

The military component of a peace operation plays an indispensable role in the protection of civilians. Oftentimes, the military is the only actor capable of addressing the most serious threats facing civilians in the contexts of contemporary peace operations. One of the main challenges for military actors in protecting civilians is determining how and when force can be used.

Security Council mandates to protect civilians often entail an authority to use force and 'all necessary means'. The term necessary contains a limitation on the authority to use force, and what is considered necessary differs in times of war and in times of peace. The legal frameworks subsequently also differ in significant ways in how the use of force is enabled and legalised. Attention to which legal framework that applies to the peace operation in each given situation is thereby necessary in addressing how the military can protect civilians through the use of force in a peace operation.

Furthermore, the legitimacy of the peace operation is increasingly linked to the legality of the operation, making the legality of the force essential for both the enabling of adequate protection of civilians, and for the overall success of the peace operation. In developing guidance for how the military can provide protection in peace operations, the legal frameworks must therefore serve as a necessary point of departure.

This report aims at outlining how different legal frameworks enable and limit the use of force, and thus addresses the question of how the military component of a peace operation can provide protection of civilians in the field. By providing legal aspects on the use of force, this report aims at furthering the development of effective strategies to protect civilians in peace operations.



Empowering the Protection of Civilians

Legal aspects of the use of force to protect civilians in peace operations

Carina Lamont

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Foreword

Protection of civilians (PoC) has gained top priority on the international agenda. The UN-mandated operation in Libya, largely motivated by a need to protect the Libyan population from the ongoing conflict, marked a new turn for peacekeeping at large.

Military actors have a unique role to play in PoC due to their ability to use force. This role is however still being developed, and until guidance and strategies are established, military actors face difficult situations when engaged in protection activities. So far, military missions have often found themselves without the proper guidance on how to turn theory into practice.

The present report highlights one key area where contemporary guidance generally falls short – the legal underpinnings of peace operations and their mandates to use force. The use of force in armed conflicts is regulated by law; however, in the context of PoC there is still confusion on which the applicable legal frameworks really are, and what they entail. What is worse, without clarity, this confusion could lead to situations where peace operations are unable or unwilling to respond to human rights violations and large-scale violence against civilians. An enhanced understanding of the legal frameworks that guide the use of force is necessary to increase effectiveness of peace operations with protection mandates.

This report, published by the Peace Support Operations project at FOI, represents a first and important step towards better guidance on the role, opportunities and limitations of the military in PoC.

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Sammanfattning

Att skydda civila är en uppgift för både civila och militära aktörer i konfliktområden. En nära samverkan mellan olika aktörer är nödvändig för att skyddet ska bli så effektivt som möjligt. Det militära instrumentet är unikt i detta hänseende genom dess förmåga att med våld eller hot om våld stävja attacker mot civilbefolkningen. Militära styrkors roll är därför ofta avgörande i insatser med mandat att skydda civila, inte minst då de även möjliggör åtgärder från andra aktörer i området. Samtidigt råder det ofta stora oklarheter avseende *hur* militära styrkor ska skydda civila och ytterst, hur de kan bruka våld. Till skillnad från många fredsbevarande insatser under 1990-talet är distinktionen mellan krig och fred för en fredsfrämjande insats idag mer komplex, och samtidigt av allt större vikt. Fredsfrämjande insatser verkar idag i miljöer som i juridisk mening kan karaktäriseras som både krig och fred, med variationer i tid och rum. Beroende på om det råder krig eller fred ger de olika juridiska ramverken den militära styrkan olika förutsättningar att bruka våld i uppgiften att skydda civila.

Instrument som behandlar skydd av civila måste beakta den juridiska komplexiteten i våldsanvändningen som följer med militärens roll. Denna rapport söker klargöra centrala juridiska ramverk som reglerar våldsanvändning i insatser. Därmed bidrar rapporten med en viktig pusselbit till utvecklingen av en effektiv strategi för att skydda civila i internationella fredsinsatser.

Nyckelord: skydd av civila, våldsanvändning, behov och proportionalitet

Summary

Protecting civilians is a task assigned to both civilian and military actors in peace operations, and close cooperation between the different actors is necessary to enable effective protection. The military component is unique in its ability to use force and its subsequent capability to protect civilians from physical force. The military component is therefore of critical importance for peace operations mandated to protect civilians. At the same time, many questions remain regarding how the military can protect civilians, and ultimately how they can use force for that purpose. Many peace operations operate in environments where making a distinction between war and peace is increasingly complex. Making such distinction is, however, necessary to enable sufficient protection of civilians. Depending on whether or not an armed conflict exists the applicable law provides different frameworks for how force can be used, and consequently, for how the military can protect civilians. Clarifying the scope and limitation on the use of force in the respective legal frameworks is thus crucial, and instruments addressing protection of civilians must be cautious of the legal complexity that follows with the military role in protecting civilians. This report seeks to clarify legal questions arising regarding the use of force and the military role in protection civilians. Thereby, the report seeks to contribute to the development of effective strategies to protect civilians in peace operations.

Keywords: PoC, protection of civilians, use of force, necessity, proportionality, international human rights law, international humanitarian law

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List of Abbreviations

DDR	Disarmament, Demobilization and Reintegration
DPKO	Department for Peacekeeping Operations
DR Congo	the Democratic Republic of Congo
IASC	Inter-Agency Standing Committee
ICC	International Criminal Court
ICJ	International Court of Justice
ICTY	International Criminal Tribunal for Former Yugoslavia
IDP	Internally displaced person
IHL	International Humanitarian Law
IHRL	International Human Rights Law
OLA	United Nations Office of Legal Affairs
PoC	Protection of civilians
RoE	Rules of Engagement
SOFA	Status of Forces Agreement
SSR	Security Sector Reform
UN	United Nations
UNODC	United Nations Office on Drugs and Crime

1 Introduction

Recent history has taught us just how daunting the challenge of protection of civilians really is. By June 2012, the civilian death toll in Syria had reached approximately 10,000 according to UN reports.¹ Reports on Sudan from 2011 held that both government and rebel forces had carried out targeted attacks on civilians based on their ethnic affiliations.² And the examples go on. Syria, Libya, Sudan and the DR Congo all provide testament to the immense protection needs arising in contemporary conflicts.

The increasing number of asymmetric conflicts around the globe has also brought with it changing and increasing threats to the civilian population.³ The disparity between the parties in asymmetric warfare frequently causes the disadvantaged party to exploit the protected status of civilians and civilian objects.⁴ As a consequence, violence is directed immediately at the civilian population or at essential civilian objects, and belligerents are increasingly undertaking military operations in densely populated urban areas, resulting in high levels of civilian casualties, disruption of basic services and damaging of civilian infrastructure.⁵

In addition, the increasing involvement of civilians in armed conflict, either as direct participants or in supporting functions of a party to the conflict, also poses a significant challenge to the distinction between civilians and individuals participating in the hostilities.⁶ Thereby, civilians run an increased risk of being victims of intentional targeting, and military actors run an increased risk of being

¹ United Nations, News Centre online:

<http://www.un.org/apps/news/story.asp?NewsID=42178&Cr=syria&Cr1=> (accessed 8 June 2012).

² Human Rights Watch, *Sudan: New attacks on civilians in Darfur*, online:

<http://www.hrw.org/news/2011/01/28/sudan-new-attacks-civilians-darfur> (accessed March 20 2012).

³ International Review 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, online: <http://www.icrc.org/eng/assets/files/other/irrc-867-ihl-challenges.pdf> (accessed 2 March 2012), 732.

⁴ *ibid*, 732; See also Marina Mancini, *Report of the Conference 'New Conflicts and the Challenge of the Protection of the Civilian Population'*, Istituto Affari Internazionali, Documenti No. 11/03, Available at SSRN: <http://ssrn.com/abstract=1773721> or <http://dx.doi.org/10.2139/ssrn.1773721> Rome, February (2011), 3.

⁵ International Committee of the red Cross (ICRC), *Roundtable on Civil–Military Coordination The Concept of Protection: Towards a Mutual Understanding*, 12 December (2011).

⁶ International Review 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, online: <http://www.icrc.org/eng/assets/files/other/irrc-867-ihl-challenges.pdf> (accessed 2 March 2012), 734-735.

attacked by individuals they are unable to distinguish from the civilian population.⁷ Thus, civilians are increasingly put at the center of the battle,⁸ making the protection of civilians (PoC) both increasingly necessary and increasingly complex.

PoC is also central to the legitimacy and credibility of the United Nations. The UN and the Security Council has addressed PoC as a theme since the turn of the millennium. By the late 1990's, the issue of protection was coming into focus as civilian populations in conflicts in the Balkans and Rwanda, Liberia and Sierra Leone was systematically targeted. Civilians were becoming 'the vast majority' of victims in armed conflicts.⁹ The international community meanwhile showed little ability to halt these atrocities. Since then, the concept of PoC has been increasingly included in the agendas and policy debates of international and intergovernmental organizations.¹⁰ The Security Council consistently address PoC issues in decisions and statements, and holds biannual open debates on PoC.¹¹ Moreover, in accordance with resolution 1894, comprehensive protection strategies, involving a wide range of actors with distinct responsibilities for each actor, are being incorporated into mission implementation plans.¹² PoC is thus a task of increasing importance in peace operations. Mandates demand it, and the local credibility and international legitimacy of peace operations depend on it.¹³

As a consequence, PoC is a key feature of many peace operation mandates today. PoC is however far from limited to peace operations, or for that matter, military components. The host government plays a central role, although in some conflict areas the government rather constitutes a threat to the civilian population. Humanitarian actors perform perhaps the most visible protection activities. Other fields, such as human rights, security sector reform, rule of law and political reform play significant roles in PoC. The UN has clearly stated that coordination and cooperation among different actors is central to delivering adequate

⁷ International Review 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, online: <http://www.icrc.org/eng/assets/files/other/irrc-867-ihl-challenges.pdf> (accessed 2 March 2012), 735.

⁸ *ibid.*

⁹ United Nations Security Council, *Statement by the President of the Security Council*, S/PRST/1999/6 (1999), 1.

¹⁰ United Nations Office for the Coordination of Humanitarian Affairs online: www.unochaonline.un.org/humansecurity/Background/tabid/2100/language/en-US/Default.aspx, Background. (accessed 26 April 2012).

¹¹ Security Council Report, *Protection of Civilians in Armed Conflict*, No 2, 31 May (2012), 4.

¹² United Nations Security Council Resolution 1894, S/Res/1894, 11 Nov (2009), para 24.

¹³ Martin Fisher, *Issue Paper: Protection of Civilians in the Context of Peace Operations*, Pearson Peacekeeping Center, June (2011), 2.

protection to civilians. The strife for a system-wide approach to PoC has frequently been acknowledged as imperative to delivering effective protection.¹⁴

Due to the military capacity to use force, the military component of a peace operation is a key actor in ensuring protection from physical harm.¹⁵ Ensuring protection from physical harm will frequently require the use of force or the capacity to use force. While the concept of PoC has undergone significant conceptual development in recent years, the question of *how* to provide protection still remains largely unaddressed.¹⁶ This is particularly true for the use of force, and it is therefore particularly troublesome for the military in delivering on the mandate to protect civilians.

Military actors have, since the introduction of PoC in peace operations, struggled with how to turn theory into practice. Ultimately, this often comes down to how to protect through the use of force. The ambiguity on how to use force has on occasion left peacekeepers without necessary means to intervene in situations when civilians are in need of protection. Attention to the legal parameters of the use of force is necessary to prevent PoC from remaining an elusive task in peace operations.

1.1 Purpose and aim

This study addresses the question of how the military can protect civilians in peace operations. What sets the military apart from other actors is its ability to provide protection through the use of force. Due to the use of force always being regulated by law, the legal aspects of the use of force is a necessary point of departure for the development of protection strategies.

This report will primarily analyse the meaning of the term ‘all necessary means’ frequently entailed in PoC mandates in light of the two legal frameworks applicable to the force used in peace operations, namely International Humanitarian Law (IHL) and International Human Rights Law (IHRL). In addition, aspects frequently included in writings on PoC have been found to be of

¹⁴ See Justin MacDermott and Måns Hanssen, *Protection of Civilians- Delivering on the Mandate through Civil-Military Coordination*, Swedish Defense Research Agency (FOI), Sep. (2010), 33-35.

¹⁵ United Nations Department for Peacekeeping operations/ Department for Field Support, *Operational Concept of Protection of Civilians in United Nations Peacekeeping Operations* (2010), 5.

