

The protection of civilians mandate in UN peacekeeping operations: reconciling protection concepts and practices

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Abstract

The ‘protection of civilians’ mandate in United Nations (UN) peacekeeping operations fulfils a critical role in realising broader protection objectives, which have in recent years become an important focus of international relations and international law. The concepts of the ‘protection of civilians’ constructed by the humanitarian, human rights and peacekeeping communities have evolved somewhat separately, resulting in disparate understandings of the associated normative bases, substance and responsibilities. If UN peacekeepers are to effectively provide physical

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protection to civilians under threat of violence, it is necessary to untangle this conceptual and normative confusion. The practical expectations of the use of force to protect civilians must be clear, and an overarching framework is needed to facilitate the spectrum of actors working in a complementary way towards the common objectives of the broader protection agenda.

Keywords: protection of civilians, peacekeeping, United Nations, international humanitarian law, international human rights law, responsibility to protect.

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The protection of civilians has in recent years become an important focus of international relations and international law, particularly in the context of United Nations (UN) peacekeeping operations. It is often at the heart of international debates on responding to major conflicts, as evidenced in the ongoing discourse on the situations in Syria, Mali and the Central African Republic.¹ Yet despite the international attention being focused on protection issues, the normative bases, content and responsibilities associated with practical implementation remain contested, with disparate usage of the protection lexicon in international law and across humanitarian, human rights and peacekeeping communities. The concept has come to encompass a wide range of rights and obligations under *jus ad bellum*, the UN Charter, international humanitarian law (IHL) and international human rights law (IHRL), as well as a spectrum of activities including the use of force for the physical defence of civilian populations, aspects of humanitarian action and human rights monitoring, reporting and advocacy. The fragmented conceptions and lack of strategic coherence has, at times, negatively impacted the practical implementation of protection mandates, with protection actors sometimes working at cross purposes.

The UN peacekeeping protection of civilians mandate fulfils a critical role in realising overarching objectives of civilian protection, and yet, partly due to the proliferation of competing 'protection' concepts, there remains a lack of clarity on the normative framework and practical substance of the mandate. As a result, the peacekeeping mandate is at risk of being diluted, and the potential focus and effectiveness of the use of force to protect civilians undermined.

This article will review the historical development of the protection of civilians mandate in UN peacekeeping operations. It will examine the treatment of civilian protection issues under relevant bodies of international law, and explore the competing concepts constructed by the humanitarian, human rights, and peacekeeping communities. It will then move on to examine some of the practical

1 Security Council Meeting Record S/PV.7019, 19 August 2013; Security Council Meeting Record S/PV.6985, 25 June 2013; Security Council Meeting Record S/PV.7098, 22 January 2014; *Cross-Cutting Report 2013 No. 3: Protection of Civilians*, Security Council Report, 20 December 2013, pp. 11–12, available at: www.securitycouncilreport.org/protection-of-civilians/. All internet references were last visited in February 2014.

challenges manifesting due to the differing concepts of protection. The article proposes reconciling the spectrum of concepts and activities in an overarching framework, and refocusing the protection of civilians peacekeeping mandate on physical protection from imminent violence.

Historical development of the protection of civilians mandate

UN peacekeeping operations were originally conceived as interpositional military forces deployed to carry out observation and ceasefire monitoring.² The end of the Cold War heralded a quantitative and qualitative shift, with many more peacekeeping missions deployed and the range of tasks significantly expanded. Where early peacekeeping missions had sought to freeze a conflict, the next generation of peace operations sought to address the root causes through peacebuilding activities, including electoral assistance, promotion of human rights, disarmament, demobilisation and reintegration of combatants, security sector reform, and other rule of law-related activities.³

Due to growing international concern with the humanitarian situation in several countries, spurred by the ‘CNN effect’,⁴ a number of UN missions were deployed into less permissive environments of ongoing internal conflict with a mandate to use force to ensure a safe and secure environment and to support the delivery of humanitarian assistance.⁵ There were several high-profile failures to protect civilians during the early to mid-1990s, including in Rwanda and the former Yugoslavia.⁶ It was not until 1999 that the first UN peacekeeping mission was specifically mandated to use force ‘to protect civilians’, a mandate that has been provided to almost all UN peacekeeping missions established since.⁷ Yet the origins

2 For example, UN Emergency Force (UNEF I), 1956–1967; UN Observation Group in Lebanon (UNOGIL), 1958; UN Force in Cyprus (UNFICYP), 1964–present; UN Emergency Force II (UNEF II), 1974–1979; UN Disengagement Observer Force (UNDOF), 1974–present; and UN Interim Force in Lebanon (UNIFIL), 1978–present.

3 For example, UN Angola Verification Mission II (UNAVEM II), 1991–1995; UN Mission for the Referendum in Western Sahara (MINURSO), 1991–present; UN Observer Mission in El Salvador (ONUSAL), 1991–1995; UN Transitional Authority in Cambodia (UNTAC), 1992–1993; UN Operation in Mozambique (ONUMOZ), 1992–1994; UN Assistance Mission in Rwanda (UNAMIR), 1993–1996.

4 The ‘CNN effect’ refers to the broadcasting of images of suffering populations, which caused democratic constituencies to put pressure on their governments to ‘do something’. See Piers Robinson, *The CNN Effect: The Myth of News, Foreign Policy and Intervention*, Routledge, London and New York, 2002.

5 Examples include UN operations in Somalia (UNOSOM I and II), the former Yugoslavia (UNPROFOR) and Haiti (UNMIH).

6 See the Report of the Secretary-General Pursuant to General Assembly Resolution 53/35: The Fall of Srebrenica, A/54/549, 15 November 1999, para. 49; and Report of the Independent Inquiry into the Actions of the United Nations during the 1994 Genocide in Rwanda, S/1999/1257, 16 December 1999, paras. 50–52.

7 The only UN peacekeeping operation deployed since 1999 without a protection of civilians mandate was the UN Supervision Mission in Syria (UNSMIS), which was established to monitor a cessation of armed violence and to monitor and support the full implementation of the Joint Special Envoy’s six-point plan to end the conflict in Syria: see SC Res. 2043, 14 April 2012, available at: www.un.org/en/peacekeeping/documents/six_point_proposal.pdf.

of the protection of civilians mandate in UN peacekeeping are deeper and richer, reaching back almost to the beginning of UN peacekeeping itself.

UN peacekeeping operations have been involved in the protection of civilians since the deployment of the UN Operation in the Congo (ONUC) in 1960. ONUC Operational Directive No. 8 asserted:

Where feasible, every protection will be afforded to unarmed groups who may be subjected by any armed party to acts of violence likely to lead to loss of life. In such cases, UN troops will interpose themselves, using armed force if necessary, to prevent such loss of life.⁸

However, the ONUC deployment was exceptional. As a result of the escalating conflict, the activities of the UN forces bordered on war-fighting. The resulting political and financial strains placed on the organisation acted against the deployment of similarly expansive and robust operations for some time.⁹

The UN Protection Force established in 1992 and deployed to the former Yugoslavia (UNPROFOR) was the UN's first peacekeeping mission to make a concerted attempt to protect civilians, although it was not mandated or resourced to provide direct physical protection to the civilian population.¹⁰ UNPROFOR proceeded with an indirect civilian protection strategy based on two components: protection through the delivery of humanitarian assistance, and protection through the demilitarisation and defence of territory ('safe areas'). At the height of its mandate, UNPROFOR was authorised to use force in three main situations: to 'deter attacks against the safe areas'; to 'ensure the freedom of movement of UNPROFOR'; and to 'protect humanitarian convoys'.¹¹ There was however no specific 'protection of civilians' mandate, and UNPROFOR's authorisation to use force was presented as *acting in self-defence*.

Following the delivery of reports on the UN peacekeeping failures in Bosnia¹² and Rwanda¹³ in the 1990s, the Security Council embarked upon

8 Operations Directive No. 8 (untitled), February 1961, UN Archives DAG/13/1.6.5.0.0; Operations Directives August 1960–January 1964, Box 3, pp. 2–3; and Trevor Findlay, *The Use of Force in UN Peace Operations*, Oxford University Press, New York, 2002, Appendix 2.

