²

²⁰⁸ For example: ECtHR *Al-Skeini and Others v. UK*, Appl. No. 55721/07, Judgment (Grand Chamber) 7 July 2011; *Andreou v. Turkey*, Appl. No. 45653/99, Judgment of 27 October 2009, *Solomou v. Turkey*, Appl. No. 36832/97, Judgment of 24 June 2008; *Issa and others v. Turkey* Appl. No. 31821/96, Admissibility Decision of 20 May 2000, paras 69-71; *Loizidou v. Turkey* (preliminary objections), Appl. No. 15318/89, Judgment of 23 March 1995, para 62; *Cyprus v. Turkey*, Appl. No. 25781/94, Judgment of 10 May 2001, paras 75-80; *Ilascu and Others v. Moldova and Russia*, Appl. No. 48787/99, Judgment of 8 July 2004, paras 314-316. See also Inter-Am CtHR *Franklin Guillermo Aisalla Molina. (Ecuador – Colombia)*, Report No. 112/10 (admissibility), Inter-state Petition IP-02, October 21, 2010; and ICJ Reports 2005, paras 178-80; and ICJ Reports 2004, paras 110-1.

²⁰⁹ ECtHR *Al-Jedda v. UK*, Appl. No. 27021/08, Judgment (Grand Chamber) 7 July 2011; *Al-Saadoon and Mufdhi v. UK*, Appl. No. 61498/08, Judgment 2 March 2010; *Medvedyev and Others v. France* Appl. No. 3394/03, Judgment (Grand Chamber) 23 March 2010; *Ocalan v Turkey*, Appl. 46221/99, Decision on Admissibility 12 May 2005; *Ilich Sanchez Ramirez v. France* Appl. No. 28780/95, Commission Decision on Admissibility, 24 June 1996; *Stocké v Federal Republic of Germany*, Appl. No. 11755/85, Judgment 19 March 1991; *Reinette v France*, Appl. No. 14009/88, Commission Decision on Admissibility, 2 October 1989; *Hess v UK*, Appl. No. 6231/73, Commission Decision on Admissibility, 28 May 1975; Inter-Am Com HR, *Precautionary Measures on Guantanamo Bay*, Cuba 13 March 2002; HRC *Lopez Burgos v Uruguay*, UN Doc. CCPR/C/13/D/52/1979.

²¹⁰ African Commission, *DRC v Burundi, Rwanda, Uganda*, Communication 227/1999, reported in 20th Activity Report of the African Commission on Human and Peoples' Rights, Annex IV. The African Charter on Human and Peoples' Rights contains no explicit restriction on territorial applicability.

²¹¹ ICJ Reports 2004, para 109; and ICJ Reports 2005, para 217.

²¹² ICJ Reports 2004, para 139. For criticism of this decision and its implications see Dennis, 2006, pp. 435-53.

The Human Rights Committee has adopted this approach with regard to Israel's occupation of the Palestinian territories.²¹³ The European Court has done so with respect to Turkey's occupation of northern Cyprus,²¹⁴ and Russia's support for a breakaway state in Moldova.²¹⁵ The Inter-American Commission has done so in respect of the US occupation of Grenada and Panama.²¹⁶ The Human Rights Committee has questioned Belgium about abuses allegedly committed by their armed forces during the UN peacekeeping operation in Somalia.²¹⁷ The UN Committee against Torture has also expressed 'grave concern over the alleged sexual

²¹³ Concluding observations of the Human Rights Committee: Israel, UN Doc. CCPR/C/79/Add. 93 (1988); Concluding observations of the Human Rights Committee: Israel, UN Doc. CCPR/CO/78/ISR (2003)

²¹⁴ ECtHR *Loizidou v. Turkey*, Appl. No. 15318/89, Merits, 18 December 1996; *Cyprus v. Turkey*, Appl. No. 25781/94, Commission Report, 4 June 1999, para. 96, Merits Judgment 10 May 2001.

²¹⁵ ECtHR *Catan and Others v. Republic of Moldova and Russia* Appl. Nos. 43370/04, 8252/05 and 18454/06, Judgment (Grand Chamber) 19 October 2012; *Ilascu and others v Moldova and Russian Federation*, Appl. No. 48797/99, Judgment (Grand Chamber) 8 July 2004; *Ivanțoc and Others v. Moldova and Russia* Appl. No. 23687/05, Judgment 15 November 2011.

²¹⁶ Inter-Am Com HR, *Disabled People's International v. United States* Case 9213 OEA/ser, L/V/II.71, doc. 9 rev. 1 (1987) (Annual Report 1986-1987); Inter-American Commission on Human Rights *Coard et al. v. United States*, Report N. 109/99 - Case 10.951, (IACHR), 29 September 1999; *Salas et al. v. United States*, Report No. 31/93, Case No. 10,573, 14 October 1993. The US disputed the jurisdiction of the Commission in these cases and so they were brought under the Inter-American Declaration of Human Rights (rather than the Convention). The declaration has no provision for derogations from its provisions and contains no territorial jurisdictional clause.

²¹⁷ Summary Record of the 1707th Meeting: Belgium. 27 October 1998, UN Doc. CCPR/C/SR.1707, 27 October 1998, paras 2 and 3. 'Mr. LALLAH, referring to the question raised earlier by Mr. Klein, said there could be no doubt that actions carried out by Belgium's agents in another country fell within the scope of the Covenant. . . He understood that the two soldiers responsible for the incident in Somalia had been acquitted. What grounds were there for that acquittal, and what defence had been put forward? There were disturbing recent reports of a string of further offences for which Belgian soldiers serving in Somalia had been convicted in the Belgian courts, offences that had included force-feeding a Muslim child with pork until it vomited, tying a Somali child to a vehicle and ordering the vehicle to drive off, procuring and offering a teenage Somali girl as a present at a birthday party, and acts of public indecency. They were all the more horrifying incidents in that the soldiers concerned were serving under the flag of the United Nations, the organization that was author of the Universal Declaration of Human Rights. In all cases the court had imposed only suspended sentences, and the sentences had been confirmed by the military courts.' See also CCPR/C/79/Add.99, 19 November 1998, para 14. In its Concluding Observations the Committee notes that it is 'concerned about the behaviour of Belgian soldiers in Somalia under the aegis of the United Nations Operation in Somalia (UNOSOM II), and acknowledges that the State party has recognized the applicability of the Covenant in this respect.' In its Concluding Observations of the Human Rights Committee: Belgium. 12/08/2004, CCPR/CO/81/BEL, 12 August 2004, para 6, the Committee notes that: it is 'concerned at the fact that the State party is unable to affirm, in the absence of a finding by an international body that it has failed to honour its obligations, that the Covenant automatically applies when it exercises power or effective control over a person outside its territory, regardless of the circumstances in which such power or effective control was obtained, such as forces constituting a national contingent assigned to an international peacekeeping or peace enforcement operation.'

exploitation and abuse of minors by military members of the Sri Lankan contingent of the United Nations Stabilization Mission in Haiti (MINUSTAH).²¹⁸

The Inter-American Commission has ruled that an extraterritorial killing of four anti-Castro Cubans, whose plane was shot down in international air space – was considered admissible because it regarded the victims as being subject to Cuba’s power and control when they were killed.²¹⁹ It has also stated that a State Party ‘may be responsible under certain circumstances for the acts and omissions of its agents which produce effects or are undertaken outside that State’s own territory.’²²⁰ In its Concluding Observations to Italy’s fifth periodic report under the ICCPR the Human Rights Committee welcomed ‘the State party’s position that the guarantees of the Covenant apply to the acts of Italian troops or police officers who are stationed abroad, whether in a context of peace or armed conflict.’²²¹ Poland and Norway have also reported on measures taken to ensure compliance with these extra-territorial obligations.²²² Germany has accepted the applicability of the rights contained within the ICCPR: ‘Wherever its police or armed forces are deployed abroad, in particular when participating in peace missions . . . to all persons . . . insofar as they are subject to its jurisdiction.’²²³

In 2001, the Netherlands challenged a request by the Human Rights Committee to provide information about the fall of Srebrenica during the war in Bosnia-Herzegovina,²²⁴ stating that it disagreed ‘with the Committee’s suggestion that the provisions of the International

²¹⁸ Concluding observations of the Committee against Torture: Sri Lanka, 31 October–25 November 2011, para 23.

²¹⁹ Inter-Am Com HR *Armando Alejandro Jr. and Others v Cuba* (known as the ‘Brothers to the Rescue’ case) no. 11.589, Report no. 86/99, 29 September 1999, para 23.

²²⁰ Inter-Am Com HR *Victor Saldaño v Argentina* Inter-American Commission Report No. 38/99, 11 March 1999, para 17.

²²¹ HRC Concluding Observations: Italy, CCPR/C/ITA/CO/5, 24 April 2006, para 3.

²²² Poland’s fifth periodic report, CCPR/CO/82/POL., 2 December 2004, para 3; and HRC Concluding Observations to Norway’s fifth periodic report, CCPR/C/NOR/CO/5, 25 February 2006, para 6.

²²³ Germany: Follow-up response to the Concluding Observations, CCPR/CO/80/DEU/Add.1, 11 April 2005.

²²⁴ Concluding Observations of the Human Rights Committee: Netherlands, UN Doc. CCPR/CO/72/NET, para 27 (2001).

Covenant on Civil and Political Rights are applicable to the conduct of Dutch blue helmets in Srebrenica', and claiming that the wording of Article 2 of the ICCPR 'clearly states that each State Party undertakes to respect and to ensure to all individuals "within its territory and subject to its jurisdiction" the rights recognized in the Covenant.'²²⁵ The Dutch government claimed that: 'It goes without saying that the citizens of Srebrenica, *vis-a-vis* the Netherlands, do not come within the scope of that provision.'²²⁶ As previously discussed, however, a Dutch court subsequently ruled that the Dutch Battalion at Srebrenica had violated its positive obligations to some of the genocide's victims.

The European Court of Human Rights has generally adopted a similar reasoning. In *Cyprus v. Turkey* in 1975, the European Commission first ruled that the authorized agents of a State are 'bound to secure the said rights and freedoms to all persons under their actual responsibility, whether that authority is exercised within their own territory or abroad.'²²⁷ This has been reaffirmed by the Court in cases such as when a group of shepherds were allegedly detained, tortured and killed by Turkish security forces in northern Iraq;²²⁸ a suspected murder and restrictions of freedom of expression in northern Cyprus;²²⁹ the killing of civilians by the Turkish security forces, both inside and outside the buffer zone in northern Cyprus;²³⁰ a fatal collision between an Italian coast guard ship and a boat of Albanian

²²⁵ Replies of the Government of the Netherlands to the Concerns Expressed by the Human Rights Committee, UN Doc. CCPR/CO/72/NET/Add.1, 29 April 2003, para 19. It also stated that: 'The strong commitment of the Netherlands to investigate and assess the deplorable events of 1995 is therefore not based on any obligation under the Covenant.'

²²⁶ *Ibid.*

²²⁷ E Com HR *Cyprus v. Turkey*, Appl. No 6780/74 and 6950/75, Commission Admissibility decision, 26 May 1975. See also ECtHR *Drozdz and Janousek v. France and Spain* Appl. No. 12747/87, Judgment 26 June 1982.

²²⁸ ECtHR *Issa and others v. Turkey*, Appl. No. 31821/96, Admissibility Decision 20 May 2000, para 71. The Court noted that 'Article 1 of the Convention cannot be interpreted so as to allow a State Party to perpetrate violations of the Convention on the territory of another State, which it could not perpetrate on its own territory.' The facts of the case were disputed with Turkey denying that the operation had taken place and the Court subsequently found no violation as the required standard of proof could not be established. See also *Issa and others v. Turkey*, Appl. No. 31821/96, Judgment 16 November 2004.

²²⁹ ECtHR *Andreias Manitaras and Others v. Turkey* Appl. No. 54591/00, 3 June 2008; and *Djavit An v. Turkey*, Appl. No. 20652/92, Judgment 20 February 2003.

²³⁰ ECtHR *Andreou v. Turkey*, Appl. No. 45653/99, Admissibility Decision 3 June 2008 and Judgment 27 October. 2009; *Isaak and Others v. Turkey* Appl. No. 44587/98, Admissibility Decision 28

migrants;²³¹ the detention at sea of a group of Cambodian drug smugglers²³² and the interception and forcible return of a group of Somali and Eritrean migrants.²³³ In another case the Court found a violation against Turkey after it killed seven Iranian men during a cross-border operation in which it bombed an area from where it claimed suspected terrorists had been operating.²³⁴ Indeed the Commission has gone so far as to say that the test of an ‘exercise of authority’ should be: ‘In so far as, by their acts or omissions, they affect such persons or property’.²³⁵

The European Court, however, took a markedly different position when it declared *Bankovic v. Belgium and 16 Other Contracting States* inadmissible because the applicants – relatives of five employees of a Serbian television centre who were killed by a NATO bomb during the Kosovo crisis – were not within the jurisdiction of the respondent States within the meaning of the Convention.²³⁶ The Court ruled that jurisdiction was ‘primarily territorial’²³⁷ and other bases were exceptional, requiring special justification in the particular circumstances of each case.²³⁸ It stated that the Convention is ‘a constitutional instrument of *European* public order’ and this regional context constitutes its ‘legal space’.²³⁹ It further reasoned that ‘the positive obligation in Article 1 to secure “the rights and freedoms defined in Section I of this Convention” could not be ‘divided and tailored in accordance with the particular circumstances of the extra-territorial act in question’.²⁴⁰

September 2006 and Judgment 24 June 2008; *Solomou v Turkey*, Appl. No. 36832/97, Judgment 24 June 2008.

²³¹ ECtHR *Xhavara and others v Italy and Albania*, Appl. No. 39473/09, Admissibility decision 11 January 2001.

²³² ECtHR *Medvedyev v France* Appl. No. 3394/03, Judgment 29 March 2010.

²³³ ECtHR *Hirsi Jamaa and Others v. Italy*, Appl. No. 27765/09, Judgment (Grand Chamber) 23 February 2012.

²³⁴ *Mansur PAD and Others v. Turkey* Appl. No. 60167/00, Commission Admissibility decision, 28 June 2007.

²³⁵ E Com HR *Cyprus v. Turkey*, Appl. Nos. 6780/74 and 6950/75, Commission Admissibility decision, 26 May 1975, para 136.

²³⁶ *Bankovic v. Belgium and 16 Other Contracting States*, Appl. No. 52207/99, (Grand Chamber), Decision on Admissibility, 19 December 2001.

²³⁷ *Ibid.*, para 35.

²³⁸ *Ibid.*, para 37 and 43-57.

²³⁹ *Ibid.*, para 56. [Emphasis in the original]

²⁴⁰ *Ibid.*

The *Bankovic* decision has been widely criticized as inconsistent with the rest of the emerging case law, the changing nature of state practice and evolving concepts of responsibility in international law.²⁴¹ Larsen argues that the Court's 'all or nothing approach' to the protection of rights meant that because 'it was clearly unrealistic to require NATO forces to comply with the entire range of Convention rights towards the population in Belgrade . . . the Court opted for a nothing at all conclusion.'²⁴² Hannum has caustically observed that the Court seems to consider that 'simply shooting suspects is apparently immune from scrutiny, so long as you are careful not to arrest them first'.²⁴³ Amnesty International has described the attack as 'a war crime' and notes that the Court's decision left the victims with no redress.²⁴⁴

Some of the original *Bankovic* applicants brought a case in the Italian domestic courts, but these ruled that Italy's decision to take part in the air strikes had been a political one, so could not be judicially reviewed, a decision subsequently upheld by the European Court.²⁴⁵ The Court has also dismissed a case brought by Saddam Hussein, over his arrest, detention by US-led coalition forces, following the invasion of Iraq in 2003, finding that the applicant had failed to demonstrate the role and responsibility of each of the respondent States for his

²⁴¹ See, for example, Kerem Altiparmak, 'Bankovic: An Obstacle to the Application of the European Convention for Human Rights in Iraq?', 9 *J. Conflict & Security Law*, 2004, pp. 213, 223-24; Alexander Orakhelashvili, 'Restrictive Interpretation of Human Rights Treaties in the Recent Jurisprudence of the European Court of Human Rights', *European Journal of International Law*, Vol. 14, No. 3, 2003, pp.529-68; Dinah Shelton, 'The Boundaries of Human Rights Jurisdiction in Europe', *Duke Journal of Comparative and International Law*, Vol. 13, 2003, pp.95-153; Hampson, 2008, pp.549-72; and Duffy, 2005, pp.282-289.

²⁴² Larsen, 2012, p.203.

²⁴³ Hurst Hannum, 'Remarks: Bombing for Peace: Collateral damage and human rights', *American Society of International Law Proceedings*, 2002, pp. 96-99.

²⁴⁴ Amnesty International, *No justice for the victims of NATO bombings*, 23 April 2009.

²⁴⁵ *Markovic and Others v. Italy*, Appl. No. 1398/03, Judgment (Grand Chamber) 14 December 2006. The applicants argued that Italy's involvement in the relevant military operations had been more extensive than that of the other NATO members that were party to the Convention, since Italy had provided an important base used during the operation. The European Court ruled that the civil action in the Italian courts was sufficient to create a 'jurisdictional link' for the purposes of the Convention, but found no violation of on the grounds that the domestic law had been correctly applied.

particular treatment.²⁴⁶ This reluctance by the Court to review the actions of a multinational organization led by a State that is not a party to the ECHR may also partly explain the Court's decision in *Bankovic*.²⁴⁷ McGoldrick has argued that the Court may have felt that the positive obligation under Article 2, to conduct an effective investigation into the deaths was impractical in the circumstances of a bombing campaign and that:

A decision the other way would have raised additional institutional questions about the appropriateness of the European Court of Human Rights directly or indirectly applying aspects of international humanitarian law through the medium of ECHR rights, and its exercise of the review of military actions by individual states or by an international institution (NATO) . . . The *Bankovic* decision avoided these questions for the time being.²⁴⁸

Grenier maintains that 'the debate between the progressive or conservative interpretation of "jurisdiction" is not yet settled.'²⁴⁹ The Court has subsequently shown itself willing to adopt a far less rigid stance than that demonstrated in *Bankovic*. For example, it found in *Issa*, in 2004,²⁵⁰ *Isaak*, in 2006,²⁵¹ and *Andreou*, in 2008,²⁵² that extra-territorial killings – which had not been preceded by arrest – could come within the scope of the Convention. It found in *Ilaşcu and Others v. Moldova and Russia*, in 2004, that 'where a Contracting State is

²⁴⁶ *Saddam Hussein v. Coalition Forces (Albania, Bulgaria, Croatia, Czech Republic, Denmark, Estonia, Hungary, Iceland, Ireland, Italy, Latvia, Lithuania, the Netherlands, Poland, Portugal, Romania, Slovakia, Slovenia, Turkey, Ukraine and the United Kingdom)*, Appl. No. 23276/04, Decision on Admissibility, 14 March 2006.

²⁴⁷ For further discussion of the Hussein case see Stefan Talmon 'A plurality of responsible actors: international responsibility for acts of the coalition provisional authority in Iraq', in Phil Shiner and Andrew Williams (eds) *The Iraq War and International Law*, Oxford: Hart Publishing, 2008, pp.214-6.

²⁴⁸ Dominic McGoldrick, 'Extraterritorial application of the International Covenant on Civil and Political Rights', in Coomans, Fons, Kamminga, Menno, 2004, pp.46 and 71.

²⁴⁹ Jérémie Labbé Grenier, 'Extraterritorial applicability of human rights treaty obligations to United Nations-mandated forces', in International Committee of the Red Cross, *Expert meeting, Applicability of International Humanitarian Law and International Human Rights Law to UN Mandated Forces*, Geneva: ICRC, 11-12 December 2003.

²⁵⁰ *Issa and others v Turkey*, Appl. No. 31821/96, Judgment 16 November 2004.

²⁵¹ *Isaak v. Turkey*, Appl. No. 44587/98, Judgment 24 June 2008.

²⁵² *Andreou v. Turkey*, Appl. No. 45653/99, Judgment 27 October 2009.

prevented from exercising its authority over the whole of its territory by a constraining de facto situation . . . it does not thereby cease to have jurisdiction . . . [but] such a factual situation reduces the scope of that jurisdiction.²⁵³ It used similar reasoning in its admissibility decision in *Sargsyan v Azerbaijan* in 2011.²⁵⁴ In both *Issa* and *Ocalan*²⁵⁵ the Court found cases admissible even though they referred to events which had taken place outside the ‘juridical space’ of the Convention. In *Jaloud v. The Netherlands* in November 2014 the Court found a violation due to a failure to conduct an adequate investigation after Dutch soldiers killed a man at check-point in Iraq in 2004.²⁵⁶

In the *Al-Skeini* case,²⁵⁷ which concerned six Iraqis killed by British occupation forces in 2003, *Bankovic* was described by the English Court of Appeal and House of Lords as a ‘watershed authority in the light of which the Strasbourg jurisprudence as a whole has to be re-evaluated’.²⁵⁸ However the Lords also stated that: ‘The problem which the House has to face, quite squarely, is that the judgments and decisions of the European Court do not speak with one voice.’ The differences were not ‘merely in emphasis’ and their seriousness presented ‘considerable difficulties for national courts’ in trying to follow the European Court’s jurisprudence.²⁵⁹ After reviewing the case-law, the Lords ultimately held that while persons detained by British forces could be considered under their ‘effective control’, the UK

²⁵³ *Ilaşcu and Others v. Moldova and Russia*, Appl. No. 48787/99, Judgment 8 July 2004, para 333.

²⁵⁴ *Sargsyan v Azerbaijan* Appl. No. 40167/06, Decision on Admissibility (Grand Chamber) 14 December 2011.

²⁵⁵ *Ocalan v. Turkey*, Appl. No. 46221/99, Decision on Admissibility 12 May 2005.

²⁵⁶ *Jaloud v. The Netherlands* Appl. No. 47708/08, Judgment (Grand Chamber), 20 November 2014.

²⁵⁷ *Judgments - Al-Skeini and others (Respondents) v. Secretary of State for Defence (Appellant) Al-Skeini and others (Appellants) v. Secretary of State for Defence (Respondent) (Consolidated Appeals)*, 13 June 2007 [2007] UKHL 26.

²⁵⁸ *Judgments - Al-Skeini and others (Respondents) v. Secretary of State for Defence (Appellant) Al-Skeini and others (Appellants) v. Secretary of State for Defence (Respondent) (Consolidated Appeals)*, 13 June 2007 [2007] UKHL 26, para 108. Lord Brown stated: I have no doubt the Divisional Court was right to describe (at para 268) as ‘a watershed authority in the light of which the Strasbourg jurisprudence as a whole has to be re-evaluated’. The case was referred to the Grand Chamber specifically for a definitive judgment on this fundamental issue. It was fully argued, and the judgment, which was unanimous, was fully reasoned. The travaux préparatoires, the entire previous case law of the Commission and the Court, the Vienna Convention on the Law of Treaties (1969), the practice of the contracting States with regard to derogating for extra-territorial military operations (none had ever done so), comparative case law and the international law background were for the first time all considered in a single judgment.’

²⁵⁹ *Ibid.*, para 67.

was ‘not in effective control of Basrah City and the surrounding area for purposes of jurisdiction under Article 1 of the Convention at the relevant time’.²⁶⁰ With the exception of those who died while in British custody, therefore, the Court stated that the other cases did not fall into ‘any of the exceptions to the territorial principle so far recognised by the Court’.²⁶¹ One of the judges stated that:

In my judgment it is quite impossible to hold that the UK, although an occupying power for the purposes of the Hague Regulations and Geneva IV, was in effective control of Basrah City for the purposes of ECHR jurisprudence at the material time. If it had been, it would have been obliged, pursuant to the *Bankovic* judgment, to secure to everyone in Basrah City the rights and freedoms guaranteed by the ECHR. One only has to state that proposition to see how utterly unreal it is.²⁶²

The European Court, however, ultimately found a violation in *Al-Skeini v. UK*.²⁶³ It stated that, ‘in certain circumstances, the use of force by a State’s agents operating outside its territory may bring the individual thereby brought under the control of the State’s authorities into the State’s Article 1 jurisdiction’²⁶⁴ and, distinguishing itself from *Bankovic*, stated that: ‘In this sense, therefore, the Convention rights can be “divided and tailored”.’²⁶⁵ In his concurring opinion Judge Bonello stated that the Court’s case-law on the issue ‘has, so far, been bedevilled by an inability or an unwillingness to establish a coherent and axiomatic

²⁶⁰ *Ibid.*, para 87.

²⁶¹ See Joanne Williams, ‘Al Skeini: a flawed interpretation of Bankovic’, *Wisconsin International Law Journal*, Vol. 23, No. 4, 2005, pp.628-729; Markus Mayr, ‘Extraterritorial Application of the European Convention on Human Rights and the Access to the Court for Victims of Human Rights Violations of ESDP Missions’, *BSIS Journal of International Studies*, Vol. 7, 2010, pp.1-28.

²⁶² *Al-Skeini & Ors, R (on the application of) v Secretary of State for Defence* [2005] EWCA Civ 1609 (21 December 2005), para 120.

²⁶³ *Al-Skeini and Others v. UK*, Appl. No. 55721/07, Judgment (Grand Chamber) 7 July 2011.

²⁶⁴ *Ibid.*, para 136.

²⁶⁵ *Ibid.*, para 137. In *Serdar Mohammed v. Secretary of State for Defence*, Case No: HQ12X03367, [2014] EWHC 1369 (QB), 2 May 2014, para 136, Judge Leggatt subsequently noted: ‘A disappointing feature of the judgment of the European Court in the Al-Skeini case is its lack of transparency in dealing with its previous decision in the Bankovic case. Nowhere did the Court confront or expressly acknowledge the fact that it was departing from its previous approach or explain why it was doing so. The Bankovic case is not even mentioned except for citations to it in some footnotes.’

regime, grounded in essential basics and even-handedly applicable across the widest spectrum of jurisdictional controversies'.²⁶⁶ He argued for a clear universal 'functional test' of whether a State had jurisdiction which would involve both negative and positive obligations to respect and ensure human rights and stated that: 'If the perpetrators of an alleged human rights violation are within the authority and control of one of the Contracting Parties . . . their actions by virtue of that State's authority, engage the jurisdiction of the Contracting Party.'²⁶⁷

As Borelli has noted after 'years of ebbs and flows', the most recent jurisprudence of the Court makes clear that 'the Convention will indeed apply to the actions of a States' armed forces in situations of extraterritorial military action either where a State exercises effective control over a particular area, or where State agents in fact exercise control over an individual.'²⁶⁸ The question is not '*whether* the ECHR applies to extraterritorial military action', but '*how* it should apply'.²⁶⁹

From the above discussion, it can be seen that international human rights law can, in principle, be applied extraterritorially and concurrently with IHL. Chapter Five will discuss the particular problems of holding UN peacekeeping missions to account for their human rights records. The remainder of this chapter will briefly discuss the relevant provisions of refugee law, particularly in relation to people who are internally displaced within their own countries.

²⁶⁶ *Al-Skeini and Others v. UK*, Appl. No. 55721/07, Judgment (Grand Chamber) 7 July 2011. Concurring opinion of Judge Bonello.

²⁶⁷ *Ibid.*, paras 9-14. See also *Smith and others (Appellants) v. The Ministry of Defence (Respondent); Ellis (Respondent) v. The Ministry of Defence (Appellant); and Allbutt and others (Respondents) v. The Ministry of Defence (Appellant)*, Judgment, United Kingdom Supreme Court, 19 June 2013. In this case the Court accepted that the soldiers were within the jurisdiction of the UK for the purpose of Article 1 of the ECHR, but stated that the 'positive obligations' of Article 2 need to be established on a case-by-case basis.

²⁶⁸ Silvia Borelli, 'Jaloud v Netherlands and Hassan v United Kingdom: Time for a principled approach in the application of the ECHR to military action abroad', *Questions of International Law, QIL-QDI, Zoom-in*, 12 May 2015, p.26.

²⁶⁹ *Ibid.* [emphasis in original]

Refugee law, human rights and internal displacement

The first UN Security Council resolution on POC urged the UN to ensure that its personnel received appropriate training in refugee law as well international human rights law and IHL²⁷⁰ and the relevance of this body of law is also sometimes specifically mentioned in Security Council resolutions and UN reports on POC.²⁷¹ Missions with POC mandates are often also mandated to provide specific protection to refugees and IDPs and to help create conditions ‘conducive to their return’.²⁷²

Refugee law applies to people who are no longer receiving the most basic forms of protection from their own State and provides the foundational basis for the mandate of UNHCR; which was established by the UN General Assembly as a subsidiary organ under Article 22 of the UN Charter.²⁷³ UNHCR’s role in the coordination, supervision and progressive development of refugee law is stipulated in its own Statute²⁷⁴ as well as the Convention²⁷⁵ and Protocol.²⁷⁶ Although it provides regular guidance on interpretation of this law and States – particularly in the ‘global south’ – commonly associate it with their refugee decision-making, it does not

²⁷⁰ UN Security Council Resolution 1265 of 17 September 1999, para 14.

²⁷¹ See, for example, UN Security Council Resolution 2098, of 28 March 2013, para 15 (a). See also: Human rights due diligence policy on United Nations support to non-United Nations security forces UN Doc. A/67/775–S/2013/110, 5 March 2013, which repeatedly refers to refugee law as well as international human rights and humanitarian law; and *Detention in United Nations Peace Operations Interim Standard Operating Procedures*, 25 January 2011, which also refers to refugee law.

²⁷² *Report of the Secretary-General to the Security Council on the Protection of Civilians in Armed Conflict*, 29 May 2009, S/2009/277, ‘para 17. This notes that: ‘The Security Council has also promoted durable solutions for refugees and displaced persons that are safe, voluntary and dignified. Peacekeeping missions have been mandated to support the return of refugees and displaced persons, notably through the creation of secure environments and restoration of the rule of law.’

²⁷³ A detailed discussion of the provisions of refugee law is beyond the scope of this thesis and is also considered superfluous for the reasons outlined in this section. For a general overview see: James Hathaway, *The Rights of Refugees under International Law*, Cambridge: Cambridge University Press, 2014; and Guy Goodwin Gill, *The Refugee in International Law, Second Edition*, Oxford: Oxford University Press, 2007.

²⁷⁴ UNHCR Statute para 8.

²⁷⁵ Convention relating to the Status of Refugees, Adopted on 28 July 1951 by the United Nations Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons convened under General Assembly resolution 429 (V) of 14 December 1950, Article 35.

²⁷⁶ 1967 Protocol Convention relating to the Status of Refugees, Entry into force: 4 October 1967, Text: 606 UNTS 267. Article II.

possess the type of treaty oversight functions of human rights monitoring bodies.²⁷⁷ It does, however, have an extensive field presence and has played an extremely important role in defining the humanitarian concept of ‘protection’ in the field.

The basic rights to which refugees are entitled are set out in the Convention Relating to the Status of Refugees of 1951, and the 1967 Protocol. Refugee status determination is a ‘declaratory not a constitutive process’,²⁷⁸ because it was the circumstances that deprived the individual of her or his own State’s protection rather than a decision made in the State to which the person fled that made that person a refugee. However, the 1951 Convention accords rights at different stages of the process and some are only open to ‘refugees lawfully staying in’ the receiving country – such as travel documents.²⁷⁹ One of the most fundamental rights is the guarantee of *non-refoulement*,²⁸⁰ which provides protection to people fleeing persecution and seeking asylum even if their status has not yet been definitively determined, and is often held to have *jus cogens* status.²⁸¹ Protection against *refoulement* is also contained in international human rights law through both explicit treaty provisions²⁸² and the decisions

²⁷⁷ Guy Goodwin Gill, ‘Convention relating to the Status of Refugees Geneva, 28 July 1951, Protocol Relating to the Status of Refugees New York, 31 January 1967’, *United Nations Library of International Law*, <http://untreaty.un.org/cod/avl/ha/prsr/prsr.html>, accessed 3 December 2012. See also See also Walter Kälin, in Feller, Türk and Nicholson, *Refugee Protection in International Law*, Cambridge: Cambridge University Press, 2003

²⁷⁸ Hathaway, 2005, p.184.

²⁷⁹ 1951 Refugee Convention. These include: administrative assistance (Article 25), identity papers and travel documents (Articles 27 and 28), permission to transfer assets (Article 30) and the facilitation of naturalisation (Article 34), as well as legal recognition of the personal status of a refugee (Article 12), exemption from penalties in respect of illegal entry or presence (Article 31), limitations on the liability to expulsion (Article 32) and the prohibition on forced return (*non-refoulement*).

²⁸⁰ *Ibid.*, Article 33: ‘No Contracting State shall expel or return (‘refouler’) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.’ This is understood to include non-rejection at the frontier, if rejection would result in an individual being forcibly returned to a country of persecution.

²⁸¹ Jean Allain, ‘The jus cogens nature of non-refoulement,’ *International Journal of Refugee Law*, Oxford Journals, Vol. 13, Issue 4, pp. 533-558. See also *The Principle of Non-Refoulement as a Norm of Customary International Law. Response to the Questions Posed to UNHCR by the Federal Constitutional Court of the Federal Republic of Germany in Cases 2 BvR 1938/93, 2 BvR 1953/93, 2 BvR 1954/93*, 31 January 1994, available at <http://www.refworld.org/cgi-bin/txis/vtx/rwmain?docid=437b6db64>, accessed 30 April 2013.

²⁸² The UN Convention against Torture, Article 3; the UN International Convention to Protect all Persons from Enforced Disappearances, Article 16; the Inter-American Convention to Prevent and Punish Torture, Article 13(4).

of international courts and monitoring bodies.²⁸³ These have also helped to define the notion of ‘persecution’, which is central to the determination of refugee status, and the procedural rights for people deprived of their liberty or facing deportation under immigration laws.²⁸⁴

The Refugee Convention provides that States ‘shall not impose penalties, on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life or freedom was threatened . . . provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence’.²⁸⁵ It shall also not restrictions to their freedom of movement ‘other than those which are necessary . . . until their status in the country is regularized.’²⁸⁶ Refugee law does, however, explicitly recognises the right of States to detain asylum-seekers on ‘national security’ grounds.²⁸⁷ UNHCR has issued detailed guidance on the rights of asylum seekers in detention.²⁸⁸ Such detentions would also be subject to the safeguards contained in international human rights law described earlier in this chapter. Indeed Chetail argues that the

²⁸³ ECtHR: *Soering v UK*, Appl. No. 14038/88, Judgment 7 July 1989; *Cruz Varas v. Sweden*, Appl. No. 15576/89, Judgment 20 March 1991; *Vilvarajah and Others v UK*, Appl. Nos. 13163/87; 13164/87; 13165/87; 13447/87; 13448/87, Judgment 30 October 1991; *H.L.R. v France*, Appl. No. 24573/94, Judgment 29 April 1997; *D. v UK*, Appl. No. 30240/96, Judgment 2 May 1997; *Jabari v UK*, 2000, Appl. No. 40035/98, Judgment 11 November; *Ahmed v. Austria*, Appl. No. 25964/94, Judgment 27 November 1996. See also HRC: General Comment 20, para 9; Inter-Am Com HR: *Haitian Centre for Human Rights et al v. United States*, 1997, Case 10675, Report No. 51/96 OEA/Ser.L/V/II.95 Doc 7 rev. para 27; African Commission on Human and People’s Rights *John K Modise v. Botswana* (2000) Comm. 97/93 para 91.

²⁸⁴ For a more detailed discussion see Vincent Chetail, ‘Are refugee rights human rights? An unorthodox question on the relationship between refugee law and human rights law’ in R. Rubio-Marin (Ed), *Human Rights and Immigration, Collected Courses of the Academy of European Law*, Oxford: Oxford University Press, 2014, pp.19-72

²⁸⁵ 1951 Refugee Convention, Articles 31 and 8.

²⁸⁶ *Ibid.*

²⁸⁷ The 1951 Refugee Convention states in Article 9. ‘Nothing in this Convention shall prevent a Contracting State, in time of war or other grave and exceptional circumstances, from taking provisionally measures which it considers to be essential to the national security in the case of a particular person, pending a determination by the Contracting State that that person is in fact a refugee and that the continuance of such measures is necessary in his case in the interests of national security.’

²⁸⁸ See, for example, *Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention*, UNHCR October 2012

increasing complementarity between the two bodies of law is such that ‘human rights law has become the primary source of refugee protection.’²⁸⁹

Many people who have been forced to leave their homes due to fear and violence do not fit within the statutory definition of a refugee contained in the 1951 Convention.²⁹⁰ The UN has, therefore, often authorized UNHCR to extend assistance and international protection to other persons who can be determined or presumed to be without, or unable to avail themselves of, the protection of the government of their State of origin.²⁹¹ The protracted nature of many conflicts 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 also become an increasingly important part of UNHCR’s work.²⁹² This has led it to conduct an increasing amount of programmatic activity inside refugee producing countries.²⁹³

²⁸⁹ Chetail, 2014, p.69. This comment is, however, mainly made in relation to the protections provided by the legal systems in the ‘global north’ where international human rights law is increasingly integrated into domestic law. Countries in the ‘global south’, which continue to host the vast majority of the world’s refugees are still more likely to apply refugee law directly.

²⁹⁰ The 1951 Refugee Convention states in Article 1.A.2 that a refugee is someone who ‘owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality, and is unable to, or owing to such fear, is unwilling to avail himself of the protection of that country.’ However, other broader definitions also exist, which can be drawn from a variety of international legal instruments and case-law. See for example, the 1969 Organization for African Unity Convention for Africa; the 1984 Cartagena Declaration for the Americas and the Association of Southeast Asian Nations 2001 Bangkok Principles. See also USA for UNHCR (a 501(c) (3) non-profit organization set up to support the agency) http://www.unrefugees.org/site/c.lfIQKSOWFqG/b.4950731/k.A894/What_is_a_refugee.htm, accessed 6 December 2012.

²⁹¹ See *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and 1967 Protocol Relating to the Status of Refugees*, Geneva: UNHCR, 1996. This includes ‘persons of concern’ to UNHCR, which refers to individuals or groups considered to fall within the competence of UNHCR according to international refugee law, namely international or regional refugee instruments, UNHCR’s Statute and subsequent General Assembly resolutions, as well as specific authorizations by the Secretary General. It also includes *prima facie* refugees who are determined to be refugees by group rather than individual status determination, usually in cases of large-scale refugee influx.

²⁹² UNHCR *Handbook on Voluntary Repatriation: International protection*, United Nations High Commissioner for Refugees, Geneva, 1996, p. 1. ‘Voluntary repatriation is usually viewed as the most desirable long-term solution by the refugees themselves as well as by the international community’. However, repatriation must be voluntary and in conditions of safety and dignity, which is often impossible during protracted crises. As States in the ‘global north’ become ever more reluctant to offer resettlement, this only leaves local integrations as ‘durable solution.’

²⁹³ For discussion see Betts, Loescher and Milner, 2012, pp. 134-7.

Many complex emergencies are also marked by large-scale internal displacement and the conditions facing refugees and IDPs are often very similar.²⁹⁴ The number of IDPs has also grown considerably in recent decades and they now considerably outnumber refugees,²⁹⁵ but there is no dedicated UN agency to support them.²⁹⁶ In 1998 the UN Secretary General's Representative on IDPs published a set of principles designed to provide a 'doctrine of protection specifically tailored to the needs of the internally displaced,'²⁹⁷ The Guiding Principles on Internal Displacement have not been endorsed either by the UN General Assembly or Security Council, although their publication was 'welcomed' by UNHCR and the UN General Assembly.²⁹⁸ Some countries have, however, incorporated them into their

²⁹⁴ *Internally Displaced Persons*, UNHCR website, <http://www.unhcr.org/pages/49c3646c146.html>, accessed 5 December 2012.

²⁹⁵ *Ibid.* See also *Global IDP Estimates 1990 – 2011*, The Internal Displacement Monitoring Centre. [http://www.internal-displacement.org/8025708F004CE90B/\(httpPages\)/10C43F54DA2C34A7C12573A1004EF9FF?OpenDocument&count=1000](http://www.internal-displacement.org/8025708F004CE90B/(httpPages)/10C43F54DA2C34A7C12573A1004EF9FF?OpenDocument&count=1000) accessed 5 December 2012. This estimates that there were 26.4 million IDPs in 2011.

²⁹⁶ For an overview see: *UNHCR's Role in Support of an Enhanced Humanitarian Response to Situations of Internal Displacement. Policy Framework and Implementation Strategy*, UNHCR, 4 June 2007; UNHCR, *Internally Displaced Persons: The Role of the High Commissioner for Refugees*, 20 June 2000; UNHCR, *Protection Aspects of UNHCR Activities on behalf of Internally Displaced Persons*, 4 May 1994; UN General Assembly Resolution 47/105, 16 December 1992, para 14; UN General Assembly Resolution 48/116, 20 December 1993, para 12; and UNGA Resolution 49/169, 23 December 1994. See also Simon Bagshaw and Diane Paul, *Protect or Neglect? Toward a More Effective United Nations Approach to the Protection of Internally Displaced Persons*, Washington, DC: The Brookings-SAIS Project on Internal Displacement and the UN Office for the Coordination of Humanitarian Affairs, November 2004; and Alexander Betts, Gil Loescher and James Milner, *UNHCR: the politics and practice of refugee protection, second edition*, Oxon and New York: Routledge, 2012, pp.133-7.

²⁹⁷ *Report of the Representative of the Secretary-General, Mr. Francis M. Deng, submitted pursuant to Commission on Human Rights resolution 1997/39, Compilation and Analysis of Legal Norms, Part II: Legal Aspects Relating to the Protection against Arbitrary Displacement*, UN Doc. E/CN.4/1998/53/Add. 1, of 11 February 1998. IDPs are described as 'persons who have been forced to flee their homes suddenly or unexpectedly in large numbers, as a result of armed conflict, internal strife, systematic violations of human rights or natural or man-made disasters; and who are within the territory of their own country'.

²⁹⁸ UNHCR, *Internally Displaced Persons: The Role of the High Commissioner for Refugees*, UN Doc. E/50/SC/INF.2, 20 June 2000. This describes them as 'a useful set of standards against which to measure the protection objectives and promote dialogue with state and non-state actors of violence'. See also UN General Assembly Resolution, 62/153, 'Protection of and assistance to internally displaced persons', 6 March 2008, para 10, which welcomed 'the fact that an increasing number of States, United Nations agencies and regional and non-governmental organizations are applying them as a standard' and encouraged 'all relevant actors' to make use of them when dealing with situations of internal displacement, and UN General Assembly Resolution 60/1, 2005 World Summit Outcome, 24 October 2005, para 132, which described them as an 'important international framework for the protection of internally displaced persons'.

domestic laws, and the ‘Kampala Convention on IDPs, adopted by the African Union in 2009 also draws heavily on them.²⁹⁹

While there are good arguments to be made for providing IDPs with the support of a dedicated UN agency, it is difficult to see what additional ‘protection’ can be provided by applying analogous provisions of refugee law to people who have not left their country of origin.³⁰⁰ For example, the detention of asylum-seekers, under immigration laws, is routine,³⁰¹ and so drawing a legal parallel with IDPs in this context is unhelpful.³⁰² It is also questionable whether the emphasis in refugee law on voluntary return as the preferred durable solution is appropriate for IDPs given the global trend towards urbanization, which is often exacerbated by conflicts.³⁰³ Conversely, the assertion in the Guiding Principles that the

²⁹⁹ African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa, Kampala Convention). Adopted by the Special Summit of the Union held in Kampala on 22 October 2009. The Organization for Security and Cooperation in Europe (OSCE) has also recognized that the principles as ‘a useful framework for the work of the OSCE’ and the Parliamentary Assembly of the Council of Europe as well as its Council of Ministers urged its member states to incorporate the principles into their domestic laws.

³⁰⁰ For a detailed discussion of the legal basis of the principles see Walter Kälin, *Guiding Principles on Internal Displacement Annotations*, The American Society of International Law and The Brookings Institution – University of Bern, Project on Internal Displacement Studies in Transnational Legal Policy No. 38, Washington, DC, 2008 for the legal sources of the principles. For an overview of the arguments for and against creating a new legal instrument specifically for IDPs see: Catherine Phuong, *The International Protection of Internally Displaced Persons*, Cambridge: Cambridge University Press, 2004, pp.39-75; Paul Schmidt, ‘The Process and Prospects for the U.N. Guiding Principles on Internal Displacement to Become Customary International Law: A Preliminary Assessment’, *Georgetown Journal of International Law*, Vol. 35, No. 3, Spring 2004, pp.483-520; Roberta Cohen and Francis M. Deng, *Masses in flight: the global crisis of internal displacement*, Washington DC: the Brookings Institute, pp.128-9.

³⁰¹ UN High Commissioner for Refugees (UNHCR), *Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention*, 2012, available at: <http://www.refworld.org/docid/503489533b8.html> accessed 6 November 2014.

³⁰² Principle 12 (2) of the Guiding Principles states that: ‘If in exceptional circumstances such internment or confinement is absolutely necessary, it shall not last longer than required by the circumstances.’

³⁰³ For further discussion see Scott Leckie, *Handbook on Housing and Property Restitution for Refugees and Displaced Persons Implementing the ‘Pinheiro Principles*, Geneva: UN Food and Agricultural Organisation, Norwegian Refugee Council, UN-Habitat, UNHCR, OHCHR, OCHA, March 2007. The promotion of return to areas of origin became widespread after the Balkans wars in an attempt to ‘reverse the effects of ethnic cleansing’ and, although this was far less successful than its proponents claimed at the time, the model has since been used in other post-conflict settings. In some cases the provision of assistance has been made conditional on IDPs returning to their original home areas or is arbitrarily withheld from some people on the grounds that they ‘economic migrants’ rather than ‘genuine IDPs’. For differing views on this issues see Scott Leckie (ed), *Returning home: housing and property restitution rights of refugees and displaced persons*, Ardsley: Transnational Publishers, 2003; Sofie Aursnes Ingunn and Conor Foley, *Property restitution in practice: The Norwegian Refugee Council’s experiences*, Oslo: Norwegian Refugee Council, April 2005; and Sara

issuance of travel and identity documents, which is provided for by refugee law and IHL,³⁰⁴ is necessary to ‘give effect’ to the *non-derogable* ‘right to recognition as a person before the law’³⁰⁵ rather overstates their actual legal significance.³⁰⁶

There are many places where refugees have fled from one country to another that is itself experiencing a ‘complex emergency’ and where the provisions relating to detention and *non-refoulement* will be of obvious relevance. As will be discussed in Chapter Seven, protection against *refoulement* is part of the legal basis for why UN missions have not expelled civilians who have sought sanctuary on their bases. IDPs, however, do not constitute a separate legal category and, although many do have specific needs and vulnerabilities, the provisions that are likely to be of most relevance to the protection of their rights are contained in international human rights law or IHL. In 2004, when the Secretary General appointed a new representative on IDPs, the words human rights were inserted into the mandate title and, in 2010, the post became a Special Rapporteur on the Human Rights of Internally Displaced Persons, appointed by the Human Rights Council and serviced by OHCHR.³⁰⁷

Conclusion

Pantuliano, (ed), *Uncharted Territory: land, conflict and humanitarian action*, Warwickshire: Practical Action Publishing, 2009.

³⁰⁴ The 1951 Refugee Convention contains a number of articles relating to the right of refugees to receive administrative assistance (Article 25), identity papers and travel documents (Articles 27 and 28), permission to transfer assets (Article 30) and the facilitation of naturalisation (Article 34), as well as legal recognition of the personal status of a refugee (Article 12). Geneva Convention IV, Article 50 provides that: ‘Every person is entitled to registration and a name immediately at birth, especially in situations of occupation’, while Article 97(6) specifies that: ‘States are specifically obliged to ensure that vulnerable groups such as refugees and interned civilians in occupied territories are provided with basic documentation.’

³⁰⁵ IDP Guiding Principles, Principle 20.

³⁰⁶ UDHR, Article 6; CCPR, Article 16; ACHR Article 3 and African Charter, Article 5. For further discussion see Kälin, 2008, pp.93-5; and Conor Foley and Barbara McCallin, ‘The Recovery of Personal Documentation’, in Walter Kälin, Rhodri C. Williams, Khalid Koser and Andrew Solomon, *Incorporating the Guiding Principles on Internal Displacement into Domestic Law: Issues and Challenges*, The Brookings Institution – University of Bern, Project on Internal Displacement Studies in Transnational Legal Policy, No. 38, Washington, DC, 2010, pp.337-362.

³⁰⁷ For details see: OHCHR Home Page, ‘Introduction to the mandate of the Special Rapporteur on the Human Rights of Internally Displaced Persons (IDPs), Dr. Chaloka Beyani’, <http://www.ohchr.org/EN/Issues/IDPersons/Pages/Mandate.aspx>, accessed 23 April 2015.

This chapter set out the three main bodies of international law which, along with UN Charter law, may be most relevant to UN peacekeeping missions with POC mandates. It also discussed the debates about the extra-territorial applicability of international human rights law and its concurrent applicability with IHL. It briefly, finally, considered the relevant provisions of refugee law, particularly in relation to IDPs.

It was argued that international human rights law has provisions related to the use of force and detention powers that are relevant and potentially applicable to UN missions with POC mandates and could provide more appropriate guidance than both IHL and refugee law on many occasions. It was shown that international human rights law can apply extraterritorially and may be concurrently applicable with IHL in situations in which UN peacekeeping missions are present. While the two bodies of law have many points in common, international human rights law contains some elements that IHL does not provide. It is also overseen by monitoring bodies that have elaborated its provisions in more detail and may sometimes provide redress to those whose rights have been violated. The next chapter will now discuss the relationship between international human rights law and UN Charter law.

Chapter Five:

Who guards the guards: the UN's legal authority and obligations to protect civilians

Introduction

This thesis argues that the positive and negative obligations of international human rights law will usually provide the most appropriate legal framework and guidance within which UN peacekeeping missions should act when implementing Chapter VII POC mandates. As was discussed in the previous chapter, international human rights law can be applied extraterritorially and concurrently with IHL. It contains a 'positive obligation' to protect the rights to life and physical integrity and detailed guidance and safeguards governing the use of lethal force and arrest and detention powers. It also provides a 'right of redress' to people who have suffered violations.

The UN Charter, however, specifies that its provisions take precedence over all other international treaties. There is no mechanism to judicially review the Security Council's actions and the legal immunities that cover UN missions, makes it extremely difficult to scrutinise their records for compliance with international human rights law. Individual States may, in certain circumstances, be challenged for their own actions implementing Security Council resolutions. This has led to controversy over whether these acts should be attributable to the implementing State or the UN. This chapter provides an overview of the increasing number of problems caused by the UN's lack of accountability, the crises of legitimacy that have resulted and some of the *ad hoc* measures with which it has responded. Part III of this thesis will discuss some of the more specific issues arising in relation to POC in four contemporary UN peacekeeping missions.

The powers, principles and purposes of the UN Security Council

The primary purpose of the UN is to ‘maintain international peace and security’.¹ Its other purposes include: developing friendly relations amongst nations based on respect for the principle of equal rights and self-determination of peoples, and promoting economic, social, cultural and humanitarian cooperation, and respect for human rights.²

The Security Council has the ‘primary responsibility for the maintenance of international peace and security’ and ‘in order to ensure prompt and effective action’ the members of the UN ‘agree that in carrying out its duties under this responsibility’ it ‘acts on their behalf.’³ Under Article 25 of the UN Charter all members of the UN ‘agree to accept and carry out the decisions of the Security Council in accordance with the present Charter’⁴ while Article 103 specifies that: ‘In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail.’⁵

Article 105 also specifies that the UN and its representatives ‘shall enjoy in the territory of each of its Members such privileges and immunities as are necessary for the fulfilment of

¹ UN Charter Article 1 (1).

² UN Charter Article 1(2).

³ UN Charter Article 24.

⁴ UN Charter, Article 25. The ICJ noted in its Advisory Opinion on *Legal consequences for States of the Continued Presence of South Africa in Namibia notwithstanding Security Council Resolution 276 (1970)*. Advisory Opinion, ICJ Rep. 1971, para 114, that some Security Council resolutions ‘are couched in exhortatory rather than mandatory language and that, therefore, they do not purport to impose any legal duty on any State nor to affect legally any right of any State. The language of a resolution of the Security Council should be carefully analysed before a conclusion can be made as to its binding effect . . . having regard to the terms of the resolution to be interpreted, the discussions leading to it, the Charter provisions invoked and, in general, all circumstances that might assist in determining the legal consequences of the resolution of the Security Council.’

⁵ UN Charter, Article 103. The Vienna Convention on the Law of Treaties recognises the absolute priority of Article 103 over other treaty obligations. Vienna Convention on the Law of Treaties, Article 30. See also *Golder v. UK*, Appl. No. 4451/70, Judgment of 21 February 1975, para 29 in which the court said that ‘it should be guided by Articles 31 to 33 of the Vienna Convention of 23 May 1969 on the Law of Treaties.’

its purposes'.⁶ It provided for the drafting of the Convention on Privileges and Immunities of the United Nations of 1946, which gives legal immunity to UN officials,⁷ representatives of member States while participating in its activities⁸ and experts on mission to the UN in respect of words spoken or written and all acts performed by them in their official capacity.⁹ This also protects the UN's 'property and assets wherever located and by whomsoever held . . . from every form of legal process except insofar as in any particular case it has expressly waived its immunity.'¹⁰

Under Chapter VII the Security Council may 'determine the existence of any threat to the peace, breach of the peace, or act of aggression' and 'make recommendations, or decide what measures shall be taken' in response.¹¹ If these measures prove insufficient the Security Council 'may take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security.'¹² Chapter VII contains no references to human rights, IHL or the protection of civilians and nor were these issues initially considered

⁶ UN Charter, Article 105.

⁷ Convention on Privileges and Immunities of the United Nations 1946, Adopted by the General Assembly of the United Nations on 13 February 1946, United Nations — Treaty Series 1946-1947, Article V, Section 17 – 21.

⁸ Ibid., Article IV, Section 11 – 16.

⁹ Ibid., Article V, Sections 20, 22 and 23. These privileges and immunities 'are granted to officials in the interests of the United Nations and not for the personal benefit of the individuals themselves' and the UN Secretary General 'shall have the right and the duty to waive the immunity of any official in any case where, in his opinion, the immunity would impede the course of justice'. The Secretary General's own immunity can be waived by the Security Council. See also Article VII, Section 29. The United Nations shall make provisions for appropriate modes of settlement of: (a) Disputes arising out of contracts or other disputes of a private law character to which the United Nations is a party; (b) Disputes involving any official of the United Nations who by reason of his official position enjoys immunity, if immunity has not been waived by the Secretary General'. Disputes may also be referred to the ICJ, under Section 30.

¹⁰ Ibid., Article II, Section 2 and 3. For further discussion see, August Reinich, 'Convention on Privileges and Immunities of the United Nations, New York, 13 February 1946, Convention on Privileges and Immunities of the Specialized Agencies, New York, 21 November 1947, *United Nations Library of International Law*, ' <http://untreaty.un.org/cod/avl/ha/cpiun-cpisa/cpiun-cpisa.html>, accessed 7 March 2013; Ola Engdahl, *Protection of Personnel in Peace Operations: The Role of the 'Safety Convention' against the background of general international law*, Hague: Martinus Nijhoff Publishers, 2007; and Dieter Fleck 'The legal status of personnel involved in United Nations peace operations', *International Review of the Red Cross*, Vol. 95 No. 891/892 Autumn/Winter 2013, pp.613-36.

¹¹ UN Charter, Articles 39, 40 and 41.

¹² UN Charter, Article 42.

concerns of the Security Council.¹³ Schotten and Biehler have observed that for the first twenty-two years of its existence, the Security Council did not pass a single resolution on humanitarian or human rights aspects of armed conflict.¹⁴ This state-centred concept has changed considerably in recent decades and, as is discussed throughout this thesis, the Security Council now frequently uses its Chapter VII powers for ‘protection’ purposes.

The UN Charter is often compared to a constitution as it sets out the legal powers, roles and inter-relationships of its constituent components, and provides the legal framework that governs their activities.¹⁵ It can also be seen as a ‘living’ document, which allows for ‘constitutional development’ and the UN and its various organs have reinterpreted their own competencies in ways that, at times, have plainly departed from the original text.¹⁶ The

¹³ The Security Council is also the only organ of the UN which has no explicit authority to deal with human rights. For discussion see Gregor Schotten and Anke Biehler, ‘The Role of the UN Security Council in Implementing International Humanitarian Law and Human Rights Law’, in Roberta Arnold & Noelle Quéniévet (eds) *International Humanitarian Law and Human Rights Law*, Leiden and Boston: Martinus Nijhof, 2008, p.310.

¹⁴ Ibid. See also UN Security Council Resolution 237 of 14 June 1967, in which the Security Council called upon Israel and the Arab States to respect humanitarian principles ‘governing the treatment of prisoners of war and the protection of civilian persons in time of war contained in the Geneva Conventions’ during the Six Day war. This was followed by Security Council Resolution 307 of 21 December 1971 in which the Security Council called upon the parties to the conflict in Pakistan to respect the Geneva Conventions; Resolution 436 of 6 October 1978 in which the Security Council called upon all parties to the civil war in Lebanon to allow units of the ICRC into the area of conflict to evacuate the wounded and provide assistance; Resolution 446 of 22 March 1979 in which the Security Council directly called upon Israel to rescind its settlement policies in the West Bank and accept its responsibilities as an occupying power under the Fourth Geneva Convention; Resolution 540 of 31 October 1983 condemning violations of the Geneva Conventions in the Iran-Iraq war; Resolution 582 of 24 February 1986, in which Iran and Iraq were condemned for the use of chemical weapons; and Resolution 598 of 20 July 1987, in which the Security Council called on both countries to respect the Geneva Conventions.