¹⁶ Alexander William Beadle, *Protection of civilians in theory- a comparison of UN and NATO approaches*, Norwegian Defence Research Establishment (FFI), 15 Dec (2010), 16. See also William J. Durch and Alison C. Giffen, *Challenges of Strengthening the Protection of Civilians in Multidimensional Peace Operations*, Background Paper Prepared for the 3rd International Forum for the Challenges of Peace Operations, 27–29 April (2010), Queenbeyan, Australia, Hosted by the Asia Pacific Civil-Military Centre of Excellence, Oct (2010), 30.

value to analyse from a legal perspective. As a result of the chosen focus, the present analysis has identified 5 primary aspects as particularly important to address:

- The purpose and legal nature of a *Security Council mandate*.
- The *legal threshold of armed conflict* determining which legal framework that is applicable in each context.
- The *principle of necessity*, detailing when force can be used in the perspective of both IHL and IHRL.
- The *principle of distinction*, determining against whom force may be applied, under both IHL and IHRL.
- Analysis of the use of force in light of the principle of *impartiality*.

While not being able to provide detailed tactical guidance on how to provide protection in the field, the report will show that the legal aspects of the use of force in peace operations are critical for the development of PoC strategies. Without detailed guidelines on the legal aspects on the use of force, the military component will be deprived of clarity on how to implement PoC mandates in many peace operations. The report will thereby provide a first step of a legal analysis on the use of force to protect civilians. The report can serve as a starting point for further studying the issue of PoC in military operations, and building on the legal foundation will enhance guidelines for effective military engagement in PoC activities.

1.2 Scope, limitations and methodology

In light of the fact that most mandates to protect civilians are created under Chapter VII of the UN Charter, the present analysis is primarily focused on peace operations with a specific mandate to protect civilians under Chapter VII. For reasons of limitations, the present report will consequently not address the issue of providing PoC in Chapter VI mandated operations.

Also, in addressing the question of PoC in an existing peace operation, the question of if, when and how an intervention to protect civilians (R2P) is considered legitimate and legal (*jus ad bellum*) is outside of the scope of this research. The report, rather, will focus in the use of force *jus in bello*.¹⁷

¹⁷ International law makes a clear distinction between the right to use force, and the regulation of the force once the force is applied. The right to use force is called *jus ad bellum* (translates app. into the right to go to war) and the regulation of the force once the force is applied is called *jus in bello* (translates app. into 'the right in war'). This means that the question of when an intervention can be conducted against a state, or without the consent of the affected state, is excluded from this

To enable a complete legal analysis of the scope and limitation on the use of force to protect civilians in peace operations, definitions of the terms frequently entailed in mandates to protect civilians, namely ‘*areas of deployment*’, ‘*within capabilities*’, ‘*without prejudice to the government*’, ‘*imminent threats*’ and ‘*physical violence*’ is essential. The terms used in mandates provide a *jus ad bellum* authority and limitation on the use of force. However, the present report will only address the term ‘all necessary means’, and other *jus ad bellum* limitations entailed in the mandate will be excluded. The report will therefore also be limited to the principle of necessity, and the principle of proportionality will be largely omitted.

Due to the chosen exclusion of the terms ‘imminent threat’ and ‘physical harm’, the report will be unable to provide a complete legal analysis of the scope and limitation on the *jus ad bellum* use of force to protect civilians. The aspects chosen for the analysis are aspects frequently addressed in various reports and publications on PoC, and they are therefore considered crucial in a first step towards a complete analysis of how the military can provide PoC. By providing a legal analysis of common PoC concepts and arguments, the report will attempt to bridge the political aspects of PoC with the legal aspects. Bridging political and legal aspects, in turn, is important to enable comprehensive protections strategies that have the potential of providing effective protection of civilians in the field.

The research is further limited to tasks assigned to the *military* component of peace operations, and among the military tasks, the report will address the use of force only. While recognising that the military role in PoC is not limited to the use of force, additional tasks assigned to the military component in PoC will not be addressed. Likewise, although the roles and tasks of other actors are imperative to providing PoC, these will not be addressed in the present report.

An important aspect to military peace operations is the applicability of IHL. The question of the applicability of IHL is controversial, and there is no consensus on how or when IHL is applicable to military troops belonging to a peace operation. A majority of legal scholars, however, seem to agree on the applicability of IHL (as a minimum) *to the force applied by the troops* belonging to a peace operation *if and when engaged as a party* to an armed conflict.¹⁸ This analysis has therefore adopted the assumption that IHL is applicable to the force used by troops belonging to a peace operation when engaged in, and as a party to, an armed conflict. Moreover, the analysis has assumed that IHRL is applicable

report. Such force is used *jus ad bellum*, and is regulated by a different framework of law than the force used in and by a peace operation, which is regulated by *jus in bell* framework.

¹⁸ Alexandre Faite, and Jérémie Labbé Grenier, Ed. Legal Division of ICRC, 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), available online: <http://www.icrc.org/eng/resources/documents/publication/p0912.htm> (accessed 9 Feb 2012), Executive Summary.

extraterritorially. This means that the military component of a peace operation is obligated to adhere to IHRL when IHRL is the relevant legal framework regulating the use of force.

Lastly, although the present report is of a mainly legal nature, the report recognises and is sensitive to the fact that law alone cannot ensure PoC in the complex environment of contemporary peace operations. Rather, law must be understood to have limits, and political, economic, societal and cultural aspects also influence human conduct, and must thus be considered in addressing the complexity of violence against civilians both in times of war and peace. Law, rather, is held to provide the basic framework within which protection measures can be identified, structured, prioritised and implemented.

The report is based primarily on readings of primary sources such as treaties, Security Council mandates, Secretary General Reports, Concepts of Operations, Status of Forces Agreement (SOFA), Rules of Engagement (RoE), Mission plans, etc. Furthermore, a wide range of secondary sources, such as judicial decisions and academic publications, have been thoroughly analysed. Two interviews have also been conducted with legal scholars on the topics of Rules of Engagement and the use of force in peace operations.

Peace operations come in different shapes and forms, and are oftentimes named differently depending on their mandate. The legal frameworks enabling and limiting the use of force in such operations, however, remain the same. For the purpose of avoiding definitional problems with different forms of peace operations, the generic term adopted in the present report is *peace operations*. The term peace operation will entail operations mandated by the UN Security Council, but not necessarily conducted under UN *command and control*. The term is thereby held to include all forms of peace operations regardless of mandate and tasks.

2 PoC in context

The concept of PoC is founded on the rules entailed in IHL and IHRL and refugee law, and specified in a number of different legal instruments, such as the Geneva Conventions and its additional protocols, the Universal Declaration of Human Rights and in customary international law.¹⁹ The foundation of PoC is thus of legal nature, but the implementation of PoC inevitably extends beyond the legal doctrine, and involves a multitude of actors present in a peace operation environment.

Although significant development has taken place on the conceptual aspects of PoC, interpretations of what the notion of PoC actually entails for different actors still differ significantly.²⁰ This lack of a common definition of the concept creates challenges in identifying the roles and tasks of various protection actors.²¹ It also constitutes a significant obstacle in creating guidelines detailed enough to facilitate protection in the field.

As multi-dimensional peace operations need to be guided by unity of purpose and function as a whole, it is natural that some overlaps may exist between different actors in response to PoC. Defining the roles and tasks, and ensuring that the different roles correlate into a comprehensive protection strategy is thus essential. Consequently, to enable protection in the field two things are primarily required; definition of the concept of protection, and identification of the roles and tasks of different actors in providing protection.

This chapter will offer a definition of PoC that emphasises the importance of a two-pronged approach to PoC. It will be argued that for PoC to be effective and enable long term-protection, the concept needs to include both the aspect of identification of measures that are needed to enable PoC, and the aspect of how the measures are to be pursued. The chapter will further offer a presentation of threats frequently posed to civilians in peace operations, the role of the military and the use of force in PoC.

¹⁹ Security Council Report, *Protection of Civilians in Armed Conflict*, No 2, 31 May (2012), 3-4. See further on customary international law in chapter 3.

²⁰ See detailed analysis on the interpretation of the concept in Jon Harald Sande Lie and Benjamin de Carvalho's report 'A Culture of Protection?- Perceptions of the Protection of Civilians from Sudan', NUI report, Security in Practice no. 7, *Norsk Utenrikspolitisk Institutt* (2008).

²¹ Jon Harald Sande Li and Benjamin de Carvalho, 'A Culture of Protection- Perceptions of the Protection of Civilians from Sudan', NUI report Security in practice no 7 (2008), *Norsk Utenrikspolitisk Institutt* (2008).

2.1 Defining PoC

The United Nations Department for Peacekeeping Operations (DPKO) has attempted to clarify the concept of protection in an *Operational Concept on the Protection of Civilians in United Nations Peacekeeping Operations*.²² The Operational Concept is held here to represent the principal conceptual definition on PoC available today. Rather than providing a specific definition of protection, the Operational Concept accounts for three paradigms that frame different understandings of the concept. The paradigms range from broad all-encompassing approaches to more narrow approaches merely entailing protection from physical harm. The Operational Concept does not seek to reconcile the different paradigms, and holds that the definition of the term is rather dependent on, and may vary with the specific mandate and task of each peace operation.²³

The Operational Concept also identifies *three tiers* under which PoC can be structured. The three tiers are protection from *physical harm*, protection through *political process* and protection through a *protective environment*.²⁴ Each tier entails a number of different forms of protection, and the Operational Concept emphasizes that there is no internal hierarchy between the different tiers. On the contrary, the different tiers can both enable and feed off each other to enhance the overall protection. The different temporal and thematic aspects of protection enable attention to a broad range of protection needs, and needs varying over both time and place. Thus, the DPKO Operational Concept enables continuum of protection that aims at providing both short- and long-term protection. Correspondingly, the DPKO training manual on PoC from 2011²⁵ holds that all three aspects of protection are mutually reinforcing, and that they must be pursued simultaneously.²⁶ Thus, much like the 2011 World Development Report,²⁷ the DPKO holds that protection from immediate threats of physical force is interlinked with long-term promotion of human rights and creation of a protective environment.

Moreover, Security Council resolution 1674 acknowledges that peace and security, development and human rights are the pillars of the United Nations system, and the foundations for collective security and well-being. It further

²² United Nations Department for Peacekeeping Operations, *Operational Concept on the Protection of Civilians in United Nations Peacekeeping Operations*, 20.

²³ *Ibid*, para 11, 3.

²⁴ *ibid*, 1.

²⁵ The DPKO/ITS training manual is adapted from training materials on PoC from MONUSCO's Joint Human Rights Office (JHRO), which encompasses MONUSCO, UNHCR and UNICEF.

²⁶ DPKO training manual on protection of civilians, online: <http://www.peacekeepingbestpractices.unlb.org/PBPS/Library/Module%201%20-%20Overview%20of%20the%20Protection%20of%20Civilians.pdf> (accessed 12 March 2012).

²⁷ Center on International Cooperation, *Annual Review of Global Peace Operations*, Lynne Rienner Publishers (2012), 8

acknowledges these to be interlinked and mutually reinforcing.²⁸ By the same token, the DPKO Concept Note on protection of civilians holds that ‘a well-managed peace process that takes due consideration to justice and accountability is potentially the best form of protection for the civilian populace’.²⁹

The 2011 World Development Report also identifies that one key role of peacekeepers is to contribute to the establishment and the enabling of an environment required for long-term security and justice reform. The report further argues that peacekeepers can play a critical role in strengthening confidence and commitment to the political process.³⁰ Much like the DPKO Concept Note, the report thereby recognizes that measures of short-term protection from physical harm is inherently linked to long-term protection measures through the creation of a protective environment and strengthening of the political process.

2.1.1 The two-pronged approach to PoC

The existing guidelines on PoC clearly demonstrate an understanding that upholding and promoting respect for international law and human rights is a prerequisite for PoC. Moreover, the legitimacy of a peace operation is dependent on its ability to respect and uphold the laws applicable to the peace operation,³¹ and it is consequently important that peace operations demonstrate their own compliance with relevant laws.³²

Drawing on the World Development Report and the DPKO Concept Note, it is concluded that the concept of PoC must be held to extend beyond the mere identification of measures that enable PoC. *How* the measures are pursued is also of importance. Consequently, the definition of PoC must be two-pronged; PoC should address both what to do, and how to do it. PoC must adopt a ‘do no harm’ approach, meaning that the measures adopted must avoid causing unnecessary or indirect harm. Legality in the use of force is thereby crucial. PoC must also identify the measures that will provide the necessary protection in each given

²⁸ Security Council Resolution 1674, S/ Res/167, *Protection of Civilians in Armed Conflict* (2006), 1.

²⁹ UN DPKO/DFS Operational Concept of Protection of Civilians in United Nations Peacekeeping Operations, 4.

³⁰ Center on International Cooperation, *Annual Review of Global Peace Operations*, Lynne Rienner Publishers (2012), 8.

³¹ Claudio Bisogniero, Nato Deputy Secretary General, Keynote Address in Dr. Gian Luca Beruto (Ed.), *International Humanitarian Law Human Rights and Peace Operations*, 31st Round Table on Current Problems of International Humanitarian Law, Sanremo, 4-6 Sep. 2008, 43.