9 See William J. Durch (ed.), *The Evolution of UN Peacekeeping*, St. Martin's Press, New York, 1993, pp. 315–351; Alex J. Bellamy and Paul Williams, *Understanding Peacekeeping*, 2nd ed., Polity Press, Cambridge, 2010, pp. 86–87; and International Court of Justice (ICJ), *Certain Expenses of the United Nations (Article 17, Paragraph 2 of the Charter)*, Advisory Opinion, *ICJ Reports* 1962, p. 151. On peacekeeping and war fighting, see Katarina Månsson, 'Use of force and civilian protection', in *International Peacekeeping*, Vol. 12, No. 4, 2005, pp. 503–504; Derek Bowett, *United Nations Forces*, Stevens & Sons, London, 1964, pp. 196 and 683.

10 See William J. Durch and James A. Schear, 'Faultlines: UN operations in the former Yugoslavia', in W. J. Durch, *UN Peacekeeping, American Policy, and the Uncivil Wars of the 1990s*, St. Martin's Press, New York, 1996, pp. 197–202; and T. Findlay, above note 8, pp. 219–272.

11 SC Res. 743, 21 February 1992; SC Res. 758, 8 June 1992; SC Res. 776, 14 September 1992; SC Res. 836, 4 June 1993; T. Findlay, above note 8, pp. 221–231.

12 Report of the Secretary-General Pursuant to General Assembly Resolution 53/35: The Fall of Srebrenica, A/54/549, 15 November 1999, para. 49; Report of the Independent Inquiry into the Actions of the United Nations during the 1994 Genocide in Rwanda, S/1999/1257, 16 December 1999, paras. 50–52.

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

a programme of thematic activity,¹⁴ examining civilian protection issues and determining measures to increase UN involvement in their resolution. It also began using UN peacekeeping operations as a tool to address protection concerns. In 1999, the Security Council mandated the UN Mission in Sierra Leone (UNAMSIL) to ‘take the necessary action . . . 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 and ECOMOG [the Economic Community of West African States Monitoring Group]’.¹⁵ The language used in the UNAMSIL mandate resolution set a precedent that has been employed in most subsequent UN peacekeeping missions.¹⁶ The meeting records from the Security Council debate preceding the adoption of the protection of civilians mandate for UNAMSIL demonstrate recognition, on the part of the Security Council members, that the mandate represented the advent of a new dimension of UN peacekeeping operations. Security Council members demonstrated *express intent* that UN peacekeepers be mandated to use force to provide direct physical protection to civilians. For example, during the debate, the Argentinean delegation stated:

[T]he protection of civilians under Chapter VII [of the Charter] is a pertinent development in the context of the mandate of a peace operation. This draft resolution is significant in that it introduces a new, fundamental political, legal and moral dimension. This bears on the credibility of the Security Council and shows that the Council has learned from its own experience and that it will not remain indifferent to indiscriminate attacks against the civilian population.¹⁷

Despite the protection of civilians mandate being consistently provided to UN peacekeeping missions from 1999 onward, the clarity of purpose demonstrated in the early Security Council debates dissipated. In the absence of operational guidance for implementation, the mandate became open to the widely varying interpretations

14 The agenda of the UN Security Council encompasses country and regional issues, as well as thematic and general issues. Thematic issues addressed by the Council include ‘Women, Peace and Security’, ‘Children and Armed Conflict’ and ‘Protection of Civilians’.

15 SC Res. 1270, 22 October 1999, operative para. 14.

16 MONUC (Democratic Republic of the Congo) protection of civilians language was added to the mandate in SC Res. 1291, 24 February 2000, operative para. 8; UNMIL (Liberia): SC Res. 1509, 19 September 2003, operative para. 3(j); UNOCI (Côte d’Ivoire): SC Res. 1528, 27 February 2004, operative para. 6(i); MINUSTAH (Haiti): SC Res. 1542, 30 April 2004, operative para. 7(D)(f); ONUB (Burundi): SC Res. 1545, 21 May 2004, operative para. 5; UNMIS (Sudan): SC Res. 1590, 24 March 2005, operative para. 16(i); UNIFIL (Lebanon) protection of civilians language was added to the mandate in SC Res. 1701, 11 August 2006, operative para. 12; UNAMID (Darfur) protection of civilians language was in the original mandate, SC Res. 1769, 31 July 2007, operative para. 15(a)(2); MINURCAT (Chad and Central African Republic) protection of civilians language was added to the mandate in SC Res. 1861, 14 January 2009, operative para. 7(a)(i); MONUSCO (Democratic Republic of the Congo) protection of civilians language was in the original mandate, SC Res. 1925, 28 May 2010, operative paras. 11 and 12(a); UNISFA (Abyei), SC Res. 1990, 27 June 2011, operative para. 3(d); UNMISS (South Sudan): SC Res. 1996, 8 July 2011, operative para. 3(b); MINUMSA (Mali): SC Res. 2100, 25 April 2013, operative para. 16(c)(i). The exceptions are the UN missions in East Timor (UNTAET, UNMISSET, UNMIT), Ethiopia and Eritrea (UNMEE), and Syria (UNSMIS).

17 Security Council Meeting Record S/PV.4054, 22 October 1999, p. 16.

of senior mission leadership on the ground,¹⁸ and many peacekeeping missions that had been provided with the mandate were unable to implement it in any meaningful way. The focus of international debates on the political and security aspects of the protection of civilians were channelled into the overarching normative dilemmas associated with the concept of the 'Responsibility to Protect'.¹⁹

It was not until 2007, following the significant failures of UN peacekeeping missions to protect civilians, particularly in the Democratic Republic of the Congo (DRC),²⁰ that focus returned to the protection of civilians mandate. In response to such failures, the Security Council began to explicitly prioritise protection efforts in several UN peacekeeping missions, such as those deployed to Darfur (UNAMID),²¹ the DRC (MONUC),²² Chad and the Central African Republic (MINURCAT)²³, and more recently, South Sudan (UNMISS)²⁴ and Liberia (UNMIL).²⁵ Highlighting the importance of peacekeeping in furthering the overarching protection agenda, the thematic resolutions on the protection of civilians in armed conflict adopted between 2007 and 2011 focused to a large extent on the implementation of protection mandates in UN peacekeeping operations, stressing that protection activities should be given priority in resource allocation.²⁶

Momentum on the issue also grew in other fora. In the General Assembly, the Special Committee on Peacekeeping Operations (commonly known as the C34) included language on the protection of civilians in the report of its 2009 regular session and every subsequent annual report.²⁷ During this time, the UN Department of Peacekeeping Operations (DPKO) and Department of Field Support (DFS) undertook several major projects to support the effective implementation of the protection of civilians mandate. These included the joint commissioning, with the Office for the Coordination of Humanitarian Affairs, of a comprehensive study

18 Victoria Holt and Glyn Taylor, *Protecting Civilians in the Context of UN Peacekeeping Operations: Successes, Setbacks and Remaining Challenges*, independent study jointly commissioned by the Department of Peacekeeping Operations (DPKO) and the Office for the Coordination of Humanitarian Affairs (OCHA), United Nations, 2009, pp. 8 and 160–172.

19 The Responsibility to Protect (RtoP or R2P) is a principle of international security and human rights to address the international community's failure to prevent and stop genocides, war crimes, ethnic cleansing and crimes against humanity. See International Commission on Intervention and State Sovereignty, *The Responsibility to Protect*, IDRC Books, Ottawa, 2001; 2005 World Summit Outcome, GA Res. 60/1, 24 October 2005; and Anne Orford, *International Authority and the Responsibility to Protect*, Cambridge University Press, Cambridge, 2011.

20 See e.g. Human Rights Watch, *Killings in Kiwanja: The UN's Inability to Protect Civilians*, 12 December 2008, available at: www.hrw.org/reports/2008/12/12/killings-kiwanja; Human Rights Watch, *Abandoning Abyei: Destruction and Displacement*, 22 July 2008, available at: www.hrw.org/reports/2008/07/21/abandoning-abyei-0; Darfur Consortium, *Putting People First: The Protection Challenge Facing UNAMID in Darfur*, 28 July 2008, available at: www.darfurconsortium.org/darfur_consortium_actions/reports/2008/Putting_People_First_UNAMID_report.pdf.

21 SC Res. 1769, 31 July 2007, operative para. 15(a)(ii); SC Res. 2003, 29 July 2011, operative para. 3(a).

22 SC Res. 1856, 22 December 2008, operative paras. 3 and 6. See also Security Council Meeting Record S/PV.6055, 22 December 2008, pp. 2–3.