¹⁵ For an overview of this discussion see Blaine Sloan, ‘The United Nations Charter as a Constitution’, *Pace International Law Review*, Vol. 1 Article 3, September 1989, pp.61-126. See also: Alexander Orakhelashvili, ‘The Legal basis of the United Nations Peacekeeping Operations’, *Virginia Journal of International Law*, Vol. 43, Winter 2003, pp.486-523; Hilaire McCoubrey, and Nigel White, *The Blue Helmets: Legal Regulation of United Nations Military Operations*, Dartmouth: Dartmouth Pub Co, 1996; Christopher Joyner (ed), *The United Nations and International Law*, Cambridge: Cambridge University Press, 1997; Bruno Simma, *The Charter of the United Nations A Commentary Second Edition*, Oxford: Oxford University Press, 2002; Rosalind Higgins, *United Nations Peacekeeping 1946-1967: Documents and Commentary, Vol. III: Africa*, Oxford: Oxford University Press, 1980.

¹⁶ Ibid. See also Scott Sheeran A Constitutional Moment?: United Nations Peacekeeping in the Democratic Republic of Congo, *International Organisations Law Review*, Vol. 8 Issue 1, 2011, pp.122 and 129. Sheeran cites, as examples, the Uniting for Peace Resolution, the creation of UN peacekeeping operations, the Secretary General’s good offices function, the expansion of the concept of peace and security, the changing status of abstentions by members of the P5 and the establishment of the war crimes tribunals.

Charter does not, however, incorporate the ‘checks and balances’ that are often associated with constitutional theory, and nor does it provide for a clear separation of powers within the UN.¹⁷

Legal realists note that the wording of the UN Charter is so ‘open textured’ and ‘discretionary’ as to make the powers of the Security Council practically unchallengeable.¹⁸ Alvarez has observed that the ‘supremacy’ of the Charter over national laws, combined with the fact that Council decisions are generally not subject to judicial review, means that there are ‘few obvious legal limits to the Security Council’s powers’.¹⁹ Malanczuk argues that ‘a threat to peace . . . seems to be whatever the Security Council says is a threat to peace’.²⁰ Wood states that ‘the terms of the Charter and the established practices of the Council are sufficiently flexible that it is difficult to conceive of circumstances arising in practice that could raise serious doubts about the legality of the Council’s actions.’²¹ Koskenniemi maintains that: ‘For better or for worse, what the Council says *is* the law.’²²

The ‘principled’, or ‘aspirational’, school retorts that the framers of the UN Charter did not intend the Security Council to ‘act as if it were the organ of world governance and thus override international law and state sovereignty wherever it sees fit.’²³ Milanovic points out

¹⁷ For further discussion see: Thomas Franck, ‘The Powers of Appreciation: Who is the ultimate guardian of the powers of UN legality?’ *American Journal of International Law*, Vol. 86, 1992, pp.519-23; Derek Bowett, ‘The Impact of Security Council Decisions on Dispute Settlement Procedures’, *European Journal of International Law* Vol. 5, 1994, pp.89-101.

¹⁸ For discussion see: Herbert Hart, Lionel Adolphus, *The Concept of Law*, Oxford: Clarendon Press, 1961, p.120; and S Lamb, ‘Legal limits to UN Security Council Powers’, in Guy Goodwin-Gill and Stefan Talmon (eds) *The Reality of International Law: essays in honour of Ian Brownlie*, Oxford: Oxford University Press, 1999, p.361.

¹⁹ Jose Alvarez, *International Organizations as Law-Makers*, Oxford: Oxford University Press, 2005, p.183.

²⁰ Peter Malanczuk, *Akehurst’s Modern Introduction to International Law*, 7th Edition, Routledge, 1997, pp.212 and 426.

²¹ Michael Wood, ‘The UN Security Council and International Law’. Second lecture: ‘The UN Security Council and International Law’, *Hersch Lauterpacht Memorial Lectures*, Lauterpacht Centre for International Law, University of Cambridge, 8 November 2006, para 6.

²² Martti Koskenniemi, ‘The Police in the Temple. Order, Justice and the UN: A Dialectical View’, *European Journal of International Law*, Vol. 6, 1995, p. 327.

²³ Alexander Orakhelashvili, ‘The Acts of the Security Council: Meaning and Standards of Review’, *Max Planck Yearbook of United Nations Law*, Vol. 11, 2007, pp.146. See also Erika de Wet, ‘The role of human rights in limiting the enforcement power of the Security Council: a principled view’, in Erika

that the Security Council 'is not a global sovereign', but 'an organ of an international organization and its powers are necessarily limited by that organization's constitutive instrument, the Charter'.²⁴ De Wet argues that there are circumstances where States have a unilateral right to refuse to implement Security Council decisions.²⁵ Orakhelashvili maintains that since an 'organ cannot be the final judge of the legality of its own acts', the 'residual power to determine the legality of the Council's decisions rests with individual states.'²⁶ Shaw notes that there is an 'ambiguous and indeterminate area' surrounding the potential legality of some decisions:

While there is no doubt that under the Charter system the Council's discretion to determine the existence of threats to or breaches of international peace and security is virtually absolute . . . and its discretion to impose measures consequent upon that determination . . . is undoubtedly extensive, the determination of the legality or illegality of particular situations is essentially the Council's view as to the matching of particular facts with rules of international law. That view, when adopted under Chapter VII, will bind member states, but where it is clearly wrong in law and remains unrectified by the Council subsequently, a challenge to the system is indubitably posed.²⁷

de Wet and André Nollkaemper (eds), *Review of the Security Council by Member States*, Antwerp: Intersentia, 2003; and Erika de Wet, *The Chapter VII powers of the United Nations Security Council*, Portland, Oregon: Hart Publishing, 2004, pp.134-8.

²⁴ Marko Milanovic, 'Norm Conflict in International Law: whither human rights?', *Duke Journal of Comparative & International Law*, Vol. 20, 2009, p.94. Milanovic states that: A decision by the Council which is *ultra vires* or contrary to the Charter would, therefore, have 'no binding force.'

²⁵ De Wet, 2004, pp.375-86.

²⁶ Alexander Orakhelashvili, 'The Impact of Peremptory Norms on the Interpretation and Application of United Nations Security Council Resolutions', *European Journal of International Law*, Vol. 16 No.1, 2005, pp.59-88.

²⁷ Malcolm Shaw, *International Law, Sixth Edition*, Cambridge: Cambridge University Press, 2008, pp.1270-1. Shaw also notes that while the ICJ has 'examined and analysed UN resolutions in the course of deciding a case or rendering an Advisory Opinion, for it to declare invalid a binding Security Council resolution would equally challenge the system as it operates . . . Between the striking down of Chapter VII decisions and the acceptance of resolutions clearly embodying propositions contrary to international law, an ambiguous and indeterminate area lies.'

It has been argued that subjecting the Security Council's decisions to judicial review would 'bind it in a legal strait-jacket' and 'run counter the Council's purpose' to take prompt and effective action to preserve international peace and security.²⁸ The Security Council has, however, determined that such threats can include a very wide range of issues, such as humanitarian emergencies, the overthrow of democratically-elected leaders, extreme repression of civilian populations, cross border refugee flows, and measures to combat impunity and international terrorism.²⁹ Matheson notes that as the Security Council has expanded its areas of competence this inevitably raises issues of legal accountability.³⁰

It is widely accepted that the UN is subject to norms of *jus cogens* and by at least some parts of general international law.³¹ It is also common ground that the Security Council acts within a legal framework under a constituent instrument that defines its powers and functions and that it is, in particular, bound by its own purposes and principles.³² The UN obviously depends on its members to implement its decisions, so the Security Council is constrained by the need to retain political legitimacy.³³ Since individual States clearly do have obligations under international human rights law and IHL and since States cannot collectively avoid rules

²⁸ Wood, 8 November 2006, paras 5-6. See also Kathleen Renee Cronin-Furman, 'The International Court of Justice and the United Nations Security Council: rethinking a complicated relationship', *Columbia Law Review*, Vol. 106, 2006, pp. 435-53. Cronin-Furman argues that the ICJ should accord primacy in the consideration of international custom to the Security Council, on the specific issue of self-defence against non-state actors and that: 'Introducing possible uncertainty into the Security Council's pronouncements could hamper the Council's ability to effectively carry out its mission of maintaining international peace and security.'

²⁹ For further discussion see Michael Matheson, *Council Unbound: the growth of UN decision-making on conflict and post-conflict issues after the Cold War*, Washington: US Institute for Peace, 2006.

³⁰ *Ibid.*

³¹ For further discussion see Rosalind Higgins, *Problems and Processes: international law and how we use it*, Oxford: Oxford University Press, 1994, p.181; Felice Morgenstern, *Legal Problems of International Organizations*, Cambridge: Cambridge University Press, 1986, p.32; Alexander Orakhelashvili, *Collective Security*, Oxford: Oxford University Press, 2011, p.56; Alexander Orakhelashvili, 'The Acts of the Security Council: Meaning and Standards of Review', *Max Planck Yearbook of United Nations Law*, Vol. 11, 2007, pp.143-95; Sylvia Maus, 'Human rights in peacekeeping missions', Hans-Joachim Heintz and Andrej Zwitter, (eds) *International Law and Humanitarian Assistance*, Berlin: Springer, 2011, pp.103-28. See also more generally Andrew Clapham, *Human rights obligations of Non-State Actors*, Oxford: Oxford University Press, 2006; August Reinich, 'Securing the accountability of International Organisations', *Global Governance*, Vol., 7, No. 2, April-June 2001; and Matheson, 2006.

³² UN Charter Article 24.1 states that: 'In discharging these duties the Security Council shall act in accordance with the Purposes and Principles of the United Nations.'

³³ Wood, 8 November 2006, para 64.

which bind them individually³⁴ it seems inconceivable that the UN is completely unconstrained by similar obligations.³⁵

The ICJ has stated that international organizations ‘are subjects of international law and, as such, are bound by any obligations incumbent upon them under general rules of international law, under their constitutions or under international agreements to which they are parties.’³⁶

It has also noted that: ‘The political character of an organ cannot release it from the observance of the treaty provisions established by the Charter when they constitute limitations on its powers or criteria for its judgment. To ascertain whether an organ has freedom of choice for its decisions, reference must be made to the terms of its constitution.’³⁷

The ICTY has similarly observed that the Security Council is subject to ‘certain constitutional limitations’ and that its powers ‘cannot in any case go beyond the limits of the jurisdiction of the Organization at large, not to mention other specific limitations or those which derive from the internal division of power within the Organization.’³⁸ As Judge Jennings, of the ICJ, stated in the *Lockerbie* case, in 1998, ‘all discretionary powers of lawful

³⁴ In ECtHR *Waite and Kennedy v. Germany*, Appl. No. 26083/94, Judgment 18 February 1999, para 67, the Court stated that ‘where States establish international organisations in order to pursue or strengthen their cooperation in certain fields of activities, and where they attribute to these organisations certain competences and accord them immunities, there may be implications as to the protection of fundamental rights. It would be incompatible with the purpose and object of the Convention, however, if the Contracting States were thereby absolved from their responsibility under the Convention in relation to the field of activity covered by such attribution.’ In *Matthews v. UK* Appl. No. 24833/94 Judgment 18 February 1999, para 32, the Court observed that ‘acts of the EC as such cannot be challenged before the Court because the EC is not a Contracting Party. The Convention does not exclude the transfer of competences to international organisations provided that Convention rights continue to be “secured”. Member States’ responsibility therefore continues even after such a transfer.’

³⁵ ICTY: *Prosecutor v. Dusko Tadic*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, Case No. IT-94-1-AR72, para 296; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, 26 February 2007, ICJ Reports 2007, Further Requests for the Indication of Provisional Measures, Order of 13 September 1993, Separate Opinion of Judge Lauterpacht paras 100 and 102; and *Yassin Abdullah Kadi v. Council of the European Union and Commission of the European Communities*, Case T-315/01, Judgment of the CFI, 21 September 2005, para. 230.

³⁶ *Advisory Opinion on the Interpretation of the Agreement of 25 March 1951 Between the WHO and Egypt*, 20 December 1980, International Court of Justice, ICJ Reports 1980, para 37.

³⁷ *Advisory Opinion, Conditions of Admission of a State into membership of the United Nations*, 28 May 1948, International Court of Justice ICJ Reports, 1948, p.7.

³⁸ *Prosecutor v. Tadic*, October 1995, para. 28.

decision-making are necessarily derived from the law, and are therefore governed and qualified by the law . . . It is not logically possible to claim to represent the power and authority of the law, and at the same time, claim to be above the law.’³⁹

Reviewing the Security Council’s decisions

There is no formal mechanism for reviewing decisions of the UN Security Council and, although, the ICJ has indirectly considered the lawfulness of these on a number of occasions,⁴⁰ it has yet to find any unlawful.⁴¹ In *Namibia* the ICJ noted that: ‘Undoubtedly, the Court does not possess powers of judicial review or appeal in respect of the decisions taken by the United Nations organs concerned’.⁴² It stated, however, that ‘in the exercise of its judicial function and since objections have been advanced the Court, in the course of its reasoning, will consider these objections before determining any legal consequences arising from those resolutions.’⁴³ It found that in adopting Chapter VII resolutions condemning Apartheid South Africa and imposing sanctions the Security Council was ‘acting in the exercise of what it deemed to be its primary responsibility, the

³⁹ *Case concerning questions of interpretation and application of the Montreal Convention arising out of the Aerial incident at Lockerbie (Libya v UK)* Preliminary Objections Judgment 27 February 1998, ICJ Reports 1998, (Judge Jennings Dissenting Opinion) p.110.

⁴⁰ *Effects of Awards of Compensation Made by the United Nations Administrative Tribunal*, ICJ Reports, 1954, para 47; *Certain expenses of the United Nations (Article 17(2) of the Charter) Advisory Opinion*, 20 July 1961, ICJ Reports 1962; *Legal consequences for States of the Continued Presence of South Africa in Namibia notwithstanding Security Council Resolution 276 (1970)*, ICJ Reports 1971; and ICJ Reports 1992.

⁴¹ For discussion see Joy Gordon, ‘The Sword of Damocles: Revisiting the Question of Whether the United Nations Security Council is Bound by International Law’, *Chicago Journal of International Law*, Vol. 12 No. 2, Winter 2012; August Reinich, ‘Should Judges second-Guess the UN Security Council?’, *International Organizations Law Review* Vol. 6, 2009, pp.257–291; Dapo Akande, ‘The ICJ and the Security Council: Is There Room for Judicial Control of the Decisions of the Political Organs of the UN?’, *International & Comparative Law Quarterly*, Vol. 46 No. 2, 1997, pp.309-43; José Alvarez, ‘Judging the Security Council’, *American Journal of International Law*, Vol. 90, No. 1 January 1996, pp.1-39; Erica de Wet, ‘Judicial Review as an Emerging General Principle of Law and Its Implications for the International Court of Justice’, *Netherlands International Law Review*, Vol. 47, Issue 2, 2000, pp.181-210.

⁴² ICJ Reports 1971, para 89. *This case followed a request from the Security Council for an advisory opinion seeking legal advice on the consequences of its own decisions to use its Chapter VII powers in a series of resolutions related to Apartheid South Africa’s occupation of Namibia.*

⁴³ *Ibid.* See also de Wet, 2004, pp.48 and 127. De Wet argues that this resulted in ‘de facto review’ of the legality of the Security Council’s actions.

maintenance of peace and security'⁴⁴ and that the 'only limitations are the fundamental principles and purposes found in Chapter 1 of the Charter.'⁴⁵

In the first preliminary objections stage of the *Lockerbie* case, in 1992,⁴⁶ the majority of the ICJ held that they had jurisdiction to hear a case relating to the extradition of a terrorist suspect, which had been brought to the Security Council by the UK and US supported by first a non-binding UN Security Council Resolution⁴⁷ and then one issued using its Chapter VII powers.⁴⁸ The Chapter VII resolution had been passed three days after the closing of oral hearings on the Libyan government's request for provisional measures to enjoin the UK and US from taking action to coerce it to hand over the suspects, which it argued prejudiced their right to a fair trial.⁴⁹ The Court declined to indicate the provisional measures, but it also rejected claims that it lacked jurisdiction to hear the case.

This decision provoked a number of dissenting opinions.⁵⁰ Judge Bedjaoui questioned whether a bomb attack that took place three years previously could be said to be a current threat to peace, while Judge El-Koshi noted that the Security Council may have violated

⁴⁴ ICJ Reports, 1971, para 109.

⁴⁵ *Ibid.*, para 110. The Court went on to state in paras 128-31 that South Africa's continued occupation of Namibia was illegal and that its apartheid policies were 'a flagrant violation of the purposes and principles of the Charter of the United Nations.' See also ICTY *Prosecutor v. Dusko Tadic* October 1995; ICTR *Prosecutor v. Kanyabashi*, Decision on the Defence Motion on Jurisdiction, Case No. ICTR-96-15-T, Trial Chamber 18 June 1997, point 6. As will be discussed further in chapter six, both ICTY and the International Criminal Tribunal for Rwanda (ICTR) subsequently used *Namibia* as authority for justifying their right to review the legality of the Security Council resolutions that created them.

⁴⁶ *Case concerning questions of interpretation and application of the Montreal Convention arising out of the Aerial incident at Lockerbie (Libya v UK)* Provisional Measures Order of 14 April 1992, ICJ Reports 1992

⁴⁷ Security Council Resolution 731 of 22 January 1992.

⁴⁸ Security Council Resolution 748 of 31 March 1992.

⁴⁹ For contrasting perspectives see de Wet, 2004, pp.2-12 and Michael Reisman, 'The Constitutional Crisis in the United Nations', Faculty Scholarship Series Paper 866, *The American Journal of International Law*, Vol. 83, 1993.

⁵⁰ ICJ Reports 1992: Declaration of Vice-President Oda, Acting President; Declaration by Judge Ni; Joint Declaration by Judges Evensen, Tarassov, Guillaume and Aguilar Mawdsley (translation); Separate Opinion by Judge Lachs; Separate Opinion by Judge Shahabuddeen; Dissenting Opinion by Judge Bedjaoui (translation); Dissenting Opinion by Judge Weeramantry; Dissenting Opinion by Judge Ranjeva (translation); Dissenting Opinion by Judge Ajibola; Dissenting Opinion by Judge El-Koshi.

Article 92 of the Charter by interfering with a case before the ICJ.⁵¹ Judge Weeramantry, however, maintained that the Security Council had sole discretion over determining what constituted a threat to international peace and security under its Chapter VII powers and the ICJ could not properly review this.⁵²

By the time the ICJ made its final decision on the Preliminary Objections a second Chapter VII resolution had again demanded the extradition of the suspects and further tightened the sanctions on Libya for refusing to hand them over.⁵³ The ICJ again rejected the objections relating to jurisdiction, by 11 votes to 5, with the dissenters arguing that they were being asked to rule on the meaning, legality and effectiveness of the Security Council's resolutions, which was beyond the Court's powers to do.⁵⁴ The dispute was finally resolved by the compromise of a trial in a third country and a Security Council resolution in August 1998 proposed the suspension of the sanctions if Libya agreed to this.⁵⁵ The case was removed from the ICJ's role, at the joint request of the parties in September 2003.⁵⁶ As will be discussed below, however, the human rights impact of UN imposed sanctions has continued to cause controversy.

De Wet argues that the case shows the importance of considering human rights norms in limiting the Security Council's discretionary powers. She maintains that 'resolutions authorising individual criminal prosecution as a method for restoring international peace

⁵¹ ICJ Reports 1992, Dissenting Opinion of Judge Bedjaoui, p.176. Dissenting Opinion Judge El-Kosheri p.210.

⁵² ICJ Reports 1992. Dissenting Opinion of Judge Weeramantry.

⁵³ Security Council Resolution 883 of 11 November 1993.

⁵⁴ ICJ Reports 1992. Dissenting Opinion of Judges Schwebel, Oda and Jennings.

⁵⁵ Security Council Resolution 1192 of 27 August 1998.

⁵⁶ ICJ Press Release 2003/39, 10 September 2003. See also *BBC News*, 'Lockerbie bomber Abdelbaset al-Megrahi dies in Tripoli', 20 May 2012. Al Megrahi, the head of security for Libyan Arab Airlines, director of the Centre for Strategic Studies in Tripoli, Libya, and an alleged Libyan intelligence officer was subsequently convicted of the Lockerbie bombing and sentenced to life imprisonment. His co-defendant was acquitted and the court left the question of whether he had acted on behalf of the Libyan government unanswered. Al Megrahi was freed on compassionate grounds by the Scottish Government on 20 August 2009 following doctors reporting on 10 August 2009 that he had terminal prostate cancer and was expected to have around three months to live. He died on 20 May 2012 nearly three years after his release.

and security are legal only if and to the extent that they give due effect to the principles of independence, impartiality and even-handedness that underpin Article 1(1) of the Charter as well as Article 14 of the ICCPR.⁵⁷ She further states that ‘with respect to the Lockerbie suspects the respective resolutions totally disregard the principle of impartiality in relation to the two individuals whose extradition was demanded’ because the two countries requesting the extradition participated in the voting on the resolution.⁵⁸

The UN’s legal personality and liability

The UN Human Rights Committee has noted that ‘there is a United Nations Charter obligation to promote universal respect for, and observance of, human rights and fundamental freedoms’.⁵⁹ The extent of the obligations that this imposes on the Security Council itself, however, remains less clear. In the first instance it will depend upon the UN’s own legal personality and then on what conduct can be attributed to it and to member States carrying out its decisions.⁶⁰ If acts or omissions which conflict with human rights obligations can be attributed to the Security Council and its subsidiary organs, it then remains to be determined whether and how the UN can itself be held to account for them.⁶¹

⁵⁷ De Wet, 2004, p.349.

⁵⁸ Ibid. She also argues that the UK and US should not have voted on the original, Chapter VI, resolution since this violated Article 27 of the UN Charter.

⁵⁹ Human Rights Committee, ‘General Comment no 31 (2004), para 2.

⁶⁰ For further discussion see: *Conclusions of the work of the Study Group on the Fragmentation of International Law: Difficulties arising from the Diversification and Expansion of International Law*, International Law Commission, A/CN.4/L.682 13 April 2006 Vol. II, Part Two. See also Caitlin Bell, ‘Reassessing Multiple Attribution: The International Law Commission and the *Behrami* and *Saramati* decision’, *New York University Journal of International Law and Politics*, Vol. 42, 2010, pp.501-48. International legal personality refers to the capacity of States to enter into relationships with other States, through treaties and conventions, and to create legally binding rules, rights and obligations for themselves.

⁶¹ James Crawford, *The International Law Commission’s Articles on State Responsibility: Introduction, Text and Commentaries*, Cambridge: Cambridge University Press, 2002, p.13. See also Christopher Greenwood, ‘International Humanitarian Law and United Nations Military Operations’, in *Yearbook of International Humanitarian Law*, The Hague: TMC Asser Press, 1998, p.18; and Ralph Wilde, ‘Enhancing Accountability at the International level: the Tension between International Organization and member state responsibility and the underlying issues at stake’, *ILSA Journal of International and Comparative Law*, Vol. 12:2, 2006.

It is widely accepted that the principles of state responsibility are ‘applicable by analogy, but with some variations, to the responsibility of international organizations’.⁶² The ILC drew heavily from its 2001 Articles on Responsibility of States for Internationally Wrongful Acts when addressing the responsibility of international organisations.⁶³ The final Draft Articles, published in 2011, envisage a joint or parallel responsibility between international organisations and their members for both acts and omissions.⁶⁴ While this was expressly designed to prevent States from using international organizations to circumvent the rules of State Responsibility,⁶⁵ both sets of Articles contain a clause stating that they are ‘without prejudice to the Charter of the United Nations.’⁶⁶

⁶² For further discussion see: International Law Association, Malcolm Shaw and Karel Wellens (Co-Rapporteurs), *Berlin Conference (2004) Accountability of International Organizations* (2004), p. 27; Kristen E. Boon, ‘New Directions in Responsibility: Assessing the International Law Commission’s Draft Articles on the Responsibility of International Organizations’, *The Yale Journal of International Law Online*, Vol. 37, Spring 2011; and Paolo Palchetti, ‘The allocation of responsibility for internationally wrongful acts committed in the course of multinational operations’, *International Review of the Red Cross*, Vol. 95 No. 891/892 Autumn/Winter 2013, pp.727-42.

⁶³ UN International Law Commission, *Report on the work of its sixty-first session* (4 May to 5 June and 6 July to 7 August 2009), (A/64/10) pp. 13–183. See also *Official Records of the General Assembly, Fifty-fifth Session, Supplement No. 10 (A/55/10)*, paras. 726-728 and 729 (1); International Law Commission, Fifty-fourth Session (29 April to 7 June and 22 July to 16 August 2002), ILC Report (A/57/10), paras 461-2; UN International Law Commission, *Report on the work of its sixty-third session* (26 April to 3 June and 4 July to 12 August 2011), General Assembly Official Records, Sixty-sixth Session, Supplement No. 10 (A/66/10 and Add.1); *Eighth report on responsibility of international organizations*, Giorgio Gaja, *Special Rapporteur, International Law Commission, Sixty-third session*, Geneva, 26 April-3 June and 4 July-12 August 2011, A/CN.4/640, 14 March 2011. The ILC first addressed the topic at its fifty-second session, in 2000, appointing Giorgio Gaja as Special Rapporteur and establishing a Working Group on the subject of ‘Responsibility of international organizations’ in 2002. By 2011 the ILC had provisionally adopted 67 Draft Articles and accompanying commentaries, while the Special Rapporteur had produced eight reports surveying the comments made by governments and international organizations. At its meeting in August 2011, the Commission decided ‘to recommend to the General Assembly: (a) to take note of the draft articles on the responsibility of international organizations in a resolution and to annex them to the resolution; (b) to consider, at a later stage, the elaboration of a convention on the basis of the draft articles’.

⁶⁴ *Draft articles on the responsibility of international organizations, 2011*, Adopted by the International Law Commission at its sixty-third session, in 2011, and submitted to the General Assembly as a part of the Commission’s report covering the work of that session, A/66/10, para. 87.

⁶⁵ *Ibid.*, Articles 14 and 17. See also *UN Comments to the Draft Articles on the Responsibility of International Organisations*, UN Doc. A/CN.4/637/Add.1, 17 February 2011.

⁶⁶ *Ibid.* Article 67; and *Draft articles on Responsibility of States for Internationally Wrongful Acts 2001*, Adopted by the International Law Commission at its fifty-third session (2001), Article 59. For further discussion see José E. Alvarez, ‘Luncheon Address, Canadian Council of International Law, 35th Annual Conference on Responsibility of Individuals, States and Organizations, International Organizations: Accountability or Responsibility?’, Oct. 27th, 2006. Although generally critical of the ILCs work on defining the legal responsibilities of international organisations (IOs), he notes that ‘there are a few cases suggesting IO responsibility when the Organization acts as an administrator of territory . . . [and] Many now agree that at least the UN Security Council would not be violating the

The UN Charter specifies that: ‘The Organization shall enjoy in the territory of each of its Members such legal capacity as may be necessary for the exercise of its functions and the fulfilment of its purposes’.⁶⁷ It may also enter into ‘agreement or agreements’ with member States when seeking to deploy their armed forces and obtaining other assistance, and facilities, for the purpose of maintaining international peace and security.⁶⁸ In its Advisory Opinion on *Reparation for Injuries Suffered in the Service of the United Nations* of 1949 the ICJ was asked whether the UN had ‘the capacity to bring an international claim against the responsible *de jure* or *de facto* government’ which had failed to protect its most senior official in Palestine.⁶⁹ The ICJ was clear that the UN was not the functional or legal equivalent of a State, ‘which possess the totality of international rights and duties recognized by international law’, and that the scope of the organization’s rights and duties ‘must depend upon its purposes and functions as specified or implied in its constituent documents and developed in practice.’⁷⁰ It also noted that the drafters of UN’s Charter had ‘not been content to make the Organization created by it merely a centre “for harmonizing the actions of nations in the attainment of these common ends”’, but had ‘equipped that centre with organs’ and ‘given it special tasks’.⁷¹

The Court ruled that the UN ‘is at present the supreme type of international organization and it could not carry out the intentions of its founders if it was devoid of international personality . . . It must be acknowledged that its Members, by entrusting certain functions to it, with the

Charter (including articles 2(4) or 2(7)) should it respond to ethnic cleansing inside a country, even with force.’ He also accepts that ‘states are responsible should they “circumvent” their international organisations by using an IO’.

⁶⁷ UN Charter, Article 104.

⁶⁸ UN Charter, Article 43.

⁶⁹ *Reparations for Injuries Suffered in the Service of the United Nations*, 11 April 1949, International Court of Justice, advisory opinion, ICJ Reports 1949, pp.176-7. The UN wished to bring a compensation claim against Israel over the killing of Count Folke Bernadotte, its chief mediator in Palestine, by the so-called Stern Gang. The UN believed that Israel, which was not a member of the UN at the time, had failed to prevent the murder or punish the perpetrators.

⁷⁰ *Ibid.*, pp.178-80.

⁷¹ *Ibid.*, p.178.

attendant duties and responsibilities, have clothed it with the competence to enable those functions to be effectively discharged.⁷² Although the Charter does not specify that the UN has the capacity to bring a claim for the loss suffered by its agents, the ICJ ruled that it should be seen as having this ‘implied power’ since otherwise it could not protect the people working for it.⁷³

Parlett has noted that ‘while States possess the full range of rights and duties under international law, with attendant capacity, other subjects of international law may have different rights, duties and capacities’, which can be inferred from functional necessity and practice and need not be expressly or directly conferred by a constituent instrument.⁷⁴ It is now widely accepted that customary international law and the general principles of responsibility can apply *mutatis mutandis* to international organizations.⁷⁵ Indeed Szasz argues that the proliferation of intergovernmental organizations with ‘recognized legal personalities’ has made these entities ‘potential sources of customary law’.⁷⁶

The UN itself has long accepted that the ‘international responsibility of the United Nations for the activities of United Nations forces is an attribute of its international legal personality and its capacity to bear international rights and obligations.’⁷⁷ In 2004 the UN’s legal counsel

⁷² Ibid., p.179.

⁷³ Ibid., pp.182-4: ‘Many missions, from their very nature, involve the [UN’s] agents in unusual dangers to which ordinary persons are not exposed . . . Both to ensure the efficient and independent performance of these missions and to afford effective support to its agents, the Organization must provide them with adequate protection.’ It also noted that protection of these agents was necessary to ensure the ‘independent action of the Organization itself’ and that it was particularly important to ensure that all nationals working for the UN received the same level of protection, whether they belonged to a powerful or a weak state.

⁷⁴ Kate Parlett, *The Individual in the International Legal System, continuity and change in international law*, Cambridge: Cambridge University Press, 2011, p.32.

⁷⁵ Larsen, 2012, pp.99-105; Scott Sheeran and Jaqueline Bevilaqua, ‘The UN Security Council and International Human Rights Obligations: towards a new theory of constraints and derogations’, in Scott Sheeran and Nigel Rodley (eds) *Routledge Handbook of International Human Rights Law*, London: Routledge, 2013, pp.371-402.

⁷⁶ Paul Szasz, ‘General Law-Making Processes’, in Christopher Joyner (ed), *The United Nations and International Law*, Cambridge: Cambridge University Press, 1997, pp.27-64.

⁷⁷ Secretary-General’s report, *Administrative and budgetary aspects of the financing of the United Nations peacekeeping operations*, A/51/389, 1996, para. 6.

noted that: ‘As a subsidiary organ of the United Nations, an act of a peacekeeping force is, in principle, imputable to the Organization, and if committed in violation of an international obligation entails the international responsibility of the Organization and its liability in compensation.’⁷⁸ In 1999 the ICJ stated that while the UN and its officials were immune from legal processes, this should be seen as ‘distinct from the issue of compensation for any damages incurred as a result of acts performed by the United Nations or by its agents acting in their official capacity’, while accepting that it ‘may be required to bear responsibility for the damage arising from such acts.’⁷⁹ Compensation claims against the UN, however, ‘shall not be dealt with by national courts but shall be settled in accordance with the appropriate modes of settlement’ that the UN makes provisions for in the Convention on Privileges and Immunities.⁸⁰

From the time of its earliest missions the UN has concluded SOFAs with host nations,⁸¹ which stipulated the specific rules for settling claims.⁸² The UN Model SOFA makes provision for the establishment of a Standing Claims Commission,⁸³ but no such bodies have ever been created and peacekeeping missions have usually relied on local claims

⁷⁸ Unpublished letter of 3 February 2004 by the United Nations Legal Counsel to the Director of the Codification Division. Quoted in *Report of the ILC, General Assembly Official Records, 56th session, Supplement No. 10 A/59/10, 2004*, p.111.

⁷⁹ *Difference relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights*, Advisory opinion of 29 April 1999, ICJ Reports 1999, para 66. See also *Applicability of Article VI, Section 22, of the Convention on the Privileges and Immunities of the United Nations*, Advisory Opinion of 14 December 1989, ICJ Reports 1989.

⁸⁰ *Ibid.*

⁸¹ *Report of the Secretary General on the Model Status of Forces Agreement for Peacekeeping Operations*, UN Doc. A/45/594, 9 October 1990. See also Scott Sheeran (Research Director), *UN Peacekeeping and The Model Status of Forces Agreement*, United Nations Peacekeeping Law Reform Project, School of Law, University of Essex, 2001, p.2 and Scott Sheeran, (Research Director), *Background Paper Prepared for the Experts’ Workshop, 26 August 2010, London, UK, Hosted by the New Zealand High Commission*, United Nations Peacekeeping Law Reform Project, School of Law, University of Essex, 2010, p.18 for an analysis of the similarities and differences between the model SOFA and mission specific ones.

⁸² Bruce Oswald, Helen Durham and Adrian Bates, *Documents on the Law of UN Peace Operations*, Oxford: Oxford University Press, 2010, pp.34-8; Dieter Fleck, ‘The legal status of personnel involved in United Nations peace operations’, *International Review of the Red Cross*, Vol. 95 No. 891/892 Autumn/Winter 2013, pp.613-36.

⁸³ Marten Zwanenburg, *Accountability Of Peace Support Operations*, The Hague/London/Boston: Martinus Nijhoff, 2005, pp.89-90. This is envisaged as a quasi-judicial body consisting of one representative of the UN, one of the host state and one jointly appointed chairman.

commissions or settled disputes informally.⁸⁴ UNEF, for example, used informal negotiation to settle all claims and paid out compensation for accidental deaths taking into account ‘local levels of compensation as evidenced by the system of *diyyet* used by the *Sharia* (Moslem religious) Courts.’⁸⁵

The UN did accept responsibility in cases where civilians were killed by members of UNEF and ONUC who had opened fire without receiving orders and who were subsequently prosecuted in their own countries.⁸⁶ It only accepted attribution for harmful conduct by a member of a contingent, however, if the person was acting in an official capacity and subject to the organization’s effective command and control at the time it was carried out.⁸⁷ One case is documented where the local review board rejected a claim in which a UN soldier on duty guarding UNEF camp, ‘accidentally killed a passer-by when using his gun to chase away playing children’, on the basis that the soldier acted outside the scope of lawful self-defence as laid down in the relevant UNEF regulations.⁸⁸

During the UN’s first peacekeeping mission in the Congo in the 1960s, a number of European nationals lodged claims for damages to person and property. The UN responded by negotiating lump sum payments to their respective governments, while maintaining that it did not accept liability for damages which resulted ‘solely from military operations’.⁸⁹ In response to a protest from the Soviet Union that Belgium, in particular, had no moral right to compensation the UN’s General Secretary stated:

⁸⁴ *United Nations Library of International Law*, August Reinich, ‘Convention on Privileges and Immunities of the United Nations, New York, 13 February 1946, Convention on Privileges and Immunities of the Specialized Agencies, New York, 21 November 1947’, <http://untreaty.un.org/cod/avl/ha/cpiun-cpisa/cpiun-cpisa.html>, accessed 7 March 2013.

⁸⁵ *Report of the Secretary General, Summary of the experiences derived from the establishment and operation of the force*, UN Doc. A/3943, 9 October 1958, para 141.

⁸⁶ Zwanenburg, 2005, p.106-7.

⁸⁷ Schmalenbach, 2006, p.36 and 38-9.

⁸⁸ *Ibid.* Since he acted *ultra vires*, payments were made solely on moral grounds.

⁸⁹ Zwanenburg, 2005, p.88, citing an Agreement signed between the UN and the Government of Belgium relating to the settlement of claims filed against the United Nations in the Congo by Belgian nationals dated 23 February 1965.

It has always been the policy of the United Nations, acting through the Secretary-General, to compensate individuals who have suffered damages for which the Organization was legally liable. This policy is in keeping with generally recognized legal principles and with the Convention on Privileges and Immunities of the United Nations . . . it is reinforced by the principles set forth in the international conventions concerning the protection of the life and property of civilian population during hostilities as well as by considerations of equity and humanity.⁹⁰

In fact the UN's practice has usually been quite restricted. Oscar Schachter, the Director of the UN's General Legal Division at the time advised that: 'the Organization or a contributing State is not vicariously liable for the action of Force members not done in the performance of official duty and which are in the nature of private personal acts . . . in cases where the civil liability of a Force member is clear and where due to repatriation or other reason ONUC has been unable to arrange as settlement of the matter, consideration should be given to making *ex gratia* payments to the injured party, taking into account the circumstances of the case'.⁹¹ As Schmalenbach notes, 'international organizations are often very generous in terms of their willingness to pay compensation, but they remain vague about their legal obligation to do so in order to avoid setting a precedent.'⁹²

In a 1986 memorandum the UN Office of Legal Affairs stated that the Organization had no legal or financial liability for any death injury or damage committed by 'off-duty' members

⁹⁰ Letter dated 6 August 1965 addressed by the Secretary-General to the Permanent Representative of the Soviet Union, United Nations Juridical Yearbook, 1965, p. 41.

⁹¹ Quoted in Kirsten Schmalenbach 'Third party liability of International Organisations', in Harvey Langholtz, Boris Kondoch and Alan Wells (eds) *International Peacekeeping, The Yearbook of International Peace Operations*, Hague/Boston/London: Martin Nijhoff Publishers, 2006, p.38.

⁹² Schmalenbach, 2006, p.40.

of its peacekeeping forces,⁹³ which clearly differs from the IHL principle that parties ‘shall be responsible for all acts committed by persons forming part of its armed forces’.⁹⁴ In a review of the efficiency of the procedure published in 1995, it was stressed that while immunity could be lifted for claims relating to criminal or illegal activity this would not apply to ‘claims based on political or policy-related grievances’.⁹⁵ This principle has been restated since and remains the UN’s official policy.⁹⁶ In 1997, in response to a growing number of claims for actions in respect of its operations in the 1990s in Somalia, Rwanda and the Balkans, the UN General Assembly also passed a resolution significantly limiting the liability of the UN for private law claims brought against it as a result of its peacekeeping activities.⁹⁷ This imposes strict time limits on claims;⁹⁸ excludes claims arising from ‘operational

⁹³ Quoted in Boris Kondoh, ‘Individual and International Responsibility’, in Terry Gill and Dieter Fleck (eds), *The Handbook of the International Law of Military Operations*, Oxford: Oxford University Press, 2010, p.524. It stated that: ‘A soldier may be considered ‘off-duty’ not only when he is ‘on-leave’, but also when he is not acting in an official or operational capacity while either inside or outside the area of operations . . . We consider the primary factor in determining an ‘off-duty’ situation to be whether the member of a peacekeeping force was acting in a non-official/non-operational capacity when the incident occurred and not whether he/she was in uniform or civilian attire at the time of the incident and inside or outside the area of operations.’

⁹⁴ Hague Convention (IV) respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land. The Hague, 18 October 1907, Article 3. ‘A belligerent party which violates the provisions of the said Regulations shall, if the case demands, be liable to pay compensation. It shall be responsible for all acts committed by persons forming part of its armed forces.’ For discussion see Tom Dannenbaum, ‘Translating the Standard of Effective Control into a System of Effective Accountability: How Liability Should be Apportioned for Violations of Human Rights by Member State Troop Contingents Serving as United Nations Peacekeepers’, *Harvard International Law Journal*, Vol. 51, No. 1, 2010, pp.113-92; and Peter Rowe, ‘United Nations Peacekeepers and Human Rights Violations: the Role of Military Discipline’, *Harvard ILJ online*, Vol. 51 – June 14, 2010. Dannenbaum argues that this restrictive position is needed to take account of the structure of a multinational force in which the UN commander does not have disciplinary powers over national contingents.

⁹⁵ *Review of the Efficiency of the Administrative and Financial Functioning of the United Nations: Procedures in place for implementation of article VIII, section 29, of the Convention on the Privileges and Immunities of the United Nations, adopted by the GA on 13 Feb. 1946*, UN Doc. A/C.5/49/65, 24 April 1995, [Hereinafter Efficiency Review 1995] para 23. See also Eric De Brabandere, ‘Immunity of International Organizations in Post-conflict International Administrations’, *International Organizations Law Review*, Vol. 7 Issue 1, 2010, pp.79-119.

⁹⁶ For further discussion see Neils Blokker, ‘International Organisations: the Untouchables?’, *International Organizations Law Review*, Vol. 10 Issue 2, 2013, pp.259-75; Michael Wood, ‘Do international organisations enjoy immunity under customary international law?’, *International Organizations Law Review*, Vol. 10 Issue 2, 2013, pp.287-318. Some believe that the immunity of the UN and its associated personnel is a principle of customary law.

⁹⁷ UN General Assembly Resolution, 52/247, *Third party liability: temporal and fiscal limitations*, UN Doc. A/RES/52/247, 26 June 1998.

⁹⁸ *Ibid.*, para 8. It excludes claims ‘submitted after six months from the time the damage, injury or loss was sustained, or from the time it was discovered by the claimant, and in any event after one year from the termination of the mandate of the peacekeeping operation.’

necessity'⁹⁹ and limits compensation levels.¹⁰⁰ Compensation is also not paid when, 'in the sole opinion of the Secretary-General', the claims 'are impossible to verify'.¹⁰¹

The obstacles facing those from outside the Organization seeking redress were graphically illustrated, in February 2013, when the UN declared that a compensation claim brought on behalf of victims of a cholera outbreak in Haiti was 'not receivable' pursuant to the Convention on UN Privileges and Immunities.¹⁰² Nepalese troops are alleged to have brought the disease into Haiti in 2011 and the UN allegedly failed to screen them or ensure proper waste management systems in their camp.¹⁰³ Haiti had not been affected by cholera for over 50 years, but within the first 30 days of the epidemic's outbreak, almost 2,000 deaths were recorded and by July 2011, it was infecting at a pace of one person every minute.¹⁰⁴ In 2015 the UN acknowledged the epidemic had been the 'largest in recent world history.'¹⁰⁵ The UN insists that the Haitian individuals do not hold 'private law' claims because the failures relate to policies rather than 'criminal, illegal, or unlawful actions or activities of the mission or its members'.¹⁰⁶ As Freedman has noted, however, 'the claims are torts based on negligence,

⁹⁹ Ibid., paras 6 and 7 state that it will not cover acts not of gross negligence or willful misconduct by troop contributing countries.

¹⁰⁰ Ibid., paras 11 and 9. Compensation for loss or damage to property arising from UN operations are limited to 'the reasonable costs of repair or replacement', and 'medical and rehabilitation expenses, loss of earnings, loss of financial support, transportation expenses associated with the injury, illness or medical care, legal and burial expenses'. No compensation is paid for 'non-economic loss, such as pain and suffering or moral anguish, as well as punitive or moral damages', and payments are generally limited to a maximum US\$50,000, subject to local standards.

¹⁰¹ Ibid. paras 9, 10 and 11.

¹⁰² *UN Secretary General Press Release*, 'Haiti Cholera Victims' Compensation Claims 'Not Receivable' under Immunities and Privileges Convention, United Nations Tells Their Representatives', 21 February 2013.

¹⁰³ For further details see, *Final Report of the Independent Panel of Experts on the Cholera Outbreak in Haiti*, Independent Panel of the Secretary-General of the United Nations, Dr. Alejandro Cravioto, Dr. Claudio F. Lanata, Daniele S. Lantagne and Dr. G. Balakrish Nair, 2011, available at <http://www.un.org/News/dh/infocus/haiti/UN-cholera-report-final.pdf>, accessed 26 November 2014. It is alleged that infected human faeces was deposited untreated in a tributary that feeds into Haiti's main river.

¹⁰⁴ Ibid. See also *BBC News*, 'UN should take blame for Haiti Cholera', 20 July 2012. In which Bill Clinton, the UN's Special Envoy to Haiti, has publicly admitted that UN peacekeepers were the likely cause of the disease.

¹⁰⁵ *UN News Centre*, 'Haiti: senior UN official says cholera outbreak needs 'urgent attention' 11 May 2015.

¹⁰⁶ UN Secretary-General, 'Letter to Congresswoman Maxine Waters', 5 July 2013, available at: www.ijdh.org/wp-content/uploads/2013/07/UNSG-Letter-to-Rep.-Maxine-Waters.pdf, accessed 26

gross negligence, and/or recklessness'.¹⁰⁷ In October 2013, lawyers filed a class action in the US, challenges the UN's absolute immunity.¹⁰⁸ In March 2014 the US filed a 'statement of interest' supporting the UN's absolute immunity.¹⁰⁹

As discussed in Chapter Two, on the two occasions that UN missions were given executive powers over territories the lack of mechanisms to scrutinise their human rights records effectively seriously undermined their legitimacy. The Haiti cholera case is likely to cause similar reputational damage. As will be discussed below, the UN has tried to create *ad hoc* mechanisms to address some of its own short-comings and improve its accountability. Courts and monitoring bodies have also attempted to define whether acts authorized by the Security Council under its Chapter VII powers should be attributable to the implementing States or to the UN itself.

Attribution for conduct and norm conflicts

The drafters of the UN Charter originally envisaged an extremely comprehensive system of collective security with considerable land, sea and air forces permanently at the Security Council's disposal, under Article 47 of the Charter,¹¹⁰ but with the onset of the cold war its work soon became paralyzed by the vetoes of its permanent members.¹¹¹ No Article 47

November 2014. See also Efficiency Review 1995, para 23 which states that the UN will not address 'claims based on political or policy-related grievances'.

¹⁰⁷ Rosa Freedman, 'UN Immunity or Impunity? A Human Rights Based Challenge', *European Journal of International Law*, Vol. 25, No. 1, 2014, pp.239–254.

¹⁰⁸ *D Georges v. United Nations et al*, US (2013); *Jean-Robert et al v United Nations*, US (2014); *LaVenture et al v. United Nations*, US (2014).

¹⁰⁹ *Letter from the US Department of Justice*, 7 March 2014, available at: <http://personal.crocodoc.com/J4lRXpi>, accessed 4 December 2014.

¹¹⁰ UN Charter, Article 47.

¹¹¹ Colonel D.W. Bowett, *United Nations Forces: A legal study*, New York: Frederick A Praeger, 1964, p.15. In the initial discussions the Soviet Union contemplated a force of 'about 12 ground divisions (say 125,000 men) 600 bombers, 300 fighters, 5-6 cruisers, 24 destroyers and 12 submarines. The United States wanted 20 ground divisions (say 300,00 men), 1,250 bombers, 2,250 fighters, 3 battleships, 6 aircraft carriers, 15 cruisers, 84 destroyers and frigates and 90 submarines.' See also Christopher Greenwood, 'The United Nations and Guarantor of International Peace and Security: past present and future – a United Kingdom view', in Christian Tomuschat, (ed), *The United Nations at age Fifty*, The Hague/London/Boston: Kluwer Law International, 1995, pp.54-75.

agreements were ever concluded and the meetings of the Military Staff Committee became an empty formality.¹¹² Calls for the creation of a UN standing military force have resurfaced periodically, but rapid deployment of properly equipped troops has been a recurring problem in UN peacekeeping missions.¹¹³ This has left the Security Council with no choice but to rely on member States willing to act on its behalf.¹¹⁴ Although it is widely accepted that the Security Council can delegate this power to States,¹¹⁵ controversies have arisen about whether they are permissively ‘authorized’ or ‘obliged’ by a Security Council resolution to take certain actions.¹¹⁶

In 2007, the European Court of Human Rights declared inadmissible *Behrami and Behrami v. France and Saramati v. France, Germany and Norway*,¹¹⁷ which respectively focussed on ‘negative’ and ‘positive’ obligations under the Convention.¹¹⁸ The first was brought by the

¹¹² Alex Bellamy and Paul Williams, *Understanding Peacekeeping*, Second Edition, Polity Press, 2011, pp.81-91; Christine Gray, *Use of Force in International Law, Third Edition*, Oxford: Oxford University Press, 2008, pp.255-264; Bowett, 1964, p.18. See also Adam Roberts, ‘Proposals for UN Standing Forces: history, tasks and obstacles’, in Vaughan Lowe, Adam Roberts, Jennifer Welsh and Dominik Zaum (eds), *The United Nations Security Council and War*, Oxford: Oxford University Press, 2008, pp.99-130.

¹¹³ Ibid. In September 1948, for example, 11 days after the assassination of its most senior official in Palestine, which gave rise to the *Reparations* case, the Secretary General proposed, under Articles 97 and 98 of the Charter the establishment of a UN Guard, to protect its field staff, supply lines and neutralised areas, along with a UN Legion of 50,000 soldiers and a Volunteer Reserve Force. Similar proposals have since made periodically, but never implemented.

¹¹⁴ Bruno Simma *The Charter of the United Nations A Commentary Second Edition*, Oxford: Oxford University Press, 2002, p.729.

¹¹⁵ See, for example, Rosalind Higgins, *Problems and Processes: international law and how we use it*, Oxford: Oxford University Press, 1994, p.266; and Dan Sarooshi *The United Nations and the Development of Collective Security*, Oxford: Oxford University Press, 1999, p.153; Natalino Ronzitti, ‘Lessons of International Law from NATO’s Armed Intervention Against the Federal Republic of Yugoslavia’, *The International Spectator* Vol. XXXIV, No. 3, July - September 1999.

¹¹⁶ *Report of the ILC, General Assembly Official Records, 56th session, Supplement No. 10 A/59/10* (2004), p.110. This notes in its Commentary on the Draft Articles that states often place their military contingents at the disposal of the UN for peacekeeping operations while retaining disciplinary powers and criminal jurisdiction over their members of the national contingent and that problems can arise in such situations when trying to attribute responsibility for specific conduct. See also: Niels Blokker, ‘Is the Authorization Authorized? Powers and Practice of the UN Security Council to Authorize Use of Force by Coalitions of the Able and Willing’, *European Journal of International Law*, Vol. 11, No. 3, 2000, pp.541-568; Simma, 2002, p.729; and Larsen, 2012, pp.62-4.

¹¹⁷ *Behrami and Behrami v. France* (Appl. No. 71412/01) 31 May 2007 (Grand Chamber) Decision on Admissibility and *Saramati v. France, Germany and Norway* (Appl. No. 78166/01), (Grand Chamber) Decision on Admissibility, 2 May 2007. The two cases were joined together for the purposes of the admissibility decision.

¹¹⁸ For discussion see P. Bodeau-Livinec, G. P. Buzzini and S. Villalpando, ‘Agim Behrami & Bekir Behrami v. France; Ruzhdi Saramati v. France, Germany & Norway. Joined App. Nos. 71412/01 & 78166/01’ *American Journal of International Law*, Vol. 102, 2008.

father of a boy killed, in March 2000, by an exploding shell, dropped by NATO during its air campaign over Kosovo the previous year, which it was alleged that French KFOR soldiers had subsequently failed to mark or clear. The second was brought by an alleged Albanian militia leader who was detained in administrative KFOR military custody for several months in 2001 and 2002 without effective access to a court.¹¹⁹

The Court recalled *Bankovic* in ruling that ‘jurisdictional competence is primarily territorial’ and noted that ‘the impugned acts and omission of KFOR and UNMIK cannot be attributed to the respondent States and, moreover, did not take place on the territory of those States or by virtue of a decision of their authorities.’¹²⁰ It stated that the central question in the present case, however, was ‘whether this Court is competent to examine under the Convention those States’ contribution to the civil and security presences which did exercise the relevant control of Kosovo.’¹²¹ It noted that UNMIK ‘was a subsidiary organ of the UN created under Chapter VII of the Charter’ and so its actions were ‘in principle, attributable to the UN’.¹²² It further noted that KFOR had been created by the same UN Security Council resolution, which had delegated responsibility for security in Kosovo to it and required its leadership to report to the Security Council on its progress.¹²³ The Court recognised that neither the Security Council nor UNMIK exercised any ‘effective control’ or ‘operational command’ over KFOR.¹²⁴ Nevertheless, this ‘ultimate authority and control’ was sufficient for the Court’s assessment of attribution.¹²⁵ It cited the ICJ’s ruling that ‘the UN has a legal personality separate from that of its member states’ and noted that it is ‘not a Contracting Party to the [European] Convention’.¹²⁶ According to the Court:

¹¹⁹ Ibid,

¹²⁰ *Behrami and Behrami v. France* (Appl. No. 71412/01) 31 May 2007 (Grand Chamber) Decision on Admissibility and *Saramati v. France, Germany and Norway* (Appl. No. 78166/01), (Grand Chamber) Decision on Admissibility, 2 May 2007, para 152.

¹²¹ Ibid., para 71.

¹²² Ibid., para 143.

¹²³ Ibid., para 134.

¹²⁴ Ibid., para 141.

¹²⁵ Ibid., para 133.

¹²⁶ Ibid., para 144.

it is evident from the Preamble, Articles 1, 2 and 24 as well as Chapter VII of the Charter that the primary objective of the UN is the maintenance of international peace and security. While it is equally clear that ensuring respect for human rights represents an important contribution to achieving international peace (see the Preamble to the Convention), the fact remains that the UNSC has primary responsibility, as well as extensive means under Chapter VII, to fulfil this objective, notably through the use of coercive measures . . . operations established by UNSC Resolutions under Chapter VII of the UN Charter are fundamental to the mission of the UN to secure international peace and security and since they rely for their effectiveness on support from member states, the Convention cannot be interpreted in a manner which would subject the acts and omissions of Contracting Parties which are covered by UNSC Resolutions . . . to the scrutiny of the Court.¹²⁷

The Court has similarly ruled that it has no jurisdiction to hear a number of other cases where alleged violations of Convention rights were attributable to subsidiary organs of the UN established in the former Yugoslavia.¹²⁸ Dutch district courts also initially relied on *Behrami and Saramati* in ruling that they lacked jurisdiction to hear two other similar cases relating to the Srebrenica genocide.¹²⁹

¹²⁷ *Ibid.*, paras 148-9.

¹²⁸ *Kasumaj v. Greece*, Appl. No. 6974/05 Decision on Admissibility, 5 July 2007; *Gajić v. Germany*, Appl. No. 31446/02 Decision on Admissibility, 28 August 2007; *Berić and others v. Bosnia and Herzegovina*, Appl. Nos. 36357/04; 36360/04; 38346/04; 41705/04; 45190/04; 45578/04; 45579/04; 45580/04; 91/05; 97/05; 100/05; 101/05; 1121/05; 1123/05; 1125/05; 1129/05; 1132/05; 1133/05; 1169/05; 1172/05; 1175/05; 1177/05; 1180/05; 1185/05; 20793/05; 25496/05, Decision on Admissibility, 16 October 2007.

¹²⁹ *Judgment in the case of Mustafić, Court of Appeal in the Hague*, Civil Law Section, Case number: 200.020.173/01, Case-/cause-list number District Court: 265618/ HA ZA 06-1672, Ruling of 5 July 2011; and *Judgment in the case of Nuhanović, Court of Appeal in the Hague*, Civil Law Section, Case number: 200.020.174/01 Case-/cause-list number District Court : 265618/ HA ZA 06-1672 Ruling of 5 July 2011. Hasan Nuhanović had been a translator for the Dutch Battalion in Srebrenica at the time of the genocide. Rizo Mustafić, was a UN electrician. Mustafić was ordered to leave the base by the UN soldiers of Dutch Battalion. The soldiers did evacuate Mustafić but refused to take his father and brother, both of whom were subsequently killed in the genocide.

The decision to attribute KFOR's conduct to the UN, even though the force was not under UNMIK's effective control, was, however, controversial, particularly since the NATO forces that had initially launched military action in Kosovo without UN authorization were essentially 'blue hatted' by the Security Council and remained under NATO's operational command.¹³⁰ Larson argues that it is difficult to reconcile this decision with UN practice on responsibility for unlawful conduct in peace operations, and with the Court's own jurisprudence concerning attribution of conduct to the State.¹³¹ Milanović and Papić maintain that 'the Court's analysis is entirely at odds with the established rules of responsibility in international law and is equally dubious as a matter of policy.'¹³² Bell notes that the 'Court's implication that international law allows for only single attribution of internationally wrongful acts' is in sharp conflict with the ILC's approach which 'allow for the possibility of multiple attribution of conduct and the assignment of plural responsibility to several involved entities'.¹³³ The ILC Special Rapporteur on the responsibility of international organisations stated that the judgment was inconsistent with the Commission's own work.¹³⁴ The UN

¹³⁰ *CNN News*, 'Russian troops block NATO forces at Pristina checkpoint', 13 June 1999; and Mike Jackson, *Soldier*, London: Transworld Publishers, 2007, pp. 216–254. It was originally agreed that KFOR would consist of both NATO and Russian forces and Russia assumed that it would be given its own sector of the province. NATO, however, refused to grant Russia this in case it led to the province's partition as the Serbian dominated area around Mitrovica in northern Kosovo was firmly opposed to independence. This led to a serious incident in June 1999 when both forces advanced on Pristina airport. A small Russian column reached the airport but was blockaded by advancing NATO forces and eventually withdrew. Although Russian forces were subsequently authorised to operate in Kosovo, independently of NATO, their presence was widely considered to be token.

¹³¹ See Kjetil Mujezinovic Larsen, *Attribution of Conduct in Peace Operations: The 'Ultimate Authority and Control' Test*, 19 *The European Journal of International Law* Vol. 19 No. 3, 2008, pp.509-31; and Larsen, 2012, pp.129-36.

¹³² M. Milanović and T. Papić, 'As Bad As It Gets: The European Court of Human Rights' *Behrami and Saramati* Decision and General International Law', *International and Comparative Law Quarterly*, Vol. 58, 2009.