³² See also similar argument made by Haidi Willmot, 3rd International Forum for the Challenges of Peace Operations Queanbeyan, Australia 27-29 April 2010 Challenges of Strengthening the Protection of Civilians in Multidimensional Peace Operations Summary Report, online: <http://civmilcoe.gov.au/wp-content/uploads/2011/01/Challenges-Forum-2010-Summary-Report.pdf> (accessed 18 June 2012), 14.

context. In other words, the protection needs arising in peace operations must guide the protection strategies and the measures adopted.

2.2 Threats triggering protection needs

The first decade of the 21st century has brought with it an evolution of threats to civilians. Civil violence, organized crime and transnational terrorism are all threats that have contributed to an altered understanding of threats.³³ Contemporary conflicts also entail a wide variety of threats to civilians. Rape and sexual violence is frequently used as a strategy of war. Systematized attacks on civilians are other times ways to undermine governmental legitimacy, or a means to reach other goals than the immediate effect of the violence. PoC therefore requires a broad range of protection capabilities in both temporal and thematic terms.

The different forms of violence are also visible in the types of threats that frequently arise against civilians in peace operations. The DPKO training manual on PoC identifies four broad categories of threats that civilians are exposed to, and which demonstrates the broad range of threats facing civilians, namely *threats to life*, *threats to physical integrity*, *threats to freedom* and *threats to property*.

Table 1: Categorisation of threats to civilians³⁴

Threats to life	Arbitrary, summary/extrajudicial killings
	Murder (ranging from individual killings occurring out of criminality up to systematic violence and the perpetration of genocide)
Threats to physical integrity	Torture, mutilation, cruel, inhuman or degrading treatment
	Conflict-related sexual violence (Rape/other forms of gender-based violence (incl. threat, illicit demands, extortions, mistreatment) – from the opportunistic to the

³³ United Nations Office for the Coordination of Humanitarian Affairs online: www.unochaonline.un.org/humansecurity/Background/tabid/2100/language/en-US/Default.aspx, Background. (Accessed 26 April 2012).

³⁴ United Nations DPKO, Training manual. The DPKO/ITS training manual is adapted from training materials on PoC from MONUSCO's Joint Human Rights Office (JHRO), which encompasses MONUSCO, UNHCR and UNICEF.

	widespread and systematic use of rape)
	Abduction
	Recruitment and use of children: This includes not just children who have been combatants but also children used as fighters, cooks, porters, spies, or for sexual purposes.
	Assault and battery
	Deliberate deprivation (of food, water, livelihoods and other goods or services necessary for survival e.g. dams, hospitals etc.)
Threats to freedom	Forced disappearances
	Arbitrary/illegal arrests or detention (in violation of national or international law)
	Threats and intimidation as well as harassment at checkpoints
	Restrictions on freedom of movement (incl. forced displacement, relocation or return)
	Forced labour or recruitment (e.g. as fighters, labourers or sexual slaves)
Threats to property	Theft, extortion (for example illegal taxation)
	Looting
	Destruction of assets e.g. houses/shelters

In recognising that the list of threats above is on the one hand not exhaustive and on the other rather extensive, it is important to recall that writings on PoC stress that UN peacekeeping operations do not have the resources to address all incidents of violence. This is systematically taken into consideration in mandates through the limiting caveat that UN peacekeeping missions should provide

protection ‘within its capabilities and areas of deployment’.³⁵ Nevertheless, as stressed in the training materials, missions with a PoC mandate are authorised to protect civilians from both large and small scale attacks, including gender-based violence, if it is deemed to be within their capabilities.³⁶

As the present analysis will show, however, the legal parameters on the use of force differ significantly depending on whether or not the force is used in the context of an armed conflict. How the identified threats can be addressed therefore also differs in fundamental ways. In addressing the threats posed to civilians in the context of peace operations, it is necessary to note that many of the threats identified can take place both as part of an armed conflict, and as acts unrelated to an existing and on-going armed conflict. Murder, abductions, forced labour, etc. are all acts that can take place both as acts related to an armed conflict, and as criminal acts unrelated to the conflict. Only threats *related* to an armed conflict can be addressed within the legal framework of IHL. As held in the *Tadić* case,³⁷ for IHL to be the applicable framework regulating the use of force, there needs to be a nexus between the act and the armed conflict.³⁸ In other words, the act needs to be related to, and part of the conflict for IHL to regulate the force used in combating the threat. Threats unrelated to the conflict must rather be addressed within IHRL regardless of the existence of an armed conflict, putting additional demands on the capacity to identify the *nature* of the threats. Thereby, in addition to the existence of an armed conflict, the nature of the threat will direct which legal framework that is applicable, and thus how PoC can be implemented.

While the legal framework regulating how threats are addressed may differ, the need for protection often remains the same irrespective of the existence of an armed conflict. In the complex environments of contemporary peace operations, identifying threats and the nature of threats is a major challenge. Identifying the legal framework applicable, and addressing protection needs within the relevant legal parameters, is therefore a significant challenge for any actor tasked to use force to protect civilians. Detailed strategies guiding *how* protection mandates

³⁵ Justin MacDermott and Måns Hanssen, *Protection of Civilians- Delivering on the mandate through civil-military Coordination*, Swedish Defense Research Agency (FOI), September (2010), 26.

³⁶ Department for Peacekeeping Operations Resource hub, online: http://www.peacekeepingbestpractices.unlb.org/PBPS/Pages/Public/library.aspx?ot=2&cat=88&menukey=7_24 (accessed 15 March 2012)

³⁷ The *Tadić* case is named after Duško Tadić who was a former Serbian Democratic Party leader in Bosnia, and who was charged and convicted of crimes against humanity, grave breaches of the 1949 Geneva Conventions and violations of the customs of war by the International Criminal Tribunal for the Former Yugoslavia (ICTY) in 1997. The *Tadić* case has become an interpretive gauge for several legal aspects relating to armed conflicts in Public International Law.

³⁸ ICTY, *Prosecutor v Tadić*, IT-94-1-AR72, Appeals Chamber, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 Oct (1995), para 573. See also Dieter Fleck, *The Handbook of International Humanitarian Law*, 2nd Ed. OUP (2008), 35.

can be implemented are therefore as difficult to create as they are necessary for the delivery of effective protection in the field.

2.3 The role of the military in PoC

The DPKO Concept Note on PoC recognizes that protection is a systemic process that entails many different actors and many different activities. Due to the military capacity to use force, the military component of a peace operation is a key actor in ensuring protection, and the Concept Note identifies the military as a primary actor in protection from physical harm.³⁹ A primary means to ensure such protection is the capacity to use force.

The DPKO Operational Concept identifies different levels of protection from physical violence. Firstly, protection from physical violence is sought through *prevention* through a display of intent to hold perpetrators of violations accountable. Secondly, when threats of physical force are apparent, the display of a capacity to use force or the actual use of force as a *response* is a last resort in assuring PoC.⁴⁰

Moreover, in real-life peacekeeping situations, the military may end up in situations where there are no other actors readily available to respond to situations which may put them in the position of provider of last resort. Such situations could entail humanitarian distributions of some sort (traditionally handled by humanitarian actors), or e.g. riot control or responding to crime (traditionally handled by police actors). Therefore, the role of the military to protect civilians will depend on the nature of the peace operation,⁴¹ and military protection strategies must therefore be flexible enough to adapt to the specific contexts and specific needs of each peace operation while at the same time being specific enough to enable implementation at the tactical level.

2.4 The use of force to protect civilians

In 2009, the UN Office for the Coordination of Humanitarian Affairs (OCHA) and the Department for Peacekeeping Operations (DPKO) published a report, *Protection of civilians in the context of UN peacekeeping operations*, which

³⁹ United Nations Department for Peacekeeping operations/ Department for Field Support, *Operational Concept of Protection of Civilians in United Nations Peacekeeping Operations* (2010), 5.

⁴⁰ Justin MacDermott and Måns Hanssen, *Protection of Civilians- Delivering on the Mandate through Civil-Military Coordination*, Swedish Defense Research Agency (FOI), Sep. (2010), 28.

⁴¹ Victoria K. Holt, *The Responsibility to Protect: Considering the Operational Capacity for Civilian Protection*, Henry L. Stimson Center, 31 January (2005), 65.

found that there exists a major disconnect between the mandating, the planning and the implementation of the mandate to protect civilians in the field.⁴²

The disconnect between theory and practice is reportedly also evident in the field. A report published by the Norwegian Defence Research Establishment (FFI) quotes a military official in the United Nations Mission in DR Congo (MONUC) as stating ‘we do not know how to be robust’,⁴³ illustrating the lack of sufficient guidance on how to provide protection at the operational and tactical level. It has further been reported that there is a lack of understanding of ‘where and when force can be deployed and used in a preventive role to deter armed groups from attacking and abusing civilians’,⁴⁴ which further exemplifies the questions arising regarding the use of force in peace operations.

Lack of understanding of *when* and *how* force can be used is one of the enduring challenges of the military component of peace operations.⁴⁵ To the extent that guidance on PoC exists, it tends to address the tactical methods of protection through assurance, prevention and deterrence, but it lacks attention to the legal aspects of the use of force. The use of force is, however, always strictly regulated by law. Thus, in addressing the question *how* the military can use force to protect civilians, the legal parameters on the use of force is necessarily of central importance.

The use of force is regulated by IHL in the context of armed conflicts, and by IHRL (also called law enforcement) outside the context of an armed conflict. The actions by the military component of a peace operation is also regulated by Rules of Engagement (RoE), which can put additional limitations on the use of force on top of the applicable legal frameworks.⁴⁶ Since peace operations frequently operate in environments not fitting neatly into either scenario, peace operations will often operate in a very complex legal environment.⁴⁷ This legal complexity is particularly obvious and troublesome at the military tactical level, and in particular in the context of the use of force. It is at the tactical level that mandates

⁴² Victoria Holt & Glyn Taylor with Max Kelly, *Protection of Civilians in the Context of Peace Operations*, Independent study jointly commissioned by the Department of Peacekeeping Operations and the Office for the Coordination of Humanitarian Affairs, November (2009), 2.

⁴³ Stian Kjeksrud and Jacob Aasland Ravndal, *Protection of civilians in practice – emerging lessons from the UN mission in the DR Congo*, Norwegian Defence Research Establishment (FFI) 15 December 2010, 34.

⁴⁴ Alan Doss, ‘Great Expectations: UN Peacekeeping, Civilian Protection and the Use of Force’, *Geneva Papers*, Research Series No 4, December (2011), 41 (emphasis added).

⁴⁵ William J. Durch and Alison C. Giffen, *Challenges of Strengthening the Protection of Civilians in Multidimensional Peace Operations*, Background Paper Prepared for the 3rd International Forum for the Challenges of Peace Operations, 27–29 April 2010, Queenbeyan, Australia, Hosted by the Asia Pacific Civil-Military Centre of Excellence, Oct 2010, 30.

⁴⁶ See further analysis of RoE in chapter 4.1.1.

⁴⁷ Dale Stephens, ‘The Lawful Use of Force by Peacekeeping Forces: The Tactical Imperative’, *International Peacekeeping* (2005), vol. 12 (2), 157.

are brought from theory to practice, and it is also at the tactical level that PoC will be realized.

One complicating factor is that military actors are traditionally trained for war, and subsequently for using force regulated by IHL. Military forces are rarely neither intended nor trained for domestic security, and normally do not train for the subtle use of force regulated by IHRL.⁴⁸ Due to IHL being applicable only to armed conflicts, and peace operations frequently operating outside armed conflicts, the use of force in peace operations therefore frequently require that the military adapts to a new and different role than the one they are specifically trained for. This undoubtedly adds to the difficulty of identifying when and how force can be used in IHRL contexts.

To further complicate matters, not all use of force is regulated by IHL even in the context of an armed conflict. Only force that is applied in relation to the conflict, and by an actor party to the conflict, is regulated by IHL.⁴⁹ This means that force applied by troops in a peace operation may be obliged to adhere to IHRL in certain instances, while being permitted to extend the force to the framework of IHL (and RoE) in other instances. Identifying the nature of the force, and distinguishing between armed elements and civilians, undoubtedly constitutes a critical challenge for PoC in contemporary peace operations.

Clear guidance on the legal parameters on the use of force in both IHL and IHRL would contribute to enabling military actors to act firmly and comfortably within the law both inside and outside an armed conflict, and thereby enable peace operations to provide sufficient PoC when protection is warranted.

Identifying the legal parameters on the use of force is therefore essential for at least two reasons; for the *adequate protection of civilians*, and for the overall *success of the peace operation*.

⁴⁸ Trevor Findlay, *The Use of Force in Peace Operations*, Stockholm International Peace Research Institute (SIPRI), OUP (2002), 356.

⁴⁹ ICTY, *Prosecutor v Tadic*, IT-94-1-AR72, Appeals Chamber, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 Oct (1995), para 573. See also Dieter Fleck, *The Handbook of International Humanitarian Law*, 2nd Ed. OUP (2008), 35.