23 SC Res. 1778, 25 September 2007.

24 SC Res. 2057, 5 July 2012.

25 SC Res. 2066, 17 September 2012.

26 SC Res. 1894, 11 November 2009.

27 Annual Reports of the Special Committee on Peacekeeping Operations, A/63/19 (2009), A/64/19 (2010), A/65/19 (2011) and A/66/19 (2012).

on mandate implementation,²⁸ the development of an operational concept on the protection of civilians to guide missions' implementation efforts,²⁹ and the development of training materials for military personnel.

In the context of the violent conflict in Libya, in March 2011 the Security Council authorised member states to 'take all necessary measures ... to protect civilians and civilian populated areas under threat of attack'.³⁰ In this instance, the 'protection of civilians' language was used to authorise what was essentially a Responsibility to Protect intervention. This was because the mandate provided for Libya was concerned equally with the broader strategic basis for intervention (for which Libya had not provided its consent) as with the operational-level use of force. In comparison, the protection of civilians mandates in UN peacekeeping are usually focused on the operational-level use of force in the context of the host state's consent to the deployment of the mission (whether genuine or coerced). It had taken time, as well as nuanced and sustained political engagement, to get to the point where the concept and language associated with the protection of civilians peacekeeping mandate had been widely accepted. There was concern that the fallout of the Libya intervention, which was criticised by some as being a vehicle for regime change rather than for protection of civilians,³¹ would jeopardise the ongoing support for and development of the protection of civilians mandate in UN peacekeeping missions. Several commentators have highlighted the impact that the Libya intervention had on the willingness of some Security Council members to support intervention in response to the conflict in Syria.³²

Since the Libya intervention, the Security Council has introduced a new dimension to protection of civilians issues. In March 2013, the Council authorised the deployment of an Intervention Brigade as part of the UN Organisation Stabilisation Mission in the DRC (MONUSCO) to operate alongside the regular UN forces, with the mandate to 'ensure ... effective protection of civilians under imminent threat of physical violence'.³³ The Intervention Brigade was provided the mandate to 'neutralise' rebel armed groups by carrying out targeted offensive operations against them.³⁴ This development could have a significant impact on how the original protection of civilians mandate is understood and, in particular,

28 V. Holt and G. Taylor, above note 18.

29 UN Department of Peacekeeping Operations – Department of Field Support, Draft Operational Concept on the Protection of Civilians in United Nations Peacekeeping Operations, 2010, available at: www.peacekeeping.org.uk/wp-content/uploads/2013/02/100129-DPKO-DFS-POC-Operational-Concept.pdf.

30 SC Res. 1973, 17 March 2011, operative para. 4.

31 Alex J. Bellamy, *The Responsibility to Protect and the Problem of Regime Change*, e-International Relations, 27 September 2011, available at: www.e-ir.info/2011/09/27/the-responsibility-to-protect-and-the-problem-of-regime-change; Alex J. Bellamy and Paul D. Williams, 'The new politics of protection? Côte d'Ivoire, Libya and the responsibility to protect', in *International Affairs*, Vol. 87, No. 4, 2011; John-Mark Iyi, 'The duty of an intervention force to protect civilians: a critical analysis of NATO's intervention in Libya', in *Conflict Trends*, No. 2, ACCORD, 2012.

32 See in particular Security Council, Cross-Cutting Report 2012 No. 2: Protection of Civilians, 31 May 2012, pp. 14–22, available at: www.securitycouncilreport.org/protection-of-civilians/.

33 SC Res. 2098, 28 March 2013, operative para. 11(a)(i).

34 *Ibid.*, operative para. 12(b).

whether it is unable to be conceived as incorporating an inherent authorisation to carry out pre-emptive offensive operations.

Overview of the legal framework for the protection of civilians by UN peacekeepers

IHL and IHRL are most often understood as the normative bases for protection of civilians concepts and activities. While both of these branches of law are indeed relevant to the use of force by UN peacekeepers to protect civilians, a third, more central, normative basis for action arises from *jus ad bellum* and is grounded in the UN Charter. The latter provides greater scope for action by UN peacekeepers, although it sets out a legal *authority* or *right* rather than a positive *obligation* to which these forces may be held accountable. A detailed examination of the legal framework for the protection of civilians is beyond the scope of this work, which will instead focus on outlining the main bases for protection of civilians enshrined in the most relevant bodies of international law.

While an express Security Council mandate provides the central basis for UN peacekeepers to use force to protect civilians, it is not the sole source of legal authority to use force for such a purpose. Even in the absence of an express mandate by the Security Council, all UN peacekeepers arguably have the authority to use force to protect civilians under imminent threat of physical violence, a view endorsed by the UN itself.³⁵ This may fit under the positivist rule of the expanded concept of ‘self-defence’ that is part of UN peacekeeping (including self-defence in defence of the mandate), but is best understood as an implied power normatively connected to the UN Charter’s purposes and principles.³⁶ The analysis of the legal framework for the protection of civilians mandate also reveals that the mandate’s development is the manifestation of progressive interpretation of UN Charter provisions relating to the determination of threats to international peace and security, drawing heavily on humanitarian and human rights ideals, and moving away from the traditional state-centric paradigm.³⁷

35 Report of the Panel on United Nations Peace Operations (the Brahimi Report), 2000, A/55/305 and S/2000/809, para. 62; 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; see also SC Res. 918, 17 May 1994, which ‘[r]ecognizes 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 (emphasis added).

36 This approach is articulated in Scott Sheeran, ‘The use of force in United Nations peacekeeping operations’, in Marc Weller (ed.), *The Oxford Handbook on the Use of Force in International Law*, Oxford University Press, Oxford, forthcoming, 2014; Brahimi Report, above note 35, para. 62. For a critical view on the expanded concept of self-defence, see Nigel White, *Keeping the Peace: The United Nations and the Maintenance of International Peace and Security*, Manchester University Press, Manchester, 1993, p. 201; T. Findlay, above note 8, p. 356.

37 For example, see Haidi Willmot and Ralph Mamiya in M. Weller (ed.), above note 36; Christine Gray, *International Law and the Use of Force*, Oxford University Press, 2008, 3rd ed., pp. 313–314; Katherine Cox, ‘Beyond self-defence: United Nations peacekeeping operations and the use of force’, in *Denver Journal of International Law and Policy*, Vol. 27, 1999, pp. 239 and 258.

Foundations of the protection of civilians mandate in IHRL and IHL

While IHRL and IHL may not provide a direct legal basis for the protection of civilians mandate in UN peacekeeping, they are still relevant and normatively connected to this issue. IHRL protects a broad range of rights, but its core is intended to ensure protection against the arbitrary exercise and abuse of power by authorities for all human beings who find themselves within a state's 'effective control' (that is, over territory or otherwise over the individual, for example through detention).³⁸

IHL, by contrast, has two main aims.³⁹ The first is to protect persons who have not taken, or are no longer taking, a direct part in hostilities, including civilians as well as wounded, sick, and captured combatants. The second is to regulate the means and methods of warfare through rules on the conduct of hostilities and the use of weapons.⁴⁰ While the provisions of IHRL apply to all persons at all times within a state's jurisdiction, IHL only applies in times of armed conflict and draws a fundamental distinction between civilians and combatants who are taking a direct part in hostilities.⁴¹

IHL prohibits all attacks against civilians, unless and for such time as they are directly participating in the hostilities.⁴² IHL also specifies that, in international armed conflicts (and arguably non-international armed conflicts), precautions should be taken to try to ensure that civilians are not killed or injured in attacks on military targets.⁴³ While Article 1 of the Geneva Conventions *prima facie* provides a positive obligation to protect (that is, 'to ensure respect' for IHL), in practice this provision is read and implemented more narrowly.⁴⁴ The provisions of IHL

38 International Covenant on Civil and Political Rights (ICCPR), Art. 2(1); UN Human Rights Committee, General Comment No. 31, 26 May 2004, UN Doc. CCPR/C/21/Rev.1/Add. 13 (2004) para. 21; Report of the Secretary-General on Respect for Human Rights in Armed Conflicts, GA Res. 8052, 18 September 1970; European Court of Human Rights, *Loizidou v. Turkey* (Preliminary Objections), Application No. 15318/89, Series A, No. 310, 1995, para. 62; Marko Milanovic, *Extraterritorial Application of Human Rights Treaties: Law, Principles, and Policy*, Oxford University Press, Oxford, 2011.