¹³³ C. A. Bell, 'Reassessing multiple attribution: the International Law Commission and the *Behrami* and *Saramati* decision', *New York University Journal of International Law and Politics*, Vol. 42, 2010, pp.503 and 508.

¹³⁴ *Seventh report on responsibility of international organizations*, Giorgio Gaja, *Special Rapporteur*, International Law Commission, International Law Commission, Sixty-first session, Geneva, 4 May-5 June and 6 July-7 August 2009, A/CN.4/610, 27 March 2009, paras 26 and 30. The report stated that: 'had the Court applied the criterion of effective control set out by the Commission, it would have reached the different conclusion that the conduct of national contingents allocated to KFOR had to be attributed either to the sending State or to NATO . . . it would be difficult to accept, simply on the strength of the judgment in *Behrami and Saramati*, the criterion there applied as a potentially universal rule . . . the approach taken by the European Court of Human Rights is unconvincing . . . It is therefore not surprising that in his report of June 2008 on the United Nations Interim Administration Mission in Kosovo, the United Nations Secretary-General distanced himself from [it]'. For further discussion see

Office for Legal Affairs has also noted that ‘the court disregarded the test of “effective control” which for over six decades has guided the United Nations and member states in matters of attribution’.¹³⁵

The assumption that national contingents retain liability for the officially authorised conduct of their troops has long been considered part of the legal basis of peacekeeping.¹³⁶ The decision also appears directly to contradict part of the Court’s reasoning in *Bankovic*, where it deemed it significant that no State has made derogation pursuant to Article 15 of the Convention when participating in military missions authorized by the Security Council, since this would not be necessary if such actions were attributable to the UN.¹³⁷ Milanovic has suggested that ‘the very *obviousness* of the flaws in the Court’s decision’ were due to its reluctance to address the norm conflict between States’ human rights obligations under the European Convention and the pre-emptive effect of Article 103 of the UN Charter.¹³⁸ It did not want to accept that ‘fifteen states sitting in the Security Council could whisk away this

*Eighth report on responsibility of international organizations, Giorgio Gaja, Special Rapporteur, International Law Commission, International Law Commission, Sixty-third session, Geneva, 26 April-3 June and 4 July-12 August 2011, A/CN.4/640, 14 March 2011, paras 32 -35; and Draft articles on the responsibility of international organizations, with commentaries, 2011, Adopted by the International Law Commission at its sixty-third session, in 2011, and submitted to the General Assembly as a part of the Commission’s report covering the work of that session (A/66/10). See also Christopher Leck, ‘International Responsibility in United Nations Peacekeeping Operations: command and control arrangements and the attribution of conduct’, *Melbourne Journal of International Law*, Vol. 10, Issue 1, May 2009, p.346.*

¹³⁵ Comments and observations of the Office of Legal Affairs on the draft Articles on Responsibility of International Organizations, adopted by the International Law Commission on first reading in 2009, February 2011. Cited in Larsen, 2012, p.145.

¹³⁶ *Attorney-General v. Nissan*, 11 February 1969, as reported in 1969 All England Law Reports, Vol. 1, p. 62. Cited in *United Nations, Juridical yearbook, 1969*, The Lords stated that: ‘The functions of the United Nations Force as a whole are international. But its individual component forces have their own national duty and discipline and remain in their own national service.’ See also *Bici and another v. Ministry of Defence* [2004] All ER (D) 137 (Apr), [2004] EWHC 786 (QB) in which a British court ruled that British soldiers who shot at a car in Kosovo in 1999, killing two people and injuring another, could not claim ‘combat immunity’ to cover their actions.

¹³⁷ *Bankovic v. Belgium and 16 Other Contracting States*, Appl. No. 52207/99, (Grand Chamber), Decision on Admissibility, 19 December 2001, para 38: ‘Although there have been a number of military missions involving Contracting States acting extra-territorially since their ratification of the Convention (inter alia, in the Gulf, in Bosnia and Herzegovina and in the FRY), no State has indicated a belief that its extra-territorial actions involved an exercise of jurisdiction within the meaning of Article 1 of the Convention by making a derogation.’

¹³⁸ Marko Milanovic, ‘Norm Conflict in International Law: whither human rights?’, *Duke Journal of Comparative & International Law*, Vol. 20, 2009, p.86. [emphasis in original]

“constitutional instrument” on the basis of Article 103’ but nor did it want to ‘openly defy the Council or interfere with the Chapter VII system and peacekeeping operations in Kosovo.’¹³⁹

The case of *Al-Jedda*,¹⁴⁰ an Iraqi with dual British citizenship who was detained without trial in Baghdad for several years, raised some similar issues.¹⁴¹ The British government accepted that the applicant’s detention in a British facility brought him within the extra-territorial jurisdiction of the European Convention, in the light of *Al-Skeini*,¹⁴² but argued that his detention was authorized by the Chapter VII Security Council resolutions, which set out the mandate of the UN Assistance Mission for Iraq.¹⁴³ In 2006, one year before the *Behrami and Saramati* decision, the English Court of Appeal dismissed his complaint, holding that:

if the Security Council, acting under Chapter VII, considers that the exigencies posed by a threat to the peace must override, for the duration of the emergency the requirements of a human rights convention (seemingly other than *jus cogens*, from which no derogation is possible), the UN Charter has given it the power to so provide . . . There is no need for a member state to derogate from the obligations contained in a human rights convention by which it is bound in so far as a binding Security Council resolution overrides those obligations.¹⁴⁴

The Court also stated that the Security Council has ‘the primary responsibility for the maintenance of international peace and security, and one of the purposes of the United Nations, by which it is bound to act, is to take effective collective measures for the prevention

¹³⁹ *Ibid.*

¹⁴⁰ *Al-Jedda v. Secretary of State for Defence*, Court of Appeal [2006] EWCA Civ 327, 29 March 2006.

¹⁴¹ Hilal Abdul-Razzaq Ali Al-Jedda, an Iraqi national, who had also been granted British citizenship, was arrested in Baghdad in 10 October 2004 and detained without trial in a detention centre run by British forces in Basra until 30 December 2007.

¹⁴² ECtHR *Al-Skeini and Others v. the United Kingdom*, Appl. No. 55721/07, Judgment (Grand Chamber) 7 July 2011.

¹⁴³ Security Council Resolutions 1511, of 16 October 2003 and 1546 of 8 June 2004.

¹⁴⁴ *Al-Jedda v. Secretary of State for Defence*, Court of Appeal [2006] EWCA Civ 327, 29 March 2006, para 71.

and removal of threats to peace.’¹⁴⁵ It noted that the UN Charter contained references to human rights, but that these were ‘clearly an agenda for future action rather than a statement of human rights and fundamental freedoms in itself.’¹⁴⁶

In the light of the *Behrami and Saramati* decision, the British government argued in the House of Lords, that the detention of the applicant was attributable to the UN and thus outside the scope of the Convention.¹⁴⁷ A majority rejected the legal analogy between the UN missions in Kosovo and Iraq, on the grounds that the resolution authorizing UNMIK’s establishment predated KFOR’s deployment, while when the coalition troops had first entered Iraq they had done so without a UN mandate.¹⁴⁸ They nevertheless ruled that at the time of the applicant’s detention the detaining troops were acting under a UN Security Council authorization and that Article 103, therefore, trumped the UK’s obligations under the European Convention.¹⁴⁹

The European Court of Human Rights ultimately found a violation in the case, in July 2011.¹⁵⁰ The Court noted that the language of the Security Council resolutions did not indicate that it ‘intended to place Member States within the Multi-National Force under an obligation to use measures of indefinite internment without charge and without judicial guarantees, in breach of their undertakings under international human rights instruments including the Convention’.¹⁵¹ In fact the reference to internment was not even contained in the Security Council resolution, although it was mentioned in an annexe from the US Secretary of State attached to it, and the UN mission had also repeatedly expressed its

¹⁴⁵ *Ibid.*, para 50.

¹⁴⁶ *Ibid.*

¹⁴⁷ See *R. (on the application of Al-Jedda) (FC) (Appellant) v Secretary of State for Defence (Respondent)* [2007] UKHL 58, 12 December 2007).

¹⁴⁸ *Ibid.*, See Lord Bingham’s opinion, paras 18-25, which was supported by Baroness Hale and Lord Carswell, although Lord Rodger of Earlsferry dissented on this point arguing that both forces were operating under UN mandates at the time that the incidents took place.

¹⁴⁹ *Ibid.*

¹⁵⁰ *Al-Jedda v. the United Kingdom* Appl. No. 27021/08, Judgment (Grand Chamber) 7 July 2011.

¹⁵¹ *Ibid.*, paras 105-6.

concern at the large number of people who were being detained without trial.¹⁵² The Court also appeared to give considerably more weight to the human rights obligations contained in the UN Charter:

As well as the purpose of maintaining international peace and security . . . the United Nations was established to ‘achieve international cooperation in . . . promoting and encouraging respect for human rights and fundamental freedoms’. Article 24(2) of the Charter requires the Security Council, in discharging its duties . . . to ‘act in accordance with the Purposes and Principles of the United Nations’. Against this background, the Court considers that, in interpreting its resolutions, there must be a presumption that the Security Council does not intend to impose any obligation on Member States to breach fundamental principles of human rights . . . it is to be expected that clear and explicit language would be used were the Security Council to intend States to take particular measures which would conflict with their obligations under international human rights law.¹⁵³

Use of force and detention powers

As previously discussed in Chapter Two, where UN missions assumed executive powers, in Kosovo and East Timor, there were complaints about their use of force and detention powers, and some earlier missions faced similar controversies. Given that UN peacekeeping missions with POC mandates are both permitted and ‘legally required’ to ‘use force, including deadly force’ to fulfil their mandates, the lack of legal accountability in how they do so is troubling.¹⁵⁴ Detentions by contemporary UN missions with POC mandates are, in fact, quite

¹⁵² Ibid.

¹⁵³ Ibid., para 102.

¹⁵⁴ See, for example, Amnesty International, *Haiti: allegations of excessive use of force during demonstrations must be thoroughly investigated*, 15 December 2014, highlighting a case in which a peacekeeper in Haiti was shown on video shooting several times at demonstrators after some of them had thrown rocks at UN troops. MINUSTAH responded by promptly issuing a statement

rare. The OIOS Protection Evaluation 2014 has noted, only three missions have ever fired shots with lethal intent.¹⁵⁵ As will be discussed in the next two chapters, however, lack of clarity about the circumstances in which missions can use lethal force or detain people, is one of the reasons why they are so reluctant to use force for protective purposes.

Very broad concepts relating to how the mission will use its Chapter VII authority are usually contained in the Secretary General's report on its establishment.¹⁵⁶ The SOFA or status of mission agreement (SOMA) between the UN and the state hosting the peacekeeping operation, tend to avoid any explicit reference to the use of force, in deference to State sovereignty.¹⁵⁷ More detailed guidance will, however, be contained in standard operating procedures (SOPs) issued by the UN force commander and reflected in the mission's RoE. These generally include what types of weapons are permissible and what level of command has responsibility for taking decisions.¹⁵⁸ Simplified versions of RoE may be issued to individual soldiers for everyday reference, usually in the form of a laminated card.¹⁵⁹ UN DPKO's current guidance specifies that: 'ROEs must always be compliant with human rights and international humanitarian law, which are superior sources', but without clarifying which will be the applicable legal framework.¹⁶⁰

'acknowledging the allegations of excessive use of force and informing that an investigation had been immediately opened 'to establish the facts.'

¹⁵⁵ OIOS Protection Evaluation 2014, para 25.

¹⁵⁶ For further discussion see Findlay, 2002, p.13-4; Ray Murphy, *UN Peacekeeping in Lebanon, Somalia and Kosovo: Operational and Legal Issues*, Cambridge: Cambridge University Press, 2007, pp.153-74; and Max Kelly, *Protecting Civilians, Proposed Principles for Military Operations*, Washington DC: Stimson Center, May 2010.

¹⁵⁷ *Report of the Secretary General on the Model Status of Forces Agreement for Peacekeeping Operations*, UN Doc. A/45/594, 9 October 1990. For further discussion see Sheeran, 2011; Sheeran, 2010; and Bruce Oswald, Helen Durham and Adrian Bates, *Documents on the Law of UN Peace Operations*, Oxford: Oxford University Press, 2010, pp.34-8.

¹⁵⁸ Findlay, 2002, p.14. He notes that: 'The SOPs typically include guidelines on the manner in which weapons are to be used, for example, in regard to the use of warning shots, the controlling of fire, prohibitions on the use of automatic weapons and/or high explosives, and the action to be taken after firing.'

¹⁵⁹ Ibid. These may be known as orders for opening fire (OFOF).

¹⁶⁰ *United Nations Infantry Battalion Manual Volume I*, Department of Peacekeeping Operations/ Department of Field Support, August 2012, p.50.

The guidance on interpreting the RoEs matters considerably. In Haiti, for example, the RoE of the US-led multinational force, that entered the country in September 1994, with a Chapter VII UN Security Council mandate,¹⁶¹ was initially interpreted as leaving law enforcement to the notorious Haitian armed forces.¹⁶² A public outcry followed television pictures of US troops standing by while Haitian soldiers beat peaceful pro-democracy protesters, one of whom subsequently died.¹⁶³ The interpretation of the RoE, but not the rules themselves, was then changed to permit troops to use force to prevent the loss of human life.¹⁶⁴ As discussed in Chapter Two, during the 1990s Commanders in the field often interpreted their rules of engagement quite differently, with some expanding the notion of self-defence to permit them to defend UN civilian agencies and personnel from attack, while others took a more restrictive interpretation.¹⁶⁵

One of the criticisms of the *Report of the Independent Inquiry on Rwanda*, published in 1999, was of ‘confusion over the rules of engagement’ between the field and headquarters.¹⁶⁶ It recommended steps to ensure greater clarity for future missions, as well as their formal approval by UN headquarters.¹⁶⁷ In 1998 a working group was established to produce a draft

¹⁶¹ Security Council Resolution 944 of 29 September 1994. See also Security Council Resolutions 933 of 30 June 1994, 917, of 6 May 1994, 905 of 23 March 1994, 841 of 16 June 1993, 861 of 27 August 1993, 862 of 31 August 1993, 867 of 23 September 1993, 873 of 13 October 1993, and 875 of 16 October 1993.

¹⁶² For sharply contrasting views of the UN’s record in Haiti see Peter Hallward, *Damming the flood: Haiti and the politics of containment*, London: Verso, 2010; and David Malone and Sebastian von Einsiedel, ‘Haiti’, in Berdal, Mats and Economides, Spyros (Eds), *United Nations interventionism 1991 – 2004*, Cambridge: Cambridge University Press, 2007.

¹⁶³ For discussion of the confusion surrounding the evolving mandates of the UN-mandated forces in Haiti see Colin Granderson, ‘Military-Humanitarian Ambiguities in Haiti’, in Jonathan Moore (ed) *Hard Choices, moral dilemmas in humanitarian intervention*, Maryland and Oxford: Rowman & Littlefield, 1998.

¹⁶⁴ Chesterman, Simon, *The use of force in UN peace operations*, External study for the Department of Peacekeeping Best Practices Unit, New York: DPKO, 2003, p.15. He notes that the US also reinforced the 21,000 strong mission with an additional 1,000 soldiers.

¹⁶⁵ Findlay, 2002, p.15; and Dallaire, 2003, pp.12, 229 and 233. See also Terry D. Gill, Dieter Fleck (eds), *The Handbook of the International Law of Military Operations, Second Edition*, Oxford: Oxford University Press, 2015. While these differences may be partly due to the situations confronting missions, the interpretation of the use of force in self-defence can also differ in various legal systems, so some contingents might be more inclined towards certain approaches.

¹⁶⁶ *Report of the Independent Inquiry into the actions of the United Nations during the 1994 Genocide in Rwanda*, S/1999/1257, 16 December 1999, p.35.

¹⁶⁷ *Ibid.*, p.53.

of model set of RoEs for future missions and training purposes.¹⁶⁸ In December 2001, however, the Secretary General announced that the document, now known as the *Guidelines for the Development of Rules of Engagement for United Nations Peacekeeping Operations*, would remain a ‘work in progress’.¹⁶⁹

The draft RoE contain five sets of rules: Use of Force, Use of Weapon Systems, Authority to carry Weapons, Authority to Detain, Search and Disarm and Reaction to Civil Action/Unrest with a list that provides various options from which a selection will be made to suit each specific mission.¹⁷⁰ Individual mission RoE include one or more general permissions for the use of force selected from the numbered options on the UN Master List. These are then adapted for each operation, based on the authorizing resolutions.¹⁷¹ As discussed in Chapter Three, following the publication of the *Brahimi Report*, these rules were amended to authorise the use of force ‘up to, and including deadly force, to defend any civilian person who is in need of protection against a hostile act or hostile intent, when competent local authorities are not in a position to render immediate assistance’.¹⁷² As also discussed, however, most existing guidance on the interpretation of the RoE appears to be based on the assumption that the use of force will be implemented within an IHL legal framework and

¹⁶⁸ *Report of the Secretary-General on the Implementation of the Recommendations of the Special Committee on Peacekeeping Operations and the Panel on United Nations Peace Operations*, UN Doc A/AC.121/43, 21 February 1999.

¹⁶⁹ *Implementation of the Recommendations of the Special Committee on Peacekeeping Operations and the Panel on United Nations Peace Operations* (Report of the Secretary-General), UN Doc A/56/732 (21 December 2001), para 70.

¹⁷⁰ UN Department of Peacekeeping Operations, ‘United Nations Master List of Numbered ROE,’ *Guidelines for the Development of ROE for UNPKO, Provisional Sample ROE*, Attachment 1 to FGS/0220.001, United Nations, April 2002.

¹⁷¹ *United Nations Infantry Battalion Manual Volume I*, Department of Peacekeeping Operations/ Department of Field Support, August 2012, p.50. The mission RoEs are formulated by the DPKO Military Advisor’s office and the UN Office of Legal Affairs. The UN Under-Secretary-General for Peacekeeping Operations approves them and provides them to the mission’s Force Commander, who can request changes to the RoEs. The rules for the use of force, as formulated by the force commander, may be issued in written form to troops in the field. RoEs are ‘directions to operational commanders, which delineate the parameters within which force may be used by the military component of the peace keeping operation while executing its mandated tasks.

¹⁷² United Nations Master List of Numbered ROE, *Guidelines for the Development of ROE for UNPKO, Provisional Sample ROE*, Attachment 1 to FGS/0220.001, United Nations, April 2002, Rule 1.8.

peacekeeping soldiers receive little training or guidance on the positive and negative obligations surrounding the use of lethal force contained in international human rights law.¹⁷³

The draft RoE provide broad authorization for the detention of people who ‘commit a hostile act or demonstrate hostile intent’.¹⁷⁴ DPKO published an interim standard operating procedure to provide guidance on detention policy to peacekeeping operations in 2011 and this has been used as the basis for mission-specific guidance as well.¹⁷⁵ The policy states that missions are authorised to detain people where ‘mandated by the Security Council or General Assembly and in compliance with Mission-specific military rules of engagement’, SOFAs and SOMAs, ‘police directives on the use of force’, and ‘applicable international human rights, humanitarian and refugee law, norms and standards.’¹⁷⁶ Any person detained by UN personnel shall be released or handed over to national law enforcement officials of host state or other national authorities ‘as soon as possible’, which is understood to mean:

¹⁷³ Interviews conducted with senior UN civilian and military staff in DRC, South Sudan and Côte d’Ivoire in June and July 2012. This comment is also based on hundreds of conversations with peacekeeping soldiers during pre-deployment training seminars and workshops in Brazil, Uruguay, Washington, Stockholm, Brindisi and Entebbe between 2010 and 2015.

¹⁷⁴ UN Department of Peacekeeping Operations, ‘United Nations Master List of Numbered ROE,’ *Guidelines for the Development of ROE for UNPKO, Provisional Sample ROE*, Attachment 1 to FGS/0220.001, United Nations, April 2002. Rule 4. Authority to detain, search and disarm. Rule No. 4.1 Detention of individuals or groups who commit a hostile act or demonstrate a hostile intent against oneself, one’s unit or United Nations personnel is authorized; Rule No. 4.24 Detention of individuals or groups who commit a hostile act or demonstrate a hostile intent against other international personnel is authorized; Rule No. 4.35 Detention of individuals or groups who commit a hostile act or demonstrate hostile intent against installations and areas or goods designated by the Head of the Mission in consultation with the Force Commander, is authorized; Rule No. 4.4 Searching, including of detained person(s), for weapons, ammunition and explosives is authorized; Rule No. 4.5 Disarming individuals, when so directed by the Force Commander, is authorised.

¹⁷⁵ *Detention in United Nations Peace Operations Interim Standard Operating Procedures 2010*, UN Department of Peacekeeping Operations/Department for Field Support, 2010. See also *Detention in United Nations Peace Operations Interim Standard Operating Procedures*, UN Department of Peacekeeping Operations/Department for Field Support, 25 January 2011 and *Standing Operating Procedures on Internment by the United Nations Stabilization Mission in the Democratic Republic of the Congo*, UN Department of Peacekeeping Operations/Department for Field Support, 2103.

¹⁷⁶ *Detention in United Nations Peace Operations Interim Standard Operating Procedures*, 25 January 2011. This notes that the rules ‘provide internal operational guidance for the handling of persons and do not address issues of criminal procedures, which are governed by the laws of the respective host State.’

Within 48 hours, the detained person should be either released or handed over to the national authorities. Detainees may be held for an additional 24 hours if on transit and in the process of handover to the national authorities. Custody beyond 72 hours may only be undertaken on a written request from and for temporary detention on behalf of the national authorities, in discharge of a mandate to assist national law enforcement agencies to this effect, *or when the HOM [Head of Mission] considers detention reasonable and appropriate* to discharge the mandate in relation to the specific case. [emphasis added] . . . In case of substantial grounds indicating real risk to detained persons from national authorities of torture, ill-treatment, persecution, subjection to death penalty or arbitrary deprivation of life; the UN shall not handover but rather release the detainee.¹⁷⁷

Detained persons have ‘the right to know the reason for detention, designate a family member and or other representative person to be notified of the detention, to make complaint on condition or treatment during the detention, to make claim/compensation for bodily injury/damage to property arising from detention and to receive an inventory of items taken and have them returned under certain conditions.’¹⁷⁸ They should also be informed of their legal rights and given a medical examination. They have no right to legal representation, however, and can be questioned in the absence of a lawyer.¹⁷⁹ A ‘Detained Persons Register’ shall be maintained on initial details of detention and updated to reflect any material change of circumstances.¹⁸⁰ Detainees should be held in specified cells, in appropriate conditions, to which both the mission’s human rights components and the ICRC ‘shall be granted

¹⁷⁷ *United Nations Infantry Battalion Manual Volume II*, Department of Peacekeeping Operations/ Department of Field Support, August 2012, p.142.

¹⁷⁸ *Ibid.*, p.138.

¹⁷⁹ *Ibid.*, p.140.

¹⁸⁰ *Ibid.*, p.139.

unconditional access . . . and be notified of and have access to documents relating to detentions, releases, transfers and handover of detainees.’¹⁸¹

As will be discussed in the next two chapters this policy is problematic, in practice, for UN peacekeeping missions with POC mandates. UN missions do not have the authority to establish a criminal justice system independent of the government of the State in which they are operating, but the national systems are often incapable of meeting the minimum standards required under international human rights law of protecting people against torture and other forms of ill-treatment. The requirement to handover or release detainees, therefore, makes many missions reluctant to detain at all. As will be discussed in Chapter Six, when rebel forces were advancing on Goma, in eastern DRC, in 2012, some senior MONUSCO officials expressed uncertainty as to whether their RoE permitted the use of force to engage with or detain rebel fighters unless they were actually threatening civilians at the time.¹⁸² As will be discussed in Chapter Seven UNMISS reluctantly began to detain people within its PoC sites in 2014, using the authority provided under its SOFA to maintain safety and security within its premises, but this raises serious issues in the absence of an effective procedure to review the legality of extended detentions.¹⁸³

In October 2012 a group of States adopted a set of Principles and Guidelines under the ‘Copenhagen Process on the handling of detainees in international military operations’.¹⁸⁴

The Principles are to apply to military operations, such as those conducted by coalition forces in Iraq and Afghanistan, as well as UN peacekeeping operations where the use of force is

¹⁸¹ Ibid., pp.143-4. ‘Each COB and the Battalion HQ will have detention cells as per mission SOPs. These cells will be provided with sleeping arrange. Food, water, recreation facilities and toilet facilities will be provided. Religious scriptures should be accessible to the detainees.’

¹⁸² This view was expressed to the author of this thesis by several senior MONUSCO officials including a Deputy Special Representative of the Secretary General (DSRSG) during interviews conducted in Goma and Kinshasa in June 2012.

¹⁸³ Ralph Mamiya, ‘Legal Challenges for UN Peacekeepers Protecting Civilians in South Sudan’, American Society of International Law, Vol. 8, Issue 26, December 2014.

¹⁸⁴ Website of the Danish Ministry of Foreign Affairs, <http://um.dk/da/nyheder-fra-udenrigsministeriet/newsdisplaypage/?newsID=8FDF325A-AEFA-473B-A62B-FCC630EE0A64> (accessed 22 October 2012), accessed 28 April 2014.

authorized.¹⁸⁵ They are intended to address the ‘legal uncertainties’ surrounding detentions in such situations, including defining:

What is the legal basis for detention in international military operations? Which regime of treatment and conditions of detention applies to the detainees? What legal standards and procedures apply to transfers between States in a military coalition and the host State or internally between coalition partners? What exactly do we mean when we talk about ‘detention’? And not the least, do the answers to all these questions change when the situation in which the military operation takes place changes from an international to a non-international armed conflict or to a situation of no conflict?¹⁸⁶

The Principles are not legally binding. They recognize that: ‘States have differing views as to when and under what circumstances a “restriction on liberty” amounts to detention’¹⁸⁷ as well as divisions on the extraterritorial application of human law and its relationship with IHL.¹⁸⁸ The Principles were ‘welcomed’ by seventeen of the participating States, although

¹⁸⁵ *Blog of European Journal of International Law*, Jacques Hartman, ‘The Copenhagen Process: Principles and Guidelines’, 3 November 2012, <http://www.ejiltalk.org/the-copenhagen-process-principles-and-guidelines/>, accessed 14 April 2014. See also Bruce Oswald, ‘IHL and IHRL: The Interplay as Regards Detainees’, United States Institute of Peace, Handout, 2013.

¹⁸⁶ Thomas Winkler, Acting Legal Adviser, Danish Ministry for Foreign Affairs, ‘The Copenhagen Process on the Handling of Detainees in International Military Operations, XXXIst Round Table on Current Issues of International Humanitarian Law International Humanitarian Law, Human Rights and Peace Operations, Theme III: Working Group 2: Peace operations and detention, 5 September 2008.

¹⁸⁷ *Ibid.*, para XIII. Chairman’s Commentary, para 1.4. ‘States have differing views as to when and under what circumstances a ‘restriction on liberty’ amounts to detention. Either detention or restriction of liberty may be considered to occur in such places as roadblocks, check points, or when searching houses or property. A person who has been made subject to restriction of liberty may not necessarily be considered to have been detained. Although the person may have his liberty restricted the procedural protections referred to in Principles 7 through 15 may not be applicable to that individual. Operational uncertainties may make it difficult to distinguish a restriction of liberty from a deprivation of liberty.’

¹⁸⁸ *Ibid.* See Commentary to Principles 1, 4, 5, 12 and 15. For discussion see *Blog of European Journal of International Law*, Jacques Hartman, ‘The Copenhagen Process: Principles and Guidelines’, 3 November 2012, <http://www.ejiltalk.org/the-copenhagen-process-principles-and-guidelines/>, accessed 14 April 2014

two expressed concerns about whether they fully reflected the provisions contained in international human rights law.¹⁸⁹

Amnesty International, however warned that the Principles could significantly weaken existing protections, stating that they ‘pander to existing poor practices’ and were ‘ripe for exploitation’ by those seeking to evade their obligations under IHL and international human rights law’.¹⁹⁰ Amongst its specific concerns were that they ‘do not acknowledge the absolute prohibition of enforced disappearance and other forms of secret detention under international law’ and would allow the detaining authorities ‘not to inform family members of the fate and whereabouts of a detainee’ for undefined periods of time.¹⁹¹ They also ‘appear to endorse indefinite administrative detention on security grounds’ without providing safeguards such the right to challenge the lawfulness of detention before a court.’¹⁹² Finally, they ‘do not recognise that all complaints of torture and ill-treatment ‘must be investigated by independent and impartial authorities, that victims of such abuses have the right to an effective remedy, and that those responsible for such abuses must be brought to justice.’¹⁹³ It further noted that:

the Principles could be appended to future resolutions of the UN Security Council under Chapter VII of the UN Charter, which could indirectly give them binding legal

¹⁸⁹ *3rd Copenhagen Conference on the Handling of Detainees in International Military Operations*, Copenhagen, 18 - 19 October 2012, Minutes of the Meeting, http://um.dk/en/~media/UM/English-site/Documents/Politics-and-diplomacy/Official%20minutes_CP%20ny.pdf, accessed 14 April 2014. The Principles were welcomed by delegates from Argentina, Australia, Canada, China, Denmark, France, Finland, Germany, Malaysia, the Netherlands, Norway, South Africa, Sweden, Turkey, Uganda, United Kingdom, and the United States of America. The Swedish and Russian delegations had concerns about the Principles reflecting IHRL appropriately and made statements to that effect. The term ‘welcomed’ is taken to mean that the participants agreed that the Principles accurately reflect the decisions that occurred during the Process, are a useful outline for global approach to detention; and are not legally binding.

¹⁹⁰ Amnesty International, *Outcome of Copenhagen Process on detainees in international military operations undermines respect for human rights*, 23 October 2012 AI index: IOR 50/003/2012.

¹⁹¹ *Ibid.*

¹⁹² *Ibid.*

¹⁹³ *Ibid.*

effect. States have already tried to argue in the past that their obligations under human rights treaties can be overridden or displaced by Chapter VII resolutions.¹⁹⁴

As discussed in Chapter Four, under international human rights law, the right to liberty is potentially *derogable*, but protections against torture and ill-treatment are *non-derogable* and the right to challenge the lawfulness of a detention may be *non-derogable* as well.¹⁹⁵ The right to life is also *non-derogable* but IHL and international human rights law treat the use of force very differently and so the legality of particular actions or inactions may depend upon a determination of the applicable legal framework.

As discussed in this chapter, however, while national and international courts refuse even to consider complaints over alleged violations by UN peacekeeping missions – unless they can attribute responsibility for the actions to a State or States rather than the UN itself – ensuring compliance with these standards remains problematic. The OIOS Protection Evaluation 2014 found a general lack of understanding concerning the legal obligation of missions to use force for protective purposes¹⁹⁶ and noted that some troops had expressed concerns that they could face prosecution by the ICC for excessive use of force.¹⁹⁷ While some of the current failures of missions to provide effective protection to civilians, in line with their mandates, points to the need for clearer legal guidance, it could also reflect risk-aversion due to the fact that there are no meaningful mechanisms by which peacekeepers can be held to account by those that

¹⁹⁴ *Ibid.*

¹⁹⁵ European Court of Human Rights, *Aksoy v. Turkey*, Appl. No. 21987/93, Judgment 18 December 1996; Inter-American Court on Human Rights, *Habeas Corpus in Emergency Situations (Arts. 27(2), 25(1) and 7(6) American Convention on Human Rights)* (1987) Advisory Opinion OC-8/87, Series A, No. 8. See also ECtHR: *Lawless v. Ireland*, Appl. No. 332/57, Judgment 1 July 1961; ECtHR: *Ireland v UK*, Appl. No. 5310/71, Judgment 18 January 1978 *Brogan and others v. UK*, Appl. No. 11209/84, Judgment 29 November 1988; and *Brannigan and MacBride v. UK* Appl. No. 14553-4/89, Judgment 24 May 1993.

¹⁹⁶ OIOS Protection Evaluation 2014, para 40

¹⁹⁷ *Ibid.*, para 50.

they are supposed to be protecting. One interviewee told the evaluation that: ‘There are penalties for action, but no penalties for inaction’.¹⁹⁸

The final two sections of this chapter will discuss two areas where the current lack of accountability and mechanisms for reviewing UN actions and inactions has led to increasing crises of legitimacy for the Organisation: UN sanctions and sexual exploitation by UN peacekeepers. In both cases the UN has developed – or is in the process of developing – *ad hoc* mechanisms to address the most egregious violations, which both provide potential models that could be adapted for POC purposes, but also show the need to address the problem of ‘who guards the guards’ in a more systematic way.

Sanctions, travel bans and asset seizures

From the start of the 1990s the Security Council began to make increasing use of its Chapter VII powers to impose arms embargos and economic sanctions.¹⁹⁹ An embargo was imposed against Iraq, in August 1990, following its invasion of Kuwait,²⁰⁰ against Yugoslavia, in September 1991, as it descended into civil war²⁰¹ and against Haiti, in June 1993, following a military coup.²⁰² Although the intention of these measures was to put

¹⁹⁸ Ibid. ‘Also apparent is a fear of penalties in the event of allegations of excessive use of force. Court martial, repatriation, loss of financial benefits or even prosecution by the International Criminal Court were among consequences reportedly feared by troops in a confidential survey conducted by the Department of Peacekeeping Operations/Department of Field Support in 2013, despite training that emphasizes the breadth of their authority. Risk aversion results. One interviewee stated, “There are penalties for action, but no penalties for inaction”.

¹⁹⁹ For more details see: Marcos Tourinho, ‘Becoming World Police? The Implications of Individual UN Targeted Sanctions’, *International Affairs*, 2015, forthcoming (on file with author); Michael Bothe, ‘Security Council’s Targeted Sanctions against Presumed Terrorists the Need to Comply with Human Rights Standards’, *Journal of International Criminal Justice* Vol. 6, Issue 3, 2008, pp.541-55; David Cortright, George A. Lopez, and Linda Gerber-Stellingwerf, ‘The Sanctions Era: Themes and Trends in UN Security Council Sanctions Since 1990,’ in Lowe, Roberts, Welsh, and Zaum, 2008, pp. 205–225; and De Wett, 2004, pp.217-50. The use of sanctions is provided in for in Article 41 whereby the Security Council may impose ‘complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication, and the severance of diplomatic relations.’ Sanctions were first used against Southern Rhodesia in 1965 and a mandatory arms embargo was imposed on South Africa in 1977.

²⁰⁰ Security Council Resolution 661 of 6 August 1990.

²⁰¹ Security Council Resolution 713 of 25 September 1991.

²⁰² Security Council Resolution 841 of 16 June 1993.

pressure on the countries' rulers, increasing concerns about their devastating impact on the people of the countries concerned led some to argue that the UN may be committing grave violations of economic, social and cultural rights.²⁰³ In Haiti for example, the rate of malnutrition for children under five appears to have almost doubled during the three years in which the sanctions were in place²⁰⁴ while sanctions against Iraq may have contributed to the death of up to half a million children under the age of five over an eight year period.²⁰⁵

In response to criticisms, the UN began to devise 'smarter' individual sanctions, which have been used against rebel groups in Liberia, Sierra Leone and Angola as well as to target regime leaders in Haiti, Libya, Iran and North Korea.²⁰⁶ In 1999 the Security Council established the Al Qaeda Taliban (AQT) Sanctions Committee²⁰⁷ and this has become particularly active since the terrorist attacks of 11 September 2001.²⁰⁸ In 2000 there were

²⁰³ See for example: Mary Ellen O'Connell, 'Debating the Law of Sanctions', *European Journal of International Law*, Volume 13, Issue , 2002, pp.63-79; Matthew Craven, 'Humanitarianism and the quest for smarter sanctions', *European Journal of International Law*, Volume 13, Issue 1, 2002, pp.43-61; Anna Segall, 'Economic sanctions: legal and policy constraints', *International Review of the Red Cross*, 32, 1999; Roger Normand, 'A human rights assessment of sanctions: the case of Iraq, 1990-7', in Willem van Genugten and Gerard de Groot (eds) *United Nations Sanctions: Effectiveness and Effects, especially in the field of human rights. A multi-disciplinary approach*, Antwerpen: Interseta, 1999; Michael Brzoska, 'From Dumb to Smart? Recent Reforms of UN Sanctions', *Global Governance*, Vol. 9 No. 4, October-December 2003, pp.519-535.

²⁰⁴ UNICEF, *State of the World's Children in 1996*, UNICEF, 1997, panel 4.

²⁰⁵ UNICEF Newline 'Iraq surveys show humanitarian emergency', August 12 1998. UNICEF Executive Director Carol Bellamy said that: 'if the substantial reduction in child mortality throughout Iraq during the 1980s had continued through the 1990s, there would have been half a million fewer deaths of children under-five in the country as a whole during the eight-year period 1991 to 1998.'

²⁰⁶ Biersteker, Thomas J. and Eckert, Sue E., *Strengthening Targeted Sanctions Through Fair and Clear Procedures*, Watson Institute for International Studies, Brown University, 2006; and Tourinho, 2015. The UN has imposed targeted sanctions in 63 cases since the start of the 1990s, three quarters of which have been imposed on individuals.

²⁰⁷ Security Council Resolution 1267 of 15 October 1999. This strongly condemned the continuing use of Afghan territory by the Taliban, for the sheltering and training of terrorists and planning of terrorist acts. It froze the funds and other financial resources of the Taliban and established a Sanctions Committee.

²⁰⁸ See also Security Council Resolutions 1333 adopted on 19 December 2000; Resolution 1363 adopted on 30 July 2001; Resolution 1373, adopted on 28 September 2001; and Resolution 1390 adopted on 16 January 2002. Resolution 1333 extended the application of the sanctions provided for under Resolution 1267 to any individuals or entities identified by the Sanctions Committee as being associated with al-Qaeda or Osama bin Laden. The resolution further required a list to be maintained for the implementation of the UN sanctions. In Resolution 1363 the Security Council decided to set up a mechanism to monitor the measures imposed 'the Monitoring Group', while Resolution 1373 decided that States should take a further series of measures to combat international terrorism and ensure effective border controls in this connection. In Resolution 1390 the Security Council decided to

only seven entities or individuals listed by the AQT Committee while by 2003 another 397 had been added.²⁰⁹ As Gehring and Dörfler have noted the initial listing process was ‘virtually unconstrained’, occurred ‘in the absence of reliable decision criteria’ and partially reversed the burden of proof.²¹⁰ There was no clear procedure within the original mechanism for listed individuals to seek a review of their case, or to be de-listed, so many of those affected challenged the decisions through the courts.²¹¹

In 2005 the European Court of Human Rights had found no violation in the case of *Bosphorus Airways v. Ireland* concerning the seizure of an aircraft leased by Yugoslav Airlines in pursuant of the sanctions regime authorised by the Security Council in relation to the conflict in the former Yugoslavia.²¹² In September 2008, however, the European Court of Justice (ECJ) ruled, in *Kadi v. Council of European Union*, that an order freezing of assets of someone identified as an alleged *Al Qaeda* member by the AQT Sanctions Committee had failed to respect fundamental rights because it did not provide a right to challenge a freezing

impose a ban on entry and transit for individuals and entities concerned by the international sanctions, to regularly update the list of persons concerned by the sanctions, to promulgate expeditiously such guidelines and criteria as might be necessary to facilitate the implementation of the sanctions and to make any information it considered relevant, including the list of persons concerned, publicly available.

²⁰⁹ David Cortright, *Patterns of Implementation: Do Listing Practices Impede Compliance with UN Sanctions? A Critical Assessment*, Policy Brief No. SSRP 0912-01, Sanctions and Security Research Program; Fourth Freedom Foundation, Goshen; Kroc Institute of International Peace Studies, University of Notre Dame, Notre Dame, 2009.

²¹⁰ Thomas Gehring and Thomas Dörfler, ‘Division of Labor and Rule-based Decisionmaking Within the UN Security Council: The Al-Qaeda/Taliban Sanctions Regime’, *Global Governance*, No. 19, 2013, pp.567–587. Proposals for listings were circulated by the Committee chairperson and adopted unless a member objected in which case it went to the Committee for discussion. See also *Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism*, UN Doc. A/67/396, 26 September 2012; Andrea Bianchi, ‘Assessing the Effectiveness of the UN Security Council’s Anti-terrorism Measures: The Quest for Legitimacy and Cohesion’, *The European Journal of International Law*, (2006), Vol. 17 No. 5, pp.881–919; *Viewpoints of the Council of Europe Commissioner for Human Rights*, Thomas Hammarberg, Council of Europe Commissioner for Human Rights, 1 December 2008; *Press Conference by Special Rapporteur on Human Rights and Countering Terrorism*, Martin, Scheinin, UN Department of Public Information, 22 October 2008; Gray, 2008, pp.193-252; and Duffy, 2006, pp.17-69.

²¹¹ Thomas J. Biersteker, ‘Targeted Sanctions and Individual Human Rights,’ *International Journal* Vol. 65, No. 1, 2010, pp.85–103.

²¹² *Bosphorus Hava Yollari Turizm v. Ireland* Appl. No. 45036/98, Judgment (Grand Chamber), 30 June 2005. For further discussion see Frank Schorkopf, ‘The European Court of Human Rights’ Judgment in the Case of *Bosphorus Hava Yollari Turizm v. Ireland*’, *German Law Journal*, Vol. 6, No. 9, 2005, pp.1255-63.

order.²¹³ A court of first instance had held that it had no jurisdiction to inquire into the lawfulness of a Chapter VII Security Council resolution, because the obligations it imposed on members of the EU prevailed over fundamental rights as protected by the Community legal order.²¹⁴ On appeal, however, the ECJ held that it was competent to review the lawfulness of the Regulation because EU law formed a distinct internal legal order.²¹⁵

By holding EU law to be separate branch of law to general international law, the ECJ avoided addressing the pre-emptive nature of Article 103 of the UN Charter.²¹⁶ This appears, however, to present a direct confrontation between the two systems.²¹⁷ Even supporters of the judgment acknowledge that it creates conflicting obligations for EU member states.²¹⁸ De Burca has argued that the ECJ decision risks fragmenting the international legal system because the Court was in effect stating that ‘no international treaty could affect the autonomy of the EC legal system, and that even if the Charter were to be ranked as part of EC law it

²¹³ *Yassin Abdullah Kadi and Al Barakaat International Foundation v. Council of the European Union and Commission of the European Communities* (joined cases) C-402/05 P and C-415/05 P, Judgment of 3 September 2008.

²¹⁴ *Kadi v Council of European Union*, Case T-315/01, 21 September 2005, paras 213-226. See also, *Ahmed Ali Yusuf and Al Barakaat International Foundation v. Council of the European Union and Commission of the European Communities*, Case T-306/01, Judgment of the Court of First Instance, 21 September 2005.

²¹⁵ For further discussion see: Albert Posch, ‘The Kadi case: rethinking the relationship between EU law and international law?’, *Columbia Journal of European Law on-line*, Vol. 15, 2009, pp.1-5; and Ramses A. Wessel, *Editorial: The UN, EU, and Jus Cogens*, 3 *International Organizations Law Review*, 1, 5 (2006). Wessel rejected the lower court’s view that it was competent to review Security Council decisions for compatibility with *jus cogens* norms. He also criticised the court’s statement that *jus cogens* rights could include the right to private property.

²¹⁶ Takis Tridimas and Jose A. Gutierrez-Fons, ‘EU Law, International Law and Economic Sanctions Against Terrorism: The Judiciary in Distress?’, *Fordham International Law Journal*, Vol. 32, Issue 2, 2008. See also Christina Eckes, ‘Decision-making in the Dark? Autonomous EU Sanctions and National Classification’, *Amsterdam Centre for European Law and Governance Working Paper Series 2012 – 02*, University of Amsterdam, May 2012.

²¹⁷ Gráinne de Burca, ‘The European Court of Justice and the International Legal Order After Kadi’, *Harvard International Law Journal*, Vol. 51, No. 1, Winter 2010, pp.1-49. See also Opinion of Advocate General Poiares Maduro, *Yassin Abdullah Kadi and Al Barakaat International Foundation v. Council and Commission*, Joined cases C-402/05 P and C-415/05 P, delivered 16 January 2008, in which he noted that there should be a ‘presumption’ that the European Commission (EC) wanted to honour its international legal commitments, but given the failure of the UN to provide an effective mechanism for reviewing whether its actions respected fundamental human rights principles, the EC was not precluded from carrying out such reviews itself.

²¹⁸ Katja S. Ziegler, ‘Strengthening the Rule of Law, but Fragmenting International Law: The Kadi Decision of the ECJ from the Perspective of Human Rights’, *University of Oxford Legal Research Paper Series*, Paper No 11/2009 March 2009, p.15. She has likened the decision to ‘putting the Damocles sword of State responsibility above the Member States in order for them to reform the UN system’.

would be ranked below the normative level of the EC treaties themselves and lower than the general principles of EC law'.²¹⁹

Individual sanctions are increasingly being used by the Security Council for POC purposes and the ECJ has also annulled measures implemented in accordance with a POC Security Council resolution, on Côte d'Ivoire.²²⁰ The wife of Côte d'Ivoire's President and a prominent business associate of him were accused of obstructing the 'peace and reconciliation process' by publicly 'inciting hatred and violence and through participation in disinformation campaigns in connection with the 2010 presidential election'.²²¹ The Court ruled that these reasons 'failed to provide the actual and specific reasons of why the Council, who enjoys a wide margin of discretion, considered it necessary to apply restrictive measures' and the 'absence of a single concrete element' that would justify them.²²² As will be discussed further in Chapter Seven, sanctions have also been used for POC purposes in relation to the conflicts in Darfur and South Sudan.

In October 2008, the UN Human Right Committee found in the case of *Nabil Sayadi and Patricia Vinck v. Belgium*,²²³ that a travel ban against the complainants by the AQT Sanctions Committee was disproportionate and constituted a violation of their right to freedom of movement.²²⁴ The majority of the Committee avoided addressing the potential norm conflict by finding a violation on the basis that even though Belgium was not competent to remove their names from either the UN or EU lists, it was responsible for placing their names there

²¹⁹ De Burca, 2010, pp.5 and 27. [emphasis in original]

²²⁰ *Bamba v. Council*, Case T-86/11, Judgment of the General Court (Fifth Chamber, Extended Composition) 8 June 2011; and *Morokro v. Council*, Case T-316/11 Judgment of the General Court (Fifth Chamber) of 16 September 2011.

²²¹ *Ibid.*

²²² *Ibid.* For further discussion see Council of Europe, *Committee of Legal Advisers on Public International Law (CAHDI) UN Sanctions and Respect for Human Rights*, March 2012.

²²³ *Sayadi and Vinck v. Belgium*, CCPR/C/94/D/1472/2006, Communication No. 1472/2006, Views adopted on 22 October 2008.

²²⁴ ICCPR, Article 12.

originally.²²⁵ In his concurring opinion, one Committee member, Nigel Rodley, took a step towards considering the Security Council's own human rights obligations.

Rodley stated that he had initially dissented on admissibility because he had 'presumed that there was indeed a conflict between the State party's obligations under the Covenant' and the UN Charter.²²⁶ On 'further reflection', however, he had 'come to the view that the Committee could itself take at least a *prima facie* view as to the existence or otherwise of a conflict'.²²⁷ He stated that the wording of the UN Charter strongly suggests that there should be a 'presumption that the Security Council did not intend that actions taken pursuant to its resolutions should violate human rights', which would apply to *jus cogens* and *non-derogable* rights and that 'even in respect of rights that may be derogated from during a public emergency, any departures would be conditioned by the principles of necessity and proportionality'.²²⁸ He then listed a set of 'presumptions' which, 'should be applied in interpreting the resolutions for the purposes of establishing whether there is indeed a conflict' between the two sets of obligations.²²⁹ He concluded that while it is not an issue for the Committee he 'would venture to suggest that these criteria would also be helpful to those called upon to assess the legal validity of a Security Council resolution'.²³⁰

²²⁵ The two complainants, who were Belgian nationals, had been placed on the lists appended to that resolution in January 2003, on the basis of information which had been provided to the Security Council by Belgium, shortly after the commencement of a domestic criminal investigation in September 2002. In 2005, the Brussels Court of First Instance had ordered the Belgian State, *inter alia*, to urgently initiate a delisting procedure with the United Nations Sanctions Committee, and the State had subsequently done so. The Committee found a violation because both the dismissal of the criminal investigation and the State party's delisting requests showed that the restrictions were not necessary to protect national security or public order. In the Committee's opinion, although the State party itself was not competent to remove the names from the list, it had the duty to do all it could to obtain that deletion as soon as possible, to provide the complainants with compensation, to make public the requests for delisting, and to ensure that similar violations did not occur in the future.

²²⁶ *Sayadi and Vinck v. Belgium*, 22 October 2008, Appendix A, Individual opinions on the Committee's Decision on Admissibility.

²²⁷ *Ibid.*

²²⁸ *Ibid.*, Appendix B, Individual opinion of Committee member Sir Nigel Rodley (concurring).

²²⁹ *Ibid.* These were that the Security Council did not intend to violate human rights; it did not intend to violate 'peremptory norm of international (human rights) law (*jus cogens*)', it did not intend to violate non-derogable rights (which are not *jus cogens*) in times of grave public emergency; and that it did intend to abide by the principles of necessity and proportionality should it require derogations.

²³⁰ *Ibid.* Similar arguments have been put forward by Milanovic, 2009; and Alexander Orakhelashvili, 'The Impact of Peremptory Norms on the Interpretation and Application of United Nations Security Council Resolutions', *European Journal of International Law*, Vol. 16 No.1, 2005, pp.59–88.

In September 2012 the European Court of Human Rights found, in the case of *Nada v. Switzerland*,²³¹ that a ban on entering or transiting through Switzerland, imposed on the applicant as a result of the addition of his name to the AQT Sanctions Committee list, had breached his right to private and family life.²³² The Court referred to the ‘presumption’ in favour of human rights set out in *Al-Jedda*, but ruled that in this case the presumption had been ‘rebutted’ because the UN Security Council resolutions in question contained ‘clear and explicit language, imposing an obligation to take measures capable of breaching human rights’.²³³ It nevertheless found a violation because Switzerland ‘should have persuaded the Court that it had taken – or at least had attempted to take – all possible measures to adapt the sanctions regime to the applicant’s individual situation.’²³⁴ It then concluded:

That finding dispenses the Court from determining the question, raised by the respondent and intervening Governments, of the hierarchy between the obligations of the States Parties to the Convention under that instrument, on the one hand, and those arising from the United Nations Charter, on the other.²³⁵

Some courts have also found that domestic laws implementing the listing procedures have violated their own constitutional protections of human rights.²³⁶ In the 2005 World Summit Outcome Document the General Assembly had called upon the Security Council, ‘to ensure that fair and clear procedures exist for placing individuals and entities on sanctions lists and for removing them, as well as for granting humanitarian exemptions’.²³⁷ The Security

²³¹ *Nada v. Switzerland*, Appl. No. 10593/08, Judgment (Grand Chamber), 12 September 2012.

²³² *Ibid.* The Court found violations of under Article 8 and 13 of the ECHR.

²³³ *Ibid.*, para 172.

²³⁴ *Ibid.*, para 196.

²³⁵ *Ibid.*, para 197.

²³⁶ See for example, *Abdelrazik v. Canada (Minister of Foreign Affairs)* (Canadian Federal Court), Judgment 4 June 2009; and *Ahmed and others v. HM Treasury* (United Kingdom Supreme Court), Judgment 27 January 2010. For further discussion see Marko Milanovic, ‘Norm Conflict in International Law: whither human rights?’, *Duke Journal of Comparative & International Law*, Vol. 20, 2009; and Larsen, 2012, pp.87-90.

²³⁷ World Summit Outcome Document, 2005, para 109.

Council has responded to these criticisms with a series of resolutions towards ensuring fairer and clearer procedures.²³⁸ In 2009, an Office of the Ombudsperson was established, which can help individuals to obtain a de-listing.²³⁹ A delisting proposal is now automatically adopted after sixty days unless the AQT Sanctions Committee decides by consensus to uphold the listing or unless a member State takes the matter to the Security Council.²⁴⁰ Although it falls short of providing a formal judicial review of the Committee's decisions,²⁴¹ the authority ceded to the Ombudsperson has been described as 'unprecedented and extraordinary'.²⁴²

Sexual exploitation and UN accountability

At the same time the UN has faced a separate crisis due to a growing number of reports documenting the involvement of peacekeeping personnel in sexual exploitation and abuse.²⁴³

²³⁸ Patricia O'Brien, statement by the under-secretary-general for Legal Affairs and UN legal counsel delivered to the International Law Commission, Geneva, May 23, 2013, p.18 available at <http://legal.un.org/ilc/sessions/65/Statement%20byTheLegal%20Counsel.pdf>, accessed 6 January 2015. Security Council Resolution 1617 of 29 July 2005 spelled out the designation criteria more clearly to increase the transparency of the process. Security Council Resolution 1730 of 19 December 2006 established a de-listing procedure whereby those who found themselves on the list could petition the committee for it to consider their case. Security Council Resolution 1822 of 30 June 2008 established a periodic review of all listing decisions

²³⁹ Security Council Resolution 1904 of 17 December 2009. See also UN Security Council Resolutions 1989 of 17 June 2011 and 2083 of 17 December 2012, which strengthened the office.

²⁴⁰ For further discussion see Gehring and Dörfler, 2013, pp.567–587.

²⁴¹ *Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism*, UN Doc. A/67/396, 26 September 2012.

²⁴² Sue E. Eckert and Thomas J. Biersteker, *Due Process and Targeted Sanctions An Update of the "Watson Report"*, Watson Institute for International Studies, Brown University, Rhode Island, December 2012.

²⁴³ *A comprehensive strategy to eliminate future sexual exploitation and abuse in United Nations peacekeeping operations*, [Hereinafter the Zeid Report 2005], UN General Assembly Resolution A/59/710, 24 March 2005. UN *Investigation by the Office of Internal Oversight Services into Allegations of Sexual Exploitation and Abuse in the United Nations Organization Mission in the Democratic Republic of the Congo*, A/59/661, 5 January 2005; UN *Implementation of the United Nations Comprehensive Strategy on Assistance and Support to Victims of Sexual Exploitation and Abuse by United Nations Staff and Related Personnel*, A/64/176, 27 July 2009; Dr. Thelma Awori, Dr. Catherine Lutz, and General Paban J. Thapa, *Expert Mission to Evaluate Risks to SEA Prevention Efforts in MINUSTAH, UNMIL, MONUSCO and UNMISS*, 3 November 2013 ; OIOS *Inspection and Evaluation Division, Evaluation Report, Evaluation of the Enforcement and Remedial Assistance Efforts for Sexual Exploitation and Abuse by the United Nations and Related Personnel in Peacekeeping Operations*, IED-15-001, 15 May 2015, reissued 12 June 2015; Nicola Dahrendorf, *Sexual exploitation and abuse: lessons learned study, addressing sexual exploitation and abuse in MONUC, UNDPKO*, Best Practices Unit, March 2006; Corinna Csásky, *No one to turn to: the under-reporting of child sexual exploitation and abuse by aid workers and peacekeepers*, London: Save the

In February 2002 UNHCR and Save the Children published a report detailing sexual violence and exploitation carried out by UN peacekeepers against children in refugee camps in Guinea, Liberia and Sierra Leone.²⁴⁴ In May 2003 the General Assembly adopted Resolution 57/306,²⁴⁵ which led to a Secretary General's Bulletin on 'Special measures for protection from sexual exploitation and sexual abuse' that October.²⁴⁶ The following year, in response to further scandals, the UN published 'A Comprehensive Strategy to Eliminate Future Sexual Exploitation and Abuse in United Nations Peacekeeping Operations' (the *Zeid Report*) whose findings were endorsed by the General Assembly in March 2005.²⁴⁷

The *Zeid Report* noted that there was 'extensive mosaic of provisions' dealing with sexual exploitation and abuse that had been drafted at various times and with varying degrees of legal force.²⁴⁸ The rules applied differently to different categories of personnel and the situation was particularly unclear in relation to the military because the rules could only be made binding 'with the agreement of and action by the troop-contributing country (TCCs) concerned'.²⁴⁹ It recommended that TCCs hold more on-site courts martial and adopt formal memoranda of understanding so that cases could be forwarded to the competent national or military authorities.²⁵⁰ The existing model memorandum should also be amended to specify that disciplinary action will be taken against personnel found to have violated the standards set out in the 2003 bulletin.²⁵¹ TCCs should also report on the outcome of cases within their jurisdiction' and the General Assembly should make compliance with this procedure 'an

Children UK, 2008; Sarah Mendelson, *Barracks and Brothels: peacekeeping and human trafficking in the Balkans*, Washington: Centre for Strategic and International Studies, February 2005; and Sarah Martin, *Must boys be boys? Ending sexual exploitation and abuse in UN Peacekeeping missions*, New York: Refugees International, October 2005.

²⁴⁴ UNHCR and Save the Children-UK, *Sexual Violence and Exploitation: The Experience of Refugee Children in Guinea, Liberia, and Sierra Leone Based on Initial Findings and Recommendations from Assessment Mission 22 October – 30 November 2001*, February 2002.

²⁴⁵ General Assembly Resolution 57/306 of 22 May 2003.

²⁴⁶ Secretary-General's bulletin on 'Special measures for protection from sexual exploitation and sexual abuse', ST/SGB/2003/13.

²⁴⁷ UN General Assembly Resolution A/59/710, 24 March 2005.

²⁴⁸ *Zeid Report* 2005, para 22.

²⁴⁹ *Ibid.*, paras 14-21.

²⁵⁰ *Ibid.* Summary of recommendations pp.4-6.