3 PoC and the law

As stated above, the question of *how* to use force in a peace operation is regulated either by IHL (in the context of an armed conflict), or by IHRL (outside the context of an armed conflict).⁵⁰ Thereby, determining *how* protection can be ensured requires analysis of the parameters on the use of force entailed in both legal frameworks. To address the scope and limitation on the use of force entailed in IHRL and IHL respectively, however, a brief outline of the structure of international law is required. For that purpose, a description of the sources and interpretive methods of international law will be provided along with a general analysis of the legal standing of Security Council mandates. Next, the principles of necessity and distinction will be analysed in light of IHL and IHRL, and the chapter will conclude by analysing the use of force in light of the impartiality of peace operations.

In analysing the scope and limitation on the use of force to protect civilians, it is important to note the distinction between the law as it is written and intended, and the law as it is applied. For example, although a fundamental basis of law is the principle *equality before the law*, the law is oftentimes not applied equally to all. Ethnicity, gender, age, nationality and power are aspects that have been found to frequently affect how the law is applied to different individuals within nations. Likewise, power, positions and inter-state relations are aspects that affect how the law is applied on the international arena. The law is therefore oftentimes not equally applied in reality.

While how the law is applied is of importance in measuring the efficiency of law, failure to meet the intentions of law does not, however, undermine the validity of the law. Therefore, while recognising that the application of law sometimes fail to live up to its intentions, this chapter is merely aimed at analysing the law as it is *intended*, and not as it is necessarily *applied*.

The legal frameworks of peace operations are both extensive and complicated. To aid the understanding of the legal arguments made in the present report, a brief outline of the basics of international law will be presented. Thereafter, the legal significance of Security Council mandates, the threshold of armed conflicts and the legal aspects of ‘all necessary means’ will be provided. Lastly, the principle of distinction and the principle of impartiality will be analysed in the perspectives of both law and PoC.

⁵⁰ Although human rights continue to apply, albeit more limited, during armed conflict, it is either IHL or the IHRL that regulates the force used. Therefore, analysis of the legal parameters of the use of force in IHL and IHRL are of essence to the present analysis.

3.1 Basic framework of international law

The international legal system is distinct from all domestic legal systems in the world. While the sources of law are generally easy to identify in domestic legal systems, the situation is very different on the international arena. Due to the lack of a legislative and executive authority on the international arena, identifying existing international laws is a demanding task.⁵¹

International law consists of several sources of law. Article 38 (1) of the Statute of the International Court of Justice (ICJ) is widely recognized as the most authoritative and complete listing of existing sources of international law.⁵² Article 38 (1) identifies 3 sources, namely international conventions (treaties), custom and general principles of law.⁵³

International conventions (or treaties) are a source of law binding on states to the extent that they are 'expressly recognized by the contesting states'.⁵⁴ *Custom* is a source of international law that is not necessarily codified (written down in text), but that constitutes general practice and is accepted as law. For custom to be law, in other words, two things are required; *state practice* that is widely applied by a significant number of states, and that the practice is founded on a perceived legal obligation to act in that specific way (*opinio juris*).⁵⁵ Establishing existing customary law is therefore a demanding exercise which requires analysis of both how states actually act, and whether or not the reason for such action is a subjective belief that the practice is required by law.⁵⁶ This is an essential part of customary international law which prevents that violations of the law enable the creation new law.

General principles of law are even more controversial and vague than customary international law. Some general principles that constitute common themes in most judicial systems of the world can be held to be uncontested, such as *equality before the law* (requiring the law to be applied equally to all individuals), and *predictability of law* (requiring law to be established prior to any convictions). The named principles are also central to the concept of rule of law.

⁵¹ Malcolm N. Shaw, *International Law*, 6th Ed., CUP (2008), 84.

⁵² *ibid*, 70.

⁵³ International Court of Justice, Statute, article 38 (1).

⁵⁴ *ibid*, article 38 (1) (a).

⁵⁵ International Court of Justice, Statute, article 38 (1) (b) holds: 'international custom, as evidence of a general practice accepted as law'. *Opinio juris* constitutes a mental (subjective) element that is required together with the objective element of state practice for customary law to exist.

⁵⁶ See ICJ Advisory Opinion on the *Legality of the Threat or Use of Nuclear Weapons* (1996), 31. See also ICJ *Continental Shelf (Libyan Arab Jarnahiriya/Malta)*, Judgment, ICJ Reports (1985), 29, para. 27.

The sources of international law are thoroughly debated, as well as the interpretation and application of the law. While the controversies are worthy of thorough research, they lie well beyond the scope of the present report. The international legal system is, however, widely held to be based on the civil law tradition,⁵⁷ and interpretation of law should therefore primarily be based on the treaty text, and on any preparatory work detailing the intentions of the law. Moreover, and as opposed to in the common law tradition, judicial decisions are identified as a mere subsidiary source of international law.⁵⁸

3.2 Security Council mandates and the use of force

International law has traditionally made a distinct separation between *if* and *how* force may be used. While the question of *if* is addressed within the *jus ad bellum* (right to use force) framework of international law, the question of *how* is addressed by the *jus in bello* (right in war) framework, involving IHL or IHRL, or both.

Due to the fact that Security Council resolutions are not *treaties*, Security Council resolutions must primarily be interpreted in the context of the UN Charter.⁵⁹ Interpretation must also have regard for the particular political background and the drafting process of the resolution.⁶⁰ Security Council resolutions are not legal documents, and are created without much (if any) input from the United Nations Office of Legal Affairs (OLA).⁶¹ Thus, while Security Council resolutions provide legal authorizations, the terms used in Security Council resolutions are not necessarily of a legal nature. The practical implementations of the mandate, and the subsequent interpretation of the terms, do, however, have legal consequences.

A Security Council resolution provides an authorisation to use force under *jus ad bellum*, meaning that it provides legal grounds to use force. The mandate is, however, irrelevant for establishing *how* the force in each situation may be applied in the peace operation, and it is thus also irrelevant for establishing which

⁵⁷ Colin B. Picker, 'International Law's Mixed Heritage: A Common/ Civil Law Jurisdiction', *Vanderbilt Journal of Transnational Law*, Vol. 41 (2008), 1106.

⁵⁸ International Court of Justice, Statute, article 38 (1) € holds: 'subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law'.

⁵⁹ Michael C. Wood, 'Interpretation of Security Council Resolutions', *Max Planck Yearbook of United Nations Law*, Vol. 2 (1998), 95.

⁶⁰ *ibid*, 74.

⁶¹ *ibid*, 80.

legal framework that is applicable to the force used by peace operations.⁶² The question of how the force can be applied is regulated by the applicable legal framework, and by Rules of Engagement (RoE).⁶³ Thereby, the mandate to use force is applicable irrespective of the existence of an armed conflict, and a peace operation may thereby be authorised to use force under both IHL (if and when an armed conflict exists) and under IHRL (outside the context of an armed conflict).

3.2.1 Mandates to protect civilians

Mandates to protect civilians are generally composed of four components, namely protection from *imminent threats of physical violence*, through *necessary action*, in *areas of deployment and within capabilities*, and *without prejudice to the government*.⁶⁴ Consequently, defining the terms is essential to identify the complete *jus ad bellum* authority to use force entailed in the mandate.⁶⁵

PoC is realised mainly as a mandated task under Chapter VII of the UN Charter, enabling use of force beyond self-defence, and force for the sole purpose of protecting civilians. Mandates authorising use of force for the specific purpose of protecting civilians can arguably be held to provide limitations in the *jus ad bellum* authorization to use force.⁶⁶ Mandates authorising ‘all necessary means’ for the purpose of protecting civilians must consequently satisfy requirements of both *jus ad bellum* and *jus in bello*.⁶⁷ In other words, force used must have the purpose of protecting civilians and it must abide by the legal framework applicable to the particular situation (IHL or IHRL). The use of force for other purposes⁶⁸, such as enabling a shift in governmental structure, would thereby fall outside of the *jus ad bellum* authorization to use force, and would as such be illegal.

⁶² Alexandre Faite, and Jérémie Labbé Grenier, Ed. Legal Division of ICRC, 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, available online: <http://www.icrc.org/eng/resources/documents/publication/p0912.htm> (accessed 9 Feb 2012), Executive Summary, 2.

⁶³ See further on RoE in chapter 4.1.1.

⁶⁴ Max Kelly and Alison Giffen, *Military Planning to Protect Civilians- Proposed guidance for United Nations Peacekeeping*, The Henry L. Stimson Center (2011), 39.

⁶⁵ For purpose of limitation, the present analysis will only address the term ‘all necessary means’.

⁶⁶ Julian M. Lehman, ‘All Necessary Means to Protect Civilians: What the Intervention in Libya Says About the Relationship Between Jus in Bello and Jus Ad Bellum’, *Journal of Conflict and Security Law*, Vol 17 No 1 (2012), 130.

⁶⁷ *ibid*, 130.

⁶⁸ Unless specifically mandated elsewhere in the mandate.

3.2.2 Military and police force

The mandate to use force has sometimes been interpreted as limited to either self-defence or to IHL in the context of armed conflicts.⁶⁹ The mandate to use force to protect civilians under Chapter VII and outside an armed conflict, however, extends beyond self-defence, and provides authorization to use force within the IHRL framework. The authority thus resembles that of a law enforcement actor, even if the authorisation is limited to the specific purposes identified in the Security Council mandate. To appreciate the full scope of the authorisation to use force in PoC mandates, the identification of the roles and tasks of the military and the police, and the distinction between the two, could be beneficial to enhancing PoC in the field.

The traditional distinction between military and police force is linked to the development of the nation state, and its claim on monopoly on the use of force for both external and internal security.⁷⁰ While the military are traditionally tasked to ensure external security, the police are tasked to ensure security within a state. Both the military and the police are consequently entrusted with an authority to use force, although in distinctly different contexts. While the military is normally entrusted with the power to use force in times of war, the police is entrusted with such powers in domestic settings, and in times of peace. Thus, the military are traditionally trained for the use of force regulated by IHL, while the police (law enforcement) are intended for the use of force regulated by IHRL. Ensuring security based on the rule of law and human rights within a state requires a more subtle exercise of power than ensuring security within IHL.⁷¹ The difference, thus, is of importance, and will be further studied below.

Chapter VII mandated peace operations authorises the use of force for the fulfilment of mandated tasks.⁷² In authorizing the use of force beyond self-defence, and for the fulfilment of mandated tasks, the mandate translates into an authority to use force for the identified purposes and within IHRL. Thus, for the specific purposes identified in the mandate, the peace operation is authorised to act as a law enforcement actor. The use of force as a law enforcement actor is regulated by IHRL, but can still under certain circumstances enable force up to and including lethal force. The circumstances for how force can be applied, however, differ in IHL and IHRL, as further analysis will show. Due to the differences entailed in the two legal frameworks on the use of force, identifying

⁶⁹ See the interpretation made by the Uruguayan troops in the Bukavu crisis, DR Congo below in chapter 4.2.1. See also United Nations, Eleventh Report of the Secretary General on the United Nations Organization Mission in the Democratic Republic of Congo, S/2002/621 (2002), 9.

⁷⁰ 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) (2004), 12.

⁷¹ *ibid*, 13.

⁷² Swedish Government, Statens Offentliga Utredningar, SOU 2011:76, 57.

the theoretically imprecise borderlines between war and peace is of increasing importance in today's peace operations.

The fact that modern peace operations are mandated to use force to protect civilians may result in troops becoming increasingly engaged in violent confrontation bordering on armed conflict. The use of force in order to enable a secure environment in accordance with the mandate, however, does not necessarily result in participation in an armed conflict.⁷³ Up until such time that the threshold for armed conflict is reached, the mandate authorises use of force beyond self-defence, and within the IHRL framework. Thereby, pinpointing the exact time when troops become party to a conflict, and thus when IHL regulates the force used by the military troops, is also necessary. As a result, peace operations need to be able to identify the threshold of armed conflicts, and distinguish between situations regulated by IHRL and situations regulated by IHL.

3.3 The threshold of armed conflict

The primary determining factor for which legal framework that is applicable to the peace operation is whether or not an *armed conflict* exists. The identification of an armed conflict is therefore crucial to enable identification of the relevant legal parameters regulating the use of force in a peace operation.

The Geneva Conventions do not define the term 'armed conflict'.⁷⁴ The existence of an armed conflict, and thus the legal framework applicable, is determined, rather, on the facts on the ground.⁷⁵ The threshold determining the existence of an armed conflict is thereby not an exact science. That is particularly true for non-international armed conflicts. The existence of a non-international armed conflict must be assessed on a case by case basis, and primarily against two specific treaty texts, namely common article 3 of the Geneva Conventions, and article 1 of Additional Protocol II (APII). Article 3 applies to 'armed conflicts not of an international character',⁷⁶ and holds that the level of violence must reach a level that distinguishes it from other forms of violence to which IHL does

⁷³ Ola Engdahl, 'The status of peace operation personnel under international humanitarian law', *Yearbook of International Humanitarian Law*, Vol. 11 (2008), 116.