39 See Geoffrey Best, *War and Law since 1945*, Clarendon Press, Oxford, 1994; Dieter Fleck (ed.), *Handbook of Humanitarian Law*, 2nd ed., Oxford University Press, Oxford, 2008; Christopher Greenwood, *Essays on War in International Law*, Cameron May, London, 2006; ICRC, *Customary International Humanitarian Law*, Vol. I: Rules, Jean-Marie Henckaerts and Louise Doswald-Beck (eds.), Cambridge University Press, Cambridge, 2005 [hereafter 'ICRC Customary Law Study'], Rules 1–11; SC Res. 1894, 11 November 2009.

40 Sometimes referred to as the Hague law, these rules are mainly contained in the 1907 Hague Regulations respecting the Laws and Customs of War on Land, the 1980 Convention on Certain Conventional Weapons and its five Protocols, the 1925 Gas Protocol, the 1972 Biological Weapons Convention, the 1993 Chemical Weapons Convention, and the 1997 Antipersonnel Mine Convention. Francois Bugnion, 'Law of Geneva and Law of The Hague', in *International Review of the Red Cross*, Vol. 83, No. 844, 2001, pp. 901–922.

41 Jean-François Quéguiner, 'Precautions under the law governing the conduct of hostilities', in *International Review of the Red Cross*, Vol. 88, No. 864, December 2006, pp. 793–821; Report of the Secretary-General on Respect for Human Rights in Armed Conflicts, above note 38.

42 Common Article 3 to the Four Geneva Conventions.

43 Additional Protocol I to the Geneva Conventions, Art. 48; Additional Protocol II to the Geneva Conventions, Art. 13(1).

44 Laurence Boisson de Chazournes and Luigi Condorelli, 'Common Article 1 of the Geneva Conventions revisited: protecting collective interests', in *International Review of the Red Cross*, Vol. 82, No. 837, 2000,

applicable in non-international armed conflicts are less extensive than those relating to international armed conflicts.⁴⁵

IHRL is potentially of broader relevance for the protection of civilians mandate. This is particularly so when recognising that, while IHL does apply *per se* to UN peacekeepers, such UN forces are generally not considered to be party to an armed conflict.⁴⁶ The Secretary-General's Bulletin on Observance by United Nations Forces of International Humanitarian Law provides a test which treats UN peacekeepers as more analogous to civilians or non-combatants than to a party to the armed conflict. The Bulletin does this by prescribing that IHL applies 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'.⁴⁷ This is however controversial, and the International Committee of the Red Cross (ICRC) adopts a different view of the issue.⁴⁸

The most important rights under IHRL for the protection of civilians in peacekeeping include the right to life, the prohibition against torture and ill-treatment, and the freedom from arbitrary detention.⁴⁹ These are human rights that any host state will have an obligation to respect and *ensure* respect for (that is, a positive obligation), including by non-state actors.⁵⁰ In relation to these human rights, only the freedom from arbitrary detention may be derogated from in a state of emergency.⁵¹ While the applicability of IHRL to UN peacekeeping operations is difficult to contest,⁵² the precise content of these obligations is more unclear than

p. 67; Carlo Focarelli, 'Common Article 1 of the 1949 Geneva Conventions: a soap bubble?', in *European Journal of International Law*, Vol. 21, No. 1, 2010, p. 125.

45 See ICRC Customary Law Study above note 39, and US criticisms in 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', in *International Review of the Red Cross*, Vol. 89, No. 866, June 2007, p. 444.

46 See UN Secretary-General's Bulletin, Observance by UN Forces of International Humanitarian Law, 6 August 1999, ST/SGB/1999/13, section 1.1; Scott Sheeran, 'A constitutional moment? United Nations peacekeeping in the Democratic Republic of Congo', in *International Organizations Law Review*, Vol. 8, 2011, pp. 55 and 113–114; Christopher Greenwood, 'Scope of application of humanitarian law', in D. Fleck, above note 39, pp. 39 and 46; Martin Zwanenburg, *Accountability of Peace Support Operations*, Martinus Nijhoff Publishers, Leiden, 2005, pp. 171–174; ICRC, statement of the ICRC to the United Nations General Assembly 50th session, 16 November 1995, Fourth Committee, Agenda Item 86, available at: www.icrc.org/eng/resources/documents/statement/57jmrn.htm.

47 UN Secretary-General's Bulletin, above note 46, section 1.1.

48 The ICRC is critical of this perspective, as are some others: see M. Zwanenburg, above note 46, pp. 171–174.

49 See Universal Declaration of Human Rights, Arts. 3, 5, and 9; ICCPR, Arts. 6(1), 7, and 9(1).

50 See ICCPR, Art. 2(1); General Comment No. 31, above note 38, paras. 3 and 10; Inter-American Court of Human Rights, *Velasquez Rodriguez v. Honduras* (Preliminary Objections), Serie C, No. 1, Judgement, 26 June 1989, para. 172 (referring to 'the lack of due diligence to prevent the violation or to respond to it as required by the Convention'); Human Rights Committee, *Bautista de Arellana v. Colombia*, Communication No. 563/1993, UN Doc. CCPR/C/55/D/563/1993 (1995), paras. 8.2 and 10.

51 ICCPR, Art. 4(2); Anna-Lena Svensson-McCarthy, *The International Law of Human Rights and States of Exception*, Martinus Nijhoff Publishers, Leiden, 1998; Scott Sheeran, 'Reconceptualising states of emergency under international human rights law: theory, legal doctrine, and politics', in *Michigan Journal of International Law*, Vol. 34, No. 2, 2013, pp. 101–168.

52 See S. Sheeran, above note 46, pp. 112–119; Guglielmo Verdirame, *The UN and Human Rights: Who Guards the Guardians?*, Cambridge University Press, Cambridge, 2012; Frederic Megret and Florian

for IHL obligations. The UN is not party to human rights treaties and the greatest difficulty lies in understanding the *scope* and *extent* of obligations for a UN force, which has no sovereignty over a territory and has lesser powers than a state.⁵³ No equivalent of the Secretary-General's Bulletin on IHL exists to guide the application of IHRL to UN peacekeepers.

The 2000 Report of the Panel on United Nations Peace Operations (the Brahimi Report), a landmark UN document on peacekeeping, indicated that:

[P]eacekeepers – troops or police – who witness violence against civilians should be presumed to be authorised to stop it, within their means, in support of basic United Nations principles and . . . consistent with 'the perception and the expectation of protection created by an operation's very presence'.⁵⁴

This statement is connected to a potential UN obligation to ensure respect for IHRL (also known as the 'due diligence' obligation)⁵⁵ by others such as non-state actors, private individuals and even local authorities.⁵⁶ While there is real scope for this argument of *positive* obligation, it is complicated and requires untangling a range of legal issues which are outside the scope of this article, including: the basis and scope of human rights obligations of the UN and its peacekeepers;⁵⁷ the extent to which derogation is possible (as for states of emergency) for any such applicable obligations;⁵⁸ and the UN's legal authority to use force in a peacekeeping operation without an express mandate from the Security Council to do so (which is usually the case for a non-Chapter VII operation).⁵⁹ As a normative guide for UN peacekeepers, IHL may provide less protection to civilians than IHRL and is silent on many issues – particularly concerning active steps to protect – which could be directly relevant to the protection of civilians mandate. This is evident

Hoffman, 'The UN as a human rights violator? Some reflections on the UN's changing human rights responsibilities', in *Human Rights Quarterly*, Vol. 25, No. 2, 2003, pp. 314–334; legal advice dated 1 April 2009 from UN Office of Legal Affairs to the UN Department of Peacekeeping Operations, available at: <http://documents.nytimes.com/united-nations-correspondence-on-peacekeeping-in-the-democratic-republic-of-the-congo#p=1>; Geoffrey Gettleman, 'U.N. army told not to join Congo army in operation', in *New York Times*, 9 December 2009, available at: www.nytimes.com/2009/12/10/world/africa/10congo.html.

53 *Ibid.*; ICJ, above note 9, pp. 163–164.