²⁵¹ *Ibid.*, paras 24 and 70-1.

essential condition for acceptance of an offer from a troop-contributing country. Similar provisions should be included in the model memorandum of understanding and be referred to in Security Council resolutions.²⁵²

The report noted two fundamental obstacles to ensuring full legal accountability. First of all, that the UN sometimes operated ‘in areas where there was no functioning legal system or where the legal system was so devastated by conflict that it no longer satisfied minimum international human rights standards. In such cases it would not be in the interests of the United Nations to waive immunity *because its Charter requires it to uphold, promote and respect human rights.*’²⁵³ [emphasis added] Secondly, that the UN could not ‘obligate a troop-contributing country to prosecute’ since this decision ‘is an act of sovereignty’.²⁵⁴ One solution it suggested could be the development of an international convention that would subject UN personnel to the jurisdiction of States. Alternatively, ‘to try to get agreement with the host State when negotiating the status-of-forces agreement for the United Nations to provide assistance to the host State to ensure that criminal proceedings against United Nations personnel satisfied international human rights standards.’²⁵⁵ It stated that:

The founders of the United Nations did not intend that the privileges and immunities of [its] officials . . . should constitute a shield from national criminal prosecution for crimes committed in a State hosting a United Nations operation. However, the absence of a functioning judicial system in some peacekeeping locations means that it is not feasible to waive immunity in those jurisdictions. As a result, the prosecution of staff or experts on mission for crimes committed in such a State depends on whether the State of nationality of the suspect has conferred extraterritorial

²⁵² Ibid., para 81.

²⁵³ Ibid., para 87.

²⁵⁴ Ibid., para 80.

²⁵⁵ Ibid., para 89.

jurisdiction on its courts to take such action and whether it can, in the circumstances of the case, effectively take such action.²⁵⁶

Partly in response to the *Zeid Report*, in November 2005 the UN established a Conduct and Discipline Team in DPKO, which became the Conduct and Discipline Unit, two years later, located in the Department of Field Support.²⁵⁷ This is one of several investigatory and adjudicative bodies within the UN,²⁵⁸ and overlap and duplication between them often hinders effective investigations of complaints.

In December 2015 the UN published a Report of an Independent Review on Sexual Exploitation and Abuse by International Peacekeeping Forces in the Central African Republic.²⁵⁹ This detailed the negligence of the mission (MINUSCA) in responding to these allegations and was highly critical of both the mission leadership and the head of its human rights component, both of whom were found to have committed abuses of authority.²⁶⁰ The report had been commissioned that June and as a result of its preliminary findings, in August 2015, MINUSCA's head of mission, Babca Gaye, resigned from his post.²⁶¹ The report noted that 'the manner in which UN agencies responded to the Allegations was seriously flawed' with information being 'passed from desk to desk, inbox to inbox, across multiple UN

²⁵⁶ Ibid. Summary of recommendations pp.4-6. See also para 88.

²⁵⁷ *Homepage of the UN Conduct and Discipline Unit*, <https://cdu.unlb.org/FAQs.aspx>, accessed 3 May 2016.

²⁵⁸ See for example: *Homepage of the UN Ethics Office*, <http://www.un.org/en/ethics/>, accessed 15 April 2015; *Homepage of the UN Dispute Tribunal*, <http://www.un.org/en/oaj/dispute/>, accessed 15 April 2015. Prior to this staff disputes within the UN were settled by an internal mechanism in the form of the United Nations Administrative Tribunal, established by General Assembly Resolution 351 A (IV) of 9 December 1949. See also *Homepage of the UN Office of Internal Oversight Services* <https://oios.un.org/page?slug=about-us> accessed 3 May 2016.

²⁵⁹ Marie Deschamps, (Chair) Hassan B. Jallow and Yasmin Sooka, *Taking Action on Sexual Exploitation and Abuse by Peacekeepers: Report of an Independent Review on Sexual Exploitation and Abuse by International Peacekeeping Forces in the Central African Republic*, [Hereinafter Sexual Exploitation and Abuse report, 2015] 17 December 2015.

²⁶⁰ Ibid.

²⁶¹ *BBC News*, 'UN's CAR Envoy Gaye sacked over peacekeeper abuse claims', 12 August 2015.

offices, with no one willing to take responsibility to address the serious human rights violations.²⁶²

The report was also critical of the leadership of OHCHR, and other senior headquarters staff, for appearing to spend more time trying discipline a senior official who helped bring the allegations to light, rather than investigating them and bringing the perpetrators to justice.²⁶³

It nevertheless recommended the setting up of a Coordination Unit in OHCHR to oversee and coordinate responses to conflict related sexual violence, including: ‘monitoring, reporting and follow up on allegations of sexual abuse; analyzing data with a view to tracking trends and practices for the purpose of improving prevention and accountability; and following up on the implementation of the Panel’s recommendations.’²⁶⁴

In February 2016 the UN appointed a special coordinator to work exclusively on the problem of sexual exploitation by peacekeepers.²⁶⁵ In March the Security Council voted to give the Secretary General the right to repatriate entire units if their home countries fail to prosecute alleged perpetrators of sexual misconduct within six months.²⁶⁶ In April 2016 it was reported that soldiers in the mission from France, Gabon, and Burundi had sexually abused at least 108 women and children in a single province between 2013 and 2015.²⁶⁷ It was also reported that 25 new and separate allegations had been lodged in the first three months of 2016.²⁶⁸

²⁶² Sexual Exploitation and Abuse report, 2015, Executive Summary.

²⁶³ Ibid. See also *Guardian* ‘UN aid worker suspended for leaking report on child abuse by French troops’, 29 April 2015.

²⁶⁴ Ibid.

²⁶⁵ *UN News Centre*, ‘Seasoned official appointed to coordinate UN efforts to curb sexual abuse by peacekeepers’, 8 February 2016.

²⁶⁶ UN Security Council Resolution 2272 of 11 March 2016.

²⁶⁷ *Foreign Policy*, ‘UN Sex abuse scandal in Central Africa Republic hits rock bottom’, 8 April 2016. One French commander was reported to have tied up four girls and forced them to have sex with a dog, while a Congolese peacekeeper was said to have raped a 16-year-old in a hotel room.

²⁶⁸ Ibid. See also Amnesty International, *CAR: UN troops implicated in rape of girl and indiscriminate killings must be investigated*, 11 August 2015. This claimed that MINUSCA peacekeepers had raped a 12 year old girl and killed a 16 year old boy and his father when they indiscriminately opened fire on civilians.

In his response to the High-level Panel on Peace Operations, published in September 2015, the Secretary General promised that ‘by the end of 2015 immediate response teams would be set up to gather and preserve evidence within 72 hours of receipt of an allegation’ of sexual exploitation or abuse, that investigations ‘must be concluded within six months’ and that strong sanctions would be imposed ‘against those who commit acts of misconduct and those who fail to take action against them, including mission leadership and command authorities’.²⁶⁹ Missions had also ‘been instructed to put in place, by the second quarter of 2016, a framework to provide community-based mechanisms where people can more readily come forward to raise complaints’ regarding UN personnel and an ‘adequately resourced victim assistance programme’ was being created.²⁷⁰

A full discussion of the UN’s efforts to address the issue of sexual abuse in its peacekeeping operations goes beyond the scope of this thesis.²⁷¹ The fact that the UN is attempting to address it through its disciplinary structures is significant, although MINUSCA’s and OHCHR’s experiences show that considerable flaws remain in the current system, and what has been described as a ‘pervasive culture of impunity in an organisation where whistleblowers are given minimal protection from reprisals’²⁷² As will be discussed in the next two chapters, however, there have been repeated cases of UN peacekeeping personnel with POC mandates simply refusing to provide protection or to fully investigate alleged violations of IHL and international human rights law without any disciplinary action being taken against them.

²⁶⁹ *The future of United Nations peace operations: implementation of the recommendations of the High-level Independent Panel on Peace Operations, Report of the Secretary-General, A/70/357–S/2015/682*, 2 September 2015, paras 119–21.

²⁷⁰ *Ibid.*, para 123.

²⁷¹ See, for example, *Guidelines on Integrating a Gender Perspective into the Work of United Nations military in Peacekeeping Operations*, DPKO/DFS, March 2010; *Policy on Gender Equality in Peacekeeping Operations*, DPKO/DFS, 2010.

²⁷² *Guardian*, ‘UN tribunal finds ethics office failed to protect whistleblower’, 27 June 2012. See also: Government Accountability Project, ‘Whistleblowers Urge Ban Ki-Moon and U.N. Executives to Strengthen Anti-Retaliation Measures’, 8 April 2015, <http://whistleblower.org/press/whistleblowers-urge-ban-ki-moon-and-un-executives-strengthen-anti-retaliation-measures>, accessed 15 April 2015. This states that of the 297 cases where whistleblowers complained of retaliation for trying to expose wrongdoing inside the UN, the ethics office fully sided with the complainant just once in six years.

The OIOS Protection Evaluation 2014 stated that it was not aware of a single case in which the failure of a UN unit to execute an order of the Force Commander ‘had been conveyed to the Security Council’ or even included in a mission report because: ‘Mission military officers reportedly preferred to keep “harmonious relations” with contingents rather than report matters up the line.’²⁷³ In its response DPKO, ‘strongly’ rejected a recommendation that such cases should be brought to the Council’s attention arguing that there were ‘existing processes in place to address issues related to command and control, conduct and discipline, and a host of related issues’.²⁷⁴ This suggests either that existing UN guidance about the use of force for protective purposes is not clear enough or that the UN is not ensuring that senior mission staff members are fully held to account when they fail to protect civilians.

Conclusions

This chapter has discussed the relationship between international human rights law and UN Charter law and, in particular, the increasing problems resulting from the lack of an effective mechanism for reviewing actions authorised by the Security Council acting under its Chapter VII powers. These have become increasingly acute as the Council has made more frequent and wide-ranging use of these powers in ways that clearly impact on individual human rights. National and international courts have increasingly been prepared to scrutinize acts authorized by the UN Security Council for compliance with international human rights law but only so long, as these can be attributed to member States, rather than the UN itself.

Recent decisions by ECJ that the EU’s ‘distinct internal legal order’ enables it to override

²⁷³ OIOS Protection Evaluation 2014, para 37 and Critical Recommendation 1. ‘The Department of Peacekeeping Operations should emphasize command and control obligations and require all peacekeeping missions with a protection of civilians mandate, in the event of a failure by any contingent to follow orders or instructions issued by the mission regarding the protection of civilians mandate, to communicate such occurrences to United Nations Headquarters, which shall then ensure that the cases are reviewed and taken up with the troop contributing countries concerned. Where the matters are systemic or material, the Secretary-General may consider informing the Security Council.’

²⁷⁴ Ibid. Annex I, Comments on the draft report received from the Department of Peacekeeping Operations and the Department of Field Support, para 8.

decisions by the UN Security Council exercising its Chapter VII powers creates a clear potential dilemma for EU members supporting the UN in its efforts to protect civilians. Challenging the records of individual States in implementing Security Council resolutions risks increasing the fragmentation of international law and may make some States more reluctant to commit their soldiers, police to UN peacekeeping missions.

As discussed in the previous chapter, the situations in which the Security Council exercises its powers under Chapter VII may be analogous with situations in which States may need to derogate from some of their human rights obligations.²⁷⁵ Although the UN Charter makes no provision for the Security Council to derogate, the provisions of Article 103, which states that the ‘obligations’ of member States under Charter, shall ‘prevail’ over their obligations under any other international agreement, rests on similar principles.²⁷⁶ If this were to be accepted, Rodley’s reasoning in *Sayadi and Vinck v. Belgium* could be used as a basis for determining whether acts authorised by the Security Council – such as targeted sanctions, travel bans or asset seizures and the use of force and arrest and detention procedures – are justifiable within the framework provided by international human rights law.²⁷⁷

In the absence of true effective legal accountability, the UN has sought to develop mechanisms to address its own short comings, such as setting up the Ombudsperson for the AQT Sanctions Committee implementing recommendations from the *Zeid Report* and making greater use of its own internal disciplinary procedures. Its Secretariat also regularly

²⁷⁵ Scott Sheeran and Catherine Bevilacqua, ‘The UN Security Council and international human rights obligations: towards a theory of constraints and derogations’, in Scott Sheeran and Nigel Rodley (eds) *Routledge Handbook of International Human Rights Law*, London: Routledge, 2013, pp.371-402. They note that the Security Council acting under Chapter VII has a narrower mandate, being only concerned with international peace and security, while the circumstance in which states can derogate include natural disasters, and that the Council has far more limited powers and responsibilities than a sovereign state. See also Michael Wood, ‘The UN Security Council and International Law’. Second lecture: ‘The UN Security Council and International Law’, *Hersch Lauterpacht Memorial Lectures*, Lauterpacht Centre for International Law, University of Cambridge, 8 November 2006, para 29.

²⁷⁶ *Ibid.*

²⁷⁷ See *Sayadi and Vinck v. Belgium*, 22 October 2008, Appendix B, Individual opinion of Committee member Sir Nigel Rodley (concurring)

carries out its own reviews and 'lessons learned' exercises, from the field, which have arguably become an important process by which the Organization ensures that it remains within the constraints of international law.²⁷⁸ Such solutions, however, are *ad hoc* and partial. If mechanisms are not developed to ensure that the UN system as a whole can deal with this issue in an equitable and transparent manner this risks weakening the legitimacy of the UN itself and further discrediting the whole concept of peacekeeping.

²⁷⁸ See Sheeran , 2011, for a general discussion of this issue in relation to the UN Mission in the Democratic Republic of Congo

**PART THREE: PROTECTION OF CIVILIANS MANDATES IN FOUR
CONTEMPORARY CASE-STUDY MISSIONS**

Chapter 6

**Peacekeeping or war-fighting: the UN missions in the Democratic Republic and Côte
d'Ivoire**

Introduction

This chapter will discuss the UN peacekeeping missions to the DRC and Côte d'Ivoire. These have been marked by controversy both for failing to provide sufficient protection to civilians in many cases, but also because it is sometimes claimed that they may have become parties to the conflicts they were sent to try to help to resolve.

POC developed in both missions in a largely reactive process. The UN mission to the DRC gradually adopted a more robust posture with the formation of better equipped and more proactive Brigades, a process that culminated in the creation of the Force Intervention Brigade in 2013.¹ This mission has faced two particular controversies with wider implications for the future of peacekeeping: first of all, what are the UN's legal responsibilities when the national forces that it is supporting are responsible for grave violations of international human rights law and IHL, and secondly, what are the legal consequences of a mission moving from peacekeeping to war-fighting?

The UN mission to Côte d'Ivoire will be discussed more briefly. This also initially saw itself as a 'traditional' peacekeeping mission. In 2011, however, its interpretation of its 'protection

¹ Security Council Resolution 2098 of 28 March 2013. See also UN Security Council Resolutions 2211 of 26 March 2015, 2198 of 29 January 2015, 2147 of 24 December 2013, and 2136 of 30 January 2014.

responsibilities' led it to launch military action that helped to bring down the country's incumbent President, who was subsequently taken into the custody of the ICC. The UN denied that this regime-change intervention had led to it becoming a party to the conflict and this chapter contextualises the action. The Security Council also made its first use of targeted sanctions on those accused of inciting violence against civilians in Côte d'Ivoire in November 2004 and these were again used in the 2011 crisis.

There are strong grounds for considering that the UN mission in the DRC did, as a matter of fact, become a party to the conflict and so lost its legal protection and becomes bound by IHL. This should, however, be considered an aberration rather than a model for other missions. It is both possible and practical for missions to implement their POC mandates within the legal framework provided by international human rights law, rather than the more aggressive operations that would make IHL applicable. Conversely, the experience of the UN mission in the DRC shows the importance of applying the positive obligations of international human rights law to peacekeeping operations. Missions should also consider themselves bound to monitor, investigate and report on violations of international human rights law and IHL and may not lawfully support organizations and individuals who have committed grave violations of these bodies of law.

A. Democratic Republic of the Congo

The United Nations Organization Mission in the Congo (MONUC) was established in August 1999 as a small, unarmed observer force to monitor a cease-fire signed between the Democratic Republic of Congo (DRC), one rebel group and five regional States in Lusaka, Zambia.² The Lusaka Accord officially brought an end to the second Congo war, which is

² Security Council Resolution 1258 of 6 August 1999. The Lusaka Accord called for the deployment of a UN peacekeeping operation, the withdrawal of foreign troops, and the launching of an 'Inter-Congolese Dialogue' to form a transitional government leading to elections. It was signed by the DRC, Angola, Namibia, Zimbabwe, Rwanda, Uganda, and the *Movement pour la Liberation du Congo*

sometimes referred to as the ‘African world war’ because it involved nine African nations and some twenty armed groups.³ It was also one of the world’s deadliest recent conflicts, killing up to six million people.⁴

President Mobutu’s autocratic rule from 1965 faced increasing challenges by the early 1990s as economic decay and political repression mounted.⁵ Following the 1994 genocide in Rwanda, some two million Rwandese Hutus — including elements that had taken part in the genocide — fled to the neighbouring Kivu regions of eastern Congo. Hutu Power militias began to launch cross-border attacks from the refugee camps and IDP camps inside Rwanda.⁶ In mid-1996, the new Rwandan government sponsored a rebellion to overthrow Mobutu, who had close ties with the previous regime. Laurent Kabila, aided by Rwanda and Uganda,

(MLC) rebel group. The *Rassemblement Congolais pour la Démocratie* (RCD) rebel group refused to sign.

³ See, for example, *The Economist*, ‘Special Report from the Congo: Africa’s Great War’, 4 July 2002, putting the total death toll at 3 million; and *BBC News Africa*, ‘Democratic Republic of Congo Profile’, 14 September 2014, 12 years later, putting the total death toll at 6 million.

⁴ See *Mortality in the Democratic Republic of Congo: results from a nationwide survey*, New York: International Rescue Committee and Burnet Institute, 2003; *Mortality in the Democratic Republic of Congo: results from a nationwide survey conducted April-July 2004*, New York: International Rescue Committee and Burnet Institute, 2004; *Mortality in the Democratic Republic of Congo: results from a nationwide survey*, New York: International Rescue Committee and Burnet Institute, 2005; *Mortality in the Democratic Republic of Congo: an ongoing crisis*, New York: International Rescue Committee and Burnet Institute, 2007. A total of six surveys were carried out by IRC between 2000 and 2007. See IRC Homepage, ‘Congo Crisis’, www.rescue.org, accessed 29 December 2014. The most recent survey, in 2007, estimated the total death toll at 5.4 million people. The vast majority of deaths have been from conditions of malaria, diarrhoea, pneumonia and malnutrition. According to these surveys, only about two percent of the deaths resulted directly from violence.

⁵ For a general overview of the conflicts see: Michael Deibert, *The Democratic Republic of Congo, between hope and despair*, London: Zed Books, 2013; Gérard Prunier, *Africa’s World War, the Rwandan genocide and the making of a continental catastrophe*, Oxford: Oxford University Press, 2009; Martin, Meredith, *The State of Africa, a history of fifty years of independence*, Johannesburg and Cape Town: Jonathan Ball Publishers, 2006, pp.525-44; Thomas Weiss and, Cindy Collins *Humanitarian challenges and intervention, Second Edition*, Boulder: Westview Press, 2000, pp.100-10; International Crisis Group, *Scramble for the Congo. Anatomy of an Ugly War*, Africa Report, Brussels: ICG, 2000.

⁶ For further discussion of the international community’s response to these events see: Alex De Waal, *Famine Crimes: Politics and the Disaster Relief Industry in Africa*, London: James Currey, 1997, pp. 204-13; Samantha Power, *Chasing the Flame, Sergio Vieira de Mello and the fight to save the world*, London: Penguin Books, 2008, p.191-222; and Ian Martin, ‘Hard choices after genocide’ in Jonathan Moore, (ed) *Hard Choices, moral dilemmas in humanitarian intervention*, Maryland and Oxford: Rowman & Littlefield, 1998, pp.157-77. See more generally. Fiona Terry, *Condemned to repeat? The paradox of humanitarian action*, Ithaca: Cornell University, Press, 2002; Sadako Ogato, *The turbulent decade: confronting the refugee crises of the 1990s*, New York: W. W. Norton & Co., 2005. The support which UNHCR and a large number of humanitarian agencies initially gave to the ‘killers in the camps’ and then subsequently rapidly withdrew from remains a deeply controversial episode.

marched across the country to take the capital city Kinshasa in 1997 and forcibly closed many refugee camps as well.⁷ Relations between President Kabila and his foreign backers deteriorated, however, and, in July 1998, nationwide fighting erupted as fresh Rwandan and Ugandan troops entered the country. The creation of a newly-formed group, the *Rassemblement Congolais pour la Démocratie* (RCD), was announced and Rwandan troops prepared to march on Kinshasa in its support.⁸ Angolan, Zimbabwean, and Namibian troops intervened on behalf of President Kabila, while the Hutu Power groups and Mai-Mai ‘self-defence’ militias also rallied to his support. The Rwandans and the RCD withdrew to eastern DRC, while a new group, the *Movement pour la Liberation du Congo* (MLC), sponsored by Uganda, took control of the north east. Kabila was assassinated, in January 2001 and succeeded by his son Joseph.⁹

Widespread fighting continued after the signing of the Lusaka Accord.¹⁰ In January 2000 one of the UN mission’s first reports warned that its forces ‘would not have the capacity to protect the civilian population from armed attack’.¹¹ The following month the Security Council increased the mission’s strength and gave it a POC mandate¹² using language similar to that agreed for UNAMSIL the previous October.¹³ In the discussions on the Security

⁷ Human Rights Watch, *Casualties of War: Civilians, Rule of Law, and Democratic Freedoms*, New York: HRW, February 1999; and Human Rights Watch, *Eastern Congo Ravaged: Killing Civilians and Silencing Protest*, New York: HRW, May 2000.

⁸ Ibid. See also Human Rights Watch *Uganda in Eastern DRC: Fuelling Political And Ethnic Strife*, New York: HRW, March 2001; *Reluctant Recruits: Children and Adults Forcibly Recruited for Military Service in North Kivu*, New York: HRW, May 2001; and Human Rights Watch, *The War within the War: Sexual Violence Against Women and Girls in Eastern Congo*, New York: HRW, June 2002.

⁹ International Crisis Group, *The Kivus: the forgotten crucible of the Congo conflict*, Brussels: ICG, Africa Report N°56, 24 January 2003; International Crisis Group, *Storm clouds over Sun City: the urgent need to recast the Congolese peace process*, Brussels: ICG, 2002; International Crisis Group, *The Inter-Congolese Dialogue: political negotiation or game of bluff*, Brussels: ICG, 2001.

¹⁰ Ibid.

¹¹ *Report of the Secretary-General on the United Nations Organization Mission in the Democratic Republic of the Congo*, S/2000/30 of 17 January 2000, para. 67.

¹² UN Security Council Resolution 1291 of 24 February 2000, para. 4. This increased the mission strength to 5,370 armed troops, including 500 UN military observers (UNMOs), protected by four reinforced infantry battalions, and ‘appropriate civilian support staff including in the areas of human rights, humanitarian affairs, public information, child protection, political affairs, medical support and administrative support.’

¹³ Ibid., para. 8 ‘Acting under Chapter VII of the Charter of the United Nations, . . . MONUC may take the necessary action, in the areas of deployment of its infantry battalions and as it deems it within its

Council, however, the US, UK, Netherlands and Canada, expressed far greater concern about taking on POC tasks, although strong support for the POC mandate came from countries in the ‘global south’ such as Gambia, Namibia and Argentina.¹⁴

The general understanding of the language adopted was that POC was not a main part of the mandate but would be needed under certain circumstances.¹⁵ A mission report in early 2001 emphasized that UN forces could guard UN facilities but that they would ‘not be able to extract’ UN personnel, ‘or accompany humanitarian convoys’, nor ‘extend protection to the local population’.¹⁶ A new concept of operations (CONOPS) in October 2001 focused on monitoring and investigating ceasefire violations and encouraging disarmament, demobilization, repatriation, resettlement, and reintegration (DDRRR).¹⁷ The resolution did refer to the situation in the DRC as continuing to pose a threat to international peace and security in the region, but it was not adopted under Chapter VII and did not feature any POC language.¹⁸ Mission reports also contained no specific references to POC either as a planning objective or military task and an underlying assumption seems to have been that the best protection of civilians would come from the overall success of the mission.¹⁹

capabilities, to protect United Nations and co-located [Joint Military Commission] personnel, facilities, installations and equipment, ensure the security and freedom of movement of its personnel, and protect civilians under imminent threat of physical violence.’

¹⁴ Security Council, Meetings of 16 December 1999, S/PV.4083; and of 24 February 2000, S/PV.4104. Concern was expressed about the ‘complexity of the conflict’, the ‘dangerous security environment’, ‘excessive expectations being placed on MONUC’, and it having ‘inadequate resources to fulfil its mandate.’

¹⁵ For discussion see Séverine Autesserre, *The trouble with the Congo: local violence and the failure of international peacebuilding*, Cambridge: Cambridge University Press, 2010.

¹⁶ *Sixth Report of the Secretary-General on the United Nations Organization Mission in the Democratic Republic of the Congo*, S/2001/128 of 12 February 2001, para. 77. UN Security Council Resolution 1341 of 22 February 2001 actually reduced the number of troops deployed to guard UN military observers.

¹⁷ *Ninth Report of the Secretary-General on the United Nations Organization Mission in the Democratic Republic of the Congo*, S/2001/970 of 16 October 2001. By October 2001, MONUC had deployed 2,408 military personnel, including 540 staff officers/UN Military Observers (UNMOs) and 1,868 troops. UN Security Council Resolution 1376 of 9 November 2001, para 10 approved the new CONOPS and force structure.

¹⁸ *Ibid.*

¹⁹ For an overview see: *Tenth Report of the Secretary-General on the United Nations Organization Mission in the Democratic Republic of the Congo*, S/2002/169, 15 February 2002; *Twelfth Report of the Secretary-General on the United Nations Organization Mission in the Democratic Republic of the Congo*, S/2002/1180 of 18 October 2002, S/2002/169, 15 February 2002; *Thirteenth Report of the Secretary-General on the United Nations Organization Mission in the Democratic Republic of the*

In May 2002, however, the Rwandan-backed RCD-Goma militia troops in Kisangani massacred over 100 civilians in the process of suppressing a mutiny by some of their local commanders.²⁰ MONUC had around 1,000 troops in the vicinity,²¹ but decided not to send patrols to deter the abuses as they were occurring.²² The mission did protect a handful of people, who had sought shelter near to its base and stepped up patrolling in the following days, but otherwise remained passive during what Human Rights Watch (HRW) described as a ‘wave of killings, rapes and looting’.²³

Attacks on civilians continued across eastern DRC throughout 2002, but a mission report in June insisted that, ‘MONUC troops . . . are not equipped, trained or configured to intervene rapidly to assist those in need of protection’,²⁴ while a special report of September contained

Congo, S/2003/211, 21 February 2003. These note that talks sponsored by South Africa led to the government and one rebel group signing up to a power sharing agreement on 19 April 2002. The Sun City Agreement was a framework for providing the Congo with a unified, multipartite government and democratic elections. On 30 July 2002 Rwanda and the Democratic Republic of Congo signed a peace deal known as the Pretoria Accord, which provided for the withdrawal of the estimated 20,000 Rwandan soldiers in the Congo and the rounding up of the ex-Rwandan soldiers and the Hutu Power militias in the country. By the end of 2002, all Angolan, Namibian, and Zimbabwean troops had withdrawn from the country.

²⁰ *Eleventh Report of the Secretary-General on the United Nations Organization Mission in the Democratic Republic of the Congo*, S/2002/621 of 5 June 2002, para 7 – 13. See also *Briefing by High Commissioner for Human Rights to the Security Council Report on the 14-15 May Events in Kisangani - Democratic Republic of the Congo*, no date. According to the UN Special Rapporteur on Extrajudicial, Summary, or Arbitrary Executions, Asma Jahangir, 103 civilians and 60 policemen and military personnel were summarily executed, while an additional 20 unidentified bodies were found in the Tshopo River.

²¹ Victoria Holt and Glyn Taylor, *Protecting Civilians in the Context of UN Peacekeeping Operation*, OCHA/DPKO, United Nations, 2009, pp.248-9. The UN Force consisted of approximately 650 Moroccan and 550 Uruguayan soldiers and a couple of dozen military observers, but they were not configured as infantry units. These witnessed the arrival of RCD-Goma reinforcements observed gunfire in the city, and received word of violence from numerous sources, including from an international aid worker. The Deputy Force Commander repeatedly attempted to meet with RCD-Goma officials in Kisangani but was rebuffed until after the mutiny had been put down.

²² Human Rights Watch, *War crimes in Kisangani: the response of Rwandan-backed rebels to the May 2002 mutiny*, New York: HRW, August 2002. See also Joshua Marks, ‘The Pitfalls of Action and Inaction: Civilian Protection in MONUC’s Peacekeeping Operations’, *African Security Review*, Vol. 16, No. 3. 2007; Victoria Holt and Tobias Berkman, *The Impossible Mandate? Military Preparedness, the Responsibility to Protect and Modern Peace Operations*, The Stimson Center, 2006, pp.160-1; and Clifford Bernath and Anne Edgerton, *MONUC: Flawed Mandate Limits Success*, Washington, DC: Refugees International, 2003.

²³ Human Rights Watch, August 2002.

²⁴ *Eleventh Report of the Secretary-General on the United Nations Organization Mission in the Democratic Republic of the Congo*, S/2002/621 of 5 June 2002, para 71.

no reference to POC.²⁵ The following month's report, however, warned that human rights violations had 'far surpassed the worst expectations', that their 'number and scale . . . is growing rapidly' and that 'the situation demands greater protection of civilians under imminent threat of physical violence.'²⁶

Rwandan troops officially withdrew from the DRC in October 2002, while Ugandan troops withdrew in May 2003.²⁷ The latter withdrawal created a security vacuum in Bunia, which led to a series of massacres.²⁸ Over 600 civilians were killed and around 2,000 sought refuge at the MONUC base.²⁹ Two UN military observers were also killed in a nearby village.³⁰ A subsequent report by DPKO concluded that the troops stationed there did what they could within the constraints of their capabilities and mandate.³¹ An internal report by MONUC's first Force Commander stated more bluntly that:

Faced with the band of killers who were sowing death and devastation in town, [the contingent] refused to react by opening fire after proper challenge and in accordance with the mandate to protect the population and in accordance with quite unambiguous

²⁵ *Special report of the Secretary-General on the United Nations Organization Mission in the Democratic Republic of the Congo*, S/2002/1005, 10 September 2002.

²⁶ *Twelfth Report of the Secretary-General on the United Nations Organization Mission in the Democratic Republic of the Congo*, S/2002/1180 of 18 October 2002, para 49.

²⁷ The Security Council had repeatedly called for all foreign forces to leave the DRC. See, for example, Security Council resolution 1341 of 22 February 2001. However, the UN had also warned about a precipitous withdrawal leading to exactly the type of violence that did occur. See *Seventh report of the Secretary General on the United Nations Organization Mission in the Democratic Republic of the Congo* (S/2001/373), 17 April 2001, paras 28 – 31 and paras 98 – 102 and 118.

²⁸ International Crisis Group, *Africa Briefing, Pulling Back from the Brink in the Congo*, Brussels: ICG, 7 July 2004; International Crisis Group, *Africa Briefing, Back to the brink in the Congo*, Brussels: ICG, 17 December 2004.

²⁹ *Ibid.* See also *Letter Dated 16 July 2004 from the Secretary-General Addressed to the President of the Security Council*, S/2004/573 of 16 July 2004.

³⁰ *Ibid.*

³¹ *Operation Artemis: The Lessons of the Interim Emergency Multinational Force*. New York: Best Practices Unit, Department of Peacekeeping Operations, October 2004, p.7. The report asserts that the contingent of 712 troops was only prepared for static guard duty and that the tasks specified in the formal request to the troop-contributing country to redeploy that contingent to Bunia were largely limited guard duties with no mention of protection of civilians. The contingent's officers maintained that MONUC's mandate was authorized under Chapter VI and therefore force could not be used except in self-defence. The report concluded that: 'It was clear from the start that there was little more [the contingent] could do than provide security to MONUC and other international staff as well as the local civilians who sought refuge at the headquarters and at the airport base.'

rules of engagement. Instead, they persisted in only firing into the air, declaring that they could only act under Chapter VII and engage in combat with prior authority of [their parliament].³²

The UN authorized the deployment of an Interim Emergency Multinational Force (IEMF), under European Union auspices in response.³³ The IEMF was well-armed and provided with air support, although it was only authorized to operate within Bunia, and massacres continued outside the town.³⁴ It enforced a 'weapons-free zone' in Bunia and responded aggressively to provocations by the militia groups.³⁵ Thousands of IDPs were able to return home from June to August 2003.³⁶ Responsibility for the security of the region was handed back to MONUC in September 2003, which gradually also began to patrol more remote villages.³⁷

The Ituri and Kivus Brigades

The UN responded to the perceived success of the IEMF operation by organizing an Ituri Brigade with heavy armaments, and combat helicopters as well as increasing MONUC's overall troop ceiling.³⁸ In one encounter, a truck full of militia fighters attempted to drive

³² *End of Tour Report*, 31 December 2003, pp. 8-10, cited in Holt and Taylor, 2009, pp.251-2.

³³ Security Council Resolution 1484, of 30 May 2003. See also Resolution 1489, of 26 June 2003; Resolution 1493, of 28 July 2003; Resolution 1501, of 26 August 2003. See also Alpha Sow, 'Achievements of the Interim Emergency Multinational Force and Future Scenarios', in Mark Malan and Joao Gomes Porto (eds), *Challenges of Peace Implementation: The UN Mission in the Democratic Republic of the Congo*, Pretoria: Institute for Security Studies, 2004; and DPKO, October 2004.

³⁴ International Crisis Group, *Congo Crisis: Military Intervention in Ituri*, Brussels: ICG, Africa Report N°64, 13 June 2003.

³⁵ *Ibid.* In one skirmish the IEMF killed 20 militiamen. The IEMF also cut off some weapons shipments into Bunia by monitoring secondary and field airstrips, and running vehicle patrols.

³⁶ For further details see Kees Homan, 'Operation Artemis in the Democratic Republic of Congo.' In European Communities Commission. *European Commission: Faster and More United? The Debate about Europe's Crisis Response Capacity*. Luxembourg: Office for Official Publications of the European Communities. 2007.

³⁷ *Fifteenth Report of the Secretary-General on the United Nations Organization Mission in the Democratic Republic of the Congo*. S/2004/251 of 25 March 2004, paras 23-5.

³⁸ UN Security Council Resolution 1493, of 28 July 2003. This raised the overall troop level to 10,800 and specified that 4,800 of these would comprise the Ituri Brigade. It also gave MONUC the mandate to provide assistance for the reform of the security forces, the re-establishment of a State based on the rule of law and the preparation and holding of elections, while reaffirming the POC mandate under Chapter VII. See also Resolution 1501, of 26 August 2003.

into Bunia, and was fired upon by a MONUC surveillance helicopter; killing three militia members.³⁹ MONUC forces raided the political headquarters of the Ugandan-backed *Union des Patriotes Congolais* (UPC) seizing weapons and arresting a number of top officials.⁴⁰ It also accelerated the deployment of its forces outside of Bunia in response to a massacre perpetrated by the UPC and in early November these intervened to prevent a clash with a rival militia.⁴¹ When MONUC began foot patrols across the Congo River it reportedly received a heroes' welcome and its soldiers were showered with leaves and rice as they passed through the crowds.⁴²

The situation in Ituri became the subject of considerable international legal attention after the ICC announced that it would mount its first ever investigation there in 2003 and it was also a major focus of the ICJ case between the DRC and Uganda.⁴³ MONUC considerably increased its civilian staff carrying out monitoring and reporting of violations, which, paradoxically, may have emphasized the mission's weaknesses since comparable atrocities were also taking place in areas where it had fewer resources.⁴⁴ MONUC's more aggressive stance also provoked a reaction from the rebel groups. Between December 2003 and March

³⁹ Victoria Holt and Tobias Berkman, *The Impossible Mandate? Military Preparedness, the Responsibility to Protect and Modern Peace Operations*, The Stimson Center, 2006, p.163.

⁴⁰ *Ibid.*

⁴¹ Holt and Taylor, 2009, p.256.

⁴² Holt and Berkman, 2006, p.164.

⁴³ *International Criminal Court, Press Release*, 'Communications Received by the Office of the Prosecutor, 16 July 2003. 'The Office of the Prosecutor has selected the situation in Ituri, Democratic Republic of Congo, as the most urgent situation to be followed'. See also *DRC v Uganda*, ICJ Report, 2005, paras 176 and 178-9 and 209-10, which focussed on the situation in Ituri. See also Human Rights Watch, *Ituri: Covered in Blood. Ethnically Targeted Violence in Northeastern DR Congo*, New York: HRW, July 2003.

⁴⁴ Autesserre, 2010, p.209-14. She notes that MONUC was to devote far more resources to Ituri than any other district and its civilian head of office ranked senior to equivalent posts. In order to justify this use of resources, she claims that the mission highlighted atrocities taking place. One example she cites was a press conference where it broadcast a videotaped interview with a woman who had been horribly tortured by a militia force and then made to watch as they chopped up, grilled and ate her children.

2004 there were 20 attacks on its soldiers in Ituri alone.⁴⁵ This doubled to 40 attacks between September and December 2004.⁴⁶

A Kivus Brigade was also formed to carry out high visibility patrols.⁴⁷ Security in North and South Kivu deteriorated in late 2003 and early 2004, however, with clashes between RCD-Goma and the Congolese national army around Bukava.⁴⁸ The rebels subsequently seized first Kavumu airport and then Bukava itself in June 2004, after it had been abandoned by government forces.⁴⁹ The Uruguayan Battalion commander responsible for the airport's protection reportedly disobeyed a direct order to defend it and MONUC's political leadership subsequently overruled their military colleagues – who wanted to defend the town – for fear of derailing the wider mission strategy.⁵⁰ On entering Bukava, the rebel militias instigated heavy looting and widespread violence, killing an estimated 100 and displacing tens of thousands of people.⁵¹

⁴⁵ *Fifteenth Report of the Secretary-General on the United Nations Organization Mission in the Democratic Republic of the Congo*, S/2004/251 of 25 March 2004, para 25.

⁴⁶ *Sixteenth Report of the Secretary-General on the United Nations Organization Mission in the Democratic Republic of the Congo*, S/2004/1034 of 31 December 2004, para 11.

⁴⁷ *Fifteenth Report of the Secretary-General on the United Nations Organization Mission in the Democratic Republic of the Congo*, S/2004/251 of 25 March 2004, paras 23-5. See also International Crisis Group, *Maintaining Momentum in the Congo: The Ituri Problem*, Brussels: ICG, 26 August 2004. While the patrols appear to have improved civilian safety, critics argued that people remained at risk when they withdrew from an area.

⁴⁸ *Third special report of the Secretary-General on the United Nations Organization Mission in the Democratic Republic of the Congo*, S/2004/650, 16 August 2004, paras 34-46 for the UN's account of events.

⁴⁹ International Crisis Group, *The Congo's Transition is Failing: Crisis in the Kivus*. Africa Report No. 91, Brussels: ICG, 30 March 2005. MONUC forces briefly cantoned one rebel group and halted the advance of another, while the Kivus Brigade temporarily halted another rebel advance outside Bukava, but the Congolese armed forces used this respite to abandon the city and retreat south to Walungu, which they pillaged.

⁵⁰ Holt and Taylor, 2009, pp.257-8.

⁵¹ *Ibid.* The UN gives lower figures, although these are likely to be incomplete. See *Third special report of the Secretary-General on the United Nations Organization Mission in the Democratic Republic of the Congo*, S/2004/650, 16 August 2004, para 42. The figure of 100 deaths is supported by Médecins sans Frontières. *International Activity Report 2003/04: Democratic Republic of Congo*, 2004, pp.24-5, where it also reports that it was forced to evacuate its own staff from Bunia.

The combined impact of the Bunia and Bukava crises seriously damaged MONUC's reputation and there were violent demonstrations against it in many parts of the country.⁵² International aid agencies also condemned the UN's inability to protect their staff and ensure the delivery of relief supplies.⁵³ A special mission report acknowledged that the events 'represented the most serious challenge to date' in its transition strategy and complained about the gap between the expectations created by the mandate and its capacity to fulfil them.⁵⁴ The mission's reputation suffered further due to revelations of sexual exploitation by UN peacekeepers and civilian personnel at an IDP camp in Bunia.⁵⁵ In October 2004, the Security Council approved a modest increase in MONUC's size, and a new mandate, which gave greater emphasis to POC tasks listing them as second in priority only to deterring violence that might threaten the political process.⁵⁶

Almost 5,500 MONUC combat-capable troops were re-deployed to the Kivus and Ituri between October 2004 and February 2005 and undertook a number of military operations to 'enhance security', including by disarming and arresting militia members.⁵⁷ In February

⁵² *Third special report of the Secretary-General on the United Nations Organization Mission in the Democratic Republic of the Congo*, S/2004/650, 16 August 2004, para 38. UN premises were attacked in Kinshasa, Lubumbashi, Kalemie, Mbandaka, Kisangani, Beni and Kindu, resulting in the destruction of over \$1 million worth of equipment and property, while three protesters were killed by MONUC troops in Kinshasa. Other humanitarian agencies were also looted and damaged, resulting in the suspension of humanitarian programmes in food security, health care, water and education for some 3.3 million people. UN personnel were harassed, physically attacked and their private residences looted.

⁵³ MSF, 2005 where it reports that two staff members were kidnapped while travelling north of Bunia and that it has been forced to close all of its projects outside the town as a result. It was also forced to close its programmes in North Kivu due to the security situation.

⁵⁴ *Third Special Report of the Secretary-General on the United Nations Organization Mission in the Democratic Republic of the Congo*. S/2004/650 of 16 August 2004, para 2 and paras 79-102. The report called for MONUC's strength to be increased from 10,800 to 23,000 personnel, the creation of brigade-sized forces in both North and South Kivu, a new Brigade for Katanga and the Kasai provinces, an eastern division headquarters to direct military operations in the Kivus and Ituri, and a 'joint mission analysis cell' to improve information analysis.

⁵⁵ *Ibid.*, para 32.

⁵⁶ UN Security Council Resolution 1565 of 1 October 2004. This raised the force ceiling to 16,700, allowing for the creation of the north and south Kivu Brigades, but did not approve the creation of Brigades for Katanga and Kasais.

⁵⁷ *Sixteenth Report of the Secretary-General on the United Nations Organization Mission in the Democratic Republic of the Congo*, S/2004/1034 of 31 December 2004; and *Seventeenth Report of the Secretary-General on the United Nations Organization Mission in the Democratic Republic of the Congo*. S/2005/167 of 15 March 2005, para 15. 'These operations were concentrated in the areas in and around Fataki, Soba (3 kilometres north of Kafé), Mahagi and Djebu. With a view to protecting the

2005 an ambush by a militia group killed nine Bangladeshi soldiers on a routine patrol to protect an IDP camp.⁵⁸ MONUC troops responded with an operation that killed 50 - 60 militia members.⁵⁹ A subsequent UN Security Council resolution extended MONUC's mandate and stated that it was 'authorized to use all necessary means, within its capabilities and in the areas where its armed units are deployed, to deter any attempt at the use of force to threaten the political process and to ensure the protection of civilians under imminent threat of physical violence . . . in accordance with its mandate, MONUC may use cordon and search tactics to prevent attacks on civilians and disrupt the military capability of illegal armed groups'.⁶⁰

MONUC adopted a new CONOPS in April 2005, which set out the envisaged approach in more detail.⁶¹ A succession of mission reports over the next few years showed that POC was now being treated as a civil-military objective to be achieved through the neutralization of Congolese militias and 'foreign armed groups'.⁶² Mission reports stressed, however, that

civilian population threatened by militia members after the murder of a prominent businessman, on 24 February MONUC conducted a cordon-and-search operation at Ariwara and disarmed 116 militia soldiers, collecting some 118 weapons and ammunition. Also on 24 February, MONUC arrested 30 militia members and confiscated weapons in the village of Datule (about 20 kilometres from Tchomia and 8 kilometres from Kafé).'

⁵⁸ *Seventeenth Report of the Secretary-General on the United Nations Organization Mission in the Democratic Republic of the Congo*, S/2005/167 of 15 March 2005, para 16. This states that: 'The ambush may have been in response to the increasing pressure that MONUC had exerted on militia groups over the previous weeks, notably the 24 February arrest of numerous militia members in its Datule stronghold. It may also have been designed to discourage another militia group, which was in Bunia as part of its efforts to ensure the extension of State administration to the area. The ambush also took place immediately after a meeting of the Tripartite Commission in Kampala, at which MONUC briefed the participants on its robust approach to the maintenance of peace in Ituri.'

⁵⁹ *Ibid.*, para 19.

⁶⁰ Security Council Resolution 1592 of 30 March 2005, para 7.

⁶¹ *Divisional Commander's Initial Campaign Plan for Operations in DRC East*, 4 April 2005 and *Military Concept of Operations for MONUC*, 2005, Annex C.

⁶² See: *Eighteenth report of the Secretary-General on the United Nations Organization Mission in the Democratic Republic of the Congo*, S/2005/506, 2 August 2005; *Nineteenth report of the Secretary-General on the United Nations Organization Mission in the Democratic Republic of the Congo*, S/2005/603, 26 September 2005; *Twentieth report of the Secretary-General on the United Nations Organization Mission in the Democratic Republic of the Congo*, S/2005/832, 28 December 2005; *Report of the Secretary-General pursuant to paragraphs 10 and 14 of Security Council resolution 1649 (2005)*, S/2006/310, 22 May 2006; *Report of the Secretary-General on children and armed conflict in the Democratic Republic of the Congo*, S/2006/389, 13 June 2006; *Twenty-first report of the Secretary-General on the United Nations Organization Mission in the Democratic Republic of the Congo*, S/2006/390, 13 June 2006; *Report of the Security Council mission on the electoral process in the Democratic Republic of the Congo, 10-12 June 2006*, S/2006/434, 22 June 2006; *Twenty-second*

although ‘some Congolese and Member States continue to call on MONUC to forcibly disarm the foreign armed groups’ this was not MONUC’s responsibility.⁶³ The CONOPS also stated that: ‘While MONUC can use force to protect civilians, and, in this connection, will do so against the foreign armed groups, the very nature of peacekeeping prohibits peacekeepers from engaging in targeted warfare.’⁶⁴

The mission’s strategic objectives were once again reviewed and a report in March 2007 stated that the focus of the mission should now be the protection of civilians and the extension of the authority of Congolese government throughout the country.⁶⁵ MONUC’s strength was again increased, to just over 17,000 troops, and the wording of the mandate suggested that POC be a top priority.⁶⁶ ‘Protection of Civilians’ began to appear as a specific section in mission reports from April 2008 onwards. MONUC troops took direct action against rebel militia groups in North Kivu in August and September 2007.⁶⁷ In November

report of the Secretary-General on the United Nations Organization Mission in the Democratic Republic of the Congo, S/2006/759, 21 September 2006; Report of the Secretary-General pursuant to paragraph 8 of resolution 1698 (2006) concerning the Democratic Republic of the Congo, S/2007/68, 8 February 2007; Twenty-third report of the Secretary-General on the United Nations Organization Mission in the Democratic Republic of the Congo, S/2007/156, 20 March 2007; Report of the Secretary-General on children and armed conflict in the Democratic Republic of the Congo, S/2007/391, 28 June 2007; Twenty-fourth report of the Secretary-General on the United Nations Organization Mission in the Democratic Republic of the Congo, S/2007/671, 14 November 2007; Twenty-fifth report of the Secretary-General on the United Nations Organization Mission in the Democratic Republic of the Congo, S/2008/218, 2 April 2008.

⁶³ *Sixteenth Report of the Secretary-General on the United Nations Organization Mission in the Democratic Republic of the Congo, S/2004/1034 of 31 December 2004, para 34.*

⁶⁴ *Military Concept of Operations for MONUC, 2005, Annex C, p. 14. On file with author.*

⁶⁵ *Special Report of the Secretary-General on Elections in the Democratic Republic of the Congo, S/2005/320 of 26 May 2005; and Report of the Security Council mission on the electoral process in the Democratic Republic of the Congo, 10-12 June 2006, S/2006/434, 22 June 2006. See also UN Security Council Resolution 1671 of 25 April 2006. See also Twenty-third Report of the Secretary-General on the United Nations Organization Mission in the Democratic Republic of the Congo, S/2007/156 of 20 March 2007.*

⁶⁶ Security Council Resolution 1756 of 15 May 2007, para 2. ‘Acting under Chapter VII of the Charter of the United Nations . . . Decides that MONUC will have the mandate, within the limits of its capabilities and in its areas of deployment, to assist the Government of the Democratic Republic of the Congo in establishing a stable security environment in the country, and, to that end, to: *Protection of civilians, humanitarian personnel and United Nations personnel and facilities* (a) Ensure the protection of civilians, including humanitarian personnel, under imminent threat of physical violence.’ This was confirmed in December by Security Council resolution 1794 of 21 December 2007, para 5. ‘The protection of civilians must be given priority in decisions about the use of available capacity and resources’.

⁶⁷ *Twenty-fourth report of the Secretary-General on the United Nations Organization Mission in the Democratic Republic of the Congo, S/2007/671, 14 November 2007, paras 12-8. In December 2006, Laurent Nkunda, who had previously been a leading member of the RCD (Goma) formed a new*

2008, however, they failed to prevent a massacre of more than 150 people in the town of Kiwanja.⁶⁸

Operation Kimia II and Human Rights Due Diligence

Despite a peace agreement between the government and a number of militia groups in January 2008, the year was marked by fresh crises, which continued into 2009.⁶⁹ Between July and November 2008 MONUC supported the Congolese armed forces in a major operation against one militia group, which retaliated by attacking civilians and looting villages.⁷⁰ In September MONUC and the Congolese army launched another offensive, this time against the Lord's Resistance Army (LRA), which had infiltrated from neighbouring Uganda.⁷¹

militia, the *Congrès National pour la Défense du Peuple* (CNDP). His forces suffered heavy losses in clashes with a MONUC battalion and he subsequently entered an agreement to merge his militia with the national army. On 27 August 2007 major fighting broke out in North Kivu when Nkunda's forces attacked the Congolese armed forces. In September, MONUC forces halted Nkunda's advance on Sake when Congolese army positions crumbled. Mai-Mai began fighting Nkunda as well, creating new humanitarian crises. A subsequent investigation revealed 12 mass graves containing 21 victims near Sake, an area that had been held by Nkunda's forces. In late October, MONUC and the Congolese army launched an operation to neutralize a Mai-Mai group that resulted in their surrender.

⁶⁸ *Fourth Special Report of the Secretary-General on the United Nations Organization Mission in the Democratic Republic of the Congo*. S/2008/728 of 21 November 2008, paras 10-11. See also Human Rights Watch, *Killings in Kiwanja: The UN's Inability to Protect Civilians*, New York: HRW, December 2008. This claimed that there were well armed and equipped MONUC troops within 1 km of where the killings took place. They sent a patrol roughly two hours after the CNDP had regained control of Kiwanja and begun summarily executing civilians. Although the patrol found bodies in the streets, 'No further action was taken by MONUC to stop the killings or to enhance protection for civilians in the town.

⁶⁹ For an overview see: *Twenty-fifth report of the Secretary-General on the United Nations Organization Mission in the Democratic Republic of the Congo*, S/2008/218, 2 April 2008; *Twenty-sixth Report of the Secretary-General on the United Nations Organization Mission in the Democratic Republic of the Congo*. S/2008/433 of 3 July 2008; *Twenty-seventh Report of the Secretary-General on the United Nations Organization Mission in the Democratic Republic of the Congo*. S/2009/160 of 27 March 2009. In January 2008, the government signed a peace accord in Goma with over 20 Congolese armed groups (including the CNDP), under which they agreed on the need for an immediate cessation of hostilities, the disengagement of troops, return of displaced people, Disarmament, Demobilization and Reintegration (DDR), improved adherence to human rights standards, and the creation of UN buffer zones. However, in late August 2008, intense fighting began again between the CNDP and the Congolese army in the southern part of North Kivu Province. Hundreds of people were killed, and by late October 2008, the CNDP had advanced to within a few miles of Goma before declaring a unilateral cease-fire.

⁷⁰ For an overview of operations in the Kivus see Julie Reynaert, *MONUC/MONUSCO and Civilian Protection in the Kivus*, International Peace Information Service, February 2011.

⁷¹ For background on the LRA see Tim Allen, *Trial Justice: the International Criminal Court and the Lord's Resistance Army*, London: Zed books, 2006; and Andre Le Sage, *Countering the Lord's*

In December 2008 the Congolese government signed an agreement with Rwanda for a joint operation against the Hutu Power militia – *Forces Democratiques de Liberation du Rwanda* (FDLR).⁷² The government also signed peace deals with the *Congrès National pour la Défense du Peuple* (CNDP) and other smaller armed groups in the Kivus, who were granted amnesties and integrated into the Congolese armed forces.⁷³ The CNDP's then Chief of Staff, Bosco Ntaganda, announced that he had replaced Laurent Nkunda as leader of the group on 5 January 2009. Nkunda fled into Rwanda, two days later, where he was taken into custody.⁷⁴ Ntaganda had been indicted by the ICC for alleged crimes committed in Ituri in 2002 and 2003 and this indictment was unsealed in April 2008.⁷⁵ No effort was made to arrest him, however, and he assumed the rank of General in the Congolese armed forces.⁷⁶

Around 4,000 Rwandan troops crossed into the DRC, in January 2009, for a month long combined operation with the newly integrated Congolese armed forces.⁷⁷ The FDLR retaliated with massacres of the civilian population that killed 201 people, including 90 in a single village.⁷⁸ The LRA also launched a series of attacks between 24 December 2008 and

Resistance Army in Central Africa, Washington DC: Center for Strategic Research, the Institute for National Strategic Studies, National Defense University, July 2011. The LRA is a rebel group formed in Uganda in 1987 and renowned for its use of indiscriminate violence, and abduction of children to serve as soldiers, sex slaves, and porters. It received substantial support from the Sudanese government in retaliation for Ugandan support for the Sudanese People's Liberation Army. It now also operates in the DRC and South Sudan.

⁷² *Twenty-seventh Report of the Secretary-General on the United Nations Organization Mission in the Democratic Republic of the Congo*. S/2009/160 of 27 March 2009, paras 2-3. See also Security Council Resolution 1856 of 22 December 2008, renewing the mission mandate.

⁷³ *Ibid.*, paras 4-7.

⁷⁴ *Ibid.*

⁷⁵ Human Rights Watch, 'ICC: Congolese Warlord to go to trial', New York: HRW, 9 June 2014; Human Rights Watch, *DR Congo: Arrest Bosco Ntaganda for ICC trial*, New York: HRW, 13 April 2012; Human Rights Watch, 'You will be punished': *Attacks on civilians in Eastern Congo* New York: HRW, December 2009.

⁷⁶ *Ibid.*

⁷⁷ Deibert, 2013, pp.149-51.

⁷⁸ Institute for War and Peace Reporting, *Hutu Militia Rampages Across North Kivu*, IWPR, AR No. 212. 11 May 2009; Human Rights Watch, *DR Congo: Brutal Rapes by Rebels and Army*, HRW, 8 April 2009.

17 January 2009, in which they killed almost a thousand people and abducted 160 children.⁷⁹ In February 2009 it was reported that MONUC's previous Force Commander had resigned from office because he believed that the plan adopted the previous October to provide protection for civilians was 'divorced from reality'.⁸⁰

In May and July 2009 the Congolese armed forces, again with MONUC support, launched a military operation against the FDLR, known as Kimia II.⁸¹ MONUC assisted the operation through 'planning' and 'logistical support, including tactical helicopter lift, medical evacuation, fuel and rations.'⁸² The mission 'also provided fire support to FARDC [Congolese armed forces] operations when deemed essential by MONUC commanders.'⁸³ The mission report of this operation claimed that it had pushed the bulk of the FDLR away from population centres and mining sites and resulting in the repatriation of large groups of FDLR members and their dependents to Rwanda. However, it acknowledged that:

Despite the enhanced and innovative measures taken by MONUC to protect civilians, the operations also took a heavy toll on civilians, who were displaced and subjected to reprisal attacks by retreating armed groups. Furthermore, the actions of undisciplined and recently integrated FARDC elements seeking to settle old ethnic scores resulted in serious violations of international humanitarian law, including killings of civilians.

⁷⁹ Human Rights Watch, *The Christmas Massacres: LRA Attacks on Civilians in Northern Congo*, New York: HRW, February 2009. This states that the fatalities included at least 815 Congolese civilians and 50 Sudanese civilians.

⁸⁰ *El País* 'El informe del militar español que dirigió las tropas de la ONU en Congo', 8 February 2009. He warned that the limited operational capacity of the force and its lack of flexibility and mobility meant it could only protect the population in major towns and cities, and along key roads. Elsewhere, the mission could only protect itself. He concluded that it was better to resign and draw attention to what he regarded as dangerous mission creep.

⁸¹ For an overview see: *Thirtieth report of the Secretary-General on the United Nations Organization Mission in the Democratic Republic of the Congo*, S/2009/623, 4 December 2009.

⁸² *Ibid.*, para 5.

⁸³ *Ibid.*

A HRW report estimated that more than 1,400 civilians had been killed in North and South Kivu between January and September 2009.⁸⁴ Half the victims were killed by the FDLR and half by the Congolese and Rwandan armed forces and allied militia.⁸⁵ It also claimed that 7,500 women had been raped and 900,000 people forced from their homes during the course of the operation.⁸⁶ The MONUC mission report acknowledged that: ‘international non-governmental organizations reported alleged or confirmed massacres and gross human rights violations committed by elements of FARDC against civilian populations . . . some components of the United Nations system called for an immediate end to Kimia II and for the withdrawal of MONUC support for FARDC.’⁸⁷

In October 2009 the UN Special Rapporteur on Extrajudicial Executions described the results of the operation as ‘a disaster’.⁸⁸ He said that in many areas the Congolese armed forces ‘posed the greatest direct risk to security’ and noted that ‘the Security Council’s mandate has transformed MONUC into a party to the conflict in the Kivus.’⁸⁹ In the same month the UN’s Legal Counsel issued an internal memorandum, which stated that if the mission had reason to believe that the Congolese armed forces were committing violations of IHL, international human rights law or refugee law:

MONUC may not lawfully continue to support that operation, but must cease its participation in it completely . . . MONUC may not lawfully provide logistic or ‘service’ support to any FARDC operation if it has reason to believe that the FARDC units involved are violating any of those bodies of law . . . This follows directly from

⁸⁴ Human Rights Watch, ‘*You will be punished*’: *Attacks on civilians in Eastern Congo* New York: HRW, December 2009.