⁷⁴ Dieter Fleck, *The Handbook of International Humanitarian Law*, 2nd Ed. OUP (2008), 47.

⁷⁵ Alexandre Faite, and Jérémie Labbé Grenier, Ed. Legal Division of ICRC, *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, available online: <http://www.icrc.org/eng/resources/documents/publication/p0912.htm> (accessed 9 Feb 2012), Executive Summary, 1.

⁷⁶ Geneva Conventions, common article 3 (1).

not apply, for example ‘internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of similar nature’.⁷⁷

In interpreting applicable legal regimes in the *Tadić* case, the International Criminal Tribunal for former Yugoslavia (ICTY) held that ‘an armed conflict exists whenever there is a resort to armed force between states, or *protracted* violence between governmental authorities and organized armed groups or between such groups within a state’.⁷⁸ Since the *Tadić* case, the ICTY has furthered this interpretation, and has emphasised the *intensity* of the violence rather than the temporal duration of the violence in determining whether or not an armed conflict exists in a non-international context.⁷⁹ It has, however, also been pointed out that it is important to not lose sight of protracted armed violence in assessing the existence of an armed conflict.⁸⁰

3.3.1 The when and where of armed conflicts

The *Tadić* case further affirmed that ‘the temporal and geographic scope of both internal and international armed conflicts extends beyond the exact time and place of hostilities’ and further detailed that:

International humanitarian law applies from the initiation of such armed conflicts and extends beyond the cessation of hostilities until a general conclusion of peace is reached; or, in the case of internal conflicts, a peaceful settlement is achieved. Until that moment, international humanitarian law continues to apply in the whole territory of the warring States or, in the case of internal conflicts, the whole territory under the control of a party, whether or not actual combat takes place there.⁸¹

The *Tadić* case, which has become an interpretive yard stick for the existence of armed conflicts, makes a distinction between international and non-international armed conflicts in terms of both the geographical and the temporal scope of application of IHL. Regarding non-international armed conflicts, IHL is held to apply in the whole territory under the control of a party, and until a peaceful settlement is achieved.⁸² Thereby, IHL is not applicable to a territory that is not

⁷⁷ Geneva Conventions, Additional Protocol II, article 1 (2).

⁷⁸ ICTY, *Prosecutor v. Tadić*, IT-94-1-AR72, Appeals Chamber, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 Oct (1995), para 70.

⁷⁹ ICTY, *Prosecutor v. Haradinaj et al.*, IT-04-84, Trial Chamber I, Judgment, 3 April 2008, para 49.

⁸⁰ ICTY, *Prosecutor v. Boškoski and Tarčulovski*, IT-04-82-A, Appeals Chamber, Judgment, 19 May 2010, para 21.

⁸¹ ICTY, *Prosecutor v. Tadić*, IT-94-1-AR72, Appeals Chamber, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 Oct (1995), para. 633.

⁸² ICTY, *Prosecutor v. Tadić*, IT-94-1-AR72, Appeals Chamber, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 Oct (1995), para. 633.

under the control of a warring party. Moreover, IHL continues to apply in a non-international armed conflict ‘until a peaceful settlement is achieved’. Interpreting the terms ‘control’ and ‘peaceful settlement’ is consequently crucial to the determination of whether or not IHL is applicable in a non-international setting. Such interpretation is a complex exercise that lies outside of the scope of the present research, but which nonetheless is an essential analysis to make to enable identification of the legal framework that regulates the use of force.

The difficulty in identifying the threshold of armed conflicts is particularly obvious in contexts such as Afghanistan and DR Congo. While the situation in one part of Afghanistan may be of such nature and involving such intensive violence that the threshold for armed conflict is reached, the situation may be very different in another part of the country. Similarly, the situation in the eastern part of DR Congo is very different from the situation in the western part. Consequently, IHL may be applicable to one part of the country, while IHRL is the legal framework applicable to the use of force in another.⁸³ To enable strategies for PoC that allows for both legal and sufficient PoC, the strategies must be capable of addressing both contexts.

In addition, when peace operation troops are deployed for the purpose of maintaining peace and security, the force they use does not necessarily entail involvement in an armed conflict. Rather, peace operations troops frequently operate as a law enforcement body in a peace operation. In other words, the use of force to protect civilians against *criminal acts* rather than acts related to a conflict would *not* entail involvement in an armed conflict,⁸⁴ and IHL is therefore not applicable. Thereby the legal framework regulating the use of force will differ depending both on whether or not an armed conflict exists (and on whether or not the peace operation is acting as a party to the conflict), and on the nature of the threat that is being addressed.⁸⁵ Accordingly, military strategies for PoC need to be flexible enough to enable PoC within both IHL and IHRL, and sufficiently responsive to be able to adapt to the nature of the threat.

⁸³ In the *Tadić* case, the Appeals Chamber held that IHL applies to the whole territory under the control of a warring party. Thus, the territory under the control of a party does not necessarily equate the territory of the state, and different frameworks may therefore apply to different areas of the state. (see Appeals Chamber decision, para 70).

⁸⁴ Ola Engdahl, ‘The status of peace operation personnel under international humanitarian law’, *Yearbook of International Humanitarian Law*, Vol. 11 (2008), 113.

⁸⁵ See further on this in chapter 3.1.

3.4 A legal perspective of ‘all necessary means’

Necessity has been summarized as the limit of legality.⁸⁶ Identifying what is necessary is therefore imperative to enable legality of the actions. Security Council mandates frequently authorises peace operations to use ‘all necessary means’ or ‘all necessary measures’. The term *necessary* entails an obligation to adhere by the legal principle of necessity in the use of force. Although included in both IHL and IHRL, the principle of necessity differs significantly in the two frameworks.

The legality of the use of force, and in particular the use of potentially lethal force, is assessed against the right to life in both IHL and in IHRL. In neither context, however, is the right to life absolute. Thus, the force used, and in particular lethal force, must be *necessary*. What is considered necessary, however, differs in the two frameworks.

3.4.1 Necessity under IHL

The principle of necessity has been described as a principle so fundamental that without it there could be no law of war at all.⁸⁷ *Military necessity* is a legal principle that stems from IHL.

The modern interpretation of military necessity is strongly influenced by the *Lieber Code* definition, which identifies it as:

[...] measures indispensable for securing the ends of war and which are lawful according to the modern law and usage of war.⁸⁸

The principle of military necessity thereby encompasses a requirement that the action is both necessary for the achievement of the ends of war, and lawful according to the laws on means and methods of warfare.⁸⁹ Moreover, the damage inflicted must be proportionate to the military advantage sought.⁹⁰

Article 52 of the Additional Protocol I of the Geneva Conventions provides a definition of the objective of the force under IHL. It holds:

⁸⁶ Y Sandoz, C. Swinarski, B. Zimmermann, eds, *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*, Geneva ICRC (1987), § 1410.

⁸⁷ Craig J.S. Forrest, ‘The Doctrine of Military necessity and the Protection of Cultural Property During Armed Conflicts’, *California Western International Law Journal*, (2007) Vol. 37 (2), 183.

⁸⁸ Instructions for the Government if Armies of the United States in the Field, 24 April (1863), *The Lieber Code*, online: <http://www.icrc.org/ihl.nsf/FULL/110?OpenDocument> (accessed 7 may 2012), art 14.

⁸⁹ *ibid.*

⁹⁰ Dieter Fleck, *The Handbook of International Humanitarian Law*, 2nd Ed. OUP (2008), 127.

In so far as objectives are concerned, military objectives are limited to those objects under which by their nature, location, purpose or the use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage.⁹¹

The term military necessity is thereby inherently linked to the overarching goal of armed conflict, namely winning the war. The German military manual summarizes the balance between the aims of war and the limitations provided by the principle of military necessity by holding:

Military necessity has already been taking into consideration in the law of war, because the law of war constitutes a compromise between the necessities to obtain the aims of war and the principles of humanity.⁹²

IHL thereby enables a broad use of force in which the security of the individual is subsidiary to the security of the state. Collateral damage and force against civilians are thereby merely minimized under IHL, even if ‘civilian casualties are only legitimate if their deaths are incidental to the conduct of military operations’.⁹³

3.4.2 Necessity under IHRL

As noted in chapter 3.2, the mandate to use force merely has *jus ad bellum* consequences, and has no bearing on *how* force may be used (*jus in bello*). The lack of *jus in bello* consequences of a Security Council mandate results in the conclusion that a Security Council mandate, even under Chapter VII, does not presume the existence of an armed conflict. The mandate to use force is therefore not limited to the IHL framework, but also includes a mandate to use force outside an armed conflict, i.e. under the IHRL framework. Using force under the IHRL framework is, in reality, taking on police functions, and the instruments regulating the use of force for law enforcement officials are therefore relevant for the analysis on the scope and limitation on the use of force under IHLR.

The principle of necessity as detailed in IHRL instruments is scarcely outlined in guidance on the use of force for peace operations. Peace operations often operate in contexts outside of armed conflict, and the use of force in peace operations is subsequently oftentimes regulated by IHRL. IHRL emerged after IHL, and was primarily aimed at governing the relationship between the state and the

⁹¹ Geneva Conventions, Additional Protocol I, article 52.

⁹² German Military Manual ZDv/15; Louise Doswald-Beck and Sylvain Vit , ‘International Humanitarian Law and Human Rights Law’, *International Review of the Red Cross*, No 293 (1993), online: www.icrc.org/eng/resources/documents/misc/57jmrt.htm (accessed 26 April 2012).

⁹³ ICTY, *Prosecutor v Bošković and Tarčulovski*, IT-04-82-A, Appeals Chamber, Judgment, 19 May (2010), para. 46.

individuals under its jurisdiction. The use of force under IHRL is thereby normally regulated in domestic legislation. There are, however, primarily two (global) international instruments addressing the use of force under IHRL, namely the *UN Code of Conduct for Law Enforcement Officials* and the *Basic Principles on the Use of Force and Firearms by Law Enforcement Officials*,⁹⁴ Neither of these instruments are legally binding, but they are both authoritative interpretations of the use of force under IHRL.⁹⁵

The *UN Code of Conduct for Law Enforcement Officials* holds that the use of force is only permissible when strictly necessary. Further, the same instrument holds that firearms may only be used in situations of armed resistance or to protect the life of others and less forceful means are insufficient.⁹⁶

The Basic Principles on the Use of Force and Firearms by Law Enforcement Officials has identified the use of force as limited to self-defence, prevention of serious crimes involving grave threat to life or serious injury, and arrest or prevention of the escape of persons posing such threats.⁹⁷ Moreover, on the use of firearms, article 39 of the named document specifies:

Law enforcement officials shall not use firearms against persons except in self-defence or defence of others against the imminent threat of death or serious injury, to prevent the perpetration of a particularly serious crime involving grave threat to life, to arrest a person presenting such a danger and resisting their authority, or to prevent his or her escape, and only when less extreme means are insufficient to achieve these objectives. In any event, intentional lethal use of firearms may only be made when strictly unavoidable in order to protect life.⁹⁸

Thus, use of force for preventive or pre-emptive⁹⁹ purposes, as suggested by Alan Doss, a former Special Representative for the United Nations Mission in

⁹⁴ United Nations, *Basic Principles on the Use of Force and Firearms by Law Enforcement Officials*, UN Doc A/CONF.144/28/Rev.1, 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), Online: <http://www2.ohchr.org/english/law/firearms.htm> (accessed 1 March 2012)

⁹⁵ Noam Lubell, *Extraterritorial Use of Force Against Non-State Actors*, OUP (2010), 167.

⁹⁶ United Nations *Code of Conduct for Law Enforcement Officials*, General Assembly resolution 34/169, 17 Dec 1979, article 3.

⁹⁷ United Nations, *Basic Principles on the Use of Force and Firearms by Law Enforcement Officials*, UN Doc A/CONF.144/28/Rev.1 para 9. Online: <http://www2.ohchr.org/english/law/firearms.htm> (accessed 1 March 2012).

⁹⁸ United Nations, *Basic Principles on the Use of Force and Firearms by Law Enforcement Officials*, UN Doc A/CONF.144/28/Rev.1 para 9. Online: <http://www2.ohchr.org/english/law/firearms.htm> (accessed 1 March 2012), para 9.

⁹⁹ Alan Doss, 'Great Expectations: UN Peacekeeping, Civilian Protection and the Use of Force', *Geneva Papers*, Research Series No 4, December (2011), 38 and 41. Doss is seemingly using the terms preventive and pre-emptive interchangeably. Other authors (on the use of force in international law) make a distinction between the two terms, and the term preventive is often held to be more temporally distant than the term pre-emptive.

Liberia,¹⁰⁰ is not in accordance with IHRL. While IHL requires balancing the right to life against *military necessity*, IHRL requires the force to be balanced mainly against the *human rights* of the individual. Contrary to IHL, IHRL requires that force is applied only when strictly necessary, and lethal force only when other lives are endangered.