54 Brahimi Report, above note 35, para. 62, quoting the report of the Independent Inquiry on Rwanda, S/1999/1257.

55 See the various references to this positive basis of obligation ('due diligence'), below note 60.

56 *Ibid.*

57 S. Sheeran, above note 46, pp. 112–119; F. Megret and F. Hoffman, above note 52; G. Verdirame, above note 52.

58 Erika de Wet, *The Chapter VII Powers of the United Nations Security Council*, Hart, Oxford, 2004, pp. 201–202; Scott Sheeran and Catherine Bevilacqua, 'The UN Security Council and international human rights obligations: towards a theory of constraints and derogation', in Scott Sheeran and Sir Nigel Rodley (eds.), *The Routledge Handbook on International Human Rights Law*, Routledge, London, 2013; Michael Wood, 'The UN Security Council and international law', Hersch Lauterpacht Memorial Lectures, Lauterpacht Centre for International Law, University of Cambridge, 8 November 2006, para. 29, available at: www.lcil.cam.ac.uk/sites/default/files/LCIL/documents/lectures/2006_hersch_lecture_2.pdf.

59 T. Findlay, above note 8, pp. 7–14; S. Sheeran, above note 36.

when comparing the positive ('due diligence') obligations of states under IHRL with the more modest obligations of states to ensure respect for IHL.⁶⁰

Foundations of the protection of civilians mandate in the UN Charter

The UN Charter was developed in the aftermath of the failures of the Covenant of the League of Nations, and was seen as a more advanced version of a collective security agreement.⁶¹ Member states relinquished their authority to use force in their relations with other states but maintained the right of self-defence under Article 51 of the Charter. The UN Security Council was given the authority, under Chapter VII of the Charter, to authorise the use of force against member states for the purpose of maintaining or restoring international peace and security.⁶² The trigger for the Security Council's imposition of coercive measures under Chapter VII was provided in Article 39 of the Charter as the identification of a threat to international peace and security.

The development of the legal framework for UN peacekeeping has taken place in the context of the UN Charter's silence on this activity, and where there is arguably no complete theory of sources of international law for the organisation.⁶³ The interpretation of UN law accordingly draws strong parallels to constitutional law rather than the more usual interpretive approach in the Vienna Convention on the Law of Treaties.⁶⁴ As explained by Thomas Franck:

The law of, or about, international organisations is essentially constitutional law ... This is true not only because it is descriptive of the internal rules governing the operation of institutions and societies, but because it is treated by lawyers in a manner different to other law – treated as being capable of organic growth.⁶⁵

It is thus important in the UN context to understand the interpretive approach of *implied* powers under the Charter, which applies to organs (such as the Security Council) and sub-organs (such as UN peacekeeping operations), and is widely accepted in Charter interpretation.⁶⁶

60 See ICCPR, Art. 2(1); General Comment No. 31, above note 38, paras. 3 and 10; *Bautista de Arellana*, above note 50, paras. 8.2 and 10; as compared to Common Article 1 of the Geneva Conventions; L. Boisson de Chazournes and L. Condorelli, above note 44; C. Focarelli, above note 44.

61 Leland M. Goodrich and Edvard Hambro, *Charter of the United Nations: Commentary and Documents*, World Peace Foundation, Boston, 1946, pp. 21 and 59; Vaughan Lowe, Adam Roberts, Jennifer Welsh and Dominik Zaum, 'Introduction', in Lowe *et al.* (eds.), *The United Nations Security Council and War*, Oxford University Press, Oxford, 2008, pp. 11–17.

62 See Arts. 25, 39, 42 and 43 of the UN Charter.

63 See discussion in S. Sheeran, above note 46, p. 118.

64 See the section on interpretation in the Vienna Convention on the Law of Treaties, Arts. 31–33.

65 Thomas Franck, 'Book review of Derek W. Bowett, *The Law of International Institutions* (Stevens, London, 1963)', in *Harvard Law Review*, Vol. 77, 1964, p. 1565; José Alvarez, *International Organizations as Law-Makers*, Oxford University Press, Oxford, 2005, p. 191.

66 José Alvarez, 'Constitutional interpretation in international organizations', in Jean-Marc Coicaud and Veijo Heiskanen (eds.), *The Legitimacy of International Organizations*, United Nations University Press, Tokyo, 2001, p. 121; ICJ, *Reparation for Injuries Suffered in the Service of the United Nations*, 1949, Advisory Opinion, *ICJ Reports 1949*, p. 174; ICJ, above note 9.

The protection of civilians mandate, which is set out in Security Council resolutions adopted under Chapter VII of the Charter, is central to the protection aspect of UN peacekeeping operations. It represents both the mission's tasking and its explicit legal authority to use force to protect civilians. However, the decisions of the Security Council do not exclusively define the authority to use force, including to protect civilians. The use of force in UN peacekeeping operations has one of two legal bases: (a) it is *expressly* authorised under Chapter VII (such as a protection of civilians mandate); or (b), it is *implied* under the rubric of the right to self-defence (usually under a non-Chapter VII mandate).⁶⁷ In both cases, the mandate is grounded in the broader context of the Charter. A UN peacekeeping operation's legal authority to use force and encroach upon host state sovereignty is greater than that of the visiting forces of other states. This reflects the UN's status as a near universal international organisation of broad purpose and legitimacy, and that peacekeeping operations represent the international community acting through the UN.

While the protection of civilians mandate may be seen as a natural development to fulfil obligations of IHRL and IHL, in fact it rests heavily on the UN Charter and its purposes and principles. As the Brazilian delegation stated in the Security Council in 2011, '[p]rotecting civilians is one of the most important ways in which the Organisation gives expression to its ultimate objectives, as set out in the Charter'.⁶⁸ The mandate represents an important expansion of the *jus ad bellum* manifest in the Security Council authorisation of the use of force. Christine Gray, for example, in her seminal work *International Law and the Use of Force*, refers to the protection of civilians as a 'new legal and moral' dimension to the use of force.⁶⁹ It crystallises a trend suggesting that the most legitimate use of force on behalf of the international community is for the purpose of the protection of civilians.⁷⁰

The development of the protection of civilians mandate is a movement away from the traditional state-centric focus of international peace and security, which was the *raison d'être* of Chapter VII at the time when the Charter was adopted.⁷¹ It has become a practical manifestation of an approach to determining threats to international peace and security that is firmly founded in human rights and humanitarian ideas.⁷² This also reflects a parallel and earlier evolution of the

67 C. Gray, above note 37, pp. 300–304; T. Findlay, above note 8, pp. 14–15; K. Cox, above note 37, p. 249.

68 Security Council Meeting Record S/PV.6531, 10 May 2011, p. 11. See also Security Council Meeting Record S/PV.6650 (9 November 2011), p. 19: France stated 'The protection of civilians is at the heart of the mandate of United Nations peacekeeping operations. In that framework our Organisation, on a daily basis, must fulfil that mission.'

69 C. Gray, above note 37, p. 313.

70 See discussion in H. Willmot and R. Mamiya, above note 37; S. Sheeran, above note 36; K. Cox, above note 37, p. 258; Siobhan Wills, *Protecting Civilians: The Obligations of Peacekeepers*, Oxford University Press, Oxford, 2009; Daphna Shrager and Ralph Zacklin, 'The applicability of international humanitarian law to United Nations peacekeeping operations: conceptual, legal and practical issues', in *Symposium on Humanitarian Action and Peacekeeping Operations*, ICRC, Geneva, 1995, pp. 39 and 43.

71 See L. M. Goodrich and E. Hambro, above note 61, pp. 155–163.

72 See K. Cox, above note 37, p. 258; H. Willmot and R. Mamiya, above note 37.

meaning of Article 39 of the UN Charter – the trigger for the use of Chapter VII powers – from inter-state to intra-state conflicts in which civilians are the main victims and targets.⁷³ In this sense, the broader reading of the Charter also owes a debt to the foundations and growth of IHRL and IHL.

UN peacekeepers' authority to protect in the absence of an express mandate

The development and extensive use of the Security Council's protection of civilians mandate does not mean that similar legal rights and authority may not exist for UN peacekeeping missions without such an explicit mandate. After the Brahimi Report posited the presumed authority to protect civilians, the UN Secretariat revised in 2002 what became known as the UN Master List of Numbered Rules of Engagement.⁷⁴ One of the standard rules from that list, which applied to all UN peacekeeping operations regardless of their mandate, authorised 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'.⁷⁵ This reinforces the Brahimi Report suggestion that UN peacekeepers have an inherent or implied authority, in support of basic UN principles, to use force to protect civilians under imminent threat of physical violence, when the state authorities are unable or unwilling to do so.