⁸⁵ *Ibid.*

⁸⁶ *Ibid.*

⁸⁷ *Thirtieth report of the Secretary-General on the United Nations Organization Mission in the Democratic Republic of the Congo*, S/2009/623, 4 December 2009, para 9.

⁸⁸ *Press statement by Professor Philip Alston, UN Special Rapporteur on extrajudicial executions. Mission to the Democratic Republic of the Congo, 5–15 October 2009*, 15 October 2009, OHCHR website, http://www2.ohchr.org/english/issues/executions/docs/PressStatement_SumEx_DRC.pdf, accessed 19 November 2013.

⁸⁹ *Ibid.*

the Organization's obligations under customary international law and from the Charter to uphold, promote and encourage respect for human rights, international humanitarian law and refugee law.⁹⁰

The legal advice was endorsed by the UN Secretary General's Policy Committee, in June 2009.⁹¹ This prompted MONUC officials to develop what was to become known as a 'conditionality policy, whereby it suspended all military aid to units of the Congolese armed forces implicated in human rights violations.'⁹² The Security Council endorsed this policy and further called on the Secretary General to 'establish an appropriate mechanism to regularly assess' its implementation.⁹³ In late 2010 the UN Policy Committee decided that the policy should apply globally and system-wide, and launched an internal inter-agency process led by DPKO and OHCHR, which was to result in the adoption of the Human Rights Due Diligence Policy on UN support to non-UN security forces (HRDDP) in July 2011.⁹⁴ This was publicly endorsed by the Security Council in March 2013.⁹⁵

The HRDDP requires UN missions to carry out early risk assessments when considering whether to give support to or undertake joint operations with national forces and to 'take fully into account the need to protect civilians and mitigate risk to civilians, including, in particular, women, children and displaced persons and civilian objects'.⁹⁶ Missions are

⁹⁰ Confidential note, leaked by the *New York Times*, from the UN Office of Legal Affairs to Mr. Le Roy, Head of the Department of Peacekeeping Operations, 1 April 2009, para.10.

⁹¹ For a more detailed description see Jeremie Labbe and Arthur Boutellis 'Peace operations by proxy: implications for humanitarian action of UN peacekeeping partnerships with non-UN security forces', *International Review of the Red Cross*, Vol. 95 No. 891/892 Autumn/Winter 2013, pp.539-59; and Helmut Philipp Aust, 'The UN Human Rights Due Diligence Policy: An Effective Mechanism against Complicity of Peacekeeping Forces?', *Journal of Conflict and Security Law*, Oxford University Press, June 24, 2014.

⁹² *Thirtieth report of the Secretary-General on the United Nations Organization Mission in the Democratic Republic of the Congo*, S/2009/623, 4 December 2009, para 2.

⁹³ Security Council Resolution 1906 of 23 December 2009, para 23.

⁹⁴ UN Secretary General, Decision No. 2011/18, 13 July 2011.

⁹⁵ *Human rights due diligence policy on United Nations support to non-United Nations security forces*, UN Doc. A/67/775-S/2013/110, 5 March 2013 [Hereinafter HRDDP 2013].

⁹⁶ See, for example, Security Council Resolution 2100 of 25 April 2013 (on the UN mission in Mali), para. 26. MINUSMA take fully into account the need to protect civilians and mitigate risk to civilians, including, in particular, women, children and displaced persons and civilian objects in the performance

required to monitor the compliance of these forces with IHL and international human rights law and actively intervene to draw attention to violations while ensuring that its own forces lead by example.⁹⁷

Protection strategies and ‘innovative measures’

In January 2010 MONUC and UNHCR published its first mission-wide strategy for the protection of civilians.⁹⁸ ‘Protection’ was defined as:

all activities aimed at ensuring the safety and physical integrity of civilian populations, particularly children, women, and other vulnerable groups, including IDPs; preventing the perpetration of war crimes and other deliberated acts of violence against civilians; securing humanitarian access; and ensuring full respect for the rights of the individual, in accordance with relevant national and international bodies of law, i.e. human rights law and international humanitarian law.⁹⁹

The strategy stressed that: ‘MONUC does not have the operational capacity to position troops in every locality . . . and must maintain its ability to intervene decisively through a balance between concentration of forces to keep strategic and tactical reserves, and extensive deployments in priority areas to protect civilians at risk.’¹⁰⁰ It further recognized ‘the primary responsibility of the State to protect its own citizens’ and that ‘sustainable protection’ could

of its mandate . . . where undertaken jointly with the Malian Defence and Security Forces, in strict compliance with the Human Rights Due Diligence Policy.

⁹⁷ HRDDP 2013, para 2.

⁹⁸ UN Organization Mission in the Democratic Republic of Congo (MONUC) & UN High Commissioner for Refugees, ‘UN System-Wide Strategy for the Protection of Civilians in the Democratic Republic of the Congo’, January 2010 [Hereinafter MONUC Protection Strategy 2010]. See also Kyoko Ono, *Actions Taken by MONUC to Implement the Security Council Mandate on Protection of Civilians*, UN DPKO, Peacekeeping Best Practices Section, June 2008; and *Lessons Learned Note on the Protection of Civilians*, UN Department of Peacekeeping Operations, 2010; and *MONUC Protection Strategy Narrative – Draft 8*, March 31 2009 – MONUC ODSRSG (all on file with author).

⁹⁹ *Ibid.*, para 15.

¹⁰⁰ *Ibid.*, para 12.

only be achieved ‘through the restoration of a functional justice system and civilian administration’.¹⁰¹ The strategy incorporated ‘the various humanitarian, security and human rights dimensions of protection in DRC’¹⁰² and took into account ‘the need to reconcile and integrate MONUC’s mandate to protect civilians with its mandate to support the operations of FARDC integrated brigades’, conditional on the latter’s ‘behaviour and respect of IHL and human rights law’¹⁰³

The Congolese army and MONUC conducted another joint operation in January 2010, but MONUC claimed to have been more selective in its targets and mission reports stressed that there had been more focus on holding re-captured territory and developing State institutions in them.¹⁰⁴ The mission also announced a number of initiatives to increase outreach to local communities, gather more information about potential threats and the development of a database to identify ‘must-protect’ areas.¹⁰⁵ Subsequent reports detailed the increased use of Joint Protection Teams (JPTs) Community Liaison Advisers (CLAs), Community Alert Mechanisms (CANs) and the formation of Mobile Operating Bases (MOBs).¹⁰⁶

Taken together these measures indicate both a far more proactive interpretation of the mission’s POC mandate, but also a different way of thinking about how to fulfil it.¹⁰⁷ The

¹⁰¹ Ibid., para. 13.

¹⁰² Ibid., para 2.

¹⁰³ Ibid., para 21.

¹⁰⁴ *Thirty-first report of the Secretary-General on the United Nations Organization Mission in the Democratic Republic of the Congo*, S/2010/164, of 30 March 2010, para 2.

¹⁰⁵ Ibid., para 70.

¹⁰⁶ *Report of the Secretary-General on the United Nations Organization Stabilization Mission in the Democratic Republic of the Congo*, S/2010/512, of 8 October 2010; *Report of the Secretary-General on the United Nations Organization Stabilization Mission in the Democratic Republic of the Congo*, S/2011/20, of 17 January 2011. See also MONUC, *Protection in Practice, Practical Protection Handbook for Peacekeepers*, MONUC/Protection Cluster, no date; MONUC, *Meeting the Protection Challenge: an overview of MONUC initiatives on the protection of civilians*, MONUC, no date.

¹⁰⁷ The following descriptions and observation are based on the author’s own time spent in Eastern DRC in June and July of 2012 as well as interviews conducted with senior MONUSCO civilian and military personnel to research the development of scenario-based training exercises on POC commissioned by UN DPKO. For further details see MONUSCO POC pre-deployment training package, which was drafted by the author of this thesis. Available at UN Peacekeeping Resource Hub, <http://research.un.org/en/peacekeeping-community>, accessed 23 April 2015

JPTs are small mixed teams of military, police and civilian personnel that visit high risk areas to carry out ‘protection assessments’.¹⁰⁸ The presence of civil affairs staff as well as human rights, child rights and women’s rights officers, alongside military and police personnel is intended to ensure that there are skilled investigators able to conduct interviews with local people, alert to signs of human rights violations and the particular vulnerabilities of particular groups of people. The protection assessment reports contain recommendations to the Mission about troop deployments.¹⁰⁹ The CLAs are tasked with outreach activities to facilitate communication between MONUSCO troops, local communities, the authorities and humanitarian partners.¹¹⁰ The CANs have been established by distributing mobile telephones to focal points in villages surrounding UN bases to alert the CLAs or troop commanders in case of imminent threat to the security of villagers.¹¹¹ MOBs are small military units that can be deployed in the field for several weeks at a time to help secure an area and support the work of a JPT.¹¹²

In mid-2010 MONUC was transformed into MONUSCO, with a reference to ‘stabilization’ added to the mission’s title intended to ‘reflect the new phase reached in the country’.¹¹³ The Security Council urged the mission to build on ‘best practices and extend useful protection

¹⁰⁸ Ibid.

¹⁰⁹ Ibid.

¹¹⁰ Ibid. The CLAs are primarily deployed to support the protection activities of MONUSCO’s Force at the Company or Platoon level. They are national staff members, although not drawn from the particular community in which they work. They help the UN troops to build trust and gain access to local networks and a deeper understanding of the local context, which is particularly important given six month troop rotations. CLAs also respond to a longer term objective of building national capacity on POC.

¹¹¹ Ibid. A CAN Committee is in charge of adapting the model as required, reviewing and suggesting alternate technology based options, or liaising with partners on any potential extension of the phone network in priority areas. The project aims to cover most priority areas benefitting from mobile network coverage. Some MONUSCO military bases, not covered by telephone networks, have distributed high frequency radios to facilitate communication.

¹¹² Ibid. An MOB will typically consist of one around 20 soldiers, accompanied by medical and logistical support and a Community Liaison Assistant (CLA). They will be equipped with two or three light machine guns, a 60 mm mortar, an RPG-7, a sniper rifle and 20 sub-machine guns or rifles as well as binoculars, a GPS, night vision goggles, a cell-phone, Sat-phone and wireless radio set. MOBs can be deployed by road or air and located 15-20 kms away from the radius of permanent bases.

¹¹³ MONUSCO website, background

<http://www.un.org/en/peacekeeping/missions/monusco/background.shtml>, accessed 19 November 2013. See also Security Council Resolution 1925, of 28 May 2010, para 1.

measures, such as the Joint Protection Teams, Community Liaison Interpreters, Joint Investigation Teams, Surveillance Centres and Women's Protection Advisers'.¹¹⁴ Subsequent resolutions have encouraged the further use of such 'innovative measures implemented by MONUSCO in the protection of civilians' and stated that POC is the mission's priority.¹¹⁵ A Security Council Resolution in 2012 also expressed concern at 'the promotion within the Congolese security forces of well-known individuals responsible for serious human rights violations and abuses' and called for the prosecution of those responsible for acts of violence against civilians.¹¹⁶

Although attacks on civilians and human rights violations continued with regularity,¹¹⁷ mission reports became more optimistic from 2011.¹¹⁸ The capture and defections of significant FDLR commanders, coupled with the arrests of key leaders in Europe, reduced its active membership to a small rump.¹¹⁹ An increasing number of Mai Mai militia and rebel

¹¹⁴ Security Council Resolution 1925, of 28 May 2010, para 12 (f).

¹¹⁵ UN Security Council Resolution 2053, Adopted on 27 June 2012, para 1: 'reaffirms that the protection of civilians must be given priority in decisions about the use of available capacity and resources and encourages further the use of innovative measures implemented by MONUSCO in the protection of civilians'. See also *Protection of Civilians: Implementing Guidelines for Military Components of United Nations Peacekeeping Missions*, Department of Peacekeeping Operations / Department of Field Support, February 2015, pp.14-5 which cites these measures as examples of good practice.

¹¹⁶ *Ibid.*, Preamble and para 12.

¹¹⁷ See, for example, Office for the High Commissioner of Human Rights/ MONUSCO, *Final report of the fact-finding missions of the United Nations joint human rights office into the mass rapes and other human rights violations committed by a coalition of armed groups Along the Kibua-Mpofi axis in Walikale territory, North Kivu, from 30 July to 2 August 2010*, July 2011.

¹¹⁸ For an overview see: *Report of the Secretary-General on the United Nations Organization Stabilization Mission in the Democratic Republic of the Congo*, S/2011/298, of 12 May 2011; *Report of the Secretary-General on the United Nations Organization Stabilization Mission in the Democratic Republic of the Congo*, S/2011/656, of 24 October 2011; *Report of the Secretary-General on the United Nations Organization Stabilization Mission in the Democratic Republic of the Congo*, S/2012/65, of 26 January 2012; *Report of the Secretary-General on the United Nations Organization Stabilization Mission in the Democratic Republic of the Congo*, S/2012/355, of 23 May 2012; *Report of the Secretary-General on the United Nations Organization Stabilization Mission in the Democratic Republic of the Congo*, S/2012/838, of 14 November 2012; *Report of the Secretary-General on the United Nations Organization Stabilization Mission in the Democratic Republic of the Congo*, S/2013/96, of 15 February 2013; *Special report of the Secretary-General on the Democratic Republic of the Congo and the Great Lakes Region*, S/2013/119, of 27 February 2013; *Report of the Secretary-General on the United Nations Organization Stabilization Mission in the Democratic Republic of the Congo*, S/2013/388, of 28 June 2013; *Report of the Secretary-General on the United Nations Organization Stabilization Mission in the Democratic Republic of the Congo*, S/2013/581, of 30 September 2013.

¹¹⁹ *Ibid.*

groups also reportedly opted for negotiated surrender and integration into the Congolese armed forces.¹²⁰

The Force Intervention Brigade

In April 2012, however, a new armed rebel group, comprised principally of former CNDP militia and led by Ntaganda, emerged known as the M23.¹²¹ Its leaders claimed that the government had failed to respect the terms of this peace agreement, signed on 23 March 2009 and was failing to take sufficient measures against the FDLR.¹²² Ntaganda had integrated his militia into the Congolese armed forces, in return for an amnesty, and these had been identified as amongst the worst perpetrators of human rights and IHL violations during the Kimia II operation.¹²³ Pressure by the ICC for Ntaganda's arrest may have helped to spark the rebellion, or it may have been due to an order to re-deploy their forces from an area where they are believed to have controlled several illegal mining and logging operations.¹²⁴ A UN appointed investigative panel found considerable evidence to show that elements within the Rwandan government and armed forces had provided direct support to the rebellion.¹²⁵

On 20 November 2012 the rebels briefly seized control of Goma after it was abandoned by government troops.¹²⁶ It has been alleged that the UN Force Commander ignored orders from senior civilian UN officials to defend the town, called his own country's defence

¹²⁰ Ibid.

¹²¹ Jason Stearns, *From CNDP to M23: The evolution of an armed movement in eastern Congo*, Stockholm and Nairobi: Rift Valley Institute/Usalama Project, 2012, p. 44.

¹²² *Report of the Secretary-General on the United Nations Organization Stabilization Mission in the Democratic Republic of the Congo*, S/2012/355, of 23 May 2012, paras 17-9.

¹²³ Human Rights Watch, '*DR Congo: Arrest Bosco Ntaganda for ICC trial*', New York: HRW, 13 April 2012, for a detailed profile of the grave crimes he committed as a militia leader supported by Rwanda and Uganda and then as a General in the Congolese armed forces.

¹²⁴ For discussion see Stearns, 2012.

¹²⁵ *Letter dated 12 November 2012 from the Chair of the Security Council Committee established pursuant to resolution 1533 (2004) concerning the Democratic Republic of the Congo addressed to the President of the Security Council*, UN Doc S/2012/843, 15 November 2012.

¹²⁶ *Report of the Secretary-General on the United Nations Organization Stabilization Mission in the Democratic Republic of the Congo*, S/2013/96, of 15 February 2013.

ministry to ask what he should do and was told not to resist.¹²⁷ During the rebel advance some senior officials expressed uncertainty as to whether their RoE permitted the use of force to engage with or detain rebel fighters.¹²⁸ On 2 December 2012, the M23 withdrew from the city following strong diplomatic pressure on Rwanda from other countries in the region.¹²⁹

In March 2013, after consultations with various regional bodies,¹³⁰ the UN Security Council authorized a Force Intervention Brigade to undertake military operations against armed groups in the DRC.¹³¹ In announcing its formation the UN stated that the Security Council had ‘approved the creation of its first-ever “offensive” combat force, intended to carry out targeted operations to “neutralize and disarm” the notorious 23 March Movement (M23), as

¹²⁷ *Guardian*, ‘What’s the point of peacekeepers when they don’t keep the peace?’, 17 September 2015.

¹²⁸ This view was expressed to the author of this thesis by several senior MONUSCO officials including a Deputy Special Representative of the Secretary General (DSRSG) during interviews conducted in Goma and Kinshasa in June 2012.

¹²⁹ *African Union, Press Release*, ‘The African Union strongly condemns the armed offensive launched by the M23 in the province of North Kivu, in the eastern part of the Democratic Republic of Congo’, 19 November 2012 ; and ‘Declaration of the Heads of State and Government of the Member States of the International Conference on the Great Lakes Region (ICGLR) on the Security Situation in Eastern Democratic Republic of Congo (DRC)’, 5th Ordinary Summit of the Heads of State and Government, Kampala, Uganda, 24 November 2012. The ICGLR includes 12 countries in the region and has become a key mechanism for inclusive diplomacy.

¹³⁰ For further discussion see Carina Lamont and Emma Skeppström, *The United Nations at War in the DRC? Legal Aspects of the Intervention Brigade*, Stockholm: Swedish Ministry of Defence, December 2103; Patrick Cammaert and Fiona Blyth, *The UN Intervention Brigade in the Democratic Republic of the Congo*, New York: International Peace Institute, Issue Brief, July 2013; and Bruce ‘Ozzie’ Oswald, ‘The Security Council and the Intervention Brigade: Some Legal Issues’, *American Society of International Law, Insights*, Vol. 17, Issue 15, 6 June 2013. The ICGLR had previously, largely at Rwanda’s behest, called for the AU and UN to work together to establish ‘a neutral International Force to eradicate M23, FDLR and all other Negative Forces in the Eastern DRC’. The M23 rebellion gave added impetus to this demand, although the question of which countries troops should comprise its membership was controversial.

¹³¹ UN Security Council Resolution 2098, 28 March 2013, para 12(b). ‘*Neutralizing armed groups through the Intervention Brigade*: In support of the authorities of the DRC, on the basis of information collation and analysis, and taking full account of the need to protect civilians and mitigate risk before, during and after any military operation, carry out targeted offensive operations through the Intervention Brigade referred to in paragraph 9 and paragraph 10 above, either unilaterally or jointly with the FARDC, in a robust, highly mobile and versatile manner and in strict compliance with international law, including international humanitarian law and with the human rights due diligence policy on UN-support to non-UN forces (HRDDP), to prevent the expansion of all armed groups, neutralize these groups, and to disarm them in order to contribute to the objective of reducing the threat posed by armed groups on state authority and civilian security in eastern DRC and to make space for stabilization activities’. See also *Report of the Secretary-General on the implementation of the Peace, Security and Cooperation Framework for the Democratic Republic of the Congo and the region*, S/2013/569, 24 September 2013.

well as other Congolese rebels and foreign armed groups'.¹³² In the same month, following a split within the rebel group, Ntaganda surrendered himself to the US Embassy in Rwanda and was taken into custody by the ICC.¹³³

The M23 rebellion ended in November 2013 following heavy fighting in which the Intervention Brigade provided direct support to the Congolese armed forces, using artillery and attack helicopters,¹³⁴ as well as taking defensive action to protect civilians in the area.¹³⁵ Around 6,000 rebels surrendered to MONUSCO and government forces, most of whom were placed in DDR programmes.¹³⁶ MONUSCO claims that the defeat of this rebellion had also led to overtures from 'several armed groups in North Kivu . . . seeking to either surrender or negotiate'.¹³⁷ Nevertheless, it noted almost 10,000 security related incidents, threatening civilians, within the terms of the mission's mandate, in October and November 2013,¹³⁸ including scores of killings, rapes and abductions, some of which were carried out by members of the Congolese armed forces.¹³⁹ OHCHR also accused 'components of the

¹³² *UN News*, 'United Nations, "'Intervention Brigade' Authorized as Security Council Grants Mandate Renewal for United Nations Mission in Democratic Republic of Congo', 28 March 2013, <http://www.un.org/press/en/2013/sc10964.doc.htm>, accessed 5 May 2015.

¹³³ *The Economist*, 'Bosco Ntaganda: a surprising surrender', 19 March 2013.

¹³⁴ *Reuters*, 'U.N. helicopters strike rebel posts in Congo', 18 November 2012.

¹³⁵ *Report of the Secretary-General on the United Nations Organization Stabilization Mission in the Democratic Republic of the Congo*, S/2013/757, 17 December 2013, paras 17-20 and 37-40. The M23 announced an end to its rebellion on 5 November and the government confirmed the rebellion had been defeated the following day. According to the report: 'Between 1 October and 30 November, MONUSCO provided logistical support to the Congolese armed forces throughout the country The Intervention Brigade participated in the Congolese-led operations against the M23 from 26 October to 4 November. In support of these operations, MONUSCO units and sub-units, totaling 1,280 troops, together with 902 troops from the North Kivu brigade, redeployed to Munigi, Rwindi and Kiwanja to ensure protection of civilians in the area. MONUSCO support included combat operations by ground troops from the Intervention Brigade and attack helicopters, artillery and mortar fire, as well as logistics support.'

¹³⁶ *Report of the Secretary-General on the United Nations Organization Stabilization Mission in the Democratic Republic of the Congo*, S/2014/450, 30 June 2014, para 88.

¹³⁷ *Report of the Secretary-General on the United Nations Organization Stabilization Mission in the Democratic Republic of the Congo*, S/2013/757, 17 December 2013, para 22.

¹³⁸ *Ibid.*, para 36. 'In October and November, the United Nations protection cluster recorded 9,515 incidents in North Kivu, South Kivu and Orientale provinces, where six joint protection teams were deployed to assess the situation and identify protection needs. During October and November, MONUSCO received 504 protection alerts, 359 of them in North Kivu, through community alert networks. In response, MONUSCO deployed quick reaction forces and sent investigative patrols or, where appropriate, referred the alerts to national security forces.'

¹³⁹ *Ibid.*, paras 47-53.

Congolese armed forces' of torture, mistreating M23 detainees, killing civilians looting and burning villages and carrying out mass rapes and other sexual violence.¹⁴⁰ Attacks on civilians have continued and the UN continues to face criticism for failing to prevent them.¹⁴¹

In March 2014, the Security Council extended MONUSCO's mandate by another year and included the Intervention Brigade within it, 'on an exceptional basis and without creating a precedent or any prejudice'.¹⁴² The word 'imminent' was also removed from its POC mandate.¹⁴³ Mission reports during 2015 detail continuing efforts to strengthen national capacity, 'neutralize' rebel groups and provide protection to vulnerable civilians and aid workers, although both the human rights and security situation remain precarious at best.¹⁴⁴ Seven million people required humanitarian assistance to meet their basic needs in the DRC, in 2015 and MONUSCO struggles to provide protection to the most vulnerable.¹⁴⁵ With the

¹⁴⁰ UN Office of the High Commissioner for Human Rights (OHCHR) and MONUSCO, *Report of the United Nations Joint Human Rights Office on Human Rights Violations Perpetrated by Soldiers of the Congolese Armed Forces and Combatants of the M23 in Goma and Sake, North Kivu Province, and in and around Minova, South Kivu Province, from 15 November to 2 December 2012*, May 13, 2013, pp. 9–10.

¹⁴¹ Human Rights Watch, *DR Congo: Army, UN Failed To Stop Massacre*, 3 July 2014. This reported that despite being alerted to a massacre in Mutarule on June 6, 2014, while killings were underway, the commander of a nearby MONUSCO contingent stated that he had been told by his national superiors to merely clarify the situation and gather more information rather than directly intervene. See also *UN News Centre*, 'DR Congo: UN boosts force in east after gruesome massacre of civilians', 16 December 2013. In December 2013 UN troops found the bodies of 21 civilians who had been brutally slaughtered by unknown attackers. The victims were killed with machetes or knives, and the youngest among the dead was only a few months old while three girls are reported to have been raped before being beheaded.

¹⁴² UN Security Council Resolution 2147, of 28 March 2014 and 2211 of 26 March 2015. This gave an authorized troop ceiling of 19,815 military personnel, 760 military observers and staff officers, 391 police personnel and 1,050 formed police units. See also Security Council Resolutions 2198 (2015), 2147 (2014), 2136 (2014) and 2211 (2015). The overall troop ceiling level has been maintained although in 2015 the number of deployed troops was reduced by 2,000.

¹⁴³ *Ibid.*, para 4 (a) (i): 'Ensure, within its area of operations, effective protection of civilians under threat of physical violence, including through active patrolling, paying particular attention to civilians 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.'

¹⁴⁴ See *Report of the Secretary-General on the United Nations Organization Stabilization Mission in the Democratic Republic of the Congo*, S/2015/486, 26 June 2015; and *Report of the Secretary-General on the United Nations Organization Stabilization Mission in the Democratic Republic of the Congo* S/2015/172, 10 March 2015.

¹⁴⁵ *Report of the Secretary-General on the United Nations Organization Stabilization Mission in the Democratic Republic of the Congo* S/2015/172, 10 March 2015., para 22. 'More than 50 local protection committees in five provinces received around 270 early warning alerts. MONUSCO responded in 21 per cent of the cases; 46 per cent of the alerts were conveyed to the national security forces and 14 per cent to local civilian authorities. In the remaining 19 per cent of cases, the alerts

M23 rebellion defeated the Intervention Brigade has turned its attention to other armed groups.¹⁴⁶ Some have praised its robust mandate,¹⁴⁷ while others have warned that by becoming a party to the conflict it has set a dangerous precedent.¹⁴⁸ The implications of this will be discussed further in the final section of this chapter.

B. Côte d'Ivoire

The United Nations Operation in Côte d'Ivoire (UNOCI) was first authorized by the Security Council in April 2004¹⁴⁹ and the mandate has since been renewed annually.¹⁵⁰ It replaced the UN Mission in Côte d'Ivoire (MINUCI), a small political mission, mandated to facilitate the

proved either false or were received after the incident. In approximately 40 per cent of cases, violations against civilians were prevented.' See also *Report of the Secretary-General on the United Nations Organization Stabilization Mission in the Democratic Republic of the Congo*, S/2015/486, 26 June 2015, para 44. 'The Mission continued to support the establishment and operation of 56 community alert networks and 80 local protection committees in conflict affected areas in eastern Democratic Republic of the Congo. The networks and the committees helped to protect civilians from risks through enhanced cooperation with local security services, local authorities, civil society and local communities. The Mission responded, alone or in support of FARDC, the national police or local authorities, to 118 protection alerts of the 188 received from local community alert networks, effectively deterring the perceived threat or leading to the arrest of the perpetrators. In 70 cases it proved impossible to respond owing to the inaccessibility of the location, late receipt of the alert or imprecise information.' See also *Report of the Secretary-General on the United Nations Organization Stabilization Mission in the Democratic Republic of the Congo submitted pursuant to paragraph 39 of Security Council resolution 2147 (2014)*, S/2014/957, 30 December 2014.

¹⁴⁶ *UN News*, 'Secretary-General Appoints Lieutenant General Carlos Alberto dos Santos Cruz of Brazil Force Commander for UN Mission in Democratic Republic of Congo', 17 May 2013, <http://www.un.org/press/en/2013/sga1407.doc.htm>, accessed 5 May 2016.

¹⁴⁷ *Evaluation of the implementation and results of protection of civilians mandates in United Nations peacekeeping operations* Report of the Office of Internal Oversight Services, UN Doc A/68/787, 7 March 2014, para 28.

¹⁴⁸ Sheeran, Scott, and Case Stephanie, *The Intervention Brigade: Legal Issues for the UN in the Democratic Republic of the Congo*, New York: International Peace Institute, November 2014. See also , Jeremie Labbe and Arthur Boutellis, 'Peace operations by proxy: implications for humanitarian action of UN peacekeeping partnerships with non-UN security forces', *International Review of the Red Cross*, Volume 95 Number 891/892 Autumn/Winter 2013, pp.539-60.

¹⁴⁹ Security Council Resolution 1528, of 4 April 2004.

¹⁵⁰ See UN Security Council Resolutions 1594 of 4 April 2005; 1609 of 24 June 2005; 1643 of 15 December 2005; 1652 of 24 January 2006; 1657 of 6 February 2006; 1726 of 15 December 2006; 1739 of 10 January 2007; 1763 of 29 June 2007; 1765 of 16 July 2007; 1826 of 29 July 2008; 1880 of 30 July 2009; 1911 of 28 January 2010; 1924 of 27 May 2010; 1933 of 30 June 2010; 1962 of 20 December 2010; 1981 of 13 May 2011; 2000 of 27 July 2011; 2062_ of 26 July 2012; 2112 of 30 July 2013; 2162 of 25 June 2014; and 2226 of 26 June 2015. In April 2012 UNOCI comprised 10,954 uniformed personnel including: 9,404 troops; 200 military observers; 1,350 police (including formed units); 400 international civilian personnel; 758 local staff; and 290 United Nations Volunteers. Its strength of September 2013 was 9,994 total uniformed personnel including: 8,492 troops; 187 military observers; 1,315 police (including formed units); 409 international civilian personnel; 772 local staff; and 153 United Nations Volunteers.

implementation of peace agreement signed the previous year.¹⁵¹ UNOCI reached peak strength of over 10,000 uniformed personnel in April 2012, but began downsizing in March 2013, as security conditions improved.¹⁵²

Although the UNOCI mission was authorized under Chapter VII and had a POC mandate, there was little specific reference to these tasks in the Security Council debate, in February 2004, that led to its adoption and a statement from the Secretary General immediately after this made no reference to it.¹⁵³ POC has also never been included as a specific section in mission reports.¹⁵⁴ These show that the mission initially saw its role in ‘traditional’ peacekeeping terms: it deployed along a specified ceasefire line, in support of a formal peace agreement to reduce the likelihood of renewed fighting between two well-defined belligerents.¹⁵⁵

¹⁵¹Security Council Resolution 1514 of 13 November 2003. See also Security Council Resolution 1479, of 13 May 2003; Security Council Resolution 1464 of 4 February 2003; Security Council Resolution 1527 of 4 February 2004; and Security Council Resolution 1528 of 27 February 2004. MINUCI was established as part of a French-brokered agreement as an observer mission that worked alongside 4,000 French troops and 1,500 troops deployed by the Economic Community of West African States (ECOWAS) in January 2003.

¹⁵² *What's in Blue*, ‘Operation in Côte d’Ivoire mandate renewal’, 24 June 2015. <http://www.whatsinblue.org/2015/06/un-operation-in-cote-divoire-mandate-renewal-1.php>, accessed 30 June 2015. An operative paragraph on the force structure of the mission refers to UNOCI’s ‘possible termination’ following the October 2015 elections, security conditions permitting and so long as the government has the capacity to assume UNOCI’s security responsibilities. The term ‘possible termination’ is again repeated in the penultimate paragraph of the draft, requesting that the Secretary-General report to the Council by 31 March 2016, with recommendations on the mission’s drawdown. Some elected members, proposed that this phrase not be repeated. However, the P3 and Russia supported reiterating this phrase, with some arguing that it is important to signal the eventual departure of the mission.

¹⁵³ UN Security Council, 4918th meeting, S/PV.4918 of 27 February 2004; and *UN Security Council Press Release*, ‘Security Council establishes Peacekeeping Operation in Côte d’Ivoire, unanimously adopting resolution 1528 (2004)’, 27 February 2004. The latter quoted Annan as stating that: ‘A strengthened United Nations presence in Côte d’Ivoire will make it easier for the Government of National Reconciliation to implement the [disarmament, demobilization, and reintegration] programme. It will also facilitate the provision of humanitarian assistance and the restoration of State authority throughout the country, contribute to the promotion of human rights and the re-establishment of the rule of law and help the country prepare for the holding of fair and transparent general elections in 2005’.

¹⁵⁴ The issue is generally dealt with under the headings of human rights, security and sexual violence as well as reports on mission activities, particularly by its military component, and under headings related to the safety of mission personnel.

¹⁵⁵ *Report of the Secretary-General on the United Nations Mission in Côte d’Ivoire submitted pursuant to Security Council resolution 1514 (2003) of 13 November 2003*, S/2004/3, 6 January 2004; *Addendum One*, S/2004/3/Add.2, 9 February 2004; *Addendum Two*, S/2004/3/Add.2, 23 February 2004; *First report of the Secretary-General on the United Nations Operation in Côte d’Ivoire*, S/2004/443, 2 June 2004; *Second report of the Secretary-General on the United Nations Operation in*

Côte d'Ivoire's first President, Félix Houphouët-Boigny, had ruled an autocratic one-party State from independence in the 1960s until his death in 1992 when he was succeeded by Henri Konan Bédié.¹⁵⁶ After decades of stability Côte d'Ivoire's economy faltered in the early 1990s, leading to widespread social protests.¹⁵⁷ Houphouët-Boigny had appointed a technocratic Prime Minister Alassane Ouattara, who came from the north of the country and his father was rumoured to have been born in Burkina Faso.¹⁵⁸ This made him a target of resentment as President Bédié, emphasized the concept of *Ivoirité* and overtly stirred up xenophobia against Muslim northerners and migrant workers, who by then composed over a quarter of the Ivoirian population.¹⁵⁹ Bédié also jailed several hundred opposition supporters and purged the army.¹⁶⁰ A coup took place in 1999, but Laurent Gbagbo, a former political prisoner who also campaigned on a xenophobic platform, was elected President the following year.¹⁶¹

Côte d'Ivoire, S/2004/697, 27 August 2004; *Third progress report of the Secretary-General on the United Nations operation in Côte d'Ivoire*, S/2004/962, 9 December 2004; *Fourth progress report of the Secretary-General on the United Nations Operation in Côte d'Ivoire*, S/2005/186, 18 March 2005; *Fifth progress report of the Secretary-General on the United Nations Operation in Côte d'Ivoire*, S/2005/398, June 2005.

¹⁵⁶ For an historical overview see: Martin, Meredith, *The State of Africa, a history of fifty years of independence*, Johannesburg and Cape Town: Jonathan Ball Publishers, 2006, pp. 285-9 and 678-9; Robert Mundt, 'Côte d'Ivoire: Continuity and Change in a Semi-Democracy', in John F. Clark and David Gardinier, *Political Reform in Francophone Africa*, Boulder: Westview Press, 1997; and David Lea and Annamarie Rowe, *A Political Chronology of Africa*, London: Taylor & Francis, 2005, pp.123-30.

¹⁵⁷ International Crisis Group, *Côte d'Ivoire: Continuing the Recovery*, Africa Briefing N°83, Brussels: ICG, 16 December 2011; International Crisis Group, Africa Report N°176, *A Critical Period for Ensuring Stability in Côte d'Ivoire*, Brussels: ICG, 1 August 2011; Human Rights Watch, *Turning Rhetoric into Reality: Accountability for Serious International Crimes in Côte d'Ivoire*, New York: HRW, April 2013; United Nations Office of the High Commissioner for Human Rights, *Report of the Commission of Inquiry into the Events Related to the March in Abidjan (Côte d'Ivoire)*, 13 May 2004.

¹⁵⁸ *Ibid.* Ouattara is an economist who had previously worked for the International Monetary Fund (IMF).

¹⁵⁹ For discussion see Alfred Babo, 'The crisis of public policies in Côte d'Ivoire: Land law and the nationality trap in Tabou's rural communities', *Africa*, Vol. 83, Special Issue 01, February 2013, pp.100-119 and Human Rights Watch, *The New Racism: the Political Manipulation of Ethnicity in Côte d'Ivoire*, New York: HRW, August 2001. Many of the migrants were from neighbouring countries drawn to Côte d'Ivoire during its economic boom years. Tensions between immigrants and the indigenous population were particularly pronounced in the west of the country where disputes over land rights were common.

¹⁶⁰ Meredith, 2006, pp. 678-9; Mundt, 1997; and Lea and Rowe, 2005, pp.123-30.

¹⁶¹ *Ibid.* On 19 September 2002, an army mutiny turned into a full-scale revolt when government buildings and military and security facilities were simultaneously attacked in Abidjan, Bouaké, and Korhogo. The government crushed the revolt in Abidjan, although the attacks resulted in the deaths of Minister of Interior Emile Boga Doudou and several high-ranking military officers. General Guéï was

Civil war broke out in September 2002 with a rebel group, the *Mouvement patriotique de Côte d'Ivoire* (MPCI), seizing control of most of the northern half of the country.¹⁶² French troops already garrisoned in the country were deployed to establish a *de facto* buffer zone preventing their further advance and, in mid-October 2002, the two sides signed a ceasefire under French supervision. Further rebellions broke out in the west of the country, in late November 2002, with the emergence of two new rebel groups, all of which subsequently fused into the *Forces Nouvelles*.¹⁶³

A ceasefire and power sharing government was agreed in January 2003,¹⁶⁴ but the conflict restarted in November 2004.¹⁶⁵ Government forces bombed rebel bases and one strike hit a French military installation.¹⁶⁶ France retaliated by destroying most of the small Ivoirian air force and violent riots against the French broke out in Abidjan.¹⁶⁷ On 15 November the

also killed under still-unclear circumstances. Ouattara took refuge in the French embassy when his home was attacked. President Gbagbo stated that some of the rebels were hiding in the shanty towns where foreign migrant workers lived and Gendarmes and vigilantes bulldozed and burned homes, attacking residents and displacing some 12,000 people.

¹⁶² International Crisis Group, Africa Report N°72, *Côte d'Ivoire: the War Is Not Yet Over*, Brussels: ICG, 28 November 2003; and Human Rights Watch, *Trapped Between Two Wars: Violence against Civilians in Western Côte d'Ivoire*, New York: HRW, August 2003. The Ivoirian Popular Movement for the Great West (MPIGO) and the Movement for Justice and Peace (MJP) were previously unknown rebel groups with ties to Charles Taylor and the Liberian government, and composed in significant part by veterans of Liberian and Sierra Leonean rebel groups, such as the RUF.

¹⁶³ Ibid.

¹⁶⁴ For details see Nicholas Cook, *Côte d'Ivoire Post-Gbagbo: Crisis Recovery*, Washington DC: Congressional Research Service, 20 April 2011. The Linas-Marcoussis Agreement signed in January 2003. The parties agreed to work together on modifying national identity, eligibility for citizenship, and land tenure laws. The LMA also stipulated a UN Monitoring Committee to report on implementation of the accord. The LMA was followed by the Accra II Agreement organized by ECOWAS and signed in March 2003, the Accra III Agreement organized by ECOWAS and the UN Secretary-General and signed in July 2004; and the Pretoria Agreement, organized by the African Union and signed in April 2005. The main provisions of all these agreements were basically similar.

¹⁶⁵ *Second report of the Secretary-General on the United Nations Operation in Côte d'Ivoire*, S/2004/697, 27 August 2004; *Report of the Secretary-General on the United Nations Operation in Côte d'Ivoire submitted pursuant to Security Council resolution 1514 (2003) of 13 November 2003*, S/2004/3 of 6 January 2004; *First report of the Secretary-General on the United Nations Operation in Côte d'Ivoire*, S/2004/443 of 2 June 2004; *Second report of the Secretary-General on the United Nations Operation in Côte d'Ivoire*, S/2004/697 of 27 August 2004. See also International Crisis Group, Africa Report N°82, *Côte d'Ivoire: No Peace in Sight*, Brussels: ICG, 12 July 2004

¹⁶⁶ *UN Security Council Press Release*, 'Attack on French forces in Côte d'Ivoire, fatal air strikes by national armed forces condemned by Security Council', 6 November 2004.

¹⁶⁷ *Third progress report of the Secretary-General on the United Nations operation in Côte d'Ivoire*, S/2004/962, 9 December 2004.

Security Council issued an arms embargo on Côte d'Ivoire and gave its leaders one month to get the peace process back on track or face a travel ban and an asset freeze.¹⁶⁸ For the first time in UN history, the resolution cited violence against civilians as one of the criterion for the sanctions regime.¹⁶⁹ On the same day the UN Special Rapporteur on the Prevention of Genocide warned that violence was being incited in Côte d'Ivoire, through hate speech.¹⁷⁰ Further diplomatic efforts led to follow up agreements, laying out frameworks for disarmament and elections.¹⁷¹ Gbagbo's presidential mandate expired on 30 October 2005, but was extended for a year, and a new Prime Minister was selected, according to a plan worked out by the AU and endorsed by the Security Council.¹⁷² State security, pro-government militia and rebel forces all carried out violations against civilians.¹⁷³ UNOCI responded by conducting 'robust and continued joint patrolling' with the national armed forces, but warned of its 'limited capacity' and reported an 'eightfold increase in the number of cases of UNOCI movements being obstructed by government forces'.¹⁷⁴

¹⁶⁸ Security Council Resolution 1572 of 15 November 2004.

¹⁶⁹ International Crisis Group, Africa Report N°90, *Côte d'Ivoire: the Worst May Be Yet To Come*, Brussels: ICG, 24 March 2005.

¹⁷⁰ *UN News Centre*, 'Special UN Adviser on Genocide warns of ethnic hate message in Côte d'Ivoire, 15 November 2004. He also noted that this is a crime listed in the statute of the International Criminal Court to which Côte d'Ivoire is a party.

¹⁷¹ International Crisis Group, Africa Briefing N°33, *Côte d'Ivoire: Halfway Measures Will Not Suffice*, Brussels: ICG, 12 October 2005.

¹⁷² UN Security Council Resolution 1633 of 21 October 2005, paras 3 and 5 'Reaffirms . . . its decision on the fact that President Gbagbo shall remain Head of State from 31 October 2005 for a period not exceeding 12 months, and demands that all the parties signatories to the Linas-Marcoussis, Accra III and Pretoria Agreements, as well as all the Ivorian parties concerned, implement it fully and without delay; . . . a new Prime Minister acceptable to all the Ivorian parties signatories to the Linas-Marcoussis Agreement shall be appointed by 31 October 2005.'

¹⁷³ For an overview of 2005 see: *Report of the Secretary-General on inter-mission cooperation and possible cross-border operations between the United Nations Mission in Sierra Leone, the United Nations Mission in Liberia and the United Nations Operation in Côte d'Ivoire*, S/2005/135, 2 March 2005; *Fourth progress report of the Secretary-General on the United Nations Operation in Côte d'Ivoire*, S/2005/186, 18 March 2005; *Fifth progress report of the Secretary-General on the United Nations Operation in Côte d'Ivoire*, S/2005/398/Add.1, 17 June 2005; *Seventh progress report of the Secretary-General on the United Nations Operation in Côte d'Ivoire*, S/2006/2, 3 January 2006; Human Rights Watch, *Côte d'Ivoire: the human rights cost of the political impasse*, New York: HRW, December 2005. See also *Relief web*, 'UN report links Ivory Coast massacre to Liberian mercenaries', 7 July 2005. This describes an incident, in June 2005, in which a village was attacked in the west of the country and 41 villagers were shot, hacked to death, or burned in their homes in a three-hour-long attack that occurred within 200 metres of a national army checkpoint.

¹⁷⁴ *Sixth Progress Report of the United Nations Operation in Côte d'Ivoire*, September 26, 2005, S/2005/604, paras 15-23.

In January 2006, militias loyal to President Gbagbo mounted violent protests against UNOCI and the Prime Minister.¹⁷⁵ Security forces transported the militias involved to different locations around Abidjan.¹⁷⁶ Bangladeshi UNOCI troops shot five protesters who stormed a UN compound.¹⁷⁷ Presidential elections were again postponed and, in November 2006, the Security Council extended the Prime Minister's mandate for an additional 12 months and enhanced his powers, against Gbagbo's objections.¹⁷⁸ In December 2005 HRW called on UNOCI to ensure that its 'forces can provide protection to all civilians whose security is at risk because of communal tension or threats from abusive armed forces.'¹⁷⁹ There seems to have been less clarity within the mission, however, about what POC involved, as mission reports contained few specific references to how UNOCI was implementing this part of its mandate.¹⁸⁰ An internal paper published by OCHA in May 2006, stressed that POC was 'limited' to the specific language of the mandate, which should be interpreted narrowly, while defining 'protection' in the humanitarian 'rights-based' advocacy terms discussed in Chapter

¹⁷⁵ International Crisis Group, Africa Briefing N°40, *Côte d'Ivoire: Stepping up the Pressure*, Brussels: ICG, 7 September 2006; International Crisis Group, Africa Report N°109, *Côte d'Ivoire: Peace as an Option*, Brussels: ICG, 17 May 2006.

¹⁷⁶ Human Rights Watch, *"Because they have guns ... I'm left with nothing": The Price of Continuing Impunity in Côte d'Ivoire*, New York: HRW, May 25, 2006.

¹⁷⁷ *New York Times*, 'UN forces exchange fire with Ivory Coast protesters', 18 January 2006.

¹⁷⁸ UN Security Council Resolution 1721 of 1 November 2006.

¹⁷⁹ Human Rights Watch, *Côte d'Ivoire: the human rights cost of the political impasse*, New York: HRW, December 2005, conclusions and recommendations. See also: Human Rights Watch, *"My Heart Is Cut": Sexual Violence by Rebels and Pro-Government Forces in Côte d'Ivoire*, New York: HRW, August 2007; Human Rights Watch, *"The Best School," Student Violence, Impunity, and the Crisis in Côte d'Ivoire*, New York: HRW, May 21, 2008; Amnesty International, *Côte d'Ivoire: Women and Girls Forgotten Victims of Conflict*, 15 March 2007.

¹⁸⁰ For an overview of the mission's activities see: *Twelfth progress report of the Secretary-General on the United Nations Operation in Côte d'Ivoire*, S/2007/133, 8 March 2007; *Report of the Secretary-General on cross-border issues in West Africa*, S/2007/143, 13 March 2007; *Thirteenth progress report of the Secretary-General on the United Nations Operation in Côte d'Ivoire*, S/2007/275, of 14 May 2007; *Report of the Secretary-General on children and armed conflict in Côte d'Ivoire*, S/2007/515, of 30 August 2007; *Fourteenth progress report of the Secretary-General on the United Nations Operation in Côte d'Ivoire*, S/2007/593, of 1 October 2007.

Three.¹⁸¹ UNOCI's Force Commander also noted that POC was not considered a priority and other tasks took precedence.¹⁸²

Operation 'Protect the Civilian Population'

After repeated postponements, presidential elections finally took place, on 31 October 2010, with Ouattara and Gbagbo emerging as leading candidates in the first round.¹⁸³ A run-off took place between them on 28 November.¹⁸⁴ Ouattara was declared the winner by the electoral commission and the result was certified by the UN, the AU and ECOWAS, but Gbagbo refused to cede power.¹⁸⁵ ECOWAS and the AU suspended Côte d'Ivoire from its

¹⁸¹ *Roundtable background paper*, Office for the Coordination of Humanitarian Affairs, 2006. OCHA had established a 'Protection Network' in 2005, which included: prominent international NGOs, mandated UN protection agencies, UNOCI's Human Rights Division, advisers from the Child Protection and Gender units, observers from the ICRC. The Network's objectives included collection of 'protection information', and the provision of analysis 'on which early warning action, advocacy and denunciation could be based. The network included two subgroups, the Child Protection Forum as of March 2006 and the IDP Protection Cluster as of April 2006. The OCHA paper advocated 'an approach to protection in which 'human rights, media and rule of law play a more proactive role'. However, no details are given about how the physical protection of civilians is to be achieved.

¹⁸² *Report of the Roundtable on the Implementation of the Protection Mandate of the UN Peacekeeping Mission in Côte d'Ivoire (UNOCI)*, Office for the Coordination of Humanitarian Affairs, 24 May 2006.

¹⁸³ See *Fifteenth progress report of the Secretary-General on the United Nations Operation in Côte d'Ivoire*, S/2008/1, of 2 January 2008; *Sixteenth progress report of the Secretary-General on the United Nations Operation in Côte d'Ivoire*, S/2008/250, of 15 April 2008; *Seventeenth progress report of the Secretary-General on the United Nations Operation in Côte d'Ivoire*, S/2008/451, of 10 July 2008; *Eighteenth progress report of the Secretary-General on the United Nations Operation in Côte d'Ivoire*, S/2008/645, of 13 October 2008; *Nineteenth progress report of the Secretary-General on the United Nations Operation in Côte d'Ivoire*, S/2009/21, of 8 January 2009; *Twentieth progress report of the Secretary-General on the United Nations Operation in Côte d'Ivoire*, S/2009/196, of 13 April 2009; *Twenty-first progress report of the Secretary-General on the United Nations Operation in Côte d'Ivoire*, S/2009/344, of 7 July 2009; *Twenty-second progress report of the Secretary-General on the United Nations Operation in Côte d'Ivoire*, S/2009/495, of 29 September 2009; *Twenty-third progress report of the Secretary-General on the United Nations Operation in Côte d'Ivoire*, S/2010/15, of 7 January 2010; *Twenty-fourth report of the Secretary-General on the United Nations Operation in Côte d'Ivoire* of 20 May 2010; *Progress report on the United Nations Operation in Côte d'Ivoire*, S/2010/537, of 18 October 2010.

¹⁸⁴ *Twenty-sixth progress report of the Secretary-General on the United Nations Operation in Côte d'Ivoire*, S/2010/600, of 23 November 2010, para 11 stated: 'The campaign was conducted in a generally peaceful and free atmosphere. However, tensions between opposing camps, in particular between FPI and RDR supporters, were apparent; there were isolated minor clashes . . . and electoral campaign posters were destroyed in some areas.'

¹⁸⁵ For a complete list of UN statements See UNOCI website 'Post-election crisis', 'Key UN statements', <http://www.un.org/en/peacekeeping/missions/unoci/elections.shtml>, accessed November 2013.

decision-making bodies¹⁸⁶ and UNOCI's military component was reinforced in December and January.¹⁸⁷ *Forces Nouvelles* seized control of most of the country, but Gbagbo remained entrenched in Abidjan.¹⁸⁸ HRW has claimed that at least 3,000 people were killed during the resulting crisis.¹⁸⁹

On 16 December forces loyal to Gbagbo killed more than 50 people and maimed a further 200 in Abidjan.¹⁹⁰ On 17 March mortars fired by forces loyal to Gbagbo into a market area in the Abobo district of the city killed 25 civilians.¹⁹¹ On 30 March 2011, the Security Council adopted a resolution imposing targeted sanctions against Gbagbo, his wife and three of his associates and reinforcing the authorisation for UNOCI to use force to protect civilians.¹⁹² UNOCI's own staff and buildings came under attack from pro-Gbagbo forces¹⁹³ and, on 4 April, the Secretary General announced that he had instructed UNOCI to take the necessary measures to prevent the use of heavy weapons against the civilian population.¹⁹⁴ On 5 April UNOCI launched operation 'Protect the Civilian Population' and UN attack helicopters were subsequently used on several occasions to destroy Gbagbo's heavy weapons.¹⁹⁵ On 11 April

¹⁸⁶ Ibid.

¹⁸⁷ UN Security Council Resolution 1951 of 24 November 2010; 1962 of 20 December 2010; 1967 of 19 January 2011; and 1968 of 16 February 2011.

¹⁸⁸ International Crisis Group, Africa Report N°171, *Côte d'Ivoire: Is War the Only Option?*, Brussels: ICG, 3 March 2011.

¹⁸⁹ Human Rights Watch, *Turning Rhetoric into Reality: Accountability for Serious International Crimes in Côte d'Ivoire*, New York: HRW, April 2013; and Human Rights Watch, *"They Killed Them Like It Was Nothing": The Need for Justice for Côte d'Ivoire's Post-Election Crimes*, New York: HRW, October 2011.

¹⁹⁰ Human Rights Watch, *"They Killed Them Like It Was Nothing": The Need for Justice for Côte d'Ivoire's Post-Election Crimes*, New York: HRW, October 2011.

¹⁹¹ Ibid., see also *Twenty-seventh progress report of the Secretary-General on the United Nations Operation in Côte d'Ivoire*, S/2011/211, 30 March 2011.

¹⁹² Security Council Resolution 1975 of 30 March 2011.

¹⁹³ *UN News Centre*, 'Côte d'Ivoire: UN condemns firing at helicopter and killing of civilian', 29 March 2011; *UNOCI Press Releases*: 'UNOCI headquarters continues to come under fire from Gbagbo's special forces', 3 April 2011; 'New attack on UNOCI patrol', 2 April 2011; 'UNOCI repels attack by Gbagbo's special forces', 2 April 2011, 'UNOCI helicopter was shot at in Abidjan', 1 April 2011; 'UNOCI civilian staff killed by stray bullet', 1 April 2011; 'Gbagbo special forces fire on UNOCI Headquarters', 1 April 2011.

¹⁹⁴ *Secretary-General statement, expressing concern over violence in Côte d'Ivoire, informing that the United Nations has undertaken military operation to prevent heavy weapons use against civilians*, Office of the Secretary General 4 April 2011.

¹⁹⁵ See *UNOCI Press Releases* 'UNOCI calls on Gbagbo's special forces to lay down their arms', 5 April 2011;

Gbagbo, who had been hiding in the basement of the presidential palace, was captured by forces loyal to Ouattara and brought into custody.¹⁹⁶ He was subsequently transferred to The Hague to stand trial at the ICC on charges of crimes against humanity.¹⁹⁷

Ouattara was inaugurated as Côte d'Ivoire's new President on 21 May 2011.¹⁹⁸ UNOCI's mission has since been extended with a POC mandate,¹⁹⁹ to 'support the new Ivorian government'.²⁰⁰ POC issues no longer appear to be a particular concern for the mission and are usually dealt with in a single paragraph.²⁰¹ A number of leaders of the former regime have since been convicted of serious crimes and human rights violations in both the Abidjan criminal and military courts, receiving sentences of up to 20 years.²⁰² Mission reports do not show concerns about the fairness of the trials although it has been noted that there were 'continued perceptions of victor's justice', due to the fact that most prosecutions have been brought exclusively against supporters of former President Gbagbo.²⁰³ In May 2015 it was reported that 321 of the 659 people detained in connection with the crisis remained in detention while most of the others had been released on bail.²⁰⁴

At the height of the violence during this crisis the UN Secretary General issued a statement

'UNOCI launches Operation "Protect the Civilian Population"', 5 April 2011; 'UNOCI transports passengers blocked in Abidjan; 5 April 2011; 'Pro-Gbagbo forces ready to end combat ', 5 April 2011; 'UN Assistant Secretary-General for Human Rights visits Côte d'Ivoire', 4 April 2011.

¹⁹⁶ *New York Times*, 'Leader's Arrest in Ivory Coast Ends Standoff', 11 April 2011.

¹⁹⁷ *Guardian*, 'Laurent Gbagbo appears at The Hague to face trial', 6 December 2011.

¹⁹⁸ *UN News Centre*, 'Côte d'Ivoire: UN chief attends inauguration of President Alassane Ouattara', 21 May 2011

¹⁹⁹ UN Security Council Resolutions 1981 of 13 May 2011; 2000 of 27 July 2011; 2062 of 26 July 2012; 2101 of 25 April 2013; 2112 of 30 July 2013.

²⁰⁰ See UNOCI Homepage website,

<http://www.un.org/en/peacekeeping/missions/unoci/background.shtml>, accessed 27 November 2013.

²⁰¹ *Thirty-sixth progress report of the Secretary-General on the United Nations Operation in Côte d'Ivoire*, S/2015/320, 7 May 2015, para 16. See also *Thirty-fifth progress report of the Secretary-General on the United Nations Operation in Côte d'Ivoire* S/2014/892, 12 December 2014; and *Thirty-fourth report of the Secretary-General on the United Nations Operation in Côte d'Ivoire*, S/2014/342, 15 May 2014.

²⁰² *Thirty-sixth progress report of the Secretary-General on the United Nations Operation in Côte d'Ivoire*, S/2015/320, 7 May 2015, para 15-6.

²⁰³ *Ibid.*

²⁰⁴ *Ibid.*, para 3.

insisting that the UN had not become a party to the conflict and was using force purely in self-defence and pursuant to its mandate to protect civilians.²⁰⁵ It also stressed that ‘those who commit serious violations of international humanitarian and human rights laws . . . will be held accountable.’²⁰⁶ There have been no allegations made that UN forces violated IHL or international human rights law, nor any attempt to bring proceedings against the UN for its actions or inactions during the crisis. As mentioned in Chapter Five, however, Gbagbo’s wife and one of his close associates have been successful in challenging the freezing of their assets by the EU Court in 2011.²⁰⁷ The new government of Côte d’Ivoire has also unfrozen bank accounts of a number of supporters of former President Gbagbo as part of its efforts to promote reconciliation.²⁰⁸

In November 2012 a group of nearly a thousand armed men attacked an IDP camp, Nahibly, near Duékoué, killing at least seven people, wounding dozens and causing 5,000 people to flee.²⁰⁹ The attack came a few weeks after an ambush in western Cote d’Ivoire that killed seven UN peacekeeping soldiers, the mission’s first fatalities.²¹⁰ In his report on the incident

²⁰⁵ *Secretary-General statement, expressing concern over violence in Côte d’Ivoire, informing that the United Nations has undertaken military operation to prevent heavy weapons use against civilians*, Office of the Secretary General 4 April 2011.

²⁰⁶ *Ibid.*

²⁰⁷ *Bamba v. Council*, Case T-86/11, Judgment of the General Court (Fifth Chamber, Extended Composition) 8 June 2011; and *Morokro v. Council*, Case T-316/11 Judgment of the General Court (Fifth Chamber) of 16 September 2011.