The scope and limitations on the use of force is thereby vastly different under the two frameworks, which has considerable consequences for the strategies on how to protect civilians. Addressing an armed group frequently attacking civilians in the area of operation of a peace operation thereby differs significantly depending of which legal framework that regulates the force. IHL enables use of force against the group for the purpose of eliminating the threat, and irrespective of whether or not the group poses a threat at the time the force is used. IHRL, on the other hand, requires that only the minimum force necessary is applied, and lethal force only if and when lives are endangered and for the purpose of protecting life. A strategy to protect civilians from such threats must therefore necessarily differ depending on which legal framework that is applicable, and strategies for PoC must be sensitive to the distinctions entailed in the different legal frameworks regulating the use of force.

3.5 The principle of distinction

Another significant difference between the use of force in IHL and IHRL is determining *against whom* force can be applied. The interlocking landscapes of the violence frequently occurring in the context of peace operations, and the increased difficulty in distinguishing civilians from individuals taking part in hostilities constitute significant challenges for peace operations, and in particular regarding PoC. Distinguishing between civilians in need of protection and individuals constituting threats to civilians is, however, necessary to enable PoC.

The principle of distinction entailed in IHL is primarily specified in article 13 (1) and 13 (2) of Additional Protocol II of the Geneva Conventions (APII) (for non-international armed conflicts), and protects the civilian population from attacks in armed conflicts. Article 13 (1) stipulates the basic rule of distinction:

1. The civilian population and individual civilians shall enjoy general protection against the dangers arising from military operations. To give effect to this protection, the following rules shall be observed in all circumstances.
2. The civilian population as such, as well as individual civilians, shall not be the object of attack. Acts or threats of violence the primary purpose of which is to spread terror among the civilian population are prohibited.

¹⁰⁰ Alan Doss, 'Great Expectations: UN Peacekeeping, Civilian Protection and the Use of Force', *Geneva Papers*, Research Series No 4, December (2011), 41. See also chapter 1.1.

3. Civilians shall enjoy the protection afforded by this Part, unless and for such time as they take a direct part in hostilities.¹⁰¹

Notably, the wording ‘unless and for such time as they take direct part in hostilities’ clearly shows that the protection awarded civilians is conditioned on them not taking direct part in hostilities. Thus, while the principle of distinction in IHL provides protection for civilians, it also simultaneously enables attacks against *combatants* in international armed conflicts,¹⁰² and against individuals taking *direct part in hostilities* in non-international armed conflicts.

The International Committee of the Red Cross (ICRC) study on customary IHL also establishes that the principle of distinction is a principle of customary IHL, and as such applicable to all actors and in all types of armed conflicts.¹⁰³ The ICRC study notes that state practice is not clear on the status of members of armed opposition groups (in non-international armed conflicts), but holds that practice indicates that individuals lose their protected status if and for the duration that they take direct part in hostilities.¹⁰⁴

The ICRC guidelines on direct participation in hostilities further holds that an individual lose his/her protected status for as long as he/she holds a position of *continuous combat function*.¹⁰⁵ Thus, under this interpretation¹⁰⁶ the scope and limitation of the legal targeting of an individual taking direct part in hostilities through a continuous combat function in a non-international armed conflict is very similar to the scope and limitation of the legal targeting of a combatant in an international armed conflict. Both the concept of direct participation and the concept of continuous combat function entail significant difficulties in practical terms. Determining the temporal scope of direct participation, and how to distinguish an individual holding a continuous combat function from one taking direct part in hostilities, and how the two are to be distinguished from civilians, are only three of many questions arising. While the scope and limitation of the concepts are beyond the limitations of this research, it is important to note that

¹⁰¹ Geneva Convention, Additional Protocol II, Art 13.

¹⁰² Geneva Convention, Additional Protocol I, Articles 48, 51(2) and 52(2).

¹⁰³ ICRC Study on Customary International Humanitarian Law, Rule 1, online: http://www.icrc.org/customary-ihl/eng/docs/v1_cha_chapter1_rule1 (accessed 29 March 2012).

¹⁰⁴ International Review of the Red Cross, *Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law*, Vol. 90 No 872 (2008), Adopted by the Assembly of the International Committee of the Red Cross on 26 February 2009, 996.

¹⁰⁵ *ibid.*

¹⁰⁶ While the ICRC is an authoritative actor on interpreting international humanitarian law, ICRC does not make law. The interpretation of continuous combat function has not been without criticism, and the legality of the targeting of individuals based on an assumed continuous combat function is thus contested. The scope and limitation of the legal targeting of individuals taking direct part in hostilities, and the similarities with the use of force entailed in IHL and IHRL respectively is thus not clear.

distinguishing between civilians and individuals that can be legally targeted in non-international armed conflicts is difficult in both theory and practice, but essential to enable sufficient PoC in peace operations.

Irrespective of the scope of direct participation and continuous combat function, however, it is clear that IHL enables force against individuals merely based on *who* they are, and the threat that the individual pose at the time is largely irrelevant for the determination of the legality of the use force against him/her as long as the targeting adheres to the principle of necessity and proportionality. In the scenario of the armed group frequently attacking civilians, force under IHL can subsequently be used against the members of the armed group (and in particular against individuals holding a *continuous combat function*) based on the mere membership and the identity of the individuals, provided that the principles of IHL are upheld.

The IHRL framework, on the contrary, does not entail a specific principle of distinction. Rather, the use of force is enabled against individuals based on the threat that the individuals pose. In terms of force that exceeds arrest or detention, *who* the individuals are is therefore irrelevant for determining the legality of the use of force against them. It is rather *what* the individuals do, and thus *the threat* that the individuals pose, that determines whether or not force can be used against them. Consequently, force that exceeds arrest and detention (i.e. physical force) cannot be used against the group frequently attacking civilians based on mere membership or the identities of the individuals. Physical force is only permissible if and when the individuals pose a threat at the time the force is used against them.

Rather than identifying an adversary, the peace operation must consequently be capable of identifying, assessing and addressing *threats* in contexts regulated by IHRL. The context of the peace operation, such as the history of the conflict in the area of operation, the means and methods of the conflict, and the general security situation in the area, is of importance in assessing and identifying threats. Certain forms of behaviour or certain situations that do not constitute threats in one area may constitute serious and apparent threats in another. It is therefore neither possible nor advisable to list scenarios or situations that constitute threats, and against which force may legally be used to provide PoC in peace operations. Identifying and assessing threats must rather be conducted for each specific context, enabling context-specific use of force aimed at protecting civilians.

3.6 The use of force and impartiality

The use of force is frequently perceived as being at odds with the principle of impartiality of peace operations. Such perceptions could lead to paralysis and a perceived lack of authority to act. In situations where civilians are under threat of

being attacked, misunderstandings on issues of impartiality could be disastrous. This chapter will show that the use of force is not necessarily at odds with impartiality. Rather, force can be impartial as long as the force is applied in accordance with the legal principles of *equality before the law* and *predictability*.

As noted above, any analysis of *legality* should be conducted against the law as it is intended rather than against how the law is applied. Along the same line, the present chapter will analyse whether or not the use of force endangers the impartiality of a peace operation through analysing impartiality against the law as it is *intended*, and not as it is necessarily *applied*.

3.6.1 Impartiality versus neutrality

Both the DPKO Concept Note and the Capstone doctrine¹⁰⁷ emphasize that actions by the military, including the use of lethal force, must be in accordance with the ‘holy trinity’¹⁰⁸ of UN peacekeeping: namely the principles of *consent*, *impartiality* and *non-use of force* (except in self-defence and in defence of the mandate).¹⁰⁹ *Impartiality* is accentuated in the United Nations *Handbook on United Nations Multidimensional Peacekeeping Operations* as fundamental to guiding the actions of the military component of the peace operation.¹¹⁰ The concept of impartiality remains diffusely defined despite its central importance to peace operations. Impartiality has also frequently been called into question as peace operations has been faced with new tasks,¹¹¹ and has, for example, been held to mean that a peace operation ‘cannot further the interest of any contestant in the dispute’.¹¹² Such definition lies dangerously close to that of *neutrality*, a concept with which *impartiality* must not be confused.

Neutrality implies avoidance of actions that would affect the local balance of power. Affecting the balance of power may be necessary to enable peace, and a peace operation can therefore not be *neutral*. *Impartiality*, on the other hand,

¹⁰⁷ The Capstone Doctrine is the *United Nations Peacekeeping Principles and Guidelines* (2008), which provides normative framework for the establishment and implementation of peace operations.

¹⁰⁸ Julie Reynaert, *MONUC/MONUSCO and Civilian Protection in the Kivus*, International Peace Information Service (IPIS), available online: http://reliefweb.int/sites/reliefweb.int/files/resources/D11C9B161C343539C1257847004BF8BF-Full_Report.pdf (accessed 17 February 2012), 10

¹⁰⁹ Max Kelly with Alison Giffen, *Military Planning to Protect Civilians- Proposed Guidance for United Nations Peacekeeping Operations*, The Henry L. Stimson Center (2011), 20.

¹¹⁰ United Nations, *Handbook on United Nations Multidimensional Peacekeeping Operations*, Peacekeeping Best Practices Unit, DPKO, Dec (2003), 56.

¹¹¹ Shyla Vohra, ‘Impartiality in United Nations Peace-keeping’, *Leiden Journal of International Law*, Vol. 9 (1996), 63.

¹¹² *ibid.*, 68

refers to taking ‘evenhanded’¹¹³ or *fair* actions. The United Nations Handbook also stresses that impartiality is distinct from neutrality, and that it is not synonymous with inaction or inability to act on violations.¹¹⁴ Yet, the use of force is still largely presumed to be at odds with the principle of impartiality. The US Army Field Manual 100-23 provides one example of the perceived reduction of impartiality with an increased authority to use force, which is illustrated by the following chart:

Table 2: The relationship between the use of force and impartiality according to US Army Field Manual:

Variables	Support to Diplomacy	Peacekeeping	Peace Enforcement
Consent	High	High	Low
Force	Low	Low (self-defense/defense of mandate from interference)	Sufficient to compel/ coerce
Impartiality	High	High	Low

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Likewise, some scholars argue that the use of force risks diluting the impartiality of the peace operation.¹¹⁶ Contrary to the argument made in the US Army Field Manual and by some scholars, the argument made here is that the use of force is not necessarily linked to impartiality. The use of force is, however, undoubtedly linked to *neutrality*. While a peace operation cannot and must not be neutral in its operations, a peace operation must at all times remain impartial. The difference, thus, is of great importance to the implementation of the mandate to protect civilians. There is therefore a need to clearly distinguish between *impartiality* and *neutrality*, diffusing the confusion and enabling military action when action is prompted and legitimate in a peace operation.

¹¹³ Max Kelly with Alison Giffen, *Military Planning to Protect Civilians- Proposed Guidance for United Nations Peacekeeping Operations*, The Henry L. Stimson Center (2011), 21.

¹¹⁴ United Nations, *Handbook on United Nations Multidimensional Peacekeeping Operations*, Peacekeeping Best Practices Unite, DPKO, Dec (2003), 56.

¹¹⁵ United States Army Field Manual 100-23 (1994), online: http://www.dtic.mil/doctrine/jel/service_pubs/fm100_23.pdf (accessed 8 may 2012), 13. See also Trevor Findlay, *The Use of Force in Peace Operations*, Stockholm International Peace Research Institute (SIPRI), OUP (2002), 394-399.

¹¹⁶ See for example Katarina Månsson, ‘Use of force and civilian protection: Peace operations in the Congo’, *International Peacekeeping*, Vol. 12 No 4 (2005), 514.

3.6.2 Impartiality and the legal principles of predictability and equality

Embracing the legal principles of *predictability* and *equality before the law* may help distinguish between impartiality and neutrality.¹¹⁷ The principles may provide interpretive guidance showing that the use of *legal* and *legitimate* force is not *neutral* to the situation at hand, but it does, when enforced legally, remain *impartial*.

Predictability of law requires that the law is *established*, *available* and sufficiently *detailed* to predict legal consequences.¹¹⁸ Predictability of law is an established principle of law, and is as such fundamental to the rule of law doctrine.

The requirement of predictability of the law is, however, not to be confused with operational or tactical plans or guidelines on the use of force, which oftentimes are classified for good reasons. The principle is applicable to the regulations establishing *what* the laws are, rather than what the operational guidelines and rules of engagement specify, namely *how* the laws are to be upheld. The principle of predictability therefore only applies to the laws on which those operational guidelines are based. In other terms, *the laws* are to be predictable, but the tactical strategies on *how to uphold the laws* do not need to be predictable.

Equality before the law entails obligations that everyone, regardless of position, power or influence, is equal before the law, and must be treated in the same manner in the same circumstances. The Brahimi report also recognized this in claiming that impartiality does not entail demands for equal treatment of all at all times.¹¹⁹ Equal treatment of all would fail to distinguish between perpetrators and victims, which is an essential distinction to make, particularly in the context of

¹¹⁷ The principle of equality is defined in article 7 of the Universal Declaration of Human Rights, and stipulates: All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination.