This legal authority for protection of civilians can perhaps be linked back at the doctrinal level to the right to use force in self-defence *including in defence of the mandate*, which is an established (though controversial) right implied in all UN peacekeeping operations.⁷⁶ The use of force in self-defence is inherent and implied, as it is not usually spelt out in Security Council mandates, status of forces agreements,⁷⁷ or other legal instruments, nor positively expressed in any other way as a legal authorisation. There are valid concerns associated with an overly broad authorisation for UN peacekeepers to use force under the rubric of 'in defence

73 Bruno Simma (ed.), *The Charter of the United Nations: A Commentary*, 2nd ed., Oxford University Press, Oxford, 2002, pp. 724–725.

74 United Nations Master List of Numbered ROE, above note 35 (and other references under that note). Also see discussion of the UN Master List in Victoria Holt and Tobias Berkman, *Impossible Mandate? Military Preparedness, the Responsibility to Protect and Modern Peace Operations*, Henry L. Stimson Centre, Washington, DC, 2006, pp. 83–86; T. Findlay, above note 8, Appendix 3. A UN template for ROE, although without model rules, is provided in the UN Infantry Battalion Manual, 2012, Vol. II, Annex C, model ROE, p. 254, available at: www.un.org/en/peacekeeping/documents/UNIBAM.Vol.II.pdf.

75 *Ibid.*, Rule 1.8.

76 See UN Department of Peacekeeping Operations, General Guidelines for Peacekeeping Operations, UN Doc. UN/210/TC/GG95, October 1995, p. 20, available at: www.un.org/Depts/dpko/training/tes_publications/books/peacekeeping_Training/genguide_en.pdf, which states that the use of force in defence of the mandate 'might be interpreted as entitling United Nations personnel to open fire in a wide variety of situations'.

77 T. Findlay, above note 8, p. 8; C. Gray, above note 37, pp. 300–304: 'Where there is no express reference to the use of force in a resolution then a peacekeeping force will have the right to use force in self-defence and possibly in the implementation of its mission.'

of the mandate'.⁷⁸ As Nigel White observes: 'Allowing a [UN] force to take positive action in defence of its purpose is no different from allowing them to enforce it.'⁷⁹ However, as suggested in other writings, the protection of civilians forms one of the most central, necessary and legitimate aspects of an expanded concept of self-defence for UN peacekeepers.⁸⁰ The UN, by defending civilians in this context, does not act like an intervening state, but rather defends the norms and values of the UN Charter. This is broadly consistent with the rationale for international action that underlies the Responsibility to Protect.⁸¹

This inherent right of UN peacekeepers to use force to protect civilians does not create a *duty* or *obligation* to use force for this purpose. As the right to use force to protect civilians is either based on implied powers or the express authorisation in a Chapter VII resolution, it is quite difficult to articulate it as a positive obligation within *jus ad bellum*. Nevertheless, some commentators have insisted that such a duty to use force to protect civilians exists.⁸²

Conceptualising protection in the humanitarian, human rights and peacekeeping communities

The protection of civilians mandate provided by the Security Council to UN peacekeeping operations is distinct from the related humanitarian and human rights concepts, but is located within and forms a critical part of the broader protection agenda. As the protection of civilians has become increasingly prominent in international relations discourse and humanitarian practice, the existence of conflicting conceptions of 'protection' by various international actors has become starkly evident and has created confusion. This has been particularly so where UN peacekeeping missions have been deployed and peacekeeping, humanitarian and human rights actors have needed to work closely together, including in 'integrated missions'.⁸³

Concepts of 'protection of civilians' in the humanitarian community

The humanitarian community frames its activities within an expansive protection of civilians concept. By the late 1990s, much of the humanitarian community had

78 See T. Findlay, above note 8, pp. 6 and 14; Ray Murphy, 'United Nations peacekeeping in Lebanon and Somalia', in *Journal of Conflict and Security Law*, Vol. 8, 2003, p. 71; D. Bowett, above note 9, p. 196; B. Simma, above note 73, p. 683.

79 N. White, above note 36, pp. 5 and 201. This is acknowledged also by the UN in the 1995 General Guidelines for Peacekeeping Operations, which state that use of force in defence of the mandate 'might be interpreted as entitling United Nations personnel to open fire in a wide variety of situations'. See UN Department of Peacekeeping Operations, above note 76.

80 See e.g. S. Sheeran, above note 36; S. Wills, above note 70.

81 *Ibid.*, pp. 51–52; World Summit Outcome, above note 19; A. Orford, above note 19.

82 K. Månsson, above note 9, pp. 503 and 515; S. Wills, above note 70.

83 See UN Department of Peacekeeping Operations and UN Department of Field Support, United Nations Peacekeeping Operations: Principles and Guidelines (hereinafter Capstone Doctrine), 2008, Chapter 5, available at: http://pbpu.unlb.org/pbps/library/capstone_doctrine_eNg.pdf.

moved away from the relief-only paradigm and instead conceived the spectrum of humanitarian action within a protection of civilians framework.⁸⁴ In 1999, the Inter-Agency Standing Committee (IASC), established by the UN General Assembly to strengthen the coordination of its humanitarian emergency assistance, adopted the definition of ‘protection’ as ‘all efforts aimed at obtaining full respect for the rights of the individual and of the obligations of the authorities/arms bearers in accordance with the letter and the spirit of the relevant bodies of law’.⁸⁵ The Sphere Project, a community of humanitarian response practitioners, subsequently prepared the Charter and Minimum Standards in Humanitarian Response; this attempted to flesh out the IASC definition, articulating a widely recognised set of ‘protection principles’ to guide all humanitarian agencies, even those without a distinct protection mandate or specialist protection capacity. The Sphere Project’s charter focused on the core humanitarian protection concerns of freedom from violence, from coercion of various kinds and from deliberate deprivation of the means of survival. It also advocated the application of the ‘protection principles’ to the three stages of protection activities: (i) preventive – preventing physical threats or rights abuses; (ii) responsive – stopping ongoing violations; and (iii) remedial – providing remedies to victims.⁸⁶ Various humanitarian organisations, including the ICRC, have gone on to develop more detailed concepts of protection, connected to their own mandates.⁸⁷

The humanitarian community’s approach to the protection of civilians concept has not been without criticism. One commentator suggested that the community had manipulated the language of protection, ‘colonised it, and recast even the most mundane of aid activities as protection’.⁸⁸ It has been argued that while humanitarian protection efforts are inherently valuable, they do not in fact provide actual ‘protection’ as they cannot ‘provide directly and forcefully for the safety of people’ and because ‘much of the protection work of humanitarians deals with the post-violence lives of the victims’.⁸⁹

84 Both in conflict situations and in response to natural disasters. See, generally, Sorcha O’Callaghan and Sara Pantullano, *Protective Action: Incorporating Civilian Protection into Humanitarian Response*, Humanitarian Policy Group, London, 2007; *Humanitarian Response Review*, OCHA, 2005; ICRC, *Enhancing Protection for Civilians in Armed Conflict and Other Situations of Violence*, 2nd ed., November 2012, available at: www.icrc.org/eng/assets/files/other/icrc-002-0956.pdf.

85 This definition was adopted by the ICRC and the IASC in 1999 following several workshops hosted by the ICRC and attended by representatives of both the human rights and humanitarian communities. See also ‘Protection of civilians in conflict – the ICRC perspective’, address by Angelo Gnaedinger, ICRC Director-General, Humanitarian and Resident Coordinators’ Retreat, Geneva, 9 May 2007, available at: www.icrc.org/eng/resources/documents/statement/children-statement-140507.htm.

86 The Sphere Project, Charter and Minimum Standards in Humanitarian Response, 2011 edition, p. 32, available at: www.ifrc.org/PageFiles/95530/The-Sphere-Project-Handbook-20111.pdf

87 For the ICRC definition, see ICRC, above note 84; ICRC, ‘ICRC Protection Policy’, in *International Review of the Red Cross*, Vol. 90, No. 871, September 2008. For Oxfam’s definition, see ‘What is the “Protection of Civilians” principle?’, available at: www.oxfam.org/en/campaigns/conflict/protection-of-civilians.