²⁰⁸ *Thirty-sixth progress report of the Secretary-General on the United Nations Operation in Côte d’Ivoire*, S/2015/320, 7 May 2015, para 3

²⁰⁹ Internal Displacement Monitoring Centre *Côte d’Ivoire: IDPs rebuilding lives amid a delicate peace*, Geneva: IDMC, 28 November 2012; and *UNHCR News*, ‘UNHCR disturbed by attacks on IDP camp in Côte d’Ivoire’, Briefing Notes, 24 July 2012. These note that UN troops and police had earlier turned back a small group of dozos (a fraternity of traditional hunters often employed to provide security in Ivorian villages). About an hour later the camp was stormed by the much larger group. The attack appears to have been linked to a murder the previous night of a family of four in a nearby village, but it also clearly took place within a wider overall context of alleged militia activity and tense inter-communal relations between supporters and opponents of the previous President.

²¹⁰ The details here are based on a briefing given to the author at UNOCI headquarters in Abidjan, June 2012 and interview by the author with the chief of police and several local officials in Duékoué, June 2012. The attack took place on 8 June 2012 and coincided with the opening proceedings against Gbagbo by the International Criminal Court in The Hague. The militia group which carried out the attack on UNOCI had crossed the border from Liberia was believed to have been loyal to the former President Gbagbo. The local authorities in Cote d’Ivoire allege that many militia members are based in refugee camps there managed by UNHCR and also warned that IDP camps in western Cote d’Ivoire contained similar militia groups.

the UN Special Rapporteur on the Human Rights of Internally Displaced Persons, Chaloka Beyani, urged an investigation as to why the attack had not been prevented ‘despite the presence of government officials and UNOCI elements’ nearby.²¹¹ He told an earlier press conference that UNOCI troops had told him that the ‘rules of engagement of UN peacekeeping forces do not allow them to open fire if civilians are attacking other civilians.’²¹² This claim does not appear in the Special Rapporteur’s official report, and the UN explicitly denied it,²¹³ but it seems reasonable to assume that the statement reflects these troops own understanding of their RoE.²¹⁴

C. Peacekeeping or war fighting?

While the UN denied that its ‘Protect the Civilian Population’ operation in Côte d’Ivoire had made UNOCI a party to the armed conflict, it seems to accept that the actions of the Force Intervention Brigade may have done so in the DRC. In May 2013 Patricia O’Brien, the UN Under Secretary General for Legal Affairs, stated that: ‘By virtue of the tasks foreseen for the Intervention Brigade, it would appear that MONUSCO may end up becoming a party to armed hostilities in the DRC, thus triggering the application of international humanitarian law.’²¹⁵ Lieutenant General Babacar Gaye, when he was the UN Military Adviser for

²¹¹ Report of the Special Rapporteur on the human rights of internally displaced persons, Chaloka Beyani, A/HRC/23/44/Add.1, 24 May 2013, para 12. He recommended ‘there should be a special focus on lessons learned in relation to policing and protection practices within such camps, and the capacity and mandate of United Nations military contingents in such circumstances (namely, when providing the protection of an IDP camp from an attack by civilians).

²¹² *Inner-City News*, ‘UN Peacekeepers Inaction on IDP Killings in Cote d'Ivoire Due to DPKO Rules?’, 23 October 2012. He stated: ‘I asked the peacekeepers why they didn’t act. They said that they have to take a balance, whether acting would cause more harm. They felt more would have been killed if they had acted with force. . . . they would have been overrun. The commander to make sure preserve lives of men to continue to provide protection [sic] . . . [and the] rules of engagement of UN peacekeeping forces do not allow them open fire civilians if civilians are attacking other civilians.

²¹³ *Ibid.* ‘At the following day’s noon briefing the UN spokesman read out a statement denying what the Special Rapporteur had said about UN Peacekeeping’s rules of engagement.’

²¹⁴ Interview by the author in the field at Duékoué and at UNOCI’s headquarter in Abidjan with senior UNOCI civilian officials and military officers, June 2012. Interviewees repeatedly stated that they considered themselves bound by IHL and that this ‘protected civilians’ unless these had become a party to an armed conflict.

²¹⁵ Patricia O’Brien, statement by the under-secretary-general for Legal Affairs and UN legal counsel delivered to the International Law Commission, Geneva, May 23, 2013, p.18 available at <http://legal.un.org/ilc/sessions/65/Statement%20byTheLegal%20Counsel.pdf>, accessed 6 January

Peacekeeping Operations similarly noted that: ‘When we are asked to provide the Congolese army with support in disarming armed groups, some consider that we become parties to the conflict. But at some stage, it becomes necessary to be a party to the conflict in order to resolve it.’²¹⁶ In October 2014 Lieutenant General Dos Santos Cruz, MONUSCO’s Force Commander, made a forthright defence of this position stating that:

The United Nations should not wait for armed groups to come and terrorize communities; it should not give them freedom of movement . . . Conceptually, troops remain mindful of the United Nations principles of peacekeeping, namely, the consent of the parties, impartiality and the non-use of force except in self-defence and defence of the mandate. Those principles may not always apply against armed criminal groups in contemporary missions. Their application could be reviewed and adjusted to contemporary threats and to the context of violence that innocent civilians and peacekeeping personnel face in conflict areas . . . The assumption that military action may create collateral damage should not prevent us from taking the necessary action. On the contrary, there are many examples that prove that action against armed groups brings huge benefits to the population.²¹⁷

Sheeran and Case, however, have warned that the formation of the Intervention Brigade ‘reflects UN forces moving toward a more traditional war-fighting, rather than peacekeeping, posture’, with significant implications for the legal protection and obligations of peacekeepers.²¹⁸ O’Brien has noted that MONUSCO could lose its protected status under the

2015; and UN Office of Legal Affairs (OLA) representative Mona Ali Khalil, panel discussion, “Humanitarian Law, Peacekeeping/Intervention Forces and Troop-Contributing Countries: Issues and Challenges,” Asian-African Legal Consultative Organization (AALCO), United Nations, New York, August 21, 2013; and Mona Ali Khalil, ‘Peace Forces at War’ panel discussion at the annual general meeting of the American Society of International Law, 7-12 April 2014.

²¹⁶ Interview with Lieutenant General Babacar Gaye United Nations Military Adviser for Peacekeeping Operations’, *International Review of the Red Cross*, Vol. 95 Number 891/892 Autumn/Winter 2013, p.490.

²¹⁷ UN Security Council debate on UN Peacekeeping Operations, S/PV.727, 9 October 2014, pp.2-3.

²¹⁸ Scott Sheeran and Stephanie Case, *The Intervention Brigade: Legal Issues for the UN in the Democratic Republic of the Congo*, New York: International Peace Institute, November 2014. See

Convention on the Safety of United Nations and Associated Personnel and would face ‘practical challenges’ if ‘required to detain large numbers of fighters’ as part of its efforts to ‘neutralize’ the threats that they pose to civilians.²¹⁹ The loss of legal protection appears to have also been implicitly recognised by the Security Council when, in condemning the killing of a MONUSCO peacekeeping soldier in August 2013, it noted that ‘intentionally directing attacks against personnel, installations, material, units or vehicles involved in a 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*, constitutes a crime under international law.’²²⁰ [emphasis added]

As discussed in Chapter Three, the High Level Panel report of 2015 argued that UN peacekeeping missions are not suited to engage in military counter-terrorism operations, due to their composition and character, and urged the Security Council to exercise ‘extreme caution’ before giving missions such mandates’.²²¹ By contrast the OIOS Protection Evaluation 2014 welcomed the formation of the Intervention Brigade and the inclusion of the words ‘targeted offensive operations’ in the mandate, which it stated marks ‘a decisive change from the past’ in relation to the use of force.²²² France’s representative on the

also Jeremie Labbe and Arthur Boutellis, ‘Peace operations by proxy: implications for humanitarian action of UN peacekeeping partnerships with non-UN security forces’, *International Review of the Red Cross*, Vol. 95 No. 891/892 Autumn/Winter 2013, pp.539-60.

²¹⁹ Patricia O’Brien, statement by the under-secretary-general for Legal Affairs and UN legal counsel delivered to the International Law Commission, Geneva, May 23, 2013, p.18 available at <http://legal.un.org/ilc/sessions/65/Statement%20byTheLegal%20Counsel.pdf>, accessed 6 January 2015; and UN Office of Legal Affairs (OLA) representative Mona Ali Khalil, panel discussion, “Humanitarian Law, Peacekeeping/Intervention Forces and Troop-Contributing Countries: Issues and Challenges,” Asian-African Legal Consultative Organization (AALCO), United Nations, New York, August 21, 2013.

²²⁰ *UN News Centre*, ‘Security Council Press Statement on Democratic Republic of Congo’, 29 August 2013.

²²¹ Report of the High Level Panel on Peace Operations, 2015, para 116-9.

²²² *Evaluation of the implementation and results of protection of civilians mandates in United Nations peacekeeping operations* Report of the Office of Internal Oversight Services, UN Doc A/68/787, 7 March 2014, para 28

Security Council also commented that the idea of the Intervention Brigade had been tested ‘and it works’, so ‘could be a model when necessary for the future.’²²³

For humanitarians this revives long-standing concerns about attempts to integrate the delivery of humanitarian assistance into counter-insurgency operations.²²⁴ Ashley states that the ‘establishment of the brigade was met with outcry from many aid agencies and human rights groups over concerns that it would ultimately result in greater harm to civilians and questions around accountability.’²²⁵ Mackintosh has observed that as MONUSCO increasingly appeared to be becoming a party to the conflict, humanitarian NGOs in the DRC ‘started to paint their cars different colours: yellow, pink, anything’ to distinguish themselves from UN vehicles.²²⁶

In March 2013 three consortia representing over 3000 humanitarian NGOs expressed their dismay at a UN Security Council Resolution 2093,²²⁷ which integrated all UN functions under one UN umbrella in Somalia, warning that this could seriously compromise their humanitarian neutrality.²²⁸ Others have noted that, on purely pragmatic grounds, the UN should not relinquish ‘any pretence of neutrality or impartiality’, when it ‘lacks the requisite resources and structures to play a comprehensive or clearly strategic stabilisation role’.²²⁹

²²³ Permanent Mission of France to the UN, “DRC/CAR/Ukraine: Remarks to the Press by Mr. Gérard Araud, Permanent Representative of France to the United Nations,” March 28, 2014, available at <http://www.franceonu.org/28-March-2014-DRC-CAR-Ukraine>, accessed 1 May 2015.

²²⁴ For a description of this process in Afghanistan, see Conor Foley, *The Thin Blue Line: how humanitarianism went to war*, London: Verso, pp.94-119. See also: Nathan Hodge, *Armed humanitarians: the rise of the nation builders*, London: Bloomsbury, 2011; Ahmed Rashid, *Descent into chaos*, London: Penguin 2009; Jack Fairweather, *A war of choice: honour, hubris and sacrifice, the British in Iraq*, London: Vintage, 2012; Rory Stewart, *Occupational hazards*, London: Picador, 2006; Lucy Morgan Edwards, *The Afghan Solution: the inside story of Abdul Haq, the CIA and how western hubris lost Afghanistan*, London: Bactria Press, 2011; and Mark Duffield, *Development, Security and Unending War: Governing the World of Peoples*, Cambridge: Polity Press, 2007.

²²⁵ Ashley Jackson, *Protecting civilians: the gap between norms and practice*, Humanitarian Policy Group, Policy Brief 56, London: Overseas Development Institute, April 2014.

²²⁶ Kate Mackintosh, ‘Beyond the Red Cross: the protection of independent humanitarian organisations’ in Hans-Joachim Heintz and Andrej Zwitter (eds), *International Law and Humanitarian Assistance*, Berlin: Springer, 2011, p.46.

²²⁷ UN Security Council Resolution 2093, 6 March 2013.

²²⁸ Statement available at: www.ngovoice.org/index.php?page=2858, accessed 30 November 2014

²²⁹ Sarah Collinson, Samir Elhawary and Robert Muggah, ‘States of fragility: stabilisation and its implications for humanitarian action’, in *Disasters*, Vol. 34, Supplement 3, October 2010, p. 290. For

Sloan argues that peacekeeping missions are ‘fundamentally ill-suited to the enforcement-type tasks being asked of them’ as they are almost always under-funded, under-equipped and reliant on troops who are under-trained.²³⁰

There has been considerable less controversy about the ‘innovative measures’ developed as part of MONUC’s protection strategy, described above. Indeed they have been welcomed by humanitarian agencies and are often implemented in consultation with Protection Working Groups.²³¹ These deployments are essentially based on gathering information, improving early warning mechanisms, and supporting the development of local protection plans and coordination structures.²³² Deploying forces with the aim of ‘protecting civilians’ rather than ‘defeating the enemy’ draws on some contemporary counter-insurgency theory,²³³ but also on the type of robust community policing strategies used in developing and middle income countries where communities have come under the control of heavily-armed criminal gangs.²³⁴ Policing in such situations, where levels of violence are often far higher than many

further discussion see James Sloan, *The Militarisation of Peacekeeping in the Twenty-First Century*, Oxford: Hart Publishing, 2011.

²³⁰ James Sloan, *The Militarisation of Peacekeeping in the Twenty-First Century*, Oxford: Hart Publishing, 2011.

²³¹ Interviews conducted with a variety of humanitarian agency protection staff in DRC and in other missions between 2010 and 2015. The author of this thesis also regularly participated in Protection Working Groups in Liberia where similar practices also occurred.

²³² Interview conducted by the author of this thesis in Eastern DRC with senior MONUSCO civilian and military personnel in June and July of 2012.

²³³ See, for example, David Kilcullen, *The Accidental Guerrilla: fighting small wars in the midst of a big one*, London: Hurst & Co., 2009, which reflects on his experiences designing the ‘surge’ in Iraq in 2007 and subsequent similar operations in Afghanistan. See also Nathan Hodge, *Armed humanitarians: the rise of the nation builders*, London: Bloomsbury, 2011; Philip Wilkinson, *The Military Contribution to Peace Support Operations, Joint Warfare Publication (JWP) 3-50, Second Edition*, Shrivenham: Ministry of Defence, 2004; Robert B. Oakley, Michael J. Dziedzic, Eliot M. Goldberg (eds), *Policing The New World Disorder: Peace Operations And Public Security*, Washington DC: National Defense University Press, 1998; Oliver Ramsbotham, Hugh Miall, Tom Woodhouse, *The Dilemmas of Statebuilding: Confronting the Contradictions of Post War Peace Operations*, Abingdon: Routledge, 2009; Beth Cole and Emily Hsu (lead writers), *Guiding Principles for Stabilization and Reconstruction*, Washington: United States Institute for Peace, 2009; OECD-DAC *Supporting Statebuilding in Situations of Conflict and Fragility: Policy Guidance*, DAC Guidelines and Reference Series, Paris: OECD, 2011.

²³⁴ For a description of such operations currently being conducted in the *favelas* of Rio de Janeiro see Conor Foley, *Pelo telefone: rumours, truths and myths on the pacification of the favelas of Rio de Janeiro*, Rio de Janeiro: Humanitarian Action in Situations Other than War, Pontificia Universidade Católica do Rio de Janeiro, March 2014. Around 40,000 people have been shot dead in Rio de Janeiro in the last decade and the gangs until recently physically controlled most of the *favelas* barricading the entrances and deploying openly armed guards to patrol them. For further discussion on urban violence

officially recognized conflict zones,²³⁵ is nevertheless conducted within a law and order paradigm, in which the use of force is regulated by international human rights law rather than IHL.²³⁶ As discussed in Chapter Four, international human rights monitoring bodies have required States to comply with both the positive and negative provisions protecting the right to life and freedom from torture, even ‘in difficult security conditions, including in a context of armed conflict’.²³⁷

The Intervention Brigade was created ‘on an exceptional basis and without creating a precedent or any prejudice’²³⁸ and some argue that ‘UN peacekeepers remain unlikely to engage in offensive military operations and peace enforcement.’²³⁹ As Patrick Cammaert, a previous MONUC Force Commander, has pointed out that the mission was ‘already authorised to conduct offensive operations under its Chapter VII mandate (and it did), where the rules of engagement authorise the use of force beyond self-defence.’²⁴⁰ Indeed some argue that the UN has been a party to the conflict in the DRC since the formation of the Ituri and Kivus Brigades in 2003 or Operation Kimia II in 2009.²⁴¹

in Brazil see Luke Dowdney, *Neither War nor Peace. International comparisons of children and youth in organised armed violence*, Rio de Janeiro: Viva Rio, 2005; and Luke Dowdney, *Children of the drug trade*, Rio de Janeiro: Viva Rio, 2003; Teresa Caldeira, *City of Walls: crime, segregation and citizenship in Sao Paulo*, Berkeley: University of California Press, 2000; Sarah Hautzinger, *Violence in the City of Women: police and batterers in Bahia, Brazil*, Berkeley: University of California Press, 2007; Janice Perlman, *Favela: four decades of living on the edge in Rio de Janeiro*, Oxford: Oxford University Press, 2010

²³⁵ For a broader discussion of the problems of policing in situations of extreme urban violence see: Mark Duffield, *Development, Security and Unending War: Governing the World of Peoples*, Cambridge: Polity Press, 2007; Alice Hills, *Policing in post-conflict societies*, London: Zed books, 2009; Robert Muggah and Kevin Savage, ‘Urban Violence and Humanitarian Action: Engaging the Fragile City,’ *Journal of Humanitarian Assistance*, 2012; and Elena Lucchi, *Humanitarian interventions in situations of urban violence*, ALNAP Lessons Paper. London: ALNAP/ODI.

²³⁶ Ibid.

²³⁷ ECtHR: *Al-Skeini and Others v. UK*, Appl. No. 55721/07, Judgment (Grand Chamber) 7 July 2011, para 164. See also *Kaya v. Turkey*, Appl. No. 22729/93, Judgment 19 February 1998, para 9.

²³⁸ Security Council Resolution 2147, of 28 March 2014. This gave an authorized troop ceiling of 19,815 military personnel, 760 military observers and staff officers, 391 police personnel and 1,050 formed police units.

²³⁹ Jeremie Labbe and Arthur Boutellis ‘Peace operations by proxy: implications for humanitarian action of UN peacekeeping partnerships with non-UN security forces’, *International Review of the Red Cross*, Vol. 95 Number 891/892 Autumn/Winter 2013, p.543.

²⁴⁰ Patrick Cammaert and Fiona Blyth, *The UN Intervention Brigade in the Democratic Republic of the Congo*, International Peace Institute, Issue Brief, July 2013.

²⁴¹ For discussion see Tristan Ferraro, ‘The applicability and application of international humanitarian law to multinational forces’, *International Review of the Red Cross*, Vol. 95 Number 891/892

POC is listed as a separate task from ‘neutralizing armed groups’ in MONUSCO mission reports and the emphasis in POC activities is strongly on community liaison and working with the Congolese police force.²⁴² Mission reports in 2014 and 2015 do not show that it is taking a more aggressive stance, partly because the security situation itself is easing as an increasing number of rebels surrender to government forces.²⁴³ In December 2014 the UN revised its POC strategy ‘with the aim of better coordinating activities between MONUSCO and the United Nations country team and supporting the Government’s efforts to fulfil its obligations with regard to the protection of civilians.’²⁴⁴ A mission report also stressed ‘the need to remove the distinction between the Force Intervention Brigade’ and other MONUSCO forces as while ‘it may be impractical for all contingents to be authorized to conduct targeted offensive operations to neutralize armed groups’ they all had ‘full responsibility to protect civilians and full authority to take all necessary measures for that purpose.’²⁴⁵

Autumn/Winter 2013, pp.561-612. See also *UN Office for the High Commissioner for Human Rights* ‘Press statement by Professor Philip Alston, UN Special Rapporteur on extrajudicial executions. Mission to the Democratic Republic of the Congo, 5–15 October 2009’, 15 October 2009. *Mission to the Democratic Republic of the Congo, 5–15 October 2009*, 15 October 2009, OHCHR website, http://www2.ohchr.org/english/issues/executions/docs/PressStatement_SumEx_DRC.pdf, accessed 19 November 2013.

²⁴² See, for example, *Report of the Secretary-General on the United Nations Organization Stabilization Mission in the Democratic Republic of the Congo*, S/2014/698, 25 September 2014, paras 50-4; *Report of the Secretary-General on the United Nations Organization Stabilization Mission in the Democratic Republic of the Congo*, S/2014/956, 30 December 2014, paras 32-3; *Report of the Secretary-General on the United Nations Organization Stabilization Mission in the Democratic Republic of the Congo*, S/2014/956, 10 March 2015, paras 40-4.

²⁴³ *Report of the Secretary-General on the United Nations Organization Stabilization Mission in the Democratic Republic of the Congo*, S/2014/157, 5 March 2014; *Report of the Secretary-General on the United Nations Organization Stabilization Mission in the Democratic Republic of the Congo*, S/2014/450, 30 June 2014; *Report of the Secretary-General on the implementation of the Peace, Security and Cooperation Framework for the Democratic Republic of the Congo and the Region*, S/2014/697, 24 September 2014; *Report of the Secretary-General on the United Nations Organization Stabilization Mission in the Democratic Republic of the Congo*, S/2014/698, 25 September 2014.

²⁴⁴ *Report of the Secretary-General on the United Nations Organization Stabilization Mission in the Democratic Republic of the Congo*, S/2014/956, 10 March 2015, para 41.

²⁴⁵ *Report of the Secretary-General on the United Nations Organization Stabilization Mission in the Democratic Republic of the Congo submitted pursuant to paragraph 39 of Security Council resolution 2147 (2014)*, S/2014/957, 30 December 2014, para 30.

In April 2013 the Security Council authorised a UN Multidimensional Integrated Stabilization Mission in Mali (MINUSMA) with ‘robust rules of engagement’ to implement a POC mandate as well as the ‘extension of State authority’.²⁴⁶ It also authorized French forces operating alongside the mission to intervene to support it when needed.²⁴⁷ In April 2014 the Security Council authorized the deployment of the Multidimensional Integrated Stabilization Mission in the Central African Republic (MINUSCA).²⁴⁸ The protection of civilians is described as the mission’s ‘utmost priority’ with other initial tasks included as ‘support for the transition process; facilitating humanitarian assistance; promotion and protection of human rights; support for justice and the rule of law; and disarmament, demobilization, reintegration and repatriation processes.’²⁴⁹ French forces are also mandated to provide the mission with operational support, ‘within the limits of their capacities and areas of deployment’ and the mission is also requested to ‘coordinate its operations with those of the African Union’.²⁵⁰ UN and AU forces are similarly involved in proactive combat operations with Islamist rebels in Somalia.²⁵¹ In July 2015 the UN stabilization mission in Haiti (MINUSTAH) deployed a ‘departmental brigade for operations and intervention’ in one of the most violent neighbourhoods in Port-au-Prince, the capital city.²⁵²

²⁴⁶ Security Council Resolution 2100 of 25 April 2013.

²⁴⁷ *Ibid.*, para 18. ‘Authorises French troops, within the limits of their capacities and areas of deployment, to use all necessary means, from the commencement of the activities of MINUSMA until the end of MINUSMA’s mandate as authorised in this resolution, to intervene in support of elements of MINUSMA when under imminent and serious threat upon request of the Secretary-General.’

²⁴⁸ Security Council Resolution 2149 of 10 April 2014.

²⁴⁹ *Ibid.* para 30, 31 and 32. See also UN Peacekeeping Homepage, MINUSCA, ‘United Nations Multidimensional Integrated Stabilization Mission in the Central African Republic,’ <http://www.un.org/en/peacekeeping/missions/minusca/>, accessed 5 May 2015.

²⁵⁰ *Ibid.*

²⁵¹ Security Council Resolutions 2111 of 24 July 2013 and 2093 of 6 March 2013. See also *Letter dated 14 October 2013 from the Secretary-General addressed to the President of the Security Council*, S/2013/606, 14 October 2013. *Foreign Policy*, ‘UN Declares war on Al-Shabab’, 16 October 2013. See also Ashley Deeks, ‘How Does the UN Define “Direct Participation in Hostilities”?’ *Lawfare*(blog), October 21, 2013, available at www.lawfareblog.com/2013/10/how-does-the-un-define-direct-participation-in-hostilities/ accessed 5 May 2015.

²⁵² *Report of the Secretary-General on the United Nations Stabilization Mission in Haiti*, S/2015/667, 31 August 2015, paras 19-20. ‘The brigade, consisting of 225 officers from the twenty-fifth police promotion, was deployed for its first major operation on 11 July in the area of La Saline, Port-au-Prince . . . A military operation, launched in December 2014 and completed in May 2015, eliminated a gang-controlled “buffer zone” between two communities in the Simon Pelé neighbourhood in Delmas (West). As at 1 July, the military component had put in place its new rapid reaction force posture with countrywide reach. There has been no requirement to date for its deployment.’

Labbe and Boutellis argue that ‘this reflects a more general trend towards these so-called “parallel” deployments of UN and (robust) national or regional non-UN forces –such as from the EU – from the DRC to Chad and Côte d’Ivoire.’²⁵³ They note that UN forces now find themselves operating in contexts where they both receive and give support to non-UN forces – both national and international – who are actively engaged in offensive military operations.²⁵⁴

As discussed in Part II of this thesis, it is generally accepted that States are under an obligation to respect and ensure respect for the provisions of international human rights law to anyone within their power or effective control, even if not situated within their territory, so long as the action or inaction can be attributed to the State and not the UN.²⁵⁵ The EU also explicitly accepts both international human rights law’s extraterritorial application and that it may be concurrently applicable with IHL.²⁵⁶ The UN’s HRDDP means that it is required to monitor non-UN forces for compliance with international human rights law and actively intervene to draw attention to violations, while ensuring that its own forces lead by example.²⁵⁷ This could lead to situations where a UN peacekeeping mission was operating alongside national and regional forces, who were both required to abide by international human rights law, without accepting that its own forces had similar legally-binding and judicially reviewable obligations.

Where the UN becomes a party to a conflict, it is accepted that it loses its legal protection and becomes bound by IHL. But if force is merely being used pursuant to a POC mandate, it

²⁵³ Jeremie Labbe and Arthur Boutellis ‘Peace operations by proxy: implications for humanitarian action of UN peacekeeping partnerships with non-UN security forces’, *International Review of the Red Cross*, Volume 95 Number 891/892 Autumn/Winter 2013, p.543.

²⁵⁴ Ibid.

²⁵⁵ *Al-Skeini and Others v. UK*, Appl. No. 55721/07, Judgment (Grand Chamber) 7 July 2011.

²⁵⁶ Frederik Naert ‘Observance of international humanitarian law by forces under the command of the European Union’, *International Review of the Red Cross*, Vol. 95 No. 891/892 Autumn/Winter 2013, pp.637-43.

²⁵⁷ Human Rights Due Diligence Policy 2013, para 2.

seems that this could be regulated by the provisions of international human rights law. The stipulations contained within this framework on the use of force and the treatment of people deprived of their liberty appear compatible with the type of ‘innovative measures’ that have been developed by the UN mission in the DRC, and also with the defensive use of force that occurred during operation protect civilians in Côte d’Ivoire. There does not, therefore, appear to be any practical reason why the UN could not stipulate that these provisions are applicable in the majority of its operations, unless and until IHL becomes applicable. The bigger obstacle may be the concerns, discussed in Chapter Five, about the nature and extent of the UN’s human rights obligations and how it can be held accountable for these. This will be discussed further in the following chapter and the conclusions of this thesis.

Chapter 7

Acting with moral courage? The UN missions to Darfur and South Sudan

Introduction

There are currently three UN peacekeeping missions in the territory of the former Sudan: the United Nations Mission in the Republic of South Sudan (UNMISS), the African Union/United Nations Hybrid mission in Darfur (UNAMID) and the United Nations Interim Security Force for Abyei (UNISFA), all of which developed out of the previous UN Mission in Sudan (UNMIS), created in 2005.¹ At the time of writing, South Sudan is experiencing a widespread ongoing conflict, which has killed tens of thousands.² The conflict in Darfur has been ongoing since 2003 and has resulted in over 300,000 deaths, both from direct violence and conflict-related causes.³

The OIOS Protection Evaluation 2014 was particularly critical of UNAMID and UNMISS, which it described as ‘frequently weak’ and ‘less than effective’.⁴ UNAMID has also been criticized for manipulating its own reports to cover up egregious violations of IHL and international human rights law by the Sudanese armed forces⁵ and even providing transport

¹ UNMIS was created by UN Security Council Resolution 1590 of 24 March 2005. See also Resolution 1547 of 11 June 2004 which created the UN Advance Mission to Sudan.

² The Council of Foreign Relations, Global Conflict Tracker, puts the death toll between December 2013 and April 2016 at around 50,000. <http://www.cfr.org/global/global-conflict-tracker/p32137#!/conflict/civil-war-in-south-sudan>, accessed 27 April 2016. See also Statement by the President of the Security Council, S/PRST/2014/26, 15 December 2014, which stated that tens of thousands had been killed.

³ *The Lancet*, ‘Patterns of mortality rates in Darfur conflict’, September 2010. This estimated with 95 per cent confidence that the excess number of deaths is between 178,258 and 461,520 (with a mean of 298,271), with 80 per cent of these deaths due to disease. The number 300,000 is usually used by the UN and aid agencies, although supporters and opponents of intervention often claim much lower or higher figures.

⁴ OIOS Protection Evaluation 2014, paras 45 and 70.

⁵ *Foreign Policy*, ‘Why is the U.N. soft-peddalling its criticism of Sudan?’, 4 August 2011; *Foreign Policy*, Report, ‘They just stood watching’ 7 April 2014; *Foreign Policy*, ‘See no evil speak no evil: UN covers up Sudan’s bad behaviour in Darfur’, 21 November 2014; *Guardian*, ‘Don’t abandon Darfur, UN whistleblower says’, 19 January 2015; International Crisis Group, *The Chaos in Darfur*, Crisis Group Africa Briefing N°110, 22 April 2015; Human Rights Watch, *Men with no mercy: rapid support forces attacks against civilians in Darfur*, New York: HRW, 9 September 2015.

for a senior government official under indictment by the ICC.⁶ The missions have, however, sheltered hundreds of thousands of civilians on their bases many of whom would otherwise almost certainly have been killed.⁷ They have also been operating in conditions where host State consent has been grudging at best and where senior government officials are accused of responsibility for serious violations against civilians.

This chapter contextualizes those developments. It will be shown that, as a matter of policy, if not law, the UN accepts responsibility for protecting the lives of people who have sought shelter in its own bases, which provides a contrast to the actions and inactions of UN peacekeeping soldiers in Rwanda and Srebrenica.⁸ Where additional guidance may be helpful is in delineating the extent of its obligations towards them. When it adopted its Human Rights Up Front Policy, in 2013, the UN declared that it would ‘take a principled stance’ and ‘act with moral courage’ in making ‘human rights and the protection of civilians’ a ‘system-wide core responsibility’⁹ Its missions in Sudan show that there remains a considerable gap in this regard between policy and practice.

A. Sudan (UNMIS)

UNMIS was originally envisioned as an observer and verification force,¹⁰ building on the work of a political mission established to monitor and assist implementation of the

⁶ Amnesty International, *UN aids Sudanese official wanted for war crimes*, 13 January 2011.

⁷ *Report of the Secretary-General on South Sudan*, S/2014/821, 18 November 2014; and *Report of the Secretary-General on UNAMID*, S/2013/607, of 14 October 2013, paras 14-6.

⁸ *Lessons Learned Note on Civilians Seeking Protection at UN Compounds*, Department of Peacekeeping Operations, Department of Field Support, 2014.

⁹ Human Rights Up Front, <http://www.un.org/sg/rightsupfront/>, accessed 30 July 2015.

¹⁰ For background papers on the establishment of the mission see *Report of the Secretary-General on the Sudan pursuant to paragraphs 6, 13 and 16 of Security Council resolution 1556 (2004), paragraph 15 of resolution 1564 (2004) and paragraph 17 of resolution 1574 (2004)*, S/2005/10, 7 January 2005; *Report of the Secretary-General on the Sudan pursuant to paragraphs 6, 13 and 16 of Security Council resolution 1556 (2004), paragraph 15 of Security Council resolution 1564 (2004) and paragraph 17 of Security Council resolution 1574 (2004)*, S/2005/68, 4 February 2005; *Report of the Secretary-General on the Sudan pursuant to paragraphs 6, 13 and 16 of Security Council resolution 1556 (2004), paragraph 15 of Security Council resolution 1564 (2004) and paragraph 17 of Security Council resolution 1574 (2004)*, S/2005/140, 4 March 2005; *Monthly report of the Secretary-General on*

Comprehensive Peace Agreement (CPA).¹¹ This brought an end to the second Sudanese civil war in January 2005,¹² after a conflict that is estimated to have killed around two-and-a-half million people and displaced between four and five million from their homes.¹³

The Secretary General's report, in January 2005, that proposed UNMIS's creation, contained two references to POC.¹⁴ Under the heading 'Security aspects', it stated that the mission would 'take action to protect civilians under imminent threat of physical violence within the capability of United Nations formed military units.'¹⁵ There was no further elaboration provided on this task, although the report contained a detailed outline of how the military component would execute its observation and verification role.¹⁶ The second reference was in a stand-alone section on 'Protection', which referred to the 'protection provisions' of IHL

Darfur, S/2005/240, 12 April 2005; *Monthly report of the Secretary-General on Darfur*, S/2005/378, 9 June 2005.

¹¹ The Comprehensive Peace Agreement between the Government of the Republic of Sudan and the Sudan People's Liberation/Sudan People's Liberation Army, <https://unmis.unmissions.org/Portals/UNMIS/Documents/General/cpa-en.pdf>, accessed 10 October 2015. The CPA was signed by the Government of Sudan and the Sudan People's Liberation Army/Movement (SPLA/M) and led to the formation of an Autonomous Government of South Sudan. The CPA also provided for a referendum, which was held on schedule in January 2011, with almost 99 per cent of participants voting for independence.

¹² For an overview of the conflict see: Robert Collins, *A History of Modern Sudan*, Cambridge: Cambridge University Press, 2008; Douglas H. Johnson, *The Root Causes of Sudan's Civil Wars*, Bloomington: Indiana University Press/ The International Africa Institute, 2003; Andrew S. Natsios, *Sudan, South Sudan, and Darfur: What Everyone Needs to Know*, Oxford and New York: Oxford University Press, 2012; Francis M. Deng, *Sudan at the Brink: Self-Determination and National Unity*, New York: Fordham University Press and the Institute for International Humanitarian Affairs, 2010; Jok Madut Jok, *War and slavery in Sudan*, Philadelphia: University of Pennsylvania Press, 2001; and Jok Madut Jok, *Sudan: Race, Religion, and Violence*, London: Oneworld Publications 2007. See also David Keen, *Complex emergencies*, Cambridge: Polity Press, 2008, pp.109-16; and Alex De Waal, *Famine Crimes: Politics and the Disaster Relief Industry in Africa*, London: James Currey, 1997, pp.86-105.

¹³ *Ibid.* The modern states of South Sudan and Sudan were part of Egypt under the Muhammad Ali Dynasty, later being governed as an Anglo-Egyptian condominium until Sudanese independence was achieved in 1956. Most of the people of southern Sudan are Christian, black Africans and they resented being governed by the predominantly Muslim, Arab north. Revolts against the latter's rule led to two civil wars, the first of which lasted from 1955 – 1972, while second ran from 1983 and ended with the CPA of January 2005. The Sudanese government relied heavily on the recruitment of proxy forces in Southern Sudan, and the north-south border areas. Control over the militia groups was weak and they carried out a large number of violations of human rights and IHL. The SPLA also suffered a number of splits within its own ranks, actively encouraged by the government of Sudan.

¹⁴ *Report of the Secretary-General on the Sudan*, S/2005/57 of 31 January 2005, para 28. Mandate

¹⁵ *Ibid.*

¹⁶ *Ibid.*, paras 45-52. Military Component. POC is mentioned in para 46 (f) but with no elaboration.

and Security Council resolutions,¹⁷ and called on the mission to develop a Sudan-wide protection strategy.¹⁸ It asserted protection to be the primary responsibility of the national authorities and contained no reference to the potential role of international peacekeeping soldiers.¹⁹

Five days before this report was released, however, the UN also published the findings of the International Commission of Inquiry on Darfur.²⁰ This had been established in September 2004²¹ ‘to investigate reports of violations of international humanitarian law and human rights law’ and determine also whether these amounted to acts of genocide.²² It confirmed widespread violations and recommended that the Security Council refer the situation to the ICC for further investigation.²³ The Security Council resolution that led to the establishment of UNMIS referred to both reports in its preamble.²⁴ The referral to the ICC was seen as particularly significant given the suspicion with which the Court was viewed by some of its

¹⁷ Ibid. paras 74-6. The two Security Council Resolutions referenced are 1265 of 17 September 1999 and 1296 of 19 April 2000.

¹⁸ Ibid., para 75. ‘The mission would develop a Sudan-wide protection strategy and work plan focusing on the protection of returning populations, host communities and those wishing to remain in situations of displacement until a durable solution can be found; civilians in armed conflict, including in Darfur and other areas where conflict may continue or erupt; and women, children and vulnerable groups of persons.’

¹⁹ Ibid., para 76.

²⁰ *Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General, Pursuant to Security Council Resolution 1564 of 18 September 2004*, Geneva, 25 January 2005.

²¹ UN Security Council Resolution 1564, 18 September 2004. This resolution also threatened Sudan with sanctions if it did not ‘comply with its obligations to protect civilians in Darfur’.

²² *Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General, Pursuant to Security Council Resolution 1564 of 18 September 2004*, Geneva, 25 January 2005 [Hereinafter Darfur Inquiry 2005], p.1.

²³ Ibid., p.5. The Security Council agreed to do this by Resolution 1593, of 31 March 2005, which was adopted with 11 votes in favour and four abstentions: China, the US, Brazil and Algeria.

²⁴ UN Security Council Resolution 1590 of 24 March 2005, preamble: ‘Taking note of the Secretary-General’s reports of 31 January 2005 (S/2005/57), 4 February 2005 (S/2005/68), and 4 March 2005 (S/2005/140) as well as the report of 25 January 2005 of the International Commission of Inquiry’.

permanent members²⁵ and its supporters hailed this as a significant victory in establishing its legitimacy.²⁶

Discussion of atrocities in Darfur also dominated the subsequent press briefing. In the presence of Sudan's representative, the UN Under Secretary General for Peacekeeping Operations stressed that 'the present state of affairs in Darfur was unacceptable' and that 'impunity must end'.²⁷ He also said that:

It must be made clear to those responsible that they would be held accountable. There was a clear recommendation from the International Commission of Inquiry on Darfur that the Security Council immediately refer the situation to the International Criminal Court, and sanctions must also be kept on the table.²⁸

Against this background, the Council rejected the Secretary General's recommendation to establish UNMIS solely under Chapter VI, specifying that its POC tasks would have a Chapter VII mandate.²⁹ POC language appeared in subsequent mission documents, but with

²⁵ See *UN Security Council Press Release*, 'Security Council refers situation in Darfur, Sudan, to Prosecutor of International Criminal Court', 31 March 2005. The US abstained on the resolution because although it 'continued to fundamentally object to the view that the Court should be able to exercise jurisdiction over the nationals, including government officials, of States not party to the Rome Statute' it nevertheless supported the establishment of 'an accountability mechanism for the perpetrators of crimes and atrocities in Darfur'. Russia supported the resolution stating that 'the struggle against impunity was one of the elements of long-term stability in Darfur. All those responsible for grave crimes must be punished, as pointed out in the report of the Commission of Inquiry.'

²⁶ *Coalition for the International Criminal Court, Homepage*, 'A Universal Court with Global Support, UN and the ICC Security Council, Res. 1593', <http://www.iccnw.org/?mod=res1593>, accessed 20 October 2015.

²⁷ See *Security Council Meeting, Press Release*, SC/8343, 24 March 2005.

²⁸ *Ibid.*

²⁹ UN Security Council Resolution 1590 of 24 March 2005, para 16: 'Acting under Chapter VII of the Charter of the United Nations, (i) Decides that UNMIS is authorized to take the necessary action, in the areas of deployment of its forces and as it deems within its capabilities, to protect United Nations personnel, facilities, installations, and equipment, ensure the security and freedom of movement of United Nations personnel, humanitarian workers, joint assessment mechanism and assessment and evaluation commission personnel, and, without prejudice to the responsibility of the Government of Sudan, to protect civilians under imminent threat of physical violence'.

little further elaboration or guidance.³⁰ Most of the UNMIS mission reports included a section entitled ‘Protection of Civilians’ and UNMIS was the first mission to create a POC Office.³¹ It is clear, however, that the mission saw this in terms of humanitarian ‘rights-based’ protection, as the following example of a POC activity makes clear:

In coordination with the Protection Working Group in Darfur, the human rights and civil affairs sections have undertaken joint missions with AMIS [AU Mission in Sudan], the Office for the Coordination of Humanitarian Affairs, IOM [International Organization for Migration] and other humanitarian actors to villages and towns across Darfur to promote protection of civilians in their own villages. During the missions, civilians were made aware of their rights, and were advised on how to approach humanitarian organizations for support and help on how to follow up their cases with the local authorities. The teams also held discussions with local religious and tribal leaders to enlist their support for the protection of civilians, and raised with local authorities issues related to extortion and protection money paid by civilians to armed militia.³²

The limitations of this approach became apparent early in UNMIS’s operations. In 2006, for example, following a series of attacks on civilians by the LRA,³³ the Security Council urged UNMIS ‘to make full use of its current mandate and capabilities’ to protect civilians against

³⁰ *Sudan Unified Mission Plan*, United Nations Mission in Sudan, 2005; *Guidelines for Troop Contributing Countries Deploying Military Units to the United Nations Mission in Sudan*, New York: DPKO Force Generation Service, May 2005, pp. 30–31; and *Rules of Engagement (ROE) for the Military Component of the United Nations Mission in Sudan (UNMIS)*, 29 April 2005, on file with the author.

³¹ Victoria Holt and Glyn Taylor, *Protecting Civilians in the Context of UN Peacekeeping Operation*, OCHA/DPKO, United Nations, 2009, p.319 ‘Thus, at the outset POC had two distinct meanings in the context of UNMIS: physical protection by the military component as a deemphasized element of their activities and, far more prominently, the coordination of UNCT activities by the POC Office.’

³² For example, *Report of the Secretary-General on the Sudan*, S/2005/579, 12 September 2005, para 53. See also *Report of the Secretary-General on the Sudan*, S/2005/821 of 21 December 2005, paras 55-7.

³³ For an overview of the LRA’s activities in Sudan see Mareike Schomerus, *The Lord’s Resistance Army in Sudan: A History and Overview*, Geneva: Small Arms Survey, Graduate Institute of International Studies, 2007.

human rights violations and attacks.³⁴ The mission responded that its troops were too thinly spread to provide such protection and were ‘only configured for a Chapter VI operation’.³⁵ It also noted that the CPA ‘expressly states that the parties to the Agreement would assume full responsibility for dealing with foreign armed groups’.³⁶ A similar tension over interpretation of the POC mandate was visible in subsequent reports,³⁷ culminating in a crisis in Abyei, in May 2008, in which a disputed town was burnt to the ground with the displacement of 30,000 people.³⁸ The US Special Envoy to Sudan openly criticized UNMIS for failing to take more robust action while its head of mission responded he had ‘neither the capacity nor the mandate’ to do so.³⁹

The following month, the President of the Security Council issued a statement calling on UNMIS ‘within its mandate’ and in accordance with this resolution ‘to robustly deploy, as appropriate, peacekeeping personnel in and around Abyei to help reduce tensions and prevent escalation of conflict in support of implementation of the CPA.’⁴⁰ The mission report of October 2008 stated that: ‘UNMIS is engaging all components of the Mission in the development of a comprehensive strategy for the protection of civilians’.⁴¹ It also, however, urged the Security Council to:

consider holding a thorough debate on provisions related to the protection of civilians
 . . . taking into consideration the public expectations such mandate provisions

³⁴ UN Security Council Resolution 1663 of 24 March 2006, para. 7.

³⁵ *Report of the Secretary-General Pursuant to Resolutions 1653 (2006) and 1663 (2006)*, S/2006/478 of 29 June 2006, paras 19-21.

³⁶ *Ibid.*

³⁷ See *Report of the Secretary-General on the Sudan*, S/2006/728 of 12 September 2006; *Report of the Secretary-General on the Sudan*, S/2008/267 of 22 April 2008; UNMIS Force Commander, *End-of-Assignment Report*, UNMIS, 6 April 2008, p. 16.

³⁸ International Crisis Group, *Sudan’s Southern Kordofan Problem: The Next Darfur?*, Brussels: ICG, 21 October 2008.

³⁹ *Sudan Tribune*, ‘UN rejects US charge about south Sudan’, 18 June 2008. See also UN Security Council Resolution, 1812 of 30 April 2008, para 6. This had ‘urged UNMIS to consult with the parties, and to deploy, as appropriate, personnel to the Abyei region, including areas of Kordofan’.

⁴⁰ Statement by the President of the Security Council, S/PRST/2008/24 of 24 June 2008.

⁴¹ *Report of the Secretary-General on the Sudan*, S/2008/662, of 20 October 2008, para 58.

generate. Clear guidelines need to be developed that can be translated into realistic rules of engagement for peacekeepers equipped with the requisite capacity.⁴²

In July 2009 the mission report stated that: ‘Given the rising tensions related to seasonal migration in the Abyei region, UNMIS conducted two training workshops . . . on issues of protection of civilians and that of children’.⁴³ The report also stated that: ‘UNMIS movements north of the Road Map Area remain restricted, thus denying the Mission any situational awareness with regard to deployment of forces by both sides just outside the Road Map Area.’⁴⁴ A POC Fact Sheet published in the same month described the mission’s objectives and achievements purely in terms of humanitarian monitoring and advocacy with no reference, whatsoever, to how UNMIS could provide physical protection.⁴⁵

The section on POC was omitted entirely from the October report,⁴⁶ but in January 2010 it was reported that: ‘UNMIS is currently developing a mission-wide protection strategy adapted to its mandate and its complex operating environment.’⁴⁷ The report of April 2010 contained a far more detailed account of the mission’s POC activities and strategy, stating this was based on ‘a three-tier approach’ which included providing immediate physical security, securing the delivery of humanitarian assistance and deterrence of violence.⁴⁸ It further stated that: ‘One of the key ways in which this protection strategy is translated into

⁴² *Ibid.*, para 80.

⁴³ *Report of the Secretary-General on the United Nations Mission in Sudan*, S/2009/357, 14 July 2009, para 67.

⁴⁴ *Ibid.*, para 14.

⁴⁵ *The Role of UNMIS Protection*, UNMIS Protection of Civilians Section, 9 July 2009. It described its role as: ‘working with all protection actors such as UN actors that have protection mandates, including UNHCR, UNICEF, and UNMIS Human Rights, as well as INGOs, ICRC and Community Based Organizations. POC works closely with humanitarian actors to identify and address protection concerns that impact people in Sudan. We work together with these humanitarian actors to develop a coordinated work plan for Sudan that outlines protection priorities, actions/programs and those responsible for them.’

⁴⁶ *Report of the Secretary-General on the United Nations Mission in the Sudan*, S/2009/545, 21 October 2009.

⁴⁷ *Report of the Secretary-General on the United Nations Mission in the Sudan*, S/2010/31, 19 January 2010, para 70.

⁴⁸ *Report of the Secretary-General on the United Nations Mission in the Sudan*, S/2010/168, 5 April 2010, paras 63-9.

UNMIS operations is through increased patrolling and extended UNMIS presence in remote potential hotspots in Southern Sudan.⁴⁹

This set the tone for the mission's subsequent reports with POC emerging as a substantive and mainstream mission activity.⁵⁰ One reason for this greater clarity may have been that UNMIS began to focus increasingly on South Sudan as separate missions were formed to deal with the then more challenging situations in Abyei and Darfur.⁵¹ Protection task forces were established in each state of South Sudan in November 2010 and these worked closely with the Southern Sudan protection cluster, 'to identify threats to populations and determine interventions.'⁵²

The final report before the mission's closure, in mid-2011, included recommendations that a new mission could play 'to facilitate peace consolidation in the new State of South Sudan.'⁵³

⁴⁹ Ibid., paras 66-7. 'In response to major conflicts, including the mid-January clashes between Dinka and Nuer which resulted in 50 reported deaths and at least 11,000 persons displaced, both local authorities and UNMIS have increased interventions and patrols . . . In January 2010, the UNMIS military component initiated pre-emptive patrolling in 13 areas in Southern Sudan where potential inter-communal violence had been identified, in order to provide a deterrent presence. In February 2010, UNMIS operations were extended across the Nile in Upper Nile State, including long range patrols into the Shilluk Kingdom and remote areas near the north-south border. UNMIS pre-emption measures recently led to the prevention of an outbreak of violence, following a long range patrol to Gemmaiza, Central Equatoria State. In addition, a Joint Monitoring Team's rapid response to reports of clashes in Abiemnom helped to de-escalate tensions in the area.'

⁵⁰ *Report of the Secretary-General on the United Nations Mission in the Sudan*, S/2010/388, 19 July 2010; *Report of the Secretary-General on the United Nations Mission in the Sudan*, S/2010/528, 14 October 2010; *Report of the Secretary-General on the United Nations Mission in the Sudan*, S/2010/681, 31 December 2010.

⁵¹ The Security Council subsequently passed Security Council Resolution 1828 of 31 July 2008 for the hybrid mission to Darfur (UNAMID) and Resolution 1990 of 27 June 2011, creating a separate mission for Abyei (UNISFA). UNAMID will be discussed in more detail below. The UNISFA mandate was renewed by resolutions 2024 of 14 December 2011; Resolution 2032 of 22 December 2011. See also Presidential Statements of 6 March 2012 and 12 April 2012; and S/PRST/2012/19 of 31 August 2012. For more details on UNISFA see *UNISFA Homepage*, <http://www.un.org/en/peacekeeping/missions/unisfa/>, accessed 18 June 2015. UNISFA was also given a Chapter VII mandate, tasked with monitoring the flashpoint border between north and south and facilitating the delivery of humanitarian aid, and authorized to use force in protecting civilians and humanitarian workers in Abyei.

⁵² *Report of the Secretary-General on the United Nations Mission in the Sudan*, S/2011/239, 12 April 2011, paras 62 and 64. The Protection Cluster was co-chaired by the Office of the United Nations High Commissioner for Refugees (UNHCR) and the Norwegian Refugee Council (NRC). Several former UNMIS staff members interviewed by this author between 2011 and 2015 have commented that some of the POC structures created worked better on paper than in reality, but they at least reflected a growing sense of the importance given to the issue within the mission.

⁵³ *Special report of the Secretary-General on the Sudan*, S/2011/314, 17 May 2011, para 2.

It proposed that POC would be ‘one of the core activities of the mission and the country team’⁵⁴ and recommended that the mission should be provided with Chapter VII authorization.⁵⁵ It also stated that the protection of civilians was ‘first and foremost the sovereign responsibility of the Government’ and that most of the mission’s POC activities would be capacity-building and providing ‘advice’ to the new police and army on ‘the general conduct of operations in accordance with international humanitarian law and human rights law’.⁵⁶ UN troops would also be ‘deployed to areas at high risk to deter conflict’ and that the use of force would be authorized only ‘as a last resort to protect civilians in imminent threat of physical danger’ within the mission’s area of deployment and capability’.⁵⁷

UNMISS’s experiences of attempting to put these strategies into practice in South Sudan will be discussed below, following an account of how the UN attempted to deal with the human rights and humanitarian crisis in Darfur.

B. Darfur

The current conflict in Darfur is often dated as beginning in February 2003 when two loosely allied rebel groups took up arms against the government of Sudan.⁵⁸ This responded with an

⁵⁴ Ibid., para 44.

⁵⁵ Ibid., para 41(r) ‘To provide, within capabilities, physical protection to civilians under imminent threat of physical danger, including through the use of force as a last resort when Government security services are unable to provide such security.’

⁵⁶ Ibid., para 44.

⁵⁷ Ibid., paras 45 and 46.

⁵⁸ For an overview see: Julie Flint and Alex De Waal, *Darfur: a short history of a long war*, London: Zed books, 2005; Gérard Prunier, *Darfur: A 21st Century Genocide, Third Edition*, Ithaca NY: Cornell University Press, 2008; Richard Cockett, *Sudan: Darfur and the Failure of an African State*, New Haven: Yale University Press, 2010; International Crisis Group *Darfur’s New Security Reality*, Africa Report No 134, Brussels: ICG, 26 November 2007; International Crisis Group, ‘*Darfur: The Failure To Protect*’, Africa Report N°. 89, Nairobi/ Brussels: ICG, 2005; International Crisis Group, ‘*Getting the UN into Darfur*’, Africa Briefing N°. 43, Nairobi /Brussels: ICG, 2006; Sara Pantuliano, *Understanding Conflict in the Sudan: An Overview*. Washington DC: The World Bank Group 2004; Sara Pantuliano, *Strategic Priorities and Key Challenges to Address Conflict and its Consequences in Darfur*. London: DFID, 2005. Darfur was incorporated into Sudan by Anglo-Egyptian forces in 1916, having previously existed as an independent Sultanate for several hundred years. It is a complex mix of more than 36 ethnic groups, of which the Fur, Zaghawa, and Masalit are the most significant. Tensions have existed for generations, between the nomadic herders, often identified as Arabs, and sedentary farmers, often identified as indigenous, over access to water and grazing land. Ethnicity is

aerial bombardment campaign against communities suspected of sympathizing with the rebels and supporting ground attacks by an Arab militia, pejoratively nicknamed the *Janjaweed*.⁵⁹ Government and *Janjaweed* forces are accused of committing numerous violations, including mass killing, looting and systematic rape of the non-Arab population, as they burned and destroyed hundreds of villages throughout the region.⁶⁰

The AU initially led the international efforts to resolve the crisis and, in July 2004, it dispatched 60 military observers and 310 protection troops in Darfur to monitor and observe a ‘humanitarian ceasefire’ agreed that April.⁶¹ The AU mission in Sudan (AMIS) was subsequently expanded in October 2004, bringing it to a total of 3,320 personnel.⁶² In June 2004 the UN also established a small political mission to assist the mediation efforts.⁶³ In May 2006 the AU brokered the Darfur Peace Agreement (DPA) between the government of Sudan and one rebel faction inside the Sudan Liberation Army (SLA), which was to be

not in itself clear-cut, given the long history of racial mixing between ‘indigenous’ peoples and the ‘Arabs’, who are distinguished by cultural-linguistic attachment as much as race. Armed raids on rich agricultural areas and skirmishes with rival groups of Arab nomadic herders were historically common occurrences in Darfur and have become more so as global warming has increased desertification in the region. These were generally resolved through traditional methods of conflict resolution, which began to break down in the 1980s and 1990s as Darfur became a theatre in a wider set of conflicts, between the government of Sudan and the rebels of South Sudan; between rival forces in neighbouring Chad; as a staging ground during the conflict between Chad and Libya; and between different factions within Sudan’s own National Islamic Front. Arms were channelled into Darfur, and proxy militias backed, by different power-brokers, making these localized struggles increasingly deadly. The settled farmers did not traditionally have the same degree of military organization as the nomadic groups, but, as drought-stricken livestock herders encroached, they became increasingly associated with the rebellion, fighting to retain what they saw as ‘their’ land.

⁵⁹ Ibid. The term ‘*Janjaweed*’ was used for the first time in 1989 to denote groups of Arab camel herders engaged in militia fighting.

⁶⁰ Darfur Inquiry 2005. See also: Amnesty International, *Sudan: Immediate Steps To Protect Civilians and Internally Displaced Persons in Darfur*, public statement, London: Amnesty International, 29 August 2003; Amnesty International, *Crying Out for Safety*, London: Amnesty International; 5 October 2006; Human Rights Watch, *Darfur in Flames. Atrocities in Western Sudan*, 2 April 2004; Human Rights Watch, *Darfur: Arrest War Criminals, not Aid Workers*, press release, 31 May 2005; Human Rights Watch, *Targeting the Fur: Mass Killings in Darfur*, 21 January 2005; Human Rights Watch, *Darfur: Aid Workers Under Threat*, press release, 5 April 2005; Lee Feinstein, *Darfur and Beyond: What is Needed to Prevent Mass Atrocities*, Council Special Report No. 22, New York: Council on Foreign Relations Press, 2007.

⁶¹ For details see UNMIS, *United Nations Mission in Sudan*, <http://www.un.org/en/peacekeeping/missions/past/unmis/background.shtml>, accessed 1 October 2015.

⁶² Ibid. This included 2,341 military personnel, 815 civilian police and complementary civilian personnel.

⁶³ Security Council Resolution 1547 of 11 June 2004.

overseen by AMIS.⁶⁴ Other groups refused to sign, however, and continued fighting.⁶⁵

AMIS was attacked a number of times and several of its members killed.⁶⁶ It was also widely criticized for its weakness and failure to protect civilians.⁶⁷

International outcry about the violations in Darfur had led to the formation of a large advocacy movement, particularly in the US, calling for ‘humanitarian intervention’ from 2004 onwards.⁶⁸ The Darfur crisis also coincided both with the aftermath of the invasion of Iraq in 2003 and the debates that led to a reference to a ‘responsibility to protect’ being incorporated into the UN General Assembly World Summit Outcome Document in 2005.⁶⁹ The US Secretary of State, Colin Powell, officially accused the Sudanese government of genocide in 2004⁷⁰ and this description was codified into US law by the Darfur Peace and Accountability Act in 2006.⁷¹ Both US President George Bush and British Prime Minister Blair also made a number of comments which implied they might take unilateral military action to protect civilians if the Security Council did not approve the deployment of a strong peacekeeping mission.⁷² The Sudanese government responded that supporters of intervention

⁶⁴ Darfur Peace Agreement, 5 May 2006, Article 25 ‘Strengthening the ceasefire monitoring and verification mechanisms’, <http://www.un.org/zh/focus/southernsudan/pdf/dpa.pdf>, accessed 1 October 2015.