¹¹⁸ Predictability of law is enabled through the general principle of law *nullum crimen sine lege*, which holds that an act cannot constitute a crime unless the act is established as criminal in law. The statute of the International Criminal Court (The Rome Statute) defines the principle *nullum crimen sine lege* in article 22: 'A person shall not be criminally responsible under this Statute unless the conduct in question constitutes, at the time it takes place, a crime within the jurisdiction of the Court. The definition of a crime shall be strictly construed and shall not be extended by analogy. In case of ambiguity, the definition shall be interpreted in favour of the person being investigated, prosecuted or convicted. This article shall not affect the characterization of any conduct as criminal under international law independently of this Statute'.

¹¹⁹ United Nations, Report of the Panel on United Nations Peace Operations, *Brahimi Report*, A/55/305-S/2000/809, 21 August (2001), para 50.

PoC. Rather, in providing predictability and equality before the law, the law enables unequal treatment to protect the weaker party or the victim of a crime.

The Capstone doctrine contextualizes the distinction between impartiality and neutrality by making reference to a referee in a soccer game. Kjeksrud and Ravland, however, hold:

*[It is]one thing to penalize a soccer player by awarding the other team a free kick, but quite another to shoot and kill a member of a militia in the eastern DRC because he fails to adhere to a peace process he does not agree with, or is in fact not a party to.*¹²⁰

They further hold that UN operations take sides in complex civil-war-like conflicts, but claim to adhere to the principle of impartiality.¹²¹ While there is merit to that argument, an important distinguishing factor between the two scenarios is the existence of predictability of the rules applicable in the soccer game, and the lack of predictability in the shooting scenario. In the case of the soccer game, the rules of the game are previously established and available to every player on the field. In the shooting incident, the rules applicable to the situation are likely to be vague at best. The lack of predictability causes a lack of transparency on the equality before the law, which in turn puts the impartiality and the legitimacy of the action into question.

The description of the referee presented in the Capstone Doctrine is therefore a well suited portrayal of the distinction between impartiality and neutrality. In taking actions that are in accordance with the mandate and previously established and transparent laws (whether IHL or IHRL, or both) the legal principle of *predictability* is upheld. If the principles are maintained regardless of the actor involved, the actions are also in accordance to the principle of *equality*. The use of force is thereby not problematic for the principle *impartiality*, as long as the force used remains within the scope and limitations of the applicable legal framework, and is applied fairly and equally to all. Consequently, the use of force to protect civilians does not risk undermining the impartiality of the operation as long as the force is *legal* (necessary and in accordance to the applicable legal framework) and *fair* (proportionate, equal and transparent).

¹²⁰ Stian Kjeksrud and Jacob Aasland Ravndal, *Protection of civilians in practice – emerging lessons from the UN mission in the DR Congo*, Norwegian Defence Research Establishment (FFI) 15 December (2010), 36.

¹²¹ Stian Kjeksrud and Jacob Aasland Ravndal, *Protection of civilians in practice – emerging lessons from the UN mission in the DR Congo*, Norwegian Defence Research Establishment (FFI) 15 December (2010), 36.

4 Implementing PoC

Implementation of protection mandates requires translation of policies into strategies on how to ensure PoC in the field. Protection strategies differ from policies in that they are intended to explain *how* the available means are to translate into achievement of declared end goals.¹²² While intentions and conceptual strategies are the foundation of a coherent protection strategy, the actual PoC takes place at the tactical level in the field. Ensuring that theory enables practice is therefore an essential part of any protection strategy.

Having outlined the legal frameworks enabling PoC by military means, this Chapter will attempt to bridge the legal aspects with the realities of protection in the field by analysing the instruments guiding the military operations in the field. A primary tool for the military component of a peace operation to deliver on mandated tasks is the Rules of Engagement (RoE), which provides guidance at the operational and tactical levels. The RoE are therefore relevant to the analysis of how PoC is realised in peace operations. The analysis of RoE conducted in this research is based on a limited number of Rules of Engagement instruments, which should be noted. The analysis made has been conducted with an overall perspective, and does not detail the specifics of each RoE or the peace operation in which the RoE is applied. Moreover, the RoE analysed here are primarily issued for peace operations operated by the UN.

Furthermore, a brief analysis of strategies for protection will be provided. Much like the analysis of RoE, the analysis of the strategies has been based on a limited number of instruments. Some issues identified, however, will be described as matters in need of attention in developing strategies for protection in peace operations. Finally, this chapter will exemplify how the Rules of Engagement and the strategies for protection are implemented in the field by providing a brief analysis of the protection situation in DR Congo.

4.1 Rules of Engagement

As previously argued, it is important that the use of force and the subsequent implementation of PoC are both sufficient and legal. It is therefore essential that the primary instrument guiding military action in peace operations enables use of legal force under both IHL and IHRL. RoE also attempt to embody two important principles of peacekeeping, namely the principles of restraint and

¹²² Stian Kjeksrud and Jacob Assland Ravndal, *Protection of civilians in practice- emerging lessons from the UN mission in the DR Congo*, Norwegian Defence Research Establishment (FFI), 15 Dec (2010), 16.

legitimacy, in its regulation of the use of force.¹²³ Seemingly, however, RoE frequently fail to provide sufficient details on the parameters on the use of force entailed in IHRL, which risks resulting in insufficient guidance on how and when force can be applied in IHRL contexts, ultimately leading to insufficient PoC.

RoE do not provide authority *to* act, but merely constitute guidance for *how* to act. It is thereby important to note that RoE are not legal instruments in themselves. RoE are rather a reflection of the law applicable, and are intended to ensure compliance with the law.¹²⁴ Therefore, while RoE can be legally binding under national law depending on national legislation, they are not legally binding under international law. Apart from being based on a Security Council mandate, the RoE are also based on the applicable legal regime regulating the use of force, i.e. either IHL or IHRL. In other terms, RoE detail *when* and *how* force can be used in a peace operation and must therefore necessarily ensure that the regulations of force entailed in the RoE are in accordance with the legal framework applicable to the specific situation. RoE can thereby provide further limitations on the use of force than IHL, but it can never exceed neither IHL nor IHRL in its regulations of the use of force.

In light of the fact that peace operations operate in a variety of different context varying from IHRL to IHL, and in environments possibly shifting between war and peace, it is necessary for the RoE to be broad enough to enable adherence to both IHL and IHRL, and flexible enough to enable shifting between the frameworks. RoE also frequently recognize IHRL as a fundamental basis for the instrument and the use of force. RoE oftentimes entail an obligation to use minimum force or alternatives to force whenever the operational situation permits. RoE also contain the principles of necessity and proportionality, requiring the force used to be necessary and proportionate to the identified objective. The limitations on the use of force incorporated in the RoE, such as the requirement of use of minimum force, means that the RoE put an additional limitation on the operation than the legal framework of IHL would enable. The application of RoE to IHRL contexts is, however, more problematic, as further analysis will reveal.

RoE frequently hold that force may only be used if other means are ineffective or ‘without any promise’ of achieving the immediate objective.¹²⁵ This guidance resembles the requirements entailed in the principle of necessity, but is of limited value due to the principle of necessity differing significantly in IHL and IHRL.

¹²³ Trevor Findlay, *The Use of Force in Peace Operations*, Stockholm International Peace Research Institute (SIPRI), OUP (2002), 14.

¹²⁴ Dale Stephens, ‘The Lawful Use of Force by Peacekeeping Forces: The Tactical Imperative’, *International Peacekeeping* (2005), vol. 12 (2), 163.

¹²⁵ Analysis of RoE from various UN operated peace operations reveal a frequently repeated obligation to use minimum force, or other means.

Modern military manuals describe military necessity either in terms of ‘measures required to achieve a legitimate purpose’, ‘required to bring about the successful conclusion of military operations’, or ‘necessary for military purposes’.¹²⁶ The terms used in military manuals describe the ultimate military purpose, namely winning the war and ensuring the survival of the nation, and the terminology is very similar to the terms used in various RoE on the use of force in peace operations. The wording of various RoE instruments thereby strongly resemble the framework of IHL on the use of force. Notably, however, none of the RoE analysed here has identified the parameters of the principle of necessity entailed in IHRL.

Military necessity as specified in IHL has a broader scope of application than the principle of necessity entailed in IHRL. For example, military necessity may enable the use of force against an armed group merely based on the group having committed previous attacks, or based on assumed future attacks against civilians. The principle of necessity under IHRL, however, will require that force (that exceeds arrest and detention) only be used when strictly necessary, and lethal force only when lives are endangered. Therefore, once the need to use force has been identified, a constraint on the level of the force (frequently existing in RoE) is of limited value if the necessity itself is faulty.

Given the inherent differences of the principle between the two legal regimes, the lack of guidance on the principle of necessity entailed in IHRL in RoE may contribute to the ambiguity on the use of force in peace operations, possibly leading to failure to use force when warranted to protect civilians. This, in turn, could result in either use of force that goes beyond the scope of IHRL, or lack of use of force when force is necessary and warranted to ensure PoC. Both scenarios could result in a weakening of PoC, and loss of legitimacy of the peace operation when operating in IHRL contexts. Peace operations in DR Congo and Libya, for example, have been criticised for using more force than necessary, and possibly in the wrong way and against the wrong targets. Clearly, and as detailed above, identifying the threshold for armed conflict in a peace operations, when a peace operation become party to such a conflict, and the nature of the threats posed to civilians, undeniably constitutes an immense challenge for the military component.

Detailing the parameters on the use of force under IHRL more exactly in RoE could result in more clarity and less ambiguity on the use of force to protect civilians in peace operations. Moreover, it could result in increased legitimacy for the peace operation as a whole.

¹²⁶ Nils Melzer, ‘Targeted killing or less harmful means? - Israeli High Court judgment on targeted killing and the restrictive function of military necessity’, *Yearbook of International Humanitarian Law*, Vol. 9 (2006), 102.

4.2 Strategies for PoC

Resolution 1894 expresses the need for peace operations to incorporate comprehensive protection strategies into the overall mission implementation plans,¹²⁷ to enhance PoC in the field. Significant progress in improving PoC has also been achieved at the strategic level. In 2011, the United Nations Secretariat finalized a framework for drafting comprehensive protection strategies in peace operations. The strategies are aimed at identifying risks and measures to address those risks, analyse capacity and resources necessary to ensure protection, clarify roles and responsibilities, and develop reporting, monitoring and review mechanisms on PoC.¹²⁸ The intention of providing PoC in peace operations is thus ambitious. It should be recognized, however, that while analysis of protection strategies developed by and for peace operations in the field indicates recognition of the importance of basing PoC on IHL and IHRL, it also reveals some concerns worthy of consideration for future strategies.

First, a chart identifying against whom force can be used is present in several documents guiding the use of force to protect civilians in peace operations. Notably, the chart displays an intention, and the actual implementation may be more nuanced than that chart indicates. Clearly, several different aspects such as political considerations and multifaceted threat assessments are important elements in the implementation of strategies. The intentions demonstrated in strategies, however, are indicative of how the implementation is pursued, and any irregularities with the intention could quite possibly turn into irregularities in the implementation.

The chart identifies specific actors potentially posing threats to civilians along one scale, and consequences for the use of force against them along another. The chart thus provides different thresholds for the use of force against the actors depending on the political consequences of the force. In other words, the chart identifies intervention against some actors as less of a risk than intervention against other actors. Rather than identifying the *seriousness of the threat* as indicative of when force may be used, the chart identifies *who* the actors are on the local socio-political arena as indicative of when force can be applied against them.

While identifying against whom force can be used based on identity or group belonging is perfectly appropriate in the context of an armed conflict, in which the identification of combatants is both necessary and in accordance with IHL, it is more problematic outside the context of an armed conflict. *Who* the actors are may affect the seriousness of the threat the individuals pose, but the focus on the *identity* rather than on the *threat* is problematic in operations regulated by IHRL.

¹²⁷ United Nations Security Council Resolution 1894, S/Res/1894 (2009), para 24.

¹²⁸ Security Council Report, *Protection of Civilians in Armed Conflict*, No 2, 31 May (2012), 14.

Although political consequences of the use of force is an important aspect necessary to consider in peace operations, treating individuals different depending on *who* they are rather than *what* they do, and on the actual threat that they pose, is problematic in view of *equality before the law*. Political aspects must therefore be balanced against the legal aspects of the use of force. It is therefore necessary that the chart is supplemented by a detailed description of the principles of necessity and distinction entailed in IHRL to enable the strategy to provide sufficient guidance on legal use of force in the pursuit of PoC outside of armed conflicts.