88 Marc DuBois, ‘Protection: the new humanitarian fig leaf’, *Humanitarian Aid on the Move (Groupe URD Newsletter)*, April 2009, available at: www.urd.org/IMG/pdf/Protection_Fig_Leaf_DuBois.pdf; Marc DuBois, ‘Protection: fig-leaves and other delusions’, in *Humanitarian Exchange Magazine*, No. 46, March 2010, available at: www.odihpn.org/humanitarian-exchange-magazine/issue-46/protection-fig-leaves-and-other-delusions.

89 *Ibid.*

Concepts of ‘protection of civilians’ in the human rights community

The human rights framework, underpinned by the inherent dignity of the human being, provides a platform for the broadest understanding of the fulfilment of civilian protection ideals. It builds on liberal political ideas and legal theory – from Locke, Rousseau, Paine and others – of the relationship between individuals and the organised power of the state. IHRL does at the international level what many constitutions do at the national level: it crystallises the obligations of governments to respect and ensure respect for a range of rights in consideration for individuals giving up other freedoms to the state and organised public power. This, in effect, places the primary responsibility for the protection of civilians on states.

The language of ‘protection of civilians’ is less prevalent in the discourse of the human rights community than in the humanitarian and peacekeeping communities.⁹⁰ In the human rights context, the concept is somewhat superfluous since the entire IHRL framework underwrites a general concept and specific aspects of the protection of individuals through respect for the wide spectrum of human rights. The concept of ‘protection’ held by the Office of the High Commissioner for Human Rights (OHCHR) was espoused in a 2006 publication:

From OHCHR’s point of view human rights protection is a wider concept, including not only civilians but all individuals in time of peace and war. OHCHR emphasises, as well, obligations of promotion, alongside protection. OHCHR’s approach to protection is based on the provisions of international human rights law, international humanitarian law, international criminal law, and international refugee law. Our approach is informed by the full range of internationally agreed human rights standards . . .⁹¹

In practice, protection-related human rights activity usually focuses on human rights monitoring and reporting, advocacy, and efforts to ensure accountability for international human rights violations. However, such effort is more often conceived as the protection and promotion of IHRL rather than as protection of civilians activities *per se*.

Concepts of ‘protection of civilians’ in the peacekeeping community

There are two core security-related aspects of the protection of civilians. The first, encapsulated in the Responsibility to Protect concept, operates at the strategic level

90 See UN Human Rights Council, Protection of the Human Rights of Civilians in Armed Conflict, Res. 9/9, 2008; and see OHCHR focus on accountability in the statement of Ms. Navi Pillay, UN High Commissioner for Human Rights, at the UN Security Council Debate on the Protection of Civilians in Armed Conflict, 25 June 2012, available at: www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=12288&LangID=E.

91 OHCHR staff, ‘Protection in the field: human rights perspectives’, in Bernard Ramcharan (ed.), *Human Rights Protection in the Field*, Routledge, London, 2006, pp. 119 and 121.

and is an interpretation of *jus ad bellum*.⁹² It conceptualises protection as preventing and halting genocide and widespread war crimes, crimes against humanity, and ethnic cleansing, and identifies the protection responsibilities of states, the UN and the broader international community.⁹³ Nicholas Tsagourias suggests that the concepts of ‘responsibility to protect’ and ‘protection of civilians’ are ‘subsets – indeed interrelated ones – of the same concept and peacekeeping has become the main tool for providing such protection’.⁹⁴

The second aspect, manifest in Security Council protection of civilians mandates, is generally focused on the operational level and solidly grounded in the collective security agreement articulated in the UN Charter.⁹⁵ The language formulation of the mandates,⁹⁶ and the discussion surrounding the first adoption of the protection of civilians mandate, indicate that the Security Council conceived the protection of civilians narrowly in terms of physical protection from the threat of imminent violence.⁹⁷ Influenced by the protection of civilians concepts prevalent in the humanitarian and human rights communities, the mandate was interpreted more broadly in the UN DPKO and DFS Operational Concept on the Protection of Civilians, in which it 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.⁹⁸ The protection of civilians peacekeeping mandate therefore has somewhat of a dual conception. It is *prima facie* described narrowly as physical protection from imminent violence in Security Council mandates, while implementation of the mandate is conceived to include a broad range of activities undertaken in a peacekeeping operation that contribute to a more general concept of protection. For example, UNAMID’s Mission Directive on the Protection of Civilians in Darfur interprets the mandate 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’.⁹⁹ A similar trend was witnessed in respect of the UN Secretary-General’s report on implementing

92 See World Summit Outcome, above note 19, paras. 138–139 (in particular on the idea of the use of force authorised by the Security Council where a state is unwilling or unable to protect its population); A. Orford, above note 19.

93 See e.g. the report of the International Commission on Intervention and State Sovereignty (ICISS), *The Responsibility to Protect*, December 2001, available at: <http://responsibilitytoprotect.org/ICISS%20Report.pdf>. The ICISS report is punctuated with numerous references to ‘human protection’ and also prescribes these grounds for the Responsibility to Protect: see e.g. p. XII, (1)A and B.

94 Nicholas Tsagourias, ‘Self-defence, protection and humanitarian values and the doctrine of impartiality and neutrality in enforcement mandates’, in M. Weller (ed.), above note 36.

95 See L. M. Goodrich and E. Hambro, above note 61, pp. 59–60; Hans Kelsen, ‘Collective security and collective self-defence under the Charter of the United Nations’, in *American Journal of International Law*, Vol. 42, No. 14, October 1948, p. 783.

96 See e.g. UNAMSIL, above note 15, which was mandated under Chapter VII of the UN Charter to ‘take the necessary action . . . to afford protection to civilians under imminent threat of physical violence, taking into account the responsibilities of the Government of [the host country]’; see also the Security Council resolutions and mandates referred to in above note 16.

97 Security Council Meeting Record S/PV.4054, 22 October 1999.

98 UN Department of Peacekeeping Operations – Department of Field Support, above note 29.

99 Cited in V. Holt and G. Taylor, above note 18, p. 181.

the Responsibility to Protect from the 2005 World Summit Outcome document.¹⁰⁰

The language formulation used by the Security Council is explicit, clear, and narrow: the use of force to protect civilians from imminent threat of *physical violence*, which is an aspect of protection that military operations have the unique capacity to fulfil. A broadened interpretation of the mandate risks diluting its power and potential effectiveness. This was recently evidenced by the Security Council's need to mandate an Intervention Brigade in MONUSCO to use offensive force to protect civilians, despite the mission's already strong protection of civilians mandate.¹⁰¹

Practical challenges of reconciling concepts of protection

The lack of clarity on key aspects of the protection of civilians peacekeeping mandate and the proliferation of related concepts within international law and across the humanitarian, human rights and peacekeeping communities raises a number of challenges for coherently advancing the protection of civilians agenda and practically realising civilian protection objectives. Some of the challenges stem from misunderstandings of the mandate and role of various actors, others from the inherent difficulty in reconciling some of the protection activities. As Bernard Ramcharan, former acting UN High Commissioner for Human Rights states, in the UN 'there is no *common, system-wide* . . . understanding of the concept of "protection". This has given rise to problematic inconsistencies in both usage and practice.'¹⁰² A few of the key practical challenges will be briefly touched upon below.

Challenges are often encountered when different actors seek to fulfil their protection mandates through activities that are not always complementary. Balancing the protection activities of the humanitarian and human rights communities with the implementation of the protection of civilians peacekeeping mandate has proved difficult at times. The robust use of force to protect civilians, through which UN peacekeepers may become a *de facto* (if not *de jure*) party to the conflict, raises a number of issues. Prior to the mandating of the African Union forces in Mali, the argument was made by actors in humanitarian and human rights communities that UN-mandated or -authorised military deployments should not be presented as 'protecting civilians' when they are expected to use force in a way that will effectively result in them becoming belligerents. As Brian Urquhart, former Under-Secretary-General for Special Political Affairs in the

100 The Secretary-General's report, Implementing the Responsibility to Protect, UN Doc. A/63/677, 2009, took a much broader perspective than the focus of the World Summit Outcome, above note 19, paras. 138–139.