⁶⁵ For an overview of these negotiations see *London Review of Books*, Alex de Waal, ‘I will not sign’, 30 November 2006. The SLA/MM faction led by Minni Minnawi signed the agreement while the faction led by Abdel Wahid Mohammed Ahmed El-Nur (SLA-AW) refused to agree to its terms. De Waal, who was closely involved in the talks, believes that the vast international pressure to get an agreement led to the imposition of ‘diplomatic deadlines’, and that a better agreement could have been negotiated, if the participants had been given more time.

⁶⁶ For a brief description of these problems see, for example: *The Washington Post*, ‘African Union Force Low on Money, Supplies and Morale’, May 13, 2007; and Nick Grongo, ‘Darfur: The International Community’s Failure to Protect’, *Journal of African Affairs*, Oxford Journals, Vol. 105, Issue 421, October 2006, pp.621-31.

⁶⁷ *Ibid.*

⁶⁸ For contrasting views see: Mamdani, Mahmood, *Saviours and Survivors: Darfur, Politics, and the War on Terror*, London: Verso, 2009; and Don Cheadle and John Prendergast, *Not On Our Watch: The Mission to End Genocide in Darfur and Beyond*, New York: Hyperion, 2007.

⁶⁹ Summit Outcome Document, General Assembly Resolution 60/1, of A/RES/60/1, 24 October 2005.

⁷⁰ *BBC News*, ‘Powell declares genocide in Sudan’, 9 September 2004.

⁷¹ Darfur Peace and Accountability Act, 2006, H.R. 3127/S. 1462. This was signed into law by President Bush in October 2006. Its main provisions are to: impose travel bans and asset freezes on individuals determined by the President to be complicit in atrocities in Darfur; authorize US assistance to strengthen and expand AMIS; impose sanctions; and urge the administration to deny the government of Sudan access to oil revenues.

⁷² For contrasting views, for and against western military intervention, see Mahmood, 2009, pp.48-71; Alex Bellamy, ‘Responsibility to Protect or Trojan Horse? The Crisis in Darfur and Humanitarian

were vastly exaggerating the casualty figures to make the case for another unilateral western military invasion.⁷³

In August 2006 the Security Council passed a resolution extending the mandate of UNMIS into Darfur and ‘requesting’ that Sudan accept this mission’s deployment.⁷⁴ The resolution contained an oblique reference to R2P’s adoption in the Summit Outcome Document’ in its preamble – the first and only such reference the Security Council has ever made when mandating a peacekeeping mission.⁷⁵ In urging Sudan to accept the deployment the US Ambassador, John Bolton, referred to the situation in Darfur as an ongoing genocide and demanded Sudan’s cooperation.⁷⁶ In a slightly more conciliatory presentation, the UK representative stated that the resolution had been drafted:

to be as acceptable to the Sudan as possible. There was, for example, no reference to the International Criminal Court in the text. Although the resolution contained Chapter VII elements, it was not under Chapter VII in its entirety. The resolution

Intervention after Iraq’, *Ethics & International Affairs* Vol. 19, Issue 2, pp.31–54, September 2005; and Conor Foley, *The Thin Blue Line: how humanitarianism went to war*, London: Verso, 2010, pp. 8-13. The view that the US and British governments were using deadlock at the Security Council as an excuse to issue bellicose statements without having to follow them through was bolstered by a number of apparently contradictory briefings issued at the time. For example, in the *Guardian*, ‘Blair wants no-fly zone enforced over Darfur’, 28 March 2007, it was reported that the British Prime Minister was considering a plan to bomb the Sudanese air force although the Ministry of Defence issued a statement on the same day stating that: ‘There are absolutely no plans for any UK military action at all in Sudan or the Darfur region of Sudan.’

⁷³ See for example, *Islamweb English*, ‘Al-Bashir rejects Darfur genocide’, 29 November 2006. Al Bashir said there was no humanitarian crisis in Darfur and accused Western countries of inflating statistics to justify a military intervention. He is quoted as saying: ‘The figure of 200,000 dead is false and the number of dead is not even 9,000. All the figures have been falsified and the child mortality rate in Darfur does not exceed that in Khartoum’.
<http://www.islamweb.net/emainpage/articles/137023/newguest.php>, accessed 22 June 2015.

⁷⁴ UN Security Council Resolution 1706 of 31 August 2006, adopted by 12 votes in favour with none against and three abstentions.

⁷⁵ *Ibid.*, preamble: ‘Recalling its previous resolutions 1325 (2000) on women, peace and security, 1502 (2003) on the protection of humanitarian and United Nations personnel, 1612 (2005) on children and armed conflict, and 1674 (2006) on the protection of civilians in armed conflict, which reaffirms inter alia the provisions of paragraphs 138 and 139 of the 2005 United Nations World Summit outcome document’.

⁷⁶ UN Security Council *Media Release*, SC/8821, 31 August 2006. Bolton stated that: ‘It was imperative to act to stop the violence in Darfur. Every day of delay only extended the genocide. He expected full cooperation and support of the Government of the Sudan for the new United Nations force. Failure to cooperate would undermine the Peace Agreement.’

also stated that the Council remained committed to the sovereignty and independence of the Sudan.⁷⁷

Eleven days later, in a presentation before the Security Council, Sudan rejected both the resolution and the way in which it had been drafted, saying that it was based on ‘flawed speculation’ about the situation in Darfur.⁷⁸ Russia and China indicated that they would veto a deployment without host state consent and the resolution was withdrawn.⁷⁹ This marked the first time in history that a UN peacekeeping mission has been authorized but subsequently failed to deploy.⁸⁰ In its absence, the mandate of AMIS was extended for another year and, in July 2007, following intensive negotiations a new AU/UN hybrid operation in Darfur (UNAMID) was authorised,⁸¹ with a mandate, which has since been renewed annually.⁸²

The trade-offs required to get agreement led to some watering down of the text, and a commitment to a ‘mostly African character’ when selecting mission personnel and troop contributing countries.⁸³ Nevertheless, POC was listed as a top priority for the mission and the US representative on the Security Council emphasized that:

the Council is entrusting UNAMID, its force commander and its personnel with carrying out its mandate using the full range of its authorities. UNAMID has the

⁷⁷ *Ibid.*

⁷⁸ UN Security Council, 5520th meeting, 11 September 2006, S/PV.5520. See also *UN News: Secretary-General tells Security Council ‘it is time to act’ in Darfur, as Council meets in wake of renewed fighting*, 11 September 2006.

⁷⁹ *Ibid.*

⁸⁰ *Foreign Policy*, ‘Ten Worst Security Council Resolutions Ever’, 21 March 2010.

⁸¹ UN Security Council Resolution 1769 of 31 July 2007. It consists of 19,555 troops and 19 Formed Police Units (FPUs), although it was slow to reach full strength.

⁸² UN Security Council Resolutions 1828 of 31 July 2008; 1881 of 30 July 2009; 1935 of 30 July 2010; 2003 of 29 July 2011; 2063 of 31 July 2012; 2113, of 30 July 2013; 2173 of 27 August 2014, and Resolution 2233 of 29 July 2015.

⁸³ Holt and Taylor, 2009, p.343. They note that references to sanctions were dropped from the text and that a proposed ‘authorization to collect and seize arms’ became the less robust task of ‘monitoring arms that are present in Darfur in violation of peace agreements’.

authority under Chapter VII to use force to prevent armed attacks, to protect civilians.⁸⁴

A Secretary General's Planning Directive of March 2006 identified POC and supporting the DPA as the mission's two strategic objectives,⁸⁵ which was reflected in the language of the mandate.⁸⁶ This effectively aligned the UN with the Sudanese government and the one rebel faction that signed the agreement, against those rebel groups who did not accept its terms.⁸⁷ There was considerable discussion of the POC mandate during the mission planning process and humanitarian actors initially lobbied for a 'strengthening' of the mandate, urging that the stipulation 'from imminent harm' be removed from the formulation, 'in order to reflect a wider conception of protection of civilians'.⁸⁸

In February 2009 UNAMID's first mission directive defined protection as: 'All activities aimed at obtaining full respect for the rights of the individual in accordance with the letter and spirit of the relevant bodies of law (i.e. international humanitarian law; human rights law; refugee law)'.⁸⁹ It also outlined three types of POC: preventive protection, immediate response protection, and follow-up protection⁹⁰ as well as identifying the military and civilian

⁸⁴ UN Security Council Meeting of 31 July 2007, S/PV.5727.

⁸⁵ *Darfur: Draft Framework Plan for a Possible Transition to a United Nations Operation*, 2 June 2006. See also *Report of the Secretary-General and the Chairperson of the African Union Commission on the Hybrid Operation in Darfur*, S/2007/307/Rev.1 of 5 June 2007; *Report of the Secretary-General on Darfur, proposing the establishment of UNAMID*, S/2007/462, of 27 July 2007; and *Report of the Secretary-General on the deployment of UNAMID*, S/2007/517, of 30 August 2007.

⁸⁶ UN Security Council Resolution 1769 of 31 July 2007, para 15: 'Acting under Chapter VII of the Charter of the United Nations: (a) *decides* that UNAMID is authorized to take the necessary action, in the areas of deployment of its forces and as it deems within its capabilities in order to: (i) protect its personnel, facilities, installations and equipment, and to ensure the security and freedom of movement of its own personnel and humanitarian workers, (ii) support early and effective implementation of the Darfur Peace Agreement, prevent the disruption of its implementation and armed attacks, and protect civilians, without prejudice to the responsibility of the Government of Sudan.'

⁸⁷ Opposition to the DPA had also sparked new waves of violence between various rebel factions. See, for example, *The UN Secretary-General's Monthly Report on Darfur*, S/2006/764, of 26 September 2006, which reported that SLA-Minawi elements had attacked villages in North Darfur in July, killing at least 100 civilians and displacing 20,000 people from their homes.

⁸⁸ Holt and Taylor, 2009, p.348.

⁸⁹ UNAMID, Mission Directive No. 1, *Mission Directive on the Protection of Civilians in Darfur*. 23 February 2009.

⁹⁰ *Ibid.* Long-term protection is explicitly excluded as the document states that it: 'deals exclusively with required immediate response to protect civilians under imminent threat, in order to bridge the gap

‘protection actors’ within the mission.⁹¹ It then listed a series of ‘most frequent grave violations against civilians in Darfur’, and alongside each ‘immediate protection’ category identified the responsibility of each ‘protection actor’.⁹² Holt and Taylor have noted that this approach was ‘problematic’ and ‘not a substitute for a coherent strategy.’⁹³

It prescribes mechanistic responses to incidents without the guidance needed to enable on-site military or police commanders to make context-sensitive judgements regarding the most appropriate action. In some cases, such as the response to offensive over flights, it does not account for the known limits of mission capacity (UNAMID has no air defence system). In others, such as violence between two or more parties, it fails to adequately acknowledge the political and security consequences that could result from the mission’s use of force to protect civilians against a belligerent, especially the Sudanese Armed Forces.⁹⁴

Security conditions actually worsened after UNAMID assumed authority at the end of 2007, with almost daily attacks on civilians and aid workers during 2008.⁹⁵ The mission did take some actions such as providing escorts to people collecting firewood, and guarding the delivery of humanitarian assistance, as well as investigating ceasefire violations and

between standard rules and regulations of [UNAMID military and police] and the identified need for explicit guidance on how to respond in the event of a specific protection incident.’

⁹¹ Ibid. These were: ‘the military, police, Humanitarian Recovery Development and Liaison Section, child protection, human rights, and Civil Affairs components, along with UNHCR, UNICEF, UNDP, OCHA, and WFP.’

⁹² Ibid.

⁹³ Holt and Taylor, 2009, p.183.

⁹⁴ Ibid. They further state that: ‘This is not to suggest that UNAMID should never take such action, but rather that this approach is unlikely to engender a change in the mission’s response to POC incidents in the absence of a realistic assessment of the context in which the ‘directed actions’ are to take place.’

⁹⁵ See *Report of the Secretary-General on the deployment of UNAMID*, S/2008/98, of 14 February 2008; *Report of the Secretary-General on the deployment of UNAMID*, S/2008/249, of 14 April 2008; *Report of the Secretary-General on the deployment of UNAMID*, S/2008/304, of 9 May 2008; *Report of the Secretary-General on the deployment of UNAMID*, S/2008/400, of 17 June 2008; *Report of the Secretary-General on the deployment of UNAMID*, S/2008/558, of 18 August 2008; *Report of the Secretary-General on the deployment of UNAMID*, S/2008/659, of 17 October 2008; *Report of the Secretary-General on the Deployment of the African Union–United Nations Hybrid Operation in Darfur*, S/2008/781 of 12 December 2008.

supporting local conflict mediation.⁹⁶ However, it was slow to reach its authorized strength due to a combination of obstructionism by the Sudanese government and a reluctance of troop contributing countries to supply it with air assets.⁹⁷ By June 2009 the mission was still only 68 per cent of its authorized strength and none of the eight attack helicopters and 18 military utility helicopters had been deployed.⁹⁸ UNAMID has also been the target of serious attacks by rebel groups opposed to the DPA.⁹⁹ By June 2015 it had suffered 212 fatal casualties,¹⁰⁰ the highest of any contemporary peacekeeping mission.¹⁰¹

Host state consent to the mission's deployment has been grudging at best and its work has been hindered by a variety of bureaucratic manoeuvres.¹⁰² The stipulation of the mission's 'mainly African character' has been used to block deployments of personnel and equipment from non-African states.¹⁰³ Lengthy customs and import regulations have also been used to hinder deployments and the Sudanese government has sometimes refused to allocate land for

⁹⁶ Presentation by Force Commander, General Martin Agwai, *Darfur and the Battle for Khartoum*, Situation Report, ISS (Institute for Security Studies), Pretoria: ISS, 4 September 2008. See also *Report of the Secretary-General on children and armed conflict in the Sudan*, S/2009/84, of 10 February 2009.

⁹⁷ See: *Report of the Secretary-General on the deployment of UNAMID*, S/2009/83, of 10 February 2009; *Report of the Secretary-General on the deployment of UNAMID*, S/2009/201, of 14 April 2009; *Report of the Secretary-General on the deployment of UNAMID*, S/2009/297, of 9 June 2009.

⁹⁸ *Ibid.*

⁹⁹ *Ibid.* For example, in June 2008 an unidentified militia attacked a UNAMID police and military patrol, killing seven peacekeepers and wounding over 20. The previous month the JEM had mounted an attack on Khartoum, the capital of Sudan. In July 2008 the security level of the mission was raised to Phase IV, which requires it to prioritize the use of mission resources to protect the mission itself.

¹⁰⁰ UN Peacekeeping Home page, Fatalities, http://www.un.org/en/peacekeeping/fatalities/documents/stats_3.pdf, accessed 22 June 2015.

¹⁰¹ *Ibid.* The total number of fatalities suffered by UNIFIL is higher (307 by November 2014), but the mission has been in existence for much longer. The first UN mission to the Congo – UNOC – also suffered a higher number of fatalities (249).

¹⁰² *Report of the Secretary-General on UNAMID*, S/2012/771, of 16 October 2012, para 63. One example of official harassment is where it is noted that UNAMID's sole contracted food rations provider had been told that it 'must cease operations and leave the country within 48 hours owing to alleged irregularities in its import notices. The government finally granted interim extensions of this deadline, month by month.

¹⁰³ For further discussion of the see: Sara Pantuliano and Sorcha O'Callaghan, *'The protection crisis': a review of field-based strategies for humanitarian protection in Darfur*, London: Overseas Development Institute Humanitarian Policy Group discussion paper, December 2006; and Helen Young, Abdal Monim Osman, Yacob Aklilu, Rebecca Dale, Babiker Bali and Abdal Jabber Fuddle, *Darfur: livelihoods under siege*, Medford MA: Feinstein International Famine Centre, Tufts University, 2005; Larry Minear, 'Lessons Learned: The Darfur Experience' in *ALNAP Review of Humanitarian Action in 2004*. London: ALNAP, 2005, pp.74–122.

UNAMID bases.¹⁰⁴ It has also frequently refused to give approval for flights, while insisting on its right to block UNAMID's communications and deny it access to particular locations on 'security grounds'.¹⁰⁵

The mission's deployment also coincided with the ICC investigation following the Security Council referral in March 2005.¹⁰⁶ The Prosecutor, Luis Moreno Ocampo, declared that it would: 'form part of a collective effort, complementing African Union and other initiatives to end the violence in Darfur and to promote justice. Traditional African mechanisms can be an important tool to complement these efforts and achieve local reconciliation.'¹⁰⁷ In April 2007 the ICC issued arrest warrants for the first two suspects: Ahmad Muhammad Harun, a Sudanese government minister,¹⁰⁸ and Ali Kushayb, an alleged *Janjaweed* leader.¹⁰⁹ Harun was charged with having recruited, armed and funded the *Janjaweed*, and incited them to conducting a reign of terror against civilians between August 2003 and February 2004.¹¹⁰ Kushayb was charged with 504 assassinations and 20 rapes, which resulted in the forced displacement of 41,000 people.¹¹¹

¹⁰⁴ Ibid.

¹⁰⁵ *BBC News*, 'Darfur peace force set to fail', 19 December 2007.

¹⁰⁶ *International Criminal Court, Darfur, Sudan, ICC 02/05, Investigation*, http://www.icc-cpi.int/en_menus/icc/situations%20and%20cases/situations/situation%20icc%200205/Pages/situation%20icc-0205.aspx, accessed 20 October 2015.

¹⁰⁷ *International Criminal Court, Press Release*, 'The Prosecutor of the ICC opens investigation in Darfur', 6 June 2005.

¹⁰⁸ *International Criminal Court, Case Information Sheet, Situation in Darfur, Sudan The Prosecutor v. Ahmad Muhammad Harun ("Ahmad Harun") and Ali Muhammad Ali Abd-Al-Rahman ("Ali Kushayb")* ICC-02/05-01/07, ICC-PIDS-CIS-SUD-001-004/15_Eng Updated: 25 March 2015. 'Ahmad Harun served from 2003 to 2005 as Minister of the State for the Interior of the Government of Sudan and allegedly in charge of the management of the "Darfur Security Desk" thereby coordinating the different bodies of the government involved in the counter-insurgency, including the Police, the Armed Forces, the National Security and Intelligence Service and the *Janjaweed* militia. . . it is alleged that in his public speeches Ahmad Harun not only demonstrated that he knew that the *Janjaweed* militia were attacking civilians and pillaging towns and villages, but also personally encouraged the commission of such illegal acts.'

¹⁰⁹ *Situation in Darfur, In the Case of the Prosecutor v. Ahmad Mohammad Harun (Ahmad Harun) and Ali Mahummad Ali Abd-al-Rahman (Ali Kushayb)*, ICC Pre Trial Chamber I, ICC-02/05-01/07, 27 April 2007.

¹¹⁰ Ibid. See also Warrant of Arrest issued for Ahmad Harun, ICC Pre Trial Chamber I, ICC-02/05-01/07-2, 27 April 2007; and Warrant of Arrest issued for Ali Kushayb, ICC Pre Trial Chamber I, ICC-02/05-01/07-3, 27 April 2007. Between them they were charged with 51 counts of war crimes and crimes against humanity.

¹¹¹ Ibid. *International Criminal Court Prosecutor opening remarks The Hague, 27 February 2007*. 'In one of the attacks in the Kodoom area in August 2003, Ali KUSHAYB was seen issuing instructions to

Kushayb was allegedly twice taken into custody by the Sudanese authorities in 2007 and 2008, but released both times.¹¹² According to HRW he was subsequently appointed to a senior position in the Central Reserve Police and was seen participating in a militia attack against civilians in central Darfur in April 2013.¹¹³ In 2009 Harun, was appointed Governor of South Kordofan, which borders South Sudan and has also been the scenes of protracted conflict and allegations of widespread violations by State forces.¹¹⁴ In early 2012, *al-Jazeera* broadcast a video of him telling government troops fighting rebels there to take no prisoners.¹¹⁵

On 14 July 2008, the ICC Prosecutor submitted an application for the issuance of a warrant of arrest for the Sudanese president al Bashir on charges of war crimes, crimes against humanity and genocide.¹¹⁶ Some observers, however, have questioned both the substance and the timing of the charges. Rony Baumann, a former President of MSF, for example, has noted that the Prosecutor's case was that the genocide had been committed in two consecutive stages: the first, through direct violence, during the during the first eighteen months of the conflict and then a second 'camp' stage where 'the extermination process continued.'¹¹⁷ He notes that:

the Militia/Janjaweed. Civilians were being fired upon as they fled. His forces pillaged and burned homes and shops. The attack . . . resulted in the destruction of most of the town and the death of more than 100 civilians, including 30 children. . . Ali KUSHAYB personally inspected a group of naked women before they were raped by men in military uniform. A witness said she and the other women were tied to trees and repeatedly raped. The evidence shows that Ali KUSHAYB personally participated in a number of summary executions.'

¹¹² *New York Times*, 'Sudan Arrests Militia Chief Facing Trial', 13 October 2008.

¹¹³ Human Rights Watch, *Sudan: ICC suspect at scene of fresh crimes*, 3 June 2013.

¹¹⁴ *Sudan Tribune*, 'Profile of Ahmad Harun', June 2015. See also International Crisis Group, *Sudan: Defining the North-South Border*, Africa Briefing N°75, Brussels: ICG, 2 Sep 2010; International Crisis Group, *Sudan's Southern Kordofan Problem: The Next Darfur?*, Brussels: ICG, 21 October 2008.

¹¹⁵ *Al Jazeera English* 'Inside Sudan - Southern Kordofan: Unfinished Business', 8 April 2012. He is seen joking with the soldiers and saying 'don't bring them back alive. We have no space for them.'

¹¹⁶ ICC, *Prosecutor v. Omar Hassan Ahmad Al Bashir*, ICC Pre Trial Chamber I, ICC-02/05-01/09-1, 4 March 2009. See also *Guardian*, 'Darfur genocide charges for Sudanese president Omar al-Bashir', 14 July 2008.

¹¹⁷ Rony Brauman, *Darfur: the International Criminal Court is wrong*, MSF, 2010.

Yet in these camps, located near Darfur's major cities as well as army garrisons, the largest emergency relief operation since the Second World War was set up. Tens of thousands of people were saved from probable death and over two million received essential aid. Health indicators are much better there than elsewhere in the country . . . Yet the ICC speaks of 'living conditions that will lead to physical destruction' – a sort of Auschwitz of the desert . . . The ICC's accusation is not only inept, but also an insult to humanitarian, foreign and Sudanese workers, who retrospectively become unknowing accomplices to genocide.¹¹⁸

The ICC Pre-Trial Chamber initially rejected the genocide charge, in March 2009, while approving the others, but it was restored to the indictment by the Appeals Chamber in February 2010.¹¹⁹ A second arrest warrant was then issued by the Court in July 2010.¹²⁰ News of the first indictment was leaked from Moreno Ocampo's office on the same day that an industrial tribunal had ruled that he had wrongfully dismissed a staff member who had alleged sexual misconduct against him.¹²¹ This has also helped al Bashir to portray the charges against him as opportunist and politically motivated.¹²²

¹¹⁸ Ibid.

¹¹⁹ For a chronology of the case to date see International Criminal Court, *Case Information Sheet Situation in Darfur, Sudan The Prosecutor v. Omar Hassan Ahmad Al Bashir* ICC-02/05-01/09 ICC-PIDS-CIS-SUD-02-004/15_Eng Updated: 26 March 2015.

¹²⁰ *UN News Centre*, 'Darfur: ICC charges Sudanese President with genocide', 12 July 2010.

¹²¹ For discussion see *World Affairs*, Julie Flint and Alex de Waal, 'Closed case: a prosecutor without borders', Spring 2009. The news that Ocampo intended to charge al-Bashir with genocide was first leaked to the *Washington Post* on 11 July 2008, the day after an industrial tribunal at the International Labour Organisation (ILO) had ruled that he had wrongfully dismissed his public information adviser, sacked after complaining that Moreno-Ocampo had 'committed serious misconduct . . . by committing the crime of rape, or sexual assault, or sexual coercion, or sexual abuse' against a South African journalist. The alleged victim did not make a complaint against Moreno-Ocampo and so no further action was taken, but the ILO panel did rule that he had abused his authority in sacking the staff member for making an internal complaint.

¹²² See, for example, *New York Times*, 'Court Issues Arrest Warrant for Sudan's Leader', 4 March 2009, which reported that: 'Within minutes of the court's announcement, thousands of people gathered in central Khartoum, the Sudanese capital, denouncing the decision and waving national flags and posters of Mr. Bashir's face.' See also *BBC News*, 'Profile of Sudan's Omar al Bashir', 12 June 2015 and Human Rights Watch, *UN Members opposed Al Bashir's visit*, 18 September 2013.

The Sudanese authorities responded to the first arrest warrant against al Bashir by expelling thirteen international aid organizations from the country, accusing them of ‘spying’ for the Court.¹²³ The government has also strictly limited access of both the remaining aid groups and UN agencies to the region, arguing that they ‘could be collaborating with the court’.¹²⁴ One aid worker noted that ‘protection’ had been ‘another casualty of the expulsions’ as it ‘was now rarely if ever referred to in program strategies and had been stripped from any UN and NGO information materials or websites’.¹²⁵

Mission reports since 2009 emphasize that UNAMID has focused much of its efforts on political engagement in the hope of achieving a durable peace settlement.¹²⁶ At one point there were around 30 rebel groups in Darfur and their distinction from government forces increasingly blurred.¹²⁷ Government-supported Arab militias sometimes allied with rebel groups, while these often struck bargains with the government.¹²⁸ There have been a series of ceasefires agreed, although most have fallen apart, sometimes just days after being signed.¹²⁹

¹²³ *Wall Street Journal*, ‘Darfur Aid Agencies Leave After Expulsion by Sudan’, 9 March 2009. See also *Guardian*, Conor Foley, ‘Darfur: a disaster for justice’, 20 April 2009.

¹²⁴ Tajeldin Abdalla Adam, Katy Glassborow, Simon Jennings and Assadig Mustafa Zakaria Musa, *Special Report: International Failures Prolong Darfur’s Misery*, The Hague: International Institute for War and Peace Reporting, April 2011, p.7.

¹²⁵ Helen Young, ‘Diminishing returns, the challenges facing humanitarian action in Darfur’, in Antonio Donini (ed), *The golden fleece, manipulation and independence in humanitarian action*, Sterling, Virginia: Stylus Publishing/Kumarian Press, 2012, pp.89-109.

¹²⁶ For an overview of events between 2009 and 2011 see *Report of the Secretary-General on the deployment of UNAMID*, S/2009/83, of 10 February 2009; *Report of the Secretary-General on the deployment of UNAMID*, S/2009/201, of 14 April 2009; *Report of the Secretary-General on the deployment of UNAMID*, S/2009/297, of 9 June 2009; *Report of the Secretary-General on the deployment of UNAMID*, S/2009/352, of 13 July 2009; *Report of the Secretary-General on elections in Sudan*, S/2009/391, of 28 July 2009; *Report of the Secretary-General on UNAMID*, S/2009/592, of 16 November 2009; *Report of the Secretary-General on UNAMID*, S/2010/50, of 29 January 2010; *Report of the Secretary-General on UNAMID*, S/2010/213, of 28 April 2010; *Report of the Secretary-General on UNAMID*, S/2010/382, of 14 July 2010; *Report of the Secretary-General on UNAMID*, S/2010/543, of 18 October 2010; *Report of the Secretary-General on UNAMID*, S/2011/22, of 18 January 2011; *Report of the Secretary-General on UNAMID*, S/2011/244, of 14 April 2011.

¹²⁷ For an overview of the shifting nature of the alliances and conflicts see International Crisis Group, *The Chaos in Darfur*, Crisis Group Africa Briefing N°110, 22 April 2015.

¹²⁸ *Ibid.*

¹²⁹ *Ibid.* Between 2008 and 2010, violent deaths in Darfur were dominated by intra-Arab fighting, notably between *abbala* (camel-herding) and *baggara* (cattle-herding) groups in South Darfur. In October 2010, Minni Minawi, withdrew from the DPA and returned to rebellion. This triggered new fighting between the government and rebels, starting in December of that year. It also led to a resumption of violence against Zaghawa civilians, with which the SLA/MM was identified. The Sudanese air force carried out aerial bombardments on areas controlled by the rebels, and communities

In January 2011 UNAMID transported Governor Harun to Abyei in one of its helicopters for a meeting to try to reconcile an inter-tribal conflict.¹³⁰ Amnesty International expressed ‘outrage’ that the mission had helped a fugitive from international justice and pointed out that the UN and the ICC are legally bound to cooperate closely together.¹³¹ A spokesperson for the UN Secretary General stated that:

the UN Mission is mandated to provide good offices to the Comprehensive Peace Agreement (CPA) parties in their efforts to resolve their differences through dialogue and negotiations . . . clashes in Abyei were ongoing and threatening to escalate to wider war. Governor Harun was critical to bring the Misseriya leaders in Southern Kordofan to peace meeting in Abyei to stop further clashes and killings.¹³²

In July 2011 a new agreement, the Doha Document for Peace in Darfur (DDPD), was signed between the government of Sudan and the Liberation and Justice Movement, (LJM) an umbrella organization of ten rebel groups.¹³³ This coincided with improved relations between

suspected of sympathizing with them, and also recruited for a militia group, the Popular Defence Forces (PDF), which reportedly carried out widespread human rights violations. Although formally under the control of the military, the PDF operate semi-autonomously, like the *Janjaweed*, often pursuing its own agendas and vendettas, related to land and local political dominance. Previously marginalized groups—including the Bergid, Berti, and Tunjur—were armed and deployed in the PDF against Zaghawa communities, though often in response to attacks by Zaghawa militias. This generated significant ethnically directed violence between January and July 2011.

¹³⁰ *Reuters*, ‘U.N. flew indicted war criminal to Sudan meeting’, 11 January 2011.

¹³¹ Amnesty International, *UN aids Sudanese official wanted for war crimes*, 13 January 2011.

¹³² *UN Office of the Spokesperson for the Secretary General*, ‘Highlights of the Noon Briefing, by Martin Nesirky, Spokesperson for Secretary-General Ban Ki-Moon’, Tuesday, 11 January 2011.

¹³³ *Report of the Secretary-General on the implementation of the Darfur political process*, S/2011/252, of 15 April 2011; *Report of the Secretary-General on UNAMID*, S/2011/422, of 8 July 2011. The JEM had by then withdrawn from the negotiations and the SLA-AW and SLA/MM also did not participate. Some critics have noted that many of the LJM’s leading members had been living abroad for many years at the time of the negotiations and have questioned how representative they are of people on the ground. In November 2011, the JEM, SLA-AW and SLA/MM, together with SPLM-N, formed a new political and military alliance, the Sudanese Revolutionary Front (SRF), which is pledged to fight for the overthrow of Sudan’s government.

Sudan and its neighbours,¹³⁴ which led to a decline in violence in West Darfur.¹³⁵ A Darfur Regional Authority was established, in accordance with the power-sharing provisions of the DDPD.¹³⁶ It was also agreed, in principle, to establish a National Human Rights Commission and a Prosecutor for a Special Court for Darfur, with jurisdiction for crimes committed since 2003.¹³⁷ The number of clashes both between rebel groups and government forces as well as inter-tribal conflicts declined in 2011 and 2012 and mission reports noted some progress by a Sudanese government appointed Special Prosecutor for Darfur in bringing charges against militia members accused of serious crimes.¹³⁸

The security situation deteriorated again in 2013, however, and well over half a million people were displaced from their homes in the next two years.¹³⁹ Tens of thousands of civilians sought protection by sheltering around UNAMID bases and by April 2014 the mission reported that it was providing direct physical protection to 60,000 IDPs.¹⁴⁰ Special

¹³⁴ Ibid. See also International Crisis Group, April 2015. Improved relations with Chad was a direct consequence of the DDPD. Relations with Libya also improved due the downfall of the Gaddafi regime, in 2011, which had previously backed the rebels. The JEM, which had been the strongest Darfur rebel movement militarily for a number of years was particularly weakened by the loss of support from Chad and Libya, and a series of internal splits following the death of its leader Khalil Ibrahim in December 2011.

¹³⁵ See, for example, *Report of the Secretary-General on UNAMID*, S/2013/607 of 14 October 2013, paras 46-9. UNAMID reported 87 incidents of human rights violations involving 189 victims between 1 July and 27 September 2013 compared to 126 incidents, involving 557 victims in the previous three months. Violations included abductions, armed attacks and physical assaults as well as 24 incidents of sexual and gender-based violence involving 31 victims, 23 of whom suffered rapes.

¹³⁶ *Report of the Secretary-General on UNAMID*, S/2011/643, of 12 October 2011; *Report of the Secretary-General on UNAMID*, S/2011/814, of 30 December 2011; *Report of the Secretary-General on UNAMID*, S/2012/231, of 17 April 2012; *Report of the Secretary-General on UNAMID*, S/2012/548, of 16 July 2012.

¹³⁷ Ibid.

¹³⁸ *Report of the Secretary-General on UNAMID*, S/2013/225, of 10 April 2013, para 5.

¹³⁹ *Report of the Secretary-General on UNAMID*, S/2013/420, of 12 July 2013, para 13. See also *Report of the Secretary-General on UNAMID*, S/2013/22, of 15 January 2013; *Report of the Secretary-General on UNAMID*, S/2013/607, of 14 October 2013, para 14-17. See also *Report of the Secretary-General on the African Union-United Nations Hybrid Operation in Darfur*, S/2015/141, of 26 February 2015, para 3; *Report of the Secretary-General on the African Union-United Nations Hybrid Operation in Darfur*, S/2015/378, of 26 May 2015, para 2; and *Sudan, Darfur Profile*, UN Office for the Coordination of Humanitarian Affairs, May 2015.

¹⁴⁰ *Report of the Secretary-General on UNAMID*, S/2013/607, of 14 October 2013, para 14-17; *Report of the Secretary-General on the African Union-United Nations Hybrid Operation in Darfur*, S/2014/279, of 15 April 2014, para 39. See also *Report of the Secretary-General on the African Union-United Nations Hybrid Operation in Darfur*, S/2015/378, of 26 May 2015, paras 39-42; and *Report of the Secretary-General on the African Union United Nations Hybrid Operation in Darfur*, S/2015/141, of 26 February 2015, paras 46-52.

Reports on the mission published in 2014 and 2015 concluded that UNAMID was ‘contributing’ to the protection of civilians through its ‘various types of patrols, static security and the promotion of community policing, particularly in camps for internally displaced persons’ as well as through support for local community mediation and facilitating the delivery of humanitarian assistance,¹⁴¹ but that the mission should adopt a more robust posture when faced with restrictions of movement to crisis-affected areas.¹⁴² One report stated that mission personnel ‘too easily turn back rather than assertively insisting on proceeding.’¹⁴³ It proposed revised benchmarks for the mission based on more effective protection of civilians and suggested that if it could not demonstrate greater progress on this than the Security Council needed to take ‘hard decisions’ about its future.¹⁴⁴

The International Crisis Group (ICG) has also claimed that the mission remains ‘too deferential’ to the Sudanese government, has ‘frequently failed to intervene and protect civilians’ and ‘systematically presented a narrative of an improving situation divorced from reality’.¹⁴⁵ In September 2015, HRW published a report detailing abuses carried out by the Rapid Support Forces (RSF), which had been created in mid-2013 by the Sudanese Intelligence Services.¹⁴⁶ It noted that the RSF had led two counterinsurgency campaigns in 2014 and 2015, during which ‘its forces repeatedly attacked villages, burned and looted homes’ as well as ‘beating, raping and executing villagers.’¹⁴⁷ The report noted that the RSF ‘received support in the air and on the ground from the Sudanese armed forces and other government-backed militia groups, including a variety of proxy militias.’¹⁴⁸ The

¹⁴¹ *Special report of the Secretary-General on the review of the African Union-United Nations Hybrid Operation in Darfur*, S/2014/138, 25 February 2014, para 13; and *Special report of the Secretary-General on the African Union-United Nations Hybrid Operation in Darfur*, S/2015/163, of 13 March 2015.

¹⁴² Special Report, 2014, para 14.

¹⁴³ *Ibid.*, para 27.

¹⁴⁴ *Ibid.*, para 51.

¹⁴⁵ International Crisis Group, *The Chaos in Darfur*, Crisis Group Africa Briefing N° 110, 22 April 2015.

¹⁴⁶ Human Rights Watch, *Men with no mercy: rapid support forces attacks against civilians in Darfur*, New York: HRW, 9 September 2015.

¹⁴⁷ *Ibid.*

¹⁴⁸ *Ibid.*

overwhelming majority of the abuses reported to it were committed by RSF or other government forces in villages and towns where rebels were reportedly never present or had left prior to the attacks. Some RSF attacks even occurred in towns or villages that were entirely under government control.¹⁴⁹

HRW noted that UNAMID reports had ‘failed to release any detailed documentation about abuses against civilians during either of the RSF-led counterinsurgency campaigns’ and that while several mission reports had referred to attacks by the RSF causing civilian displacement, there had been ‘no indication of magnitude of the other serious abuses, such as sexual violence, extrajudicial killings, and burning of villages.’¹⁵⁰ OCHA also reported that there were up to 100,000 IDPs trapped in areas where the fighting was heaviest that humanitarian agencies were unable to reach due to government restrictions.¹⁵¹ In March 2016 the UN reported that at least 138,000 people had been freshly displaced by violence since the start of the year.¹⁵²

In December 2014 the new ICC Prosecutor, Fatou Bensouda, had informed the Security Council that she had ‘no choice but to hibernate investigative activities in Darfur’ to ‘shift resources to other urgent cases’.¹⁵³ She told the Security Council that:

It is becoming increasingly difficult for me to appear before you to update you when all I am doing is repeating the same things I have said over and over again . . . Not only does the situation in Darfur continue to deteriorate, the brutality with which crimes are being committed has become more pronounced. Women and girls

¹⁴⁹ Ibid.

¹⁵⁰ Ibid.

¹⁵¹ UN Office for the Coordination of Humanitarian Affairs, *Sudan, Darfur Profile*, UN OCHA, May 2015.

¹⁵² *UN News Centre*, ‘Daily Press Briefing by the Office of the Spokesperson for the Secretary-General’, 6 April 2016.

¹⁵³ Prosecutor of the International Criminal Court, ‘Statement to the United Nations Security Council on the Situation in Darfur, pursuant to UNSCR 1593 (2005)’, 12 December 2014.

continue to bear the brunt of sustained attacks on innocent civilians. But this Council is yet to be spurred into action.¹⁵⁴

The announcement was hailed as a triumph over ‘colonialist courts’ by al Bashir.¹⁵⁵ The Ugandan president, Yoweri Museveni, also took the opportunity to call on African countries to withdraw from the ICC, saying that it had become a ‘tool to target’ the continent.¹⁵⁶ The same month saw the collapse of another ICC trial against an African head of State, when the ICC formally withdrew charges against Uhuru Kenyatta who had been indicted in 2012 for his alleged role in a wave of violence during election in Kenya in 2007.¹⁵⁷ In October 2013 an extraordinary AU General Assembly passed a resolution stating that sitting heads of State ‘shall not appear before any international court during their term of office.’¹⁵⁸ In November 2013 the AU narrowly failed to persuade the Security Council to defer ICC proceeding against Kenyatta and his Deputy President¹⁵⁹ and in February 2014 it called on its members to ‘speak with one voice’ against criminal proceedings by the ICC against sitting presidents.¹⁶⁰

¹⁵⁴ Ibid.

¹⁵⁵ *Guardian*, ‘Omar al-Bashir celebrates ICC decision to halt Darfur investigation’, 14 December 2014.

¹⁵⁶ Ibid. See also *The Telegraph*, ‘International Criminal Court is ‘hunting’ Africans’, 27 May 2013; and *Washington Post*, ‘Is the International Criminal Court really targeting black men?’, 17 June 2005.

¹⁵⁷ ICC, *Prosecutor v. Francis Kirimi Muthaura and Uhuru Muigai Kenyatta*, ICC Pre-Trial Chamber II, ICC-01/09-02/11, 23 January 2012; and ICC, *Prosecutor v. Uhuru Muigai Kenyatta*, Notice of withdrawal of the charges against Uhuru Muigai Kenyatta, ICC-01/09-02/115 December 2014. See also Abdullahi Boru Halakhe, “*R2P in Practice*”: *Ethnic Violence, Elections and Atrocity Prevention in Kenya*, New York: Global Centre for the Responsibility to Protect Occasional Paper Series No. 4, December 2013; and *BBC News*, ‘ICC drops Uhuru Kenyatta charges for Kenya ethnic violence’, 5 December 2014. Over 1,000 people were killed during this campaign, which at one point threatened to plunge the country into civil war. Peace was eventually restored with international mediation. Kenyatta was elected President of Kenya in 2013, by which time many witnesses had withdrawn their evidence against him following alleged intimidation.

¹⁵⁸ *BBC News*, ‘African Union urges ICC to defer Uhuru Kenyatta case’, 12 October 2013.

¹⁵⁹ *UN News Centre*, Security Council Resolution Seeking Deferral of Kenyan Leaders’ Trial Fails to Win Adoption, with 7 Voting in Favour, 8 Abstaining’, 15 November 2013. The vote was seven in favour with none against and eight abstentions so it fell short of the nine votes that would have been needed for it to pass.

¹⁶⁰ *Al Jazeera*, ‘African Union urges united stand against ICC’, 1 February 2014. See also *BBC News*, ‘South Africa may leave ICC over Bashir arrest row’, 25 June 2015.

In June 2014 the ICC Prosecutor expressed her concern that UNAMID's reports 'had been subject to manipulation, with the intentional effect of covering up crimes committed against civilians and peacekeepers, in particular those committed by the forces of the Government of the Sudan'.¹⁶¹ In July 2014 the UN Secretary General announced a review into the allegations.¹⁶² The review claimed not to have found any evidence of intentional cover-ups but stated the mission did not always provide its own headquarters with full reports on the circumstances surrounding incidents and was 'dysfunctional and deeply divided' about what to publicly report.¹⁶³ It also noted that initial reports from the field identifying attackers as suspected government or pro-government forces were often changed at some point in the official reporting chain to 'unidentified assailants'.¹⁶⁴ Secretary General Ban Ki-moon said that 'the lapses in the reporting standards' were 'very troubling'.¹⁶⁵

A few weeks after this statement UNAMID issued a press release stating that it had been granted access to a village in north Darfur 'following media reports of an alleged mass rape incident perpetrated against 200 women and girls in the area'.¹⁶⁶ Its team had 'spent several hours touring the village', interviewing a residents and community leaders and a local military commander. These 'reiterated to UNAMID that they coexist peacefully with local military authorities in the area' and found no evidence to substantiate the allegations.¹⁶⁷ The release failed to mention the presence of government officials observing and filming the interviews or reports that villagers had been warned by the military not to cooperate with the

¹⁶¹ *UN News Centre*, 'Justice for Darfur's victims mired in political expediency – ICC prosecutor', 17 June 2014.

¹⁶² *UN News Centre*, 'Ban announces review of probes related to UN-African Union Darfur peacekeepers', 2 July 2014. See also UN Security Council Resolution 2173 of 27 August 2014.

¹⁶³ *Letter dated 29 October 2014 from the Secretary-General addressed to the President of the Security Council*. Annex 'Executive summary of the report of the review team on allegations of manipulation of reporting on Darfur'. S/2014/771, 29 October 2014.

¹⁶⁴ *Ibid.*

¹⁶⁵ *Ibid.*

¹⁶⁶ *UNAMID Press Release*, 'UNAMID Verification Team Visits Tabit village to Investigate Mass Rape Allegations', 10 November 2014.

¹⁶⁷ *Ibid.*

investigation.¹⁶⁸ The Security Council subsequently issued a separate statement calling on the Sudanese government to allow UNAMID ‘full and unrestricted freedom of movement without delay throughout Darfur.’¹⁶⁹ In November Sudan sent a letter to the Council stating that UNAMID would not be permitted to visit the area again.¹⁷⁰ On 25 December 2014 the Sudanese government announced the expulsion of the two most senior UN officials in the country.¹⁷¹ Al Bashir stated in the same month that the mission should wrap up its operations as it had ‘become . . . a security burden on the Sudanese army.’¹⁷²

In June 2015 ICC Prosecutor Bensouda again briefed the Security Council, this time stating that her ‘determination to bring independent and impartial justice to the people of Sudan remains unshaken’, but acknowledging that there had been no substantive progress in the cases.¹⁷³ The only positive development she could highlight was that President al Bashir had been forced to make a ‘rapid departure’ from South Africa during a recent state visit after the Southern Africa Litigations Centre (SALC) brought a successful action against him in the country’s High Court.¹⁷⁴ Although the Prosecutor described this as ‘a shining precedent that must be emulated in other States’,¹⁷⁵ it is noticeable how even strong supporters of the ICC

¹⁶⁸ *Foreign Policy*, ‘See no evil speak no evil: UN covers up Sudan’s bad behaviour in Darfur’, 21 November 2014. See also *Foreign Policy*, ‘Why is the U.N. soft-peddalling its criticism of Sudan?’, 4 August 2011; and *Foreign Policy*, ‘Report, They just stood watching’, 7 April 2014.

¹⁶⁹ *UN Security Council Press Release*, ‘UN Security Council Press Statement on Darfur’, 19 November 2014.

¹⁷⁰ *Letter dated 17 November 2014 from the Permanent Representative of the Sudan to the United Nations addressed to the President of the Security Council*, S/2014/819, 18 November 2014.

¹⁷¹ *Reuters*, ‘Sudan expels two UN officials’, 25 December 2014. The officials were Ali al-Zaatari (Jordan), the Resident and Humanitarian Coordinator and Yvonne Helle (Netherlands) the Country Director of UN Development Programme (UNDP).

¹⁷² *What’s in Blue – Insights on the Work of the Security Council*, ‘South Sudan: Briefing on Developments since Peace Agreement’, 3 September 2015.

¹⁷³ Prosecutor of the International Criminal Court, ‘Statement to the United Nations Security Council on the Situation in Darfur, pursuant to UNSCR 1593 (2005)’, 29 June 2015.

¹⁷⁴ *Ibid.* paras 14-9.

¹⁷⁵ *Ibid.* See also Human Rights Watch, *UN Members opposed Al Bashir’s visit*, 18 September 2013. Al Bashir had previously been able to make diplomatic visits to six ICC state parties without being arrested: Chad, Democratic Republic of Congo, Djibouti, Kenya, Malawi and Nigeria. He has also visited Egypt, Ethiopia, Saudi Arabia and the United Arab Emirates (which are not ICC state parties) without being arrested.

have urged a rethink its prosecution strategy.¹⁷⁶ Nicole Fritz, for example, executive director of the SALC had earlier urged a suspension of the Kenya prosecution arguing that:

Courts cannot be more strident than the political consensus supporting their establishment allows . . . The ICC is the product of a brief interregnum — a decade strung between the end of one totalising narrative of international relations, the Cold War, and the beginning of another, the war on terror. The potential for international co-operation and co-ordination that seemed possible in the 1990s has been broken down in the decades since and the ICC needs to be mindful of this.¹⁷⁷

The Security Council also renewed UNAMID's mandate for a further year, in June 2015, with mandated tasks and a force structure that was essentially unchanged.¹⁷⁸ The text detailed the deteriorating security and humanitarian situation and highlighted the escalation of violence that undermined the security of civilians.¹⁷⁹ UNAMID's benchmarks were also attached as an annex, along with relevant indicators for each one.¹⁸⁰ Disagreement within the Council in the run-up to the mission's renewal centred on those, mainly western, countries who wanted to link discussion of the mission's exit strategy to clear progress on these

¹⁷⁶ *Financial Times*, Michela Wrong, 'The Kenyan attack jeopardizes international justice', 24 September 2013. See also Michela Wrong, *It's our turn to eat: the story of a Kenyan whistleblower*, London: Fourth Estate, 2009; and De Waal, 1997, p.215. Both Wrong and De Waal had previously argued vigorously for international justice mechanisms to be used to hold Africa's leaders to account for human rights violations. De Waal had argued for 'an expansion of the mandate of the international criminal tribunal [sic] to cover the investigation of famine crimes'. Both subsequently concluded that the ICC's prosecution strategy was misguided. By contrast see, for example, Abdullahi Boru Halakhe, '*R2P in Practice*': *Ethnic Violence, Elections and Atrocity Prevention in Kenya*, New York: Global Centre for the Responsibility to Protect Occasional Paper Series No. 4, December 2013. Supporters of R2P claim that the international mediation efforts that resolved the Kenyan political crisis are an example of the doctrine's first successful application and have urged 'accountability for those suspected of being most responsible for orchestrating mass atrocity crimes'.

¹⁷⁷ *Business Day Live*, Nicole Fritz, 'Why Kenya's terrorist attack might be the ICC's saving grace', 30 September 2013. The SALC came under strong domestic political criticism for this move by South Africa's ruling party. For details see *Daily Maverick*, 'In defence of the Southern Africa Litigation Centre', 25 June 2015.

¹⁷⁸ UN Security Council Resolution 2228 of 29 June 2015, paras 4-5.

¹⁷⁹ *Ibid.* Preamble and paras 14-8.

¹⁸⁰ *Ibid.* Annex A.

benchmarked goals and the African Council members, supported by Russia, who wanted faster progress on the exit strategy.¹⁸¹

One observer has described UNAMID as ‘a slow burning disaster’, that was established in a ‘politically panicked response to public pressure’ and that the ‘frank reality is no one believes that the mission is working but no one dares pull it out because they fear the moment it goes there will be an even greater spike in violence.’¹⁸² Malloch Brown, a former UN Deputy Secretary General also admitted at around the time of the mission’s deployment that: ‘No one is up for deploying a military force in the heart of Africa. People do not want to do it and it has never been a realistic option so there has always been an element of empty threat there.’¹⁸³ De Waal similarly noted early on in the crisis: ‘The knock-down argument against humanitarian invasion is that it won’t work. The idea of foreign troops fighting their way into Darfur and disarming the *Janjaweed* militia by force is sheer fantasy.’¹⁸⁴

A UN mission with a Chapter VII POC mandate can be considered as falling somewhere between invasion and inaction, but, as this chapter has shown, its exact location along this spectrum is less clear. UNAMID has suffered from the polarized and controversial context in which the Security Council established it and in which the ICC conducted its investigation. The decision to charge a sitting President with genocide and the way in which it was done appears to reflect particularly badly on the former ICC Prosecutor. The failures within the UN system as a whole during this crisis are also in many ways as serious as some of the disasters of the 1990s, discussed in Chapter Two, and suggest a failure to learn the lessons from the mass killings in Sri Lanka in 2009. As Secretary General Ban Ki-moon has noted:

¹⁸¹ *What’s in Blue – Insights on the Work of the Security Council*, ‘AU/UN Hybrid Operation in Darfur mandate renewal’, 28 June 2015, 2015. See also *Sudan Tribune*, ‘African Union extends UNAMID, calls to resume talks on exit strategy’, 24 June 2015.

¹⁸² *Guardian*, ‘What’s the point of peacekeepers when they don’t keep the peace?’, 17 September 2015.

¹⁸³ *Observer*, ‘Darfur: a glimmer of hope on the horizon’, 16 September 2007.

¹⁸⁴ *Guardian*, Alex de Waal, ‘The book was closed too soon on peace in Dafur’, 29 September 2006.

UNAMID is clearly not the only mission faced with the challenge of maintaining the consent and goodwill of the host Government, while fulfilling its obligation to report accurately and candidly, including on acts of violence committed against civilians or its own personnel . . . Ensuring that the United Nations speaks out consistently against abuses and identifies the perpetrators is a key goal of my Human Rights Up Front initiative. I therefore intend to ensure that all missions are provided with additional guidance on the fulfilment of their reporting obligations, particularly with regard to human rights and the protection of civilians.¹⁸⁵

The next section of this chapter will briefly discuss the experiences of the UN mission to South Sudan before analysing what positive obligations international human rights law could place on a UN mission and the relevance of this legal framework for POC mandates.

C. South Sudan

South Sudan came into existence in July 2011 after its people had voted overwhelmingly for independence the previous January.¹⁸⁶ UNMISS was created in the same month by the Security Council acting under its Chapter VII powers.¹⁸⁷ The mission's mandate has been renewed annually¹⁸⁸ and its tasks include to:

¹⁸⁵ *Letter dated 29 October 2014 from the Secretary-General addressed to the President of the Security Council*. Annex 'Executive summary of the report of the review team on allegations of manipulation of reporting on Darfur'. S/2014/771, 29 October 2014

¹⁸⁶ *BBC News*, South Sudan profile – Overview', 20 May 2015.

¹⁸⁷ UN Security Council Resolution 1996 of 8 July 2011. The Council decided that it should have a strength of 7,000 military personnel plus a police and civilian component. This included including military liaison officers and staff officers, up to 900 civilian police personnel, including as appropriate formed units, and an appropriate civilian component, including technical human rights investigation expertise.

¹⁸⁸ UN Security Council Resolutions 2057 of 5 July 2012; Resolution 2109 of 11 July 2013; Resolution 2155 of 27 May 2014; Resolution 2187 of 25 November 2014; and Resolution 2223 of 28 May 2015. The Security Council also responded to the deteriorating situation in South Sudan with Resolutions 2046 of 2 May 2012; 2132 of 24 December 2013; and 2206 of 3 March 2015.

consolidate peace and security, and to help establish the conditions for development . . . with a view to strengthening the capacity of the Government of the Republic of South Sudan to govern effectively and democratically and establish good relations with its neighbours . . . [and] Deterring violence including through proactive deployment and patrols in areas at high risk of conflict, within its capabilities and in its areas of deployment, protecting civilians under imminent threat of physical violence, in particular when the Government of the Republic of South Sudan is not providing such security.¹⁸⁹

In June 2012 the government of South Sudan tried to convince the Security Council that it would be ‘inappropriate’ to renew the mandate under Chapter VII as it had taken responsibility for the safety and security of its own citizens.¹⁹⁰ This was rejected, but benchmarks for progress were agreed so that the mission could exit ‘once the Government has established effective State authority, held elections in accordance with the Constitution, and sufficiently developed the capacity of its rule of law and security institutions to a level where they can effectively maintain public order and protect the civilian population.’¹⁹¹ POC has featured in all of UNMISS’s mission reports, although the initial focus was on maximizing information flow, provision of good offices and urging the government to deploy

¹⁸⁹ UN Security Council Resolution 1996 of 8 July 2011, para 3.

¹⁹⁰ See *Report of the Secretary-General on South Sudan*, S/2012/486, 26 June 2012, para 102.

¹⁹¹ *Ibid.* Annex, Benchmarks for the progress of the United Nations Mission in South Sudan, para 2.

additional security forces when necessary.¹⁹² The mission saw its task as mainly to advocate for such protection and develop early warning mechanisms to identify threats.¹⁹³

The transition to independence had already been fraught.¹⁹⁴ In May 2011 the Sudanese armed forces, again, occupied the disputed town of Abyei.¹⁹⁵ Over 140,000 people fled from fighting between the forces of Sudan and South Sudan in South Kordofan state, in June and July 2011.¹⁹⁶ There have also been aerial bombardments and incursions within South Sudan from Sudan, including through proxy armed groups.¹⁹⁷ In March 2012 South Sudan accused Sudan of bombing two of its oil wells and responded by seizing the Heglig oil fields.¹⁹⁸ It

¹⁹² *Report of the Secretary-General on South Sudan*, S/2011/314, 17 May 2011, paras 44-8; *Report of the Secretary-General on South Sudan*, S/2011/678, 2 November 2011, paras 44-7; *Report of the Secretary-General on South Sudan*, S/2012/140, 7 March 2012, paras 48-55; *Report of the Secretary-General on South Sudan*, S/2012/486, 26 June 2012, paras 54-8; *Report of the Secretary-General on South Sudan*, S/2012/820, 8 November 2012, paras 43-4; *Report of the Secretary-General on the United Nations Mission in South Sudan*, S/2013/140, 8 March 2013, paras 44-5; *Report of the Secretary-General on South Sudan*, S/2013/366, 20 June 2013, paras 40-4; *Report of the Secretary-General on South Sudan*, S/2013/651, 8 November 2013, paras 38-41; *Report of the Secretary-General on South Sudan*, S/2014/158, 6 March 2014, paras 44-54; *Report of the Secretary-General on South Sudan*, S/2014/537, 24 July 2014, paras 33-9; *Report of the Secretary-General on South Sudan*, S/2014/708, 30 September 2014, paras 32-46; *Report of the Secretary-General on South Sudan*, S/2014/821, 18 November 2014, paras 30-42; *Report of the Secretary-General on South Sudan*, S/2015/118, 17 February 2015, paras 29-41; *Report of the Secretary-General on South Sudan*, S/2015/296, 29 April 2015, paras 28-38.

¹⁹³ For example, *Report of the Secretary-General on South Sudan*, S/2011/314, 17 May 2011, paras 44-5.

¹⁹⁴ For critical analyses of the circumstances in which the mission was established see Jort Hemmer, 'We are laying the groundwork for our own failure': *The UN Mission in South Sudan and its civilian protection strategy: an early assessment*, Clingendael Conflict Research Unit (CRU), CRU Policy Brief, No. 25, January 2013; and Nahuel Arenas-García, *The UNMIS in South Sudan: Challenges & Dilemmas*, The Institute of Studies on Conflicts and Humanitarian Action (IECAH), July 2010. See also: International Crisis Group, *Politics and Transition in the New South Sudan*, Africa Report N°172, Brussels: ICG, 4 April 2011; International Crisis Group, *Sudan: Regional Perspectives on the Prospect of Southern Independence*, Africa Report N°159, Brussels: ICG, 6 May 2010; and International Crisis Group, *China's New Courtship in South Sudan*, Africa Report N°186, Brussels: ICG, 4 April 2012.

¹⁹⁵ International Crisis Group, *Negotiating Sudan's North-South Future*, Africa Briefing N°76, Brussels: ICG, 23 November 2010; and International Crisis Group, *Sudan: Defining the North-South Border*, Africa Briefing N°75, Brussels: ICG, 2 September 2010.