Secondly, some phrasings entailed in protection strategies are unnecessarily limiting. A glossary of terms related to one of the protection strategies analysed here further defines ‘imminent threat of physical violence’ as situations where credible evidence of an immediate ‘about to happen’ or presently happening act *intended* to cause physical harm.¹²⁹ The inclusion of the term *intended* is arguably unnecessarily limiting. The legal definition of the term requires that the perpetrators *intend* to cause harm, which constitutes a *mental element* with the perpetrator. The scope of the protection can therefore be held to be limited to acts that are intended to cause harm rather than the risk of actually causing physical harm to civilians. The need for protection, as noted before, is unrelated to the intention of the party posing the threat. The focusing on an *intended consequence* of a specific act rather than on the *factual risk* of physical harm can be held to constitute an unnecessary limitation of the threats from which civilians are to be protected by the peace operation. This limitation is particularly troublesome if PoC is made the objective of the peace operation.

4.3 PoC implemented- experiences from DR Congo

As the second peace operation in history, resolution 1291 of April 2000 provided MONUC with the mandate to take necessary action to protect civilians under Chapter VII of the UN Charter. This was controversial, and there were little specifics on how the PoC mandate was to be fulfilled. At the same time, numerous reports described frequent violence and targeting of civilians in the DR Congo.¹³⁰ The Secretary General also warned in a report of 5 June 2002 that MONUC was neither trained nor equipped to provide PoC as stipulated by

¹²⁹ United Nations Protection strategy 1.

¹³⁰ See Secretary General Reports on the United Nations Mission in the Democratic republic of Congo, online: <http://www.un.org/en/peacekeeping/missions/monuc/reports.shtml> (accessed 29 may 2012).

resolution 1291, and therefore would not be able to deliver protection as expected by the mandate and the local population.¹³¹

The difficulty in delivering on the mandate became apparent in the Bukavu crisis in 2004, in which the north eastern town of Bukavu was taken over by the dissident group called Congolese Democracy-Goma (RCD-G). Reports hold that government troops killed at least 15 civilians, and that dissident troops killed civilians and carried out widespread sexual violence against women and girls, some of them as young as three years of age. Unconfirmed reports also hold that as many as 80 people may have died in the fighting.¹³²

MONUC was able to ensure protection of some 4,000 internally displaced persons (IDP), but also faced widespread criticism for not using its Chapter VII mandate sufficiently to prevent the fall of Bukavu.¹³³ A DPKO review of the MONUC RoE also highlighted the apparent discrepancy between the mandated task to protect civilians in the mandate, and the RoE of MONUC *permitting* the use of force to prevent impending violence. This discrepancy enabled the interpretation that use of force was restrained, which subsequently undermined the delivery of PoC.¹³⁴ This illustrates both the lack of clear guidance on the legal aspects on the use of force for the military component, and the dire need for such guidelines.

Nonetheless, despite the difficulties in providing protection, an increasing willingness to ensure PoC in DR Congo is visible through a chronological analysis of relevant Security Council resolutions. Resolutions adopted from 1999 to 2003 all entailed limiting wording such as ‘*may take necessary action*’,¹³⁵ ‘*contribute to stabilization*’, ‘*if the situation required it*’.¹³⁶ Resolution 1565 of 2004, on the other hand, does not include such limiting wording, which could indicate an increased intention to deliver PoC in the field. Resolution 1592 goes even further, and authorizes MONUC to ‘*use cordon and search tactics to prevent attacks on civilians and disrupt the military capability of illegal armed groups that continue to use violence in those areas*’.¹³⁷

¹³¹ United Nations, Eleventh report of the Secretary General on the United Nations Organization mission in the Democratic Republic of Congo, S/2002/621 (2002), para 71-72.

¹³² Human Rights Watch, ‘DR Congo- War Crimes in Bukavu’, online: <http://www.hrw.org/news/2004/06/11/dr-congo-war-crimes-bukavu> (accessed 2 July 2012).

¹³³ Katarina Månsson, ‘Use of force and civilian protection: Peace operations in the Congo’, *International Peacekeeping*, Vol. 12 No 4 (2005), 512.

¹³⁴ The Uruguayan battalion argued that the mandate could not allow forced beyond self-defense, and that they thereby were unable to use force to protect civilians in the area. See United Nations, Eleventh Report of the Secretary General on the United Nations Organization Mission in the Democratic Republic of Congo, S/2002/621 (2002), 9.

¹³⁵ United Nations Security Council Resolution 1291, S/Res/1291 (1999), para 8 (emphasis added).

¹³⁶ United Nations Security Council Resolution 1484, S/res/1484 (2003), para 1 (emphasis added).

¹³⁷ United Nations Security Council Resolution 1592 (2005), para 7.

The peace operation in DR Congo offers a striking example of the need for the inclusion of legal aspects in the use of force to provide PoC in peace operations. The protection needs that arose in DR Congo were the result of armed groups frequently and deliberately attacking civilians. Detailed guidelines on the use of force under both IHL and IHRL could have clarified the authority to use force irrespective of the existence of an armed conflict, albeit within different parameters, and thereby enabled more effective PoC.

The experience in DR Congo also exemplifies the need for an ability to identify the threshold of an armed conflict in the complex environment of peace operations. Whether or not the armed groups attacking civilians in eastern Congo were of such organizational structure and the violence of such nature that the situation could be considered an armed conflict is not evident, but such details would enable the peace operation to adopt appropriate measures to the given situation in the pursuit of PoC.

Moreover, the type of violence that characterized the protection situation in DR Congo exemplifies the difficulty and the simultaneous necessity to distinguish between the type of violence constituting armed conflict, and the type of violence constituting merely internal tensions, disturbances or criminal acts.

Depending on the situation at hand, protection strategies must differ, requiring the military component to adjust its methods accordingly. An ability to identify the threshold of armed conflicts and the nature of various threats could enable both sufficient application of force to protect civilians, and ensure legality and thereby legitimacy of the means adopted in the pursuit of PoC. Thereby, protection from physical harm would be harmonized with the protection sought through a rule of law based protection system, protection through a protective environment, and the protection through the political process. The inherent difficulty in distinguishing members of armed groups from civilians in the asymmetric environment of non-international armed conflicts undeniably constitutes a challenge. Further research into how such distinction can be made could further the capacity to protect civilians in peace operations.

5 Conclusions

The 2011 World Development Report clearly demonstrates that any attempt to ensure PoC must be sensitive to the interlocking nature of the violence in contemporary conflict environments. There are ample reasons to adopt a flexible and over-arching approach to PoC, making the PoC the objective of peace operations, and ensuring a capacity to address all forms of threats. Enabling concerted protection strategies, incorporating both long- and short-term protection measures, and ensuring continuous assessment of needs and results, are therefore important to enable adequate PoC in contemporary peace operations.

As this report has shown, the answer to the question of *how* the military can contribute to protecting civilians in peace operations differ significantly depending on the context of the peace operation, and on the applicable legal framework that regulates the use of force. The capacity to use force is necessary to enable protection from the wide variety of threats facing civilians in the contexts of peace operations today. The use of force is not necessarily conflicting with the impartiality of the peace operation, but legality in the use of force is crucial to reinforce the development of a rule of law-based domestic protection structure that enables protection both in short and in long-term perspectives.

Analysis of the legal frameworks of IHL and IHRL on the use of force shows that the legal frameworks differ both in for what *purpose* the law enables the use of force, and in the *extent* of the force used. While IHL enables force to be used in order to pursue the military goal of winning the war, IHRL enables force for the sole purpose of protecting human rights. This provides different parameters against which the principles of necessity and proportionality are to be measured, resulting in different answers to the question how the military can use force in peace operations.

Moreover, analysis of the IHL framework shows that the *nature* of the threats facing civilians dictates how the threat can be tackled also in a peace operation operating in the context of an armed conflict. Only threats related to an armed conflict can be addressed within the IHL framework. Consequently, irrespective of the existence of an armed conflict, a peace operation must be able to analyse and identify the nature of the threats, and be capable of operating firmly and comfortably inside both IHL and IHRL to enable effective PoC.

Lack of clear guidance on the use of force has led to reluctance to use force even when prompted in peace operations. Failure to use force when necessary leads to a loss of credibility for both the UN as an organisation and for the peace

operation.¹³⁸ Ultimately, lack of clear guidance could also result in the unnecessary loss of civilian life. The prominence of military terms in guidance on the use of force and PoC for peace operations, and the subsequent lack of attention to the parameters on the use of force entailed in IHRL, may contribute to the ambiguity on the use of force in contexts regulated by IHRL. Attention to the different parameters of the principles of necessity and distinction in RoE could contribute to clarifying *when* force can be used, *how*, and *against whom*. Incorporating details on IHRL in instruments guiding the use of force to protect civilians would also endorse the development of domestic long-term and systematized protection through promotion of human rights and the rule of law. Therefore, any guidance on PoC would benefit from enhancing the direction on the scope and limitations on the use of force entailed in IHRL.

5.1 Suggestions for further research

While a number of different aspects of overall relevance to the legal aspects of PoC in peace operations have fallen outside the scope of the present research, a few areas are of particular concern and in need of further research. These are briefly outlined below:

5.1.1 Identifying the existence of an armed conflict in a peace operation

Clear guidance on the scope and limitation on the use of force for peace operations first and foremost requires identification of the threshold for armed conflict, and what status a peace operation has in the specific setting. This is challenging, not least since a full definition of situations falling within the scope of IHL is not available.

Determining the existence of a non-international armed conflict requires analysis of several controversial criteria, such as the distinction between armed conflicts and internal disturbances, and the level of organizational capacity of the parties to the conflict. Seemingly, there is little analysis available that addresses both the legal instruments guiding the determination of the existence of an armed conflict and how to apply those legal criteria to the specific context of peace operations. It has, for example, been held that the criterion of intensity may be fulfilled by the fact that government police forces are unable to handle the situation, and involvement of the military is necessary.¹³⁹ To what extent military force is indicative of the existence of an armed conflict in the context of a peace

¹³⁸ Trevor Findlay, *The Use of Force in Peace Operations*, Stockholm International Peace Research Institute (SIPRI), OUP (2002), 356.

¹³⁹ Sylvain, Vit  , ‘Typology of armed conflicts in international humanitarian law: Legal concepts and actual situations’, *International review of the Red Cross*, Vol. 91 No 873 (2009), 76.

operation is, however, unclear, and calls for further analysis. Furthermore, the legal effects of an international peace operation becoming involved as a party in such conflict,¹⁴⁰ and whether or not such involvement internationalizes the conflict, making the law of international armed conflict applicable rather than the law of non-international armed conflict, is also necessary to address to enable a detailed guidance on the legal framework applicable to the peace operation.

Identifying the existence of a non-international armed conflict is thus paved with difficulties. Nonetheless, one important conclusion to draw from the present analysis is that identifying the threshold of armed conflicts in the complex setting of peace operations, and the legal effects of such involvement, is needed to enable effective PoC in and by peace operations.

5.1.2 Military- police coordination for PoC

Military and police actors are both holders of a monopoly on the use of force in and for a state, but in very different circumstances. The military is traditionally responsible for ensuring the security of the state and its citizens from external threats. The military framework regulating the use of force is thus primarily IHL. Police actors, on the contrary, are traditionally responsible for ensuring the security within a state, and thus adhere primarily to IHRL.

As this report has shown, peace operations operate in environments characterized by transition periods from war to peace, and possibly shifting between war and peace. While the military and police roles are often distinctly separated, there is a very definite link between the military role and the police role in the specific contexts of peace operations. The role of the police is rarely mentioned in guidance on PoC, and further research into the roles of military and police actors in peace operations, and how these roles correlate, would likely better the coordination and cooperation between the police and the military components on the issue of PoC.

5.1.3 Gender and PoC

Another aspect of importance is that of *gender* in PoC. UN resolution 1325 recognizes that women are particularly vulnerable in conflict environments, and

¹⁴⁰ I.e. whether or not the armed conflict remains non-international in nature despite the involvement of the peace operation, or whether or not such involvement makes the conflict international in nature. Although the development of customary international humanitarian law has decreased the gap, differences still exist between the rules regulating international conflicts and those regulating non-international armed conflicts. Therefore, for a more exact science on the legal framework applicable to the context of a peace operation, detailing the differences between the rules regulating international armed conflicts and the rules regulating non-international armed conflicts is required.

that women play an important role in the prevention and resolution of conflicts and peace building.¹⁴¹ Research also shows that gender equality benefits the development of peace, democracy and local economy. At the same time, due to women carrying the brunt of basic services in times of war, systematised violence against women in armed conflicts constitutes an attack on the society at large. Peace operations need to be sensitive to threats specifically directed at women and incorporate measures to counter such threats in PoC strategies. Incorporating an effective and comprehensive gender perspective in strategies for PoC would benefit both PoC and the overall objectives of the peace operation. How gender can be effectively incorporated into strategies for PoC is seemingly largely unaddressed, and further research into gender perspectives is therefore warranted to enable development of gender balanced strategies for PoC.

¹⁴¹ United Nations Security Council resolution 1325, S/Res/1325 (2000), 1.

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