101 SC Res. 2098, 28 March 2013; see e.g. Bruce 'Ossie' Oswald, 'The Security Council and the Intervention Brigade: some legal issues', in *ASIL Insights*, Vol. 17, No. 15, 6 June 2013, pp. 1–5, available at: www.asil.org/insights/volume/17/issue/15/security-council-and-intervention-brigade-some-legal-issues; Carina Lamont and Emma Skeppström, *The United Nations at War in the DRC? Legal Aspects of the Intervention Brigade*, Swedish Ministry of Defence, Report No. FOI-R-3761-SE, December 2013.

102 OHCHR staff, above note 91, p. 121 (emphasis in original).

UN and an influential figure in the initial development of peacekeeping, pointed out, '[t]he moment a peacekeeping force starts killing people it becomes a part of the conflict it is supposed to be controlling, and therefore a part of the problem'.¹⁰³ UN peacekeeping forces being viewed as a party to the conflict can undermine the perceived impartiality of other UN actors, and consequently their ability to deliver on their protection mandate. This challenge is compounded when UN peacekeepers use force selectively – against rebel militia groups but not government forces or government-sponsored armed groups, as is the case for the Intervention Brigade in MONUSCO. More broadly, the humanitarian community has raised concerns that the use of force for the protection of civilians can escalate a conflict and exacerbate the humanitarian situation through reprisal attacks, heightening human rights violations and sexual violence, increasing displacement and leaving in its wake a dangerous security vacuum.¹⁰⁴ In this context, several humanitarian and human rights actors expressed concern at the mandating of the MONUSCO Intervention Brigade.¹⁰⁵

Host state consent for the deployment of a peacekeeping operation is one of the traditional 'guiding principles' of UN peacekeeping.¹⁰⁶ The withdrawal of consent, whether formal or effective, can have a significantly negative impact on the ability of the mission to fulfil its mandate. In order to establish a presence and to move freely to provide physical protection to civilian populations, a UN peacekeeping operation needs to retain the political consent and cooperation of the host government and authorities. The maintenance of such consent can be jeopardised by human rights monitoring and reporting on issues that identify governmental elements as committing gross violations. Such challenges have been faced by the UN, including in South Sudan.¹⁰⁷ A reverse dynamic exists in respect of humanitarian activity, whereby the use of force by a peacekeeping mission to protect civilians against government forces, or even government-sponsored armed groups, may result in retaliatory restriction of humanitarian access. However, even though the protection of civilians peacekeeping mandate authorises the use of force including against host state actors,¹⁰⁸ force has rarely – if at all – been used in such a manner.

103 Brian Urquhart, *A Life in Peace and War*, Harper and Row, New York, 1987, pp. 178–179.

104 Reliefweb, 'UN's new solution for Congo not without risk', 28 March 2013, available at: <http://reliefweb.int/report/democratic-republic-congo/un%E2%80%99s-new-solution-congo-not-without-risk>.

105 See for example What's in Blue, 'Adoption of a resolution on the Democratic Republic of Congo', 27 March 2013, available at: www.whatsinblue.org/2013/03/adoption-of-a-resolution-on-democratic-republic-of-congo.php; 'U.N. approves new combat force to "neutralize" Congo rebels', Reuters, 28 March 2013, available at: www.reuters.com/article/2013/03/28/us-congo-democratic-un-idUSBRE92R0X820130328; and FIDH, 'DRC: an intervention brigade within MONUSCO would require further human rights protection mechanisms', 27 March 2013, available at: www.fidh.org/DRC-An-intervention-brigade-within-MONUSCO-would-require-further-human-13106.

106 The traditional 'guiding principles' of UN peacekeeping are: Impartiality, Consent, and Non-Use of Force except in Self Defence and Defence of the Mandate. See Capstone Doctrine, above note 83.

107 'South Sudan expels a U.N. rights officer', in *New York Times*, 5 November 2012, available at: www.nytimes.com/2012/11/06/world/africa/south-sudan-expels-un-rights-officer.html?_r=0.

108 See e.g. the statement of the Permanent Representative of Costa Rica during the 2008 MONUSCO mandate renewal, Security Council Meeting Record S/PV.6055, 22 December 2008, p. 5; and the resulting

The dilution of the protection of civilians peacekeeping mandate has deflected focus away from the use of force for physical protection, resulting in unclear expectations on UN peacekeepers and consequent difficulty in holding them accountable for their failure to act. If the implementation of the mandate more clearly focused on physical protection from imminent violence, the expectations to use force, obligations to carry out enabling military activity and accompanying resource requirements would be more transparent. The lack of clarity associated with the mandate has also resulted in concerns regarding overlap of mandates, including in respect of the militarisation of humanitarian aid and resulting implications for humanitarian access.¹⁰⁹

The lack of clarity regarding the legal framework governing the establishment and implementation of the protection of civilians mandate has significant practical implications. The misconception that the peacekeeping mandate derives from IHL and IHRL, rather than from an independent normative basis, has resulted in confusion regarding the appropriateness of using force to implement protection obligations articulated in those branches of law. The lack of appreciation of the *inherent* normative basis for UN peacekeepers to protect civilians irrespective of an express mandate has resulted in the failure to recognise that UN peacekeepers will always have the authority to intervene in order to protect civilians under imminent threat of violence where the host state cannot act. Furthermore, a failure to intervene may also violate IHRL obligations owed by UN peacekeepers to the host state's population. Questions remain about the authority and obligation to use pre-emptive force and the scope of military activities that might cover. With these issues insufficiently addressed in the missions' Concepts of Operations or Rules of Engagement, and absent from the Memoranda of Understanding between the UN and troop contributing countries, the expectations of UN peacekeepers to use force to protect civilians remain unclear, undermining the potential role that the use of force can play in realising protection ideals.

Conclusion

The protection of civilians framework can be broadly conceived as comprising legal authority and obligations of protection, and activities undertaken to realise those legal protections. As demonstrated by the foregoing analysis, the humanitarian, human rights and peacekeeping communities have each constructed discrete understandings of what 'protection of civilians' means, drawing on various bodies of law and building a concept of protection to frame their own narrative and practical activities.

SC Res. 1856, 22 December 2008, operative para. 3(a), and SC Res. 1925, 28 May 2010, operative para. 12(a).

109 Pierre Krähenbühl, *The Militarization of Aid and its Perils*, ICRC Resource Centre, 22 February 2011, available at: www.icrc.org/eng/resources/documents/article/editorial/humanitarians-danger-article-2011-02-01.htm.

While each of the concepts is legitimate and useful within the respective communities, the proliferation of concepts has created a high level of confusion regarding the nature of the protection of civilians, in particular its normative basis, content and associated responsibilities. Each of the strands of protection essentially comes from the same place – a recognition of civilians as individuals with inherent dignity to whom obligations of protection are owed, including from violence. They also aspire to reach a similar destination – the fulfilment of protection obligations deriving from international law. In order to improve the implementation of protection activities, there is a need to articulate an overarching framework in which the various concepts of ‘protection of civilians’ are coherently conceived, and can interact in a complementary and mutually reinforcing manner.

A range of activities contributes to realising the legal obligations of protection drawn from the UN Charter, IHL and IHRL, including human rights monitoring, reporting and advocacy; the use of force to provide physical protection to civilians; the provision of humanitarian assistance to sustain civilians; and rights-based programmatic activity contributing to building a protective environment. Concurrently undertaking the range of activities in the absence of a coherent overarching framework raises many practical challenges. Although protection concepts and activities may not always be easily reconcilable, there is a need for a more nuanced approach that recognises shared objectives, clarifies responsibilities, and promotes complementary and mutually supportive activities in the field. In the UN peacekeeping context, this should lead to a reorientation towards the Security Council mandate language, which is focused heavily on the protection of civilians from imminent physical violence. There is also a need for an explicit recognition of the full legal framework in which the peacekeeping mandate exists, including the rights and obligations of peacekeepers arising from international law governing the use of force and the UN Charter’s purposes and principles. The broader interpretation of the peacekeeping mandate, which is currently prevalent, risks undermining the core and original intent of the Security Council, and renders unclear expectations of the use of force by UN peacekeepers.

If the most immediate and pressing needs of physical protection – from murder, rape and other attacks – are to be met by UN peacekeepers, it is necessary to untangle this conceptual and normative confusion. The core of the protection of civilians peacekeeping mandate, as well as its part in the broader protection agenda, needs to be understood to ensure that it is as clear as possible when force is expected to be used by UN peacekeepers to protect civilians.