¹⁹⁶ *Ibid.* Although South Kordofan is part of Sudan, it is home to many pro-south communities, especially in the Nuba Mountains. Under the CPA, residents of South Kordofan were to hold popular consultations in 2011 to determine the constitutional future of the state. However, South Kordofan governor Ahmed Haroun – an ICC indictee – suspended the process. Fighting between the two sides has continued, often through proxies, resulting in hundreds of deaths.

¹⁹⁷ *Report of the Secretary-General on South Sudan*, S/2012/140, 7 March 2012, para 37. See also *Report of the Secretary-General on South Sudan*, S/2012/486, 26 June 2012, paras 24-33.

¹⁹⁸ See UN Security Council Resolution 2046 of 2 May 2012. See also *Report of the Secretary-General on South Sudan*, S/2012/486, 26 June 2012, paras 15-9; and *Report of the Secretary-General on the United Nations Mission in South Sudan*, S/2013/140, 8 March 2013, para 15.

subsequently withdrew from these under international pressure, but, in December 2012 and January 2013 South Sudan again complained to the Security Council about alleged aerial bombing by its northern neighbour.¹⁹⁹

Clashes between government troops and rebel militia, some of whom were sponsored by Sudan, had led to repeated violations of international human rights law and IHL by both sides in 2011 and 2012.²⁰⁰ UNMISS suffered a series of attacks by rebel groups in 2012 and 2013,²⁰¹ as well as ongoing harassment, threats, physical assaults and attempts to seize its property by government soldiers and police.²⁰² In December 2012 government troops shot down an UNMISS helicopter, after apparently mistaking it for a Sudanese military one.²⁰³ Tensions had also been mounting in Jonglei state as part of an ongoing cycle of inter-ethnic and militia-based violence that dates back to a split within the Sudan Peoples' Liberation Movement (SPLM) and its army (SPLA) in 1991.²⁰⁴ A series of skirmishes and attacks on villages throughout 2011 left hundreds dead.²⁰⁵ Thousands of civilians sought refuge in

¹⁹⁹ Ibid.

²⁰⁰ Human Rights Watch, *'They are Killing Us': Abuses Against Civilians in South Sudan's Pibor County*, 13 September 2013; International Crisis Group, *South Sudan: Compounding Instability in Unity State*, Africa Report N°179, Brussels: ICG, 17 Oct 2011; International Crisis Group, *Jonglei's Tribal Conflicts: Countering Insecurity in South Sudan*, Africa Report N°154, Brussels: ICG, 23 December 2009. See also *Report of the Secretary-General on South Sudan*, S/2011/678, 2 November 2011, paras 18-24.

²⁰¹ *Report of the Secretary-General on South Sudan*, S/2013/366, 20 June 2013, para 22-3. On 12 March 2013, an UNMISS convoy was ambushed by unidentified armed elements, resulting in the serious injury of an UNMISS peacekeeper. On 30 March, a UN convoy was attacked by unknown armed persons resulting in gunfire damage to the vehicles. On 9 April, an UNMISS military convoy was attacked and suffered 12 fatalities. On 4 May, a UN contractor was killed and another wounded in an ambush.

²⁰² *Report of the Secretary-General on South Sudan*, S/2013/651, 8 November 2013, para 76. Between 7 May and 5 November 2013, 67 such cases were recorded including illegal arrests and detention, seizure of UN vehicles and an attempt to seize a UN helicopter.

²⁰³ *Report of the Secretary-General on the United Nations Mission in South Sudan*, S/2013/140, 8 March 2013, para 19.

²⁰⁴ For a journalistic account of the origins of this split see Deborah Scroggins, *Emma's War: love, betrayal and death in the Sudan*, London: Harper Collins, 2004.

²⁰⁵ *Report of the Secretary-General on South Sudan*, S/2011/678, 2 November 2011, para 25. April and June 2011 saw large-scale Lou Nuer attacks. In August 2011, Murle fighters attacked a number of Lou Nuer towns in response. UNMISS deployed troops in areas of tension to deter attacks, but without using force to prevent them. It also supported a Church-based reconciliation initiative between the two communities. For an overview see International Crisis Group, *South Sudan: Jonglei – 'We Have Always Been at War'*, Crisis Group Africa Report N°221, Brussels: ICG, 22 December 2014; *Report of the Secretary-General on South Sudan*, S/2012/820, 8 November 2012, paras 17-30; and *Report of*

UNMISS military compounds in Jonglei state and UNMISS redeployed almost all of its forces, leaving the bare minimum, to cover the rest of the country that December.²⁰⁶ A cycle of revenge attacks continued, through 2013 with government police and soldiers taking part in some of these.²⁰⁷

Against this background, simmering divisions within the leadership of the now ruling SPLM erupted into a full-scale conflict in December 2013. President Salva Kiir Mayardit claimed to have foiled a coup attempt while his opponents accused him of launching a dictatorial purge.²⁰⁸ Around 10,000 people died in the first few months of the conflict and a million were displaced from their homes.²⁰⁹ By December 2014 Security Council referred to the civilian death toll as being in the ‘tens of thousands’ and the displacement total at two million.²¹⁰ The SPLA quickly fractured and both sides committed widespread massacres often on ethnic grounds, as the ICG noted:

Although the dispute within the SPLM that led to the conflict was primarily political, ethnic targeting, communal mobilisation and spiralling violence quickly led to appalling levels of brutality against civilians, including deliberate killings inside churches and hospitals. Dinka elements of the Presidential Guard and other security organs engaged in systematic violence against Nuer in Juba in the early days. Armed

the Secretary-General on the United Nations Mission in South Sudan, S/2013/140, 8 March 2013, para 76.

²⁰⁶ *Report of the Secretary-General on South Sudan*, S/2012/140, 7 March 2012, paras 26-34.

²⁰⁷ *Ibid.* See also Human Rights Watch, *South Sudan: Army making ethnic conflict worse*, New York: HRW, 19 July 2013.

²⁰⁸ For details see *Report of the Secretary-General on South Sudan*, S/2014/158, 6 March 2014; and International Crisis Group, *South Sudan: A Civil War by Any Other Name*, Crisis Group Africa Report N°217, Brussels: ICG, 10 April 2014.

²⁰⁹ *Ibid.*

²¹⁰ Statement by the President of the Security Council, S/PRST/2014/26, 15 December 2014. ‘The Security Council underscores its strong condemnation of the serious human rights violations and abuses that have caused the death of tens of thousands of civilians, the displacement of nearly 2 million people in just 12 months, and the attacks upon, and deaths of, UN peacekeepers and humanitarian personnel.’

actors, including the Nuer White Army, responded by targeting Dinka and other civilians.²¹¹

As the fighting spread civilians sought protection on UNMISS bases. By the end of 2014 it was estimated that there were 100,000 sheltering in them.²¹² By May 2015 this had swelled to around 118,000 people and by August 2015 there were an estimated 200,000 in what were to become known as PoC sites.²¹³ Civilians had sought shelter on UNMISS bases before this crisis and the mission had developed guidelines for managing such situations.²¹⁴ These stated that on-site protection should be a last resort and temporary solution, outlined the roles and responsibilities of actors involved, including coordination with humanitarian agencies, and required each UNMISS base to develop contingency plans within existing budgets.²¹⁵ The outbreak of civil war caught UNMISS by surprise and the scale of the influx overwhelmed it.²¹⁶ Nevertheless, as the ICG noted:

Within hours of the outbreak of conflict, civilians began arriving at UNMISS bases seeking protection. The speed with which the fighting spread required immediate action and UNMISS senior leadership took the risky but right decision to open its gates . . . Mission staff are not humanitarians and did not have access to humanitarian supplies, such as tents, food and materials to build latrines, leading to dire conditions

²¹¹ International Crisis Group, April 2014, p.i.

²¹² See *Report of the Secretary-General on South Sudan*, S/2014/537, 24 July 2014, para 27; and *Report of the Secretary-General on South Sudan*, S/2014/821, 18 November 2014, para 34.

²¹³ *What's in Blue – Insights on the Work of the Security Council*, 'South Sudan: UNMISS and Sanctions Briefings and Draft Sanctions Resolution', 24 August 2015; and *Protection of Civilians*, Security Council Report Cross-Cutting Report, May 2015, p.23.

²¹⁴ Damian Lilly, 'Protection of Civilians sites: a new type of displacement settlement?', *Humanitarian Exchange*, London: Overseas Development Institute, Issue 62, September 2014. 'Since the start of the UNMISS mandate in July 2011, the mission has frequently provided refuge to civilians seeking temporary protection. For example, between October 2012 and November 2013 more than 12,000 civilians sought protection at UNMISS bases on 12 separate occasions. In one incident, from 19–21 December 2012, 5,000 civilians were sheltered at the UNMISS base in Wau in the west of the country.'

²¹⁵ *Ibid.*

²¹⁶ *Report of the Secretary-General on South Sudan*, S/2013/651, 8 November 2013, para 2. This described the appointment of a 'leaner Cabinet' as 'encouraging' and 'positive'. See also *UNMISS Press Conference*, 20 December 2013, where the UNMISS head of mission stated that: 'We did not see this coming.'

in some of the bases. Acknowledging the logistical and political difficulties, there is no question UNMISS' action saved – and continues to save – many thousands of civilian lives.²¹⁷

UNMISS bases came under attack in several places, particularly in Jonglei state.²¹⁸ Two peacekeeping soldiers and a civilian aid worker were killed in one UNMISS base, some bases were hit in cross-fire and UNMISS helicopters were deliberately shot at on some occasions.²¹⁹ In April 2014 the UNMISS base in Bor was stormed by an armed group who attacked the IDPs inside with axes, handguns and automatic weapons.²²⁰ According to the ICG, UNMISS troops and a police unit initially fled further into the base and it was left to the unarmed staff of an NGO to ward off the attackers, although the soldiers did eventually open fire and the attack was beaten off after 48 IDPs and three attackers had been killed.²²¹ UNMISS evacuated two of its bases in response to the attacks and the Ugandan armed forces, which had intervened in the conflict on the government's side, began to provide protection by patrolling the outer perimeter of some other bases.²²²

Towns changed hands frequently during the initial months of the conflict, leading to different groups seeking UNMISS's protection.²²³ Many of these had previously played an active role

²¹⁷ International Crisis Group, April 2014, pp.29-30. See also *Security Council Report, Cross-Cutting Report, Protection of Civilians in Armed Conflict*, May 2015, p.23. The Security Council has also specifically praised UNMISS for this initiative. See Security Council Resolution 2147, of 24 December 2013.

²¹⁸ International Crisis Group, *South Sudan: Jonglei – 'We Have Always Been at War'*, Crisis Group Africa Report N°221, Brussels: ICG, 22 December 2014, p.18 states that civilians were forcibly removed from the UNMISS base in Bor, capital of Jonglei state, and murdered. However, this is not mentioned in the mission report.

²¹⁹ *Report of the Secretary-General on South Sudan*, S/2014/158, 6 March 2014, para 18.

²²⁰ *Report of the Secretary-General on South Sudan*, S/2014/537, 24 July 2014, para 23.

²²¹ International Crisis Group, December 2014, p.26. This states that: 'men, women and children were attacked with machetes, axes, handguns, and semi-automatic weapons, in full sight of peacekeepers. Some UNMISS troops and a police unit fled further into the base. During the attack, Non-Violent Peaceforce, an NGO providing unarmed civilian protection, protected women and children against multiple groups of armed attackers while peacekeepers were nowhere to be seen. Reportedly it took nearly 25 minutes for UN troops to return fire – when they did, some of the attackers were killed and the rest fled.'

²²² *Ibid.*

²²³ *Report of the Secretary-General on South Sudan*, S/2014/158, 6 March 2014, paras 44-50.

in the conflict, but UNMISS consciously defined ‘civilians’ in adherence to IHL rules as including armed actors who had laid down their weapons.²²⁴ As the mission’s senior POC advisor noted:

A significant proportion of the people seeking refuge were former combatants. By relinquishing their weapons and uniforms they became civilians and eligible for protection. However, there was always the risk of these individuals rejoining the fighting, and UNMISS was criticised by both sides in the conflict for harbouring potential adversaries. A clear ‘no arms on UN premises’ policy was implemented. While screening was conducted by UN police at entry and exit points to ensure that weapons did not enter the PoC sites, this was not fool-proof and some weapons were brought in.²²⁵

Both sides continued to accuse UNMISS of sheltering ‘criminals’ and ‘enemies’ who were legitimate targets for attack.²²⁶ Over the course of 2014 the mission developed guidance on preserving the civilian character of its protection sites and stated that it would not admit additional individuals onto its premises where there was no ‘current fighting or threat of violence in the area’.²²⁷ Although UNMISS has been wary of allowing its ‘PoC sites’ to turn into *de facto* IDP camps, land was acquired next to bases where people can be accommodated on a more sustainable basis.²²⁸ Even humanitarian agencies such as MSF, which is particularly wary of compromising its independence and neutrality by integrating into UN structures, decided to provide direct support to IDPs in the UN bases.²²⁹ One MSF worker described the conditions in the PoC sites as ‘horrifying and an affront to human dignity,’

²²⁴ *Report of the Secretary-General on South Sudan, S/2014/708*, 30 September 2014, para 34.

²²⁵ Lilly, 2014.

²²⁶ International Crisis Group, December 2014, p.27. ‘Senior politicians and military leaders continue to use rhetoric that signals that these bases are legitimate targets rather than protected sites. Further attacks on civilians under UNMISS protection remain likely.’

²²⁷ *Report of the Secretary-General on South Sudan, S/2014/708*, 30 September 2014, para 31.

²²⁸ Lilly, 2014.

²²⁹ *Ibid.*

saying that most of the camp was ‘knee-deep in sewage, thousands of people cannot lay down and therefore sleep standing up with their infants in their arms.’²³⁰

UNMISS reconfigured its forces in response to the crisis, concentrating on defending its bases as well as those sheltering in them.²³¹ It also suspended capacity-building support for the South Sudanese government or security sector, in line with the HRDDP, in light of reports that both the government and the opposition were deliberately committing violence against civilians.²³² Its mission report in November 2014 stated that it had resumed proactive patrolling to ‘expand its reach beyond UNMISS premises’.²³³ It also reported that it was establishing a number of ‘forward operating bases’ in order to ‘ensure proactive engagement with vulnerable communities’.²³⁴ Some humanitarian agencies had strongly urged this redeployment, warning that focussing attention and assistance on the PoC sites risked neglecting the far larger number of IDPs who were sheltering elsewhere and often in worse conditions.²³⁵ By April 2015, UNMISS reported that over two million people were displaced from their homes, over 1.5 million people inside South Sudan and more than 500,000 to neighbouring countries.²³⁶

In June 2015 the mission reported that: ‘South Sudanese armed forces may have committed widespread human rights abuses, including the alleged raping and immolation of women and girls’ and ‘killing civilians, looting and destroying villages and displacing over 100,000

²³⁰ *Medecins sans Frontieres*, Ivan Gayton, ‘Living Conditions an Affront to Human Dignity in Bentiu Camp, South Sudan,’ 8 August 2014.

²³¹ *Report of the Secretary-General on South Sudan*, S/2014/821, 18 November 2014, para 76.

²³² UN Security Council Resolution 2155 of 27 May 2014, para 4.

²³³ *Ibid.* See also *Report of the Secretary-General on South Sudan*, S/2015/118, 17 February 2015, para 33, where it reported that it had ‘further enhanced efforts to deter violence against civilians beyond UNMISS premises and project its presence throughout South Sudan’ by conducting 6,048 short-duration, 99 long-duration, and 23 dynamic air patrols.’

²³⁴ *Ibid.*

²³⁵ See, for example, *Internal Displacement Monitoring Centre*, ‘South Sudan: greater humanitarian and development efforts needed to meet IDPs’ growing needs’, 9 July 2014, <http://www.internal-displacement.org/sub-saharan-africa/south-sudan/2014/south-sudan-greater-humanitarian-and-development-efforts-needed-to-meet-idps-growing-needs/>, accessed 13 January 2015.

²³⁶ *Report of the Secretary-General on South Sudan*, S/2015/296, 29 April 2015, para 20. See also *Report of the Secretary-General on South Sudan*, S/2015/118, 17 February 2015, para 24.

people.²³⁷ UNICEF also reported that boys had ‘been castrated and left to bleed to death,’ and that ‘children were bound together before having their throats slit, and while ‘others had been thrown into burning buildings.’²³⁸ The South Sudanese authorities dismissed any allegations of wrongdoing and stated that they would welcome an investigation into them.²³⁹ UNMISS responded that its human rights officers had been routinely denied access to locations of interest by the SPLA.²⁴⁰

In March 2015 the Security Council created a UN South Sudan Sanctions Committee panel of experts.²⁴¹ This claims that it has ‘conducted its work with the greatest transparency possible while maintaining, when requested or when significant safety concerns exist, the confidentiality of its sources.’²⁴² It has also ‘given relevant parties the opportunity, where appropriate and possible, to review and respond to, within a specific period, any information in its report citing those parties.’²⁴³ According to the committee guidelines, designations can come into force if none of its members object to them over a five-day period, which suggests that lessons have been learned from the controversies of the AQT Sanctions Committee.²⁴⁴

In July 2015 this Committee recommended the imposition of travel bans and assets freezes on six South Sudanese officials – three in the government and three in the opposition – as a

²³⁷ *UN News Centre*, ‘South Sudan: UN alleges ‘widespread’ human rights abuses amid uptick in fighting’, 30 June 2015. The report stated that ‘according to the testimony of 115 victims and eyewitnesses from the Unity state counties of Rubkona, Guit, Koch, Leer and Mayom, SPLA fighters also abducted and sexually abused numerous women and girls, some of whom were reportedly burnt alive in their dwellings.

²³⁸ *UNICEF Media Centre*, ‘Unspeakable violence against children in South Sudan – UNICEF chief’, 17 June 2015.

²³⁹ *UN News Centre*, ‘South Sudan: UN alleges ‘widespread’ human rights abuses amid uptick in fighting’, 30 June 2015.

²⁴⁰ *Ibid.* The Head of the Mission, Secretary-General’s Special Representative, Ellen Margrethe Løj stated that: ‘Revealing the truth of what happened offers the best hope for ensuring accountability for such terrible violence and ending the cycle of impunity that allows these abuses to continue,’ and she urged South Sudanese authorities to allow UN human rights investigators to access the sites of the alleged atrocities.

²⁴¹ Security Council Resolution 2206 of 3 March 2015.

²⁴² *Letter dated 22 January 2016 from the Panel of Experts on South Sudan established pursuant to Security Council resolution 2206 (2015) addressed to the President of the Security Council, S/2016/70*, 22 January 2016.

²⁴³ *Ibid.*

²⁴⁴ *Ibid.*

means of pressurizing them into reaching a political settlement to bring the conflict to an end.²⁴⁵ These were not the key decision-makers on either side and the decision not to initially target more senior figures partly reflected divisions within the Security Council about the effectiveness of sanctions.²⁴⁶ It was also hoped that the decision could pressurize more senior figures by signalling the Security Council's intent to target them in the future.²⁴⁷ In August 2015 both sides were persuaded to sign a peace agreement, which was welcomed by a Security Council Presidential statement.²⁴⁸ The agreement has, however, broken down repeatedly and by April 2016 there were still regular reports of continuing clashes.²⁴⁹

In its November 2014 report the mission noted that: 'UNMISS also continued separating suspects with regard to security-related incidents in holding facilities until their referral to community-led informal mitigation and dispute resolution mechanisms.'²⁵⁰ In February 2015 it was reported that the distribution of humanitarian assistance within the protection sites was proceeding effectively, 'with a few exceptions', but that there had been 'violent attempts by internally displaced youth to block humanitarian assistance to specific ethnic groups'.²⁵¹ The WFP had been forced to temporarily suspend food distribution at one site after humanitarian

²⁴⁵ *What's in Blue – Insights on the Work of the Security Council*, 'South Sudan: Human Rights Meeting and Sanctions Committee Designations', 6 July 2015. The designated individuals are Gabriel Jok Riak (SPLA Lieutenant General); Simon Gatwech Dual (SPLA in Opposition Major General); James Kuong Chuol (SPLA in Opposition Major General); Santino Deng Wol (SPLA Major General); Marial Chanuong Yol Mangok (SPLA Major General and commander of President Salva Kiir's special guard); and Peter Gadet (SPLA in Opposition Major General).

²⁴⁶ *Ibid.* See also International Crisis Group, *South Sudan: Keeping Faith with the IGAD Peace Process*, Brussels: ICG, 27 July 2015. The US, Britain and France (the P3) believed that sanctions were an effective tool of deterrence and accountability and were supported by Chile, Lithuania, New Zealand and Spain. Russia was more sceptical about sanctions and other forms of pressure. The African members of the Council – Angola, Chad and Nigeria – were divided about the timing of such sanctions, given the ongoing negotiations conducted under the auspices of African-led mediation processes. However, statements by the AU Peace and Security Council in May and June calling for sanctions helped solidify support for this limited measure.

²⁴⁷ *Ibid.*

²⁴⁸ Statement by the President of the UN Security Council on South Sudan, S/PRST/2015/16, 28 August 2015.

²⁴⁹ *What's in Blue – Insights on the Work of the Security Council*, 'South Sudan: Briefing on Developments since Peace Agreement', 3 September 2015. See also *Foreign Policy*, 'South Sudan's next civil war is starting', 22 January 2016; *Reuters*, 'South Sudan's opposition leader Machar to return to Juba in mid-April', 7 April 2016.

²⁵⁰ *Report of the Secretary-General on South Sudan*, S/2014/821, 18 November 2014, paras 12 and 35.

²⁵¹ *Report of the Secretary-General on South Sudan*, S/2015/118, 17 February 2015, para 53.

workers were assaulted.²⁵² A number of sexual assaults were also carried out near to UNMISS's protection sites, often perpetrated by government soldiers.²⁵³ In April 2015 it was reported that:

Inter-communal tensions, community leadership struggles, youth gang violence and threats against humanitarian service providers and UNMISS staff continue to pose serious challenges in many of the UNMISS protection sites. During the reporting period, a total of 410 security incidents were reported, including incidents of murder, theft, assault, domestic violence and public disorder . . . Of particular concern is sexual, gender-based and domestic violence, including the exploitation of young girls and women, by male internally displaced persons.²⁵⁴

The mission reported that it had responded by 'streamlining referral pathways with humanitarian protection partners to provide efficient emergency response services to victims of sexual, gender-based and domestic violence' as well as implementing 'conflict transformation trainings and peace dialogues' at certain sites.²⁵⁵ It also 'continued to administer four holding facilities for the temporary isolation of internally displaced persons suspected of having committed serious crimes, at the UNMISS protection sites in Juba, Bentiu, Malakal and Bor.'²⁵⁶ Initially detainees were held in makeshift detention areas, such

²⁵² Ibid.

²⁵³ Ibid. For example, three women were reportedly raped by three SPLA soldiers while they were on the way to collect firewood near one site while a 13 year old girl was reportedly raped by soldiers near another.

²⁵⁴ *Report of the Secretary-General on South Sudan*, S/2015/296, 29 April 2015, para 31.

²⁵⁵ Ibid. See also *Report of the Secretary-General on South Sudan*, S/2015/118, 17 February 2015, paras 31-2. 'Inter communal tensions, a growing number of community leadership struggles, increased youth radicalization, the use of alcohol and drugs, as well as threats against humanitarian service providers continue to pose serious challenges in many of the UNMISS protection of civilians sites. . . A total of 364 security incidents were recorded in the UNMISS protection of civilians sites during the reporting period, with theft, assault, disorderly conduct and fighting the most prevalent. Between 25 and 30 incidents were related to sexual, gender-based and domestic violence, including rape. UNMISS and humanitarian actors assisted the victims with access to health and psychological services. UNMISS police worked to identify, locate and detain the perpetrators. During search operations, UNMISS police seized prohibited items, including firearms, machetes, knives, and drugs and alcohol.'

²⁵⁶ Ibid., para 32.

as containers, which an UNMISS spokesperson admitted fell far below international standards.²⁵⁷ In May 2014 UNMISS began to erect ‘holding facilities’ and set up a fenced-in area with air-conditioned trailers, but according to a report by the Stimson Center, UN staff initially believed that they could not use force to keep detainees inside and so some simply walked out.²⁵⁸ The legal implications of this detention policy will be discussed further below.

In February 2015 the mission stated that: ‘Since the establishment of the holding facilities in May 2014, a total of 856 offenders have been temporarily detained. Most of the offenses are being handled under community-led informal mitigation and dispute resolution mechanisms. In isolated instances, offenders were expelled from the protection sites.’²⁵⁹ By April 2015 there were a total of 63 ‘suspects’ being held in these facilities, but UNMISS had ‘yet to agree with the government on a framework for the transfer of detainees to national authorities.’²⁶⁰ Some detainees had been released ‘and their cases handled under community-led informal mitigation and dispute resolution mechanisms’.²⁶¹ The report also stated that ‘nine offenders representing a significant threat to UNMISS staff and their communities were expelled from the protection site, after a detailed human rights risk assessment confirming they were not under threat of violence outside the site.’²⁶² HRW, however, claims that at least two civilians were handed over to authorities without a proper assessment of the ‘very real risks to these individuals’.²⁶³

²⁵⁷ *UN Radio*, ‘UN Mission in South Sudan Battles Crime in Its IDP Camps’, 25 January 2010.

²⁵⁸ Jenna Stern, ‘Establishing Safety and Security at Protection of Civilians Sites’, Stimson Center, September 2010, p.14.

²⁵⁹ *Report of the Secretary-General on South Sudan*, S/2015/118, 17 February 2015, para 33.

²⁶⁰ *Report of the Secretary-General on South Sudan*, S/2015/296, 29 April 2015, para 32.

²⁶¹ *Ibid.*, para 32.

²⁶² *Ibid.*, para 32.

²⁶³ Human Rights Watch, *South Sudan’s New War: Abuses by Government and Opposition Forces*, New York: HRW, 11 August 2014.

A Security Council resolution in May 2014 gave UNMISS a new mandate, focussing on its POC tasks and eliminating the mission's peace-building and state-building functions.²⁶⁴ The mission mandate continues to be extended on a bi-monthly basis.²⁶⁵

D. The 'positive obligations' of UN missions

Both UNAMID and UNMISS can claim credit for protecting the lives of hundreds of thousands of civilians who sought shelter on their bases. Indeed one of the strongest arguments that can be made for the continuation of both missions is the fear of genocide or mass killings of these civilians were this support to be precipitately withdrawn.

As discussed in Chapter Five, both domestic and international courts have ruled that they lack jurisdiction to hear challenges on the 'negative' and 'positive' obligations of UN peacekeeping missions under international human rights law. In the two cases taken against the Dutch and Belgian governments for their failure to protect lives during the genocides in Rwanda and Srebrenica, the courts were careful to distinguish between the responsibility that could be attributed to these States and that of the UN.²⁶⁶ As also discussed, however, it is widely accepted that the UN is subject to norms of *jus cogens* and that it has obligations under customary international law and from the Charter to uphold, promote and encourage respect for human rights.²⁶⁷

²⁶⁴ Security Council Resolution 2155 of 27 May 2014.

²⁶⁵ Security Council Resolution 2241 of 9 October 2015.

²⁶⁶ *Mothers of Srebrenica v. the Netherlands* ECLI:NL:RBDHA:2014:8748 (The Hague District Court), 2014; and *Mukeshimana-Ngulinzira and Others v Belgium and Others*, Court of First Instance Judgment, RG No 04/4807/A, 07/15547/A, ILDC 1604 (BE 2010) 8th December 2010. See also *Mothers of Srebrenica/Netherlands and United Nations*, District Court of the Hague, De Rechtspraak BD6795 (Neth.), 10 July 2008; and Judgment of the Supreme Court of the Netherlands, in the case of the *Mothers of Srebrenica*, First Division 10/04437, EV/AS, 13 April 2012.

²⁶⁷ Confidential note, leaked by the *New York Times*, from the UN Office of Legal Affairs to Mr. Le Roy, Head of the Department of Peacekeeping Operations, 1 April 2009, para.10.

Sheeran has noted that it simply ‘could not be that the United Nations, in carrying out its peacekeeping activities, was permitted to torture and arbitrarily execute civilians’.²⁶⁸ Alongside this ‘negative obligation’ the discussion in these two chapters has shown that the UN probably now accepts that it has a ‘positive obligation’ to take reasonable measures, within its capabilities, to protect the lives of civilians sheltering on its mission bases, at least as a matter of policy if not law. This is implicit in the UN’s most recent policy guidance on POC issued in April 2015.²⁶⁹ It has also been explicitly codified in guidance sent to all missions with POC mandates.²⁷⁰

In the absence of legal accountability, the nature and extent of its missions’ broader obligations under international human rights law are more difficult to define. The final section of this chapter, therefore, discusses what negative and positive obligations of international human rights law might potentially be applicable to UN peacekeeping missions and could be used as guidance by the UN Secretariat.

The ICJ has noted that the UN is not the functional or legal equivalent of a State and so the scope of its rights and duties, and those of its subordinate bodies, must depend upon their purposes, functions and practices.²⁷¹ It is clearly beyond the scope and powers of a peacekeeping mission to secure for everyone in its area of deployment all the rights and freedoms guaranteed by the entire corpus of international human rights law. This thesis has argued that the obligations of a POC mandate could be deemed more narrowly as a positive obligation to protect people from threats to their rights to life and physical integrity, while respecting – that is not infringing – these rights in the process. If POC is defined in this way,

²⁶⁸ Scott Sheeran, ‘A Constitutional moment: United Nations Peacekeeping in the Democratic Republic of Congo’, *International Organizations Law Review*, 8, 2011, pp.55-135.

²⁶⁹ *Policy on the Protection of Civilians in United Nations Peacekeeping*, Department of Peacekeeping Operations / Department of Field Support Ref. 2015.07, 1 April 2015.

²⁷⁰ *Lessons Learned Note on Civilians Seeking Protection at UN Compounds*, Department of Peacekeeping Operations, Department of Field Support, 2014.

²⁷¹ *Reparations for Injuries Suffered in the Service of the United Nations*, 11 April 1949, International Court of Justice, advisory opinion, ICJ Reports (1949), pp.178-9.

though, should the ‘protection’ just be from physical violence or also from arbitrary deprivations of the right to liberty or violations of basic economic, cultural such as the right to food, health, and adequate shelter? Maus, for example, has argued that ‘the delivery of humanitarian aid can easily also be considered to fall under the human rights mandate of most peace missions’ and such protection ‘cannot and must not be reduced to protection against violence and oppression, against death or torture.’²⁷²

Hundreds of thousands of IDPs in POC sites in South Sudan are currently living in appallingly squalid and life-threatening conditions. Outside of the UN’s bases, millions of people in South Sudan and Darfur live in fear of massacres, torture and rape and are denied access to life-saving humanitarian aid. After visiting some of the POC sites in South Sudan, the Executive Director of MSF Canada noted that living conditions were ‘abysmal, with water and food in continuing short supply, and most people confined to low-lying areas, which have become swamps of infestation and disease.’ He warned that people in the camps ‘suffer from violence, malnutrition and cholera’ with ‘wires and barricades designed to keep violence out, the people inside’.²⁷³ UNMISS, he concluded, had accepted a new ‘definition of protection’, which ‘appears to apply in only the most narrow sense’.²⁷⁴

As discussed in Chapter Three, the right of humanitarian access is firmly established in both IHL and international human rights law and POC mandates explicitly require UN missions to protect humanitarian aid workers delivering such assistance. Given that the majority of deaths in many conflicts where the UN is present are from conflict-related hunger and disease, rather than direct violence, the applicability of economic, social and cultural rights

²⁷² Sylvia Maus, ‘Human rights in peacekeeping missions’, Hans-Joachim Heintz and Andrej Zwitter, (eds) *International Law and Humanitarian Assistance*, Berlin: Springer, 2011, pp.112 and 116.

²⁷³ Ibid.

²⁷⁴ *Medecins sans Frontieres*, Stephen Cornish, ‘The struggle to protect civilians in South Sudan’, 29 August 2014, <http://www.msf.org/article/struggle-protect-civilians-south-sudan>, accessed 13 January 2015.

obligations in such situations is of obvious relevance.²⁷⁵ The provision of humanitarian assistance itself, however, is not a POC task and there are both principled and practical reasons for maintaining a distinction between POC and humanitarian ‘rights-based’ protection. The obligation to deliver humanitarian assistance falls firstly on the affected State²⁷⁶ and if this is unable to provide life-saving assistance it is obliged to allow access to humanitarian agencies, who have the right to offer this without it being construed as an unfriendly act.²⁷⁷ While the ICESCR contains an explicit extra-territorial obligation, this is a progressive one.²⁷⁸ There does not appear to be any obligation on the UN itself to secure a broader range of economic, social and cultural rights and nor would this be a practical or realistic requirement.

There is, however, a strong case for ensuring that the listing and de-listing procedure associated with the UN’s use of sanctions for POC purposes is made human rights-compliant. Sanctions have been imposed on leading figures within the Sudanese government in relation to atrocities committed in Darfur and while Sudan’s President remains a fugitive from international justice, it is unlikely that these will be eased. Sanctions have also been introduced, on an extremely limited basis, against some political leaders in South Sudan and as discussed above, the UN has taken steps to ensure greater transparency in the drawing up of its current sanctions. At the time of writing this thesis there have been no challenges to the procedural fairness or legality of either set of sanctions before international courts or tribunals although these could arise in the future.

²⁷⁵ *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, ICJ Advisory Opinion, ICJ Report, 9 July 2004, paras. 107–112.

²⁷⁶ Committee on Economic, Social and Cultural Rights, General Comment 3, ‘The nature of States parties obligations’, UN Doc. E/1991/23, para 10

²⁷⁷ Common Article 3 of the four Geneva Conventions; Geneva Convention IV, Articles 10, 55, 56, 59-61 and 142; Geneva Convention III, Article 9; Additional Protocol I, Articles 69, 70 and 71; and Additional Protocol II Article 18.

²⁷⁸ ICESCR, Article 2

UNMISS is also currently detaining people with no access to a court and in conditions which do not fully meet the international human rights standards discussed in Chapter Four. The mission decided that the detainees had committed offences under South Sudan law and that this was the applicable legal framework under which they should be tried and punished.²⁷⁹ It also decided, however, that there was ‘little hope that criminals of the “wrong” ethnicity would get fair treatment in South Sudan’s courts and prisons’.²⁸⁰ It was, therefore, prohibited by its own detention policy – and the prohibition of *refoulement* contained in refugee law,²⁸¹ IHL,²⁸² and international human rights law²⁸³ – from handing them over.²⁸⁴

The mission reportedly considered whether it could rely on the provisions of the Fourth Geneva Convention, requiring the occupying power to ‘maintain the orderly government of the territory’ and ensure ‘the effective administration of justice’.²⁸⁵ It decided, however, that ‘while relations between UNMISS and the Government of South Sudan no doubt reached a nadir during this period’, the legal authority of the mission still rested on host state consent.²⁸⁶ It chose instead to utilize ‘the narrow authority provided under its SOFA to maintain safety and security within its premises’ as the legal basis for its detention policy.²⁸⁷

The detainees in the PoC sites clearly are under the ‘effective control’ of the UN and the UN’s detention policy, as discussed in Chapter Five, is designed to be human rights-compliant. Yet with no access to a court or effective forms of redress if the detainees’ rights are violated, it suffers from an obvious basic lack of accountability. As also discussed, the circumstances in which the Security Council exercises its powers under Chapter VII may be

²⁷⁹ Ralph Mamiya, ‘Legal Challenges for UN Peacekeepers Protecting Civilians in South Sudan’, *American Society of International Law*, Vol. 8, Issue 26, December 2014.

²⁸⁰ *Ibid.*

²⁸¹ Refugee Convention, Article 33.

²⁸² Geneva Convention IV, Article 45.

²⁸³ UN Convention against Torture, Article 3.

²⁸⁴ *Detention in United Nations Peace Operations Interim Standard Operating Procedures*, UN Department of Peacekeeping Operations/Department for Field Support, 25 January 2011.

²⁸⁵ Geneva Convention IV, Article 64.

²⁸⁶ Mamiya, 2014.

²⁸⁷ *Ibid.*

analogous with situations in which States may need to derogate from some of their human rights obligations. This may be permissible under international human rights law, so long as the derogation satisfied requirements that the situation constitutes a genuine public emergency and that the measures taken were strictly required by the exigencies of the situation.²⁸⁸ While the right to liberty is potentially *derogable*, the rights of detained people to protection against torture and other forms of ill-treatment as well as to challenge the legal basis their detention constitute a *non-derogable core*.²⁸⁹ UNMISS, therefore, needs to create a detention review procedure, based on international human rights law to become compliant with obligations that it appears already to accept as a matter of policy.

Neither UNAMID nor UNMISS have become a party to their respective conflicts, so it appears that if they do use force in self-defence, or defence of their POC mandate, the provisions of international human rights law – as discussed in Chapter Four – would be more applicable than IHL. Again, however, there is no way of legally reviewing this and balancing the ‘positive’ and ‘negative’ obligations governing the use of lethal force. Indeed there appear to be many cases where missions arguably should have used force to protect civilians but failed to do so. As discussed in Chapter Three existing guidance appears to be that missions should interpret their authority to use force through the legal framework provided by IHL, but, in doing so must also ‘reflect and uphold the principles of UN peacekeeping, namely, consent of the host government and the main parties to the conflict, impartiality, and

²⁸⁸ Article 4 of the ICCPR; Article 15 of the ECHR; and Article 27 of the ACHR provide, in certain strictly defined circumstances, that States may derogate from certain specified obligations, to the extent that is strictly required by the exigencies of the situation. The African Charter contains no emergency clause and therefore allows no such derogation. Ireland, the UK and Turkey have derogated in relation to violence arising out of the situations in Northern Ireland and South East Turkey. See ECtHR *Lawless v. Ireland*, Appl. No. 332/57, Judgment 1 July 1961; *Ireland v UK*, Appl. No. 5310/71, Judgment 18 January 1978; *Brogan and others v. UK*, Appl. No. 11209/84, Judgment 29 November 1988.

²⁸⁹ ECtHR *Aksoy v. Turkey*, Appl. No. 21987/93, Judgment 18 December 1996; Inter-Am Ct HR, Habeas Corpus in Emergency Situations (American Convention on Human Rights Arts 27(2), 25(1) and 7(6)), Advisory Opinion OC-8/87. 30 January 1987, (Ser. A) No. 8 (1987); *Brannigan and MacBride v. UK* Appl. No. 14553-4/89, Judgment 24 May 1993. Human Rights Committee, General Comment No. 29 States of emergency, CCPR/C/21/Rev.1/Add.11 31 August 2001.

the non-use of force except in self-defense and defense of the mandate'.²⁹⁰ In practice this is often a recipe for confusion and inertia.

Both IHL and international human rights law contain requirements to 'ensure respect' for their provisions, which includes through carrying out effective investigations of violations.²⁹¹

Military commanders are obliged, under IHL, to exert their influence to stop violations by third parties through, for example, investigating violations and prosecuting perpetrators.²⁹²

International human rights law has set down more detailed principles regarding official investigations into allegations of torture and the use of lethal force and has stated that deficiencies in these could themselves constitute a violation of these rights.²⁹³ These obligations continue to apply 'in difficult security conditions, including in a context of armed conflict'.²⁹⁴ Even when a killing has been carried out by a private individual there is a duty on the State 'to use the means at its disposal to carry out a serious investigation of violations committed within its jurisdiction, to identify those responsible, to impose the appropriate punishment and to ensure the victim adequate compensation.'²⁹⁵

²⁹⁰ *Draft Operational Concept on the Protection of Civilians in United Nations Peacekeeping Operations*, New York: Department of Peacekeeping Operations–Department of Field Support, 2010.

²⁹¹ Common Article 1 of the four Geneva Conventions requires States to 'respect and ensure respect' for the Conventions in 'all circumstances'. Article 2(1) of the ICCPR states that: 'Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognised within the present Covenant without distinction of any kind.' Article 1 of the ECHR obliges contracting parties to 'secure to everyone within their jurisdiction the rights and freedoms' contained in the Convention, while Article 1 of the ACHR obliges State parties to 'undertake to respect the rights and freedoms recognized herein and to ensure to all persons subject to their jurisdiction.'

²⁹² Additional Protocol I, Article 87.

²⁹³ See, for example, ECtHR: *Kelly and Others v. the United Kingdom*, Appl. No. 30054/96, Judgment of 4 May 2001, paras 94-98; Inter-American Court of Human Rights: *Velásquez-Rodríguez v. Honduras* (1988) Series C No. 4 [Merits], paras 159-88 and 194; Human Rights Committee, General Comment 31, para 15; Committee against Torture: *Nikoli and Nikoli v. Serbia and Montenegro* (2005) UN Doc CAT/C/35/D/174/2000, UN Basic Principles, Use of Force and Firearms 1990, Article 22; and Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions, Article 9.

²⁹⁴ ECtHR: *Al-Skeini and Others v. UK*, Appl. No. 55721/07, Judgment (Grand Chamber) 7 July 2011, para 164. See also *Kaya v. Turkey*, Appl. No. 22729/93, Judgment 19 February 1998, para 9; *Jularić v. Croatia*, Appl. No. 20106/06, Judgment 20 January 2011 and *Skendžić and Krznarić v. Croatia*, Appl. No. 16212/08, Judgment 20 January 2011.

²⁹⁵ Inter-American Court of Human Rights *Velásquez-Rodríguez v. Honduras* (1988) Series C No. 4 [Merits]; ECtHR: *Finucane v UK*, Appl. No. 29178/95, Judgment, 1 July 2003, para 84. See also *Osmanoglu v. Turkey* Appl. No. 488804/99, Judgment 24 January 2008, para 75; and *Koku v. Turkey*,

These obligations are primarily intended to apply to States regulating the conduct of their own security forces and it is not suggested that they impose a legal obligation on UN peacekeeping missions to investigate every alleged violation of IHL or international human rights law in the territories to which they have been deployed. Missions are, however, legally obliged to cooperate with the ICC through, for example, facilitating investigations by the ICC prosecutor²⁹⁶ and it is difficult to see how UNAMID's actions and inactions have been compatible with this requirement. The UN already deploys human rights officers on its missions with POC mandates and their mandated tasks include monitoring for violations. The international legal standards of what constitutes an effective investigation could usefully be included in the guidance that the UN produces on the POC responsibilities of missions and be backed up with disciplinary procedures when these are breached.

As was discussed in Chapter Five, the UN has also pledged to put in place community-based mechanisms as part of a framework to provide where people can more readily come forward to raise complaints' about sexual abuse and exploitation by UN peacekeepers.²⁹⁷ It is also noteworthy that the Secretary General specifically referred to Human Rights Up Front in response to criticisms of UNAMID, when promising to provide 'additional guidance' to all missions 'on the fulfilment of their reporting obligations, particularly with regard to human rights and the protection of civilians.'²⁹⁸ UNMIS and UNAMID have operated in a highly politicized environment that had a particularly negative impact on their performance and better legal guidance is no substitute for greater political will. They do, however, highlight

Appl. No. 27305/95, Judgment 31 May 2005, para 132; and General Comment 31 of the Human Rights Committee, paras. 15 and 18..

²⁹⁶ Negotiated Relationship Agreement between the International Criminal Court and the United Nations, 4 October 2004, Article 18.

²⁹⁷ *The future of United Nations peace operations: implementation of the recommendations of the High-level Independent Panel on Peace Operations, Report of the Secretary-General, A/70/357–S/2015/682*, 2 September 2015, paras 119–23.

²⁹⁸ *Letter dated 29 October 2014 from the Secretary-General addressed to the President of the Security Council. Annex 'Executive summary of the report of the review team on allegations of manipulation of reporting on Darfur'. S/2014/771*, 29 October 2014

why the UN needs to make greater efforts to ensure its mission make ‘human rights and the protection of civilians’ a ‘system-wide core responsibility’²⁹⁹

²⁹⁹ Human Rights Up Front, <http://www.un.org/sg/rightsupfront/>, accessed 30 July 2015.

Conclusions

In March 2013 two Congolese human rights NGOs released a statement in response to the formation of the Intervention Brigade calling on MONUSCO to strengthen its existing mechanisms to protect human rights in the country.¹ The statement insisted that POC should remain a priority for the mission and stated that if the UN ‘truly believes that such an intervention brigade is the best hope of reducing the threat posed by armed groups in Eastern DRC, MONUSCO’s mandate must also include provisions to mitigate against the increased risks that communities will face.’² The mission should improve its communication with the civilian population, ‘which has been insufficient and ineffective up until now’ and ‘collaborate with communities at risk to gain their trust and identify their needs’.³ It should also ‘continue monitoring and reporting on the human rights situation in the DRC, and to support national and international efforts for the fight against impunity, including those of the International Criminal Court, to bring to justice perpetrators of serious human rights abuses and violations of international humanitarian law.’⁴

These demands fall a long way short of full legal accountability under international human rights law and the right of alleged victims to an effective remedy. As discussed throughout this thesis, however, a variety of *ad hoc* mechanisms already exist or are currently being developed to provide some form of redress to those who believe that the UN has violated their rights. What is missing is clear overall guidance – perhaps in the form of a Secretary General’s Bulletin – indicating how the UN believes international human rights law applies to its peacekeeping operations and setting out the obligations that this entails. Monitoring

¹ *FIDH News Release* ‘DRC: An intervention brigade within MONUSCO would require further human rights protection mechanisms’, 27 March 2013 <https://www.fidh.org/International-Federation-for-Human-Rights/Africa/democratic-republic-of-congo/DRC-An-intervention-brigade-within-MONUSCO-would-require-further-human-13106>, accessed 27 April 2015.

² *Ibid.*

³ *Ibid.*

⁴ *Ibid.*

mechanisms also need to be established which could receive individual complaints and issue advisory opinions on the compliance of missions with these obligations. Disciplinary action should be taken against senior mission or headquarters staff who fail to fulfil their mandated obligations to protect civilians.

In his dissenting opinion in *Namibia*, Judge Fitzmaurice observed that: ‘It was to keep the peace, not to change the world order, that the Security Council was set up’.⁵ As discussed in this thesis, however, the Security Council is increasingly using its Chapter VII powers to determine that ‘threats to international peace and security’ can include a far wider range of issues than was ever originally envisaged by the drafters of the UN Charter. As its responsibilities have increased the lack of effective accountability mechanisms over the Council’s decision-making has become increasingly problematic.

Part I of this thesis traced the evolving relationship between POC and peacekeeping to show how the concept has been increasingly integrated into the mandated tasks of many UN peacekeeping missions. As the Secretary General’s 2009 report on POC noted, a decade previously ‘members of the Security Council questioned whether situations of internal armed conflict constituted a threat to international peace and security’, but that this was now ‘firmly recognized’ by all Security Council members.⁶ It would, therefore, seem that there is now sufficient *opinio juris* and state practice for POC to be considered as an emerging norm in international law.

These mandates have proved challenging to implement, partly because of a lack of agreement within the UN system as a whole about what is actually meant by the term ‘protection’.

⁵ *Legal consequences for States of the Continued Presence of South Africa in Namibia notwithstanding Security Council Resolution 276 (1970)*. Advisory Opinion, Dissenting Opinion, Sir Gerald Fitzmaurice, ICJ Reports (1971) 294.

⁶ *Report of the Secretary-General to the Security Council on the Protection of Civilians in Armed Conflict*, 29 May 2009, S/2009/277, para3.

Some missions, at least initially, interpreted their POC mandates in humanitarian ‘rights-based’ terms and were extremely reluctant to use force for POC purposes or to fully investigate and report on egregious violations of international human rights and IHL lest this led to loss of state consent for the mission’s deployment. Broader divisions within the Security Council over the ‘responsibility to protect’ (R2P) and ‘humanitarian interventions’, may also have weakened the political support provided to some missions in implementing their POC mandates.

Another difficulty in operationalizing POC mandates is a lack of clarity about the legal framework governing the use of force by uniformed peacekeeping personnel, which was discussed in more detail in Part II of this thesis. The UN Secretary General’s Bulletin on the applicability of IHL in 1999 was issued two months before the Security Council gave its first POC mandate to a mission.⁷ Much of the guidance produced by DPKO seems to be based on the assumption that the use of force for POC purposes will be regulated by IHL provisions, but that these should be applied consistently with the ‘core principles’ of neutrality, consent and minimum use of force.⁸ This has led to ‘considerable confusion’ about how and when force can and should be used for protective purposes.⁹ For example, General Gaye, DPKO’s former Military Adviser for Peacekeeping Operations, and former head of the UN mission to the Central African Republic (MINUSCA), while arguing, in 2013, that it ‘may be necessary’ for the UN to ‘become a party to the conflict’ in the DRC stated in the same interview that:

⁷ *Secretary General’s Bulletin, Observance by UN Forces of International Humanitarian Law*, ST/SGB/1999/13, 6 August 1999; and Security Council Resolution 1270 of 22 October 1999.

⁸ See, for example, *United Nations Peacekeeping Operations, Principles and Guidelines*, New York: Department of Peacekeeping Operations, 2008, p. 15; *United Nations Infantry Battalion Manual Volume I*, Department of Peacekeeping Operations/ Department of Field Support, August 2012, pp.50 and 102; and ‘UN Tactical Level Protection of Civilians Training Modules’, Peacekeeping Resources Hub, <http://peacekeepingresourcehub.unlb.org/pbps/Pages/Public/viewdocument.aspx?id=2&docid=1368>, accessed 10 March 2014.

⁹ *Evaluation of the implementation and results of protection of civilians mandates in United Nations peacekeeping operations* Report of the Office of Internal Oversight Services, UN Doc A/68/787, 7 March 2014, para 52.

A peacekeeping force is not a war machine. From the semantic viewpoint, the expression ‘peacekeeping’ can give rise to no misunderstanding. Whatever the adjective attached to it—‘friendly’, ‘robust’, etc.—it is still keeping the peace!¹⁰

As was discussed in Chapter Six, it appears that MONUSCO did in fact become a party to the conflict it was sent to try and help to resolve in the DRC. This was recognized by the Security Council when it authorized ‘offensive operations’ to ‘neutralize’ armed opposition groups,¹¹ and when it implicitly recognized that MONUSCO peacekeeping soldiers no longer enjoyed legal protection against attacks.¹² While some have argued that this should be a model for future UN peace operations, others are strongly opposed to using it as a precedent and the High Level Panel report of 2015 urged ‘extreme caution’ before other missions were given such mandates.¹³

If UN peacekeeping missions do not become a party to the conflict, however, it is difficult to see how IHL could provide the appropriate legal framework governing the use of force for POC purposes. In such circumstances, it is submitted that, international human rights law appears to provide more appropriate guidance. As discussed in Chapter Four, this may be concurrently applicable with IHL and does impose obligations when States exercise power or effective control over people not situated within their territory. While the extent to which the UN considers itself bound by the provisions of international human rights law remains unclear, a growing number of reports, resolutions and statements do accept that it imposes obligations on the Organization. This includes internal advice by the UN Office of Legal

¹⁰Interview with Lieutenant General Babacar Gaye United Nations Military Adviser for Peacekeeping Operations’, *International Review of the Red Cross*, Volume 95 Number 891/892 Autumn/Winter 2013, p.492

¹¹ UN Security Council Resolutions 2098, 28 March 2013; 2147, of 28 March 2014 and 2211 of 26 March 2015.

¹² *UN News*, ‘Security Council Press Statement on Democratic Republic of Congo’, 29 August 2013. The press release stated that ‘intentionally directing attacks against personnel, installations, material, units or vehicles involved in a 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, constitutes a crime under international law.’

¹³ Report of the High Level Panel on Peace Operations, 2015, para 116-9.

Affairs in 2009, the endorsement of the ‘human rights due diligence policy’ by the UN General Assembly and Security Council in 2013 and the launching of the Human Rights Up Front the same year. Security Council resolutions have also called on some UN-authorized operations, such as the missions in Somalia and Mali, to comply with international human rights law.¹⁴ The most recent policy guidance on POC issued by DPKO in 2015 states that:

Protection of civilians mandates are a manifestation of the international community’s determination to prevent the most serious violations of international human rights, humanitarian and refugee law and related standards, and they should be implemented in both the letter and spirit of these legal frameworks. The POC mandate is therefore complementary to and reinforces the mission’s mandate to promote and protect human rights. When using force peacekeeping operations must abide by customary international law, including international human rights and humanitarian law, where applicable.¹⁵

Security Council mandates have also become increasingly detailed in spelling out the POC tasks of missions and calling for their prioritization. In 2009 it stressed, for all missions, that ‘mandated protection activities must be given priority in decisions about the use of available capacity and resources, including information and intelligence resources, in the implementation of mandates’ and recognized, that POC ‘requires a coordinated response from all relevant mission components’.¹⁶ Nevertheless, as the OIOS Protection Evaluation of 2014 noted, it is widely perceived that ‘gaps’ remain at the tactical level on ‘how to respond to complex and ambiguous situations that might require the use of force.’¹⁷

¹⁴ Security Council Resolution 2100 of 25 April 2013, para 24; and Security Council Resolution 2093 of 6 March 2013, para 12.

¹⁵ DPKO/DFS *Policy on the Protection of Civilians in United Nations Peacekeeping*, Ref. 2015.07, 1 April 2015, p.5-6.

¹⁶ Security Council Resolution 1894 of 11 November 2009, para 19.

¹⁷ *Evaluation of the implementation and results of protection of civilians mandates in United Nations peacekeeping operations* Report of the Office of Internal Oversight Services, UN Doc A/68/787, 7 March 2014, para 52.

Such decisions will, in fact, have to be primarily based on the judgement of individual commanders in the field. Attempting to provide central guidance to cover each individual scenario could even be counter-productive, since there will always be situations that could not have been foreseen and in which mission personnel will need to use their own initiative.¹⁸ What is most important is for everyone who serves in such a mission to be aware that they are under a 'positive obligation' to provide protection, based on reasonable judgement about how to do so, and a clear understanding of the legal framework within which mission personnel are permitted, or even required, to use force. The central point of a POC mandate can be easily understood and comprehensively explained as analogous to the positive obligations to protect people from threats to their rights to life and physical integrity, while respecting – that is not infringing – these rights in the process.

The provisions of international human rights law regarding the right to life and protection against torture, and other forms of ill-treatment, have been developed through international jurisprudence and soft-law instruments. These specify that lethal force can be used for protective purposes, but only as a last resort, when strictly necessary, and its use should be proportionate to the sought objective. A positive obligation arises if the appropriate authorities knew, or ought to have known at the time, of the existence of a real and immediate risk to civilians and failed to take measures within the scope of its powers which, judged reasonably, might be expected to have avoided or ameliorated the risk. It also requires the appropriate authorities to exercise due diligence to prevent, punish, investigate or redress the harm caused by such acts, even when carried out by private persons or entities.

¹⁸ The author of this thesis was the main author of UNDPKO's scenario-based protection training and the facilitators notes stress that discussions of such scenarios should aim to explore the options and issues involved, while stressing certain core principles, rather than providing 'answers' to be handed out like instructions.

During a ‘public emergency which threatens the life of the nation’, it is possible for States to derogate from certain rights, but unless and until they do so even *derogable* rights remain applicable. Each derogation, for each right, must be justified by the extent that is strictly required by the exigencies of the situation. Some rights, including protections against torture and the right to life, are considered so fundamental that they are *non-derogable*. Others, such as the right to liberty, have a potentially *non-derogable* core.

As discussed in Chapter Five, the situations in which the Security Council exercises its powers under Chapter VII may be analogous with situations in which States may need to derogate from some of their human rights obligations. If this is accepted then applying the standards of international human rights law to UN peacekeeping missions with POC mandates could be based on principles similar to the presumptions set out by Rodley in *Sayadi and Vinck*. These are that when the Security Council authorizes missions to use force for protective purposes, it does not intend them to violate peremptory norms of international human rights law (*jus cogens*) or *non-derogable* rights, which are not *jus cogens* and that it does intend them to abide by the principles of necessity and proportionality should it require derogations. As Lauterpacht noted in the *Bosnia Genocide*, provisional measures, even the Security Council’s decisions are subject to norms of *jus cogens*.¹⁹ Wood has also observed that while there is still debate about which norms have attained *jus cogens* status, it ‘seems inconceivable’ that the Council would impose an obligation to contravene such norms.²⁰

Yet, as discussed in Part III of this thesis, UN peacekeeping missions have frequently failed to intervene to protect civilians against mass killings. They have sometimes failed

¹⁹ *Further Requests for the Indication of Provisional Measures, Order of 13 September 1993*, Separate Opinion of Judge Lauterpacht paras 89 – 97, ICJ Report 2007.

²⁰ Michael Wood, ‘The UN Security Council and International Law’. Second lecture: ‘The UN Security Council and International Law’, *Hersch Lauterpacht Memorial Lectures*, Lauterpacht Centre for International Law, University of Cambridge, 8 November 2006, para 45.

fully to investigate and report on egregious violations of IHL and international human rights law committed by host state forces. On at least one occasion, a mission provided logistical support to national forces that carried out grave violations of IHL and international human rights law. On another a mission provided transport facilities to a senior government official under indictment by the ICC. Missions have also detained people without access to a court and there are currently no independent mechanisms by which those who suffer human rights violations as a result of the actions or inactions of these missions can obtain effective redress from the UN itself. Individual sanctions issued for POC purposes have also been overturned on human rights grounds.

POC itself developed in a largely reactive process out of discussions on the Security Council on the experiences of UN peacekeeping missions, informed by reviews and ‘lessons learned’ exercises carried out by the UN Secretariat and the missions themselves. Indeed POC’s normative significance derives from the fact that the Security Council has been endorsing practices developed in the field rather than abstract statements of principle about ‘responsibility’ and ‘protection’. One measure of its progress is that – in contrast with its abdication during the genocides in Rwanda and at Srebrenica – the UN feels at least under a moral obligation to protect the civilians currently sheltering on its bases in Darfur and South Sudan. Nevertheless, the lack of clear guidance about the legal framework within which the UN expects its peacekeeping missions to act, particularly when using force for protective purposes, contributes to a fatal ambiguity about the tasks involved. When civilians fleeing violent conflict encounter UN troops with a POC mandate it is not unreasonable that they should consider themselves actually entitled to physical protection and that the UN should consider itself legally obliged to provide this.

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