In Search of Safety - New Dimensions of Protection?

The International Legal Framework of Robust UN Peacekeeping in the Context of Civilian Protection

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A. Introductory Note: The Protection of Civilians within the International Security System

When the Taliban regained control over Afghanistan just a few months ago in August 2021, it was not only a major setback for the longstanding international efforts to build a modern democratic state, but furthermore a sheer disaster for much of Afghan civil society. Whether they support the Taliban or not, the latter's resurgence has predictably led to violent confrontations, which in turn have inevitably caused a rapid increase in civilian casualties. In the first six months of 2021, 1,659 civilians were killed and 3,254 wounded; that is 47% more than in the same period the year before.[1]

Afghanistan is, of course, only one example of many. Violent conflicts lead to civilian casualties and there is no shortage of either the one or the other. The prevailing assumption that mankind is currently witnessing the safest century in living memory is a deceptive one, for it is based on perspective alone. For millions of people around the world, war has remained a constant reality and part of daily life. Looking not only at the Taliban in Afghanistan, but further at the war in Yemen, the political insecurity in Lebanon, the Rohingya conflict in Myanmar, the civil war in Syria or the hostilities in the East China Sea,[2] one cannot help but realize that the quest for world peace is as unfinished as it has ever been.

While the world community might not yet have found an efficient counteragent to war, at least it has created means and methods to cope with such confrontations. A variety of rules on the conduct of armed conflict have been enacted and, in many places, they have indeed preserved a minimum standard of humanity in the gravest of situations. However, what continues to preoccupy legal scholars and practitioners alike are the many cases in which existing international orders either do not apply or are simply ignored.

It is here, at the latest, that the United Nations enters the stage. As the primal forum to engage in the preservation and rebuilding of peace, the United Nations have, from their foundation, acted as the mediator. Within this engagement, the protection of civilians, who are usually the first and most affected victims of armed conflict, was initially more of a byproduct than an end in itself. Over the years, however, the focus has changed significantly. Across the board, civilians, and their protection in times of crisis, moved to the center of attention. This was also confirmed by former Secretary-General Kofi Annan in 2012. A United Nations that serves not only states but also their people was his vision

[1] 'Afghanistan: Record Number of women and children killed or wounded' (*UN News*) <https://news.un.org/en/story/2021/07/1096382> accessed 16 December 2021.

[2] see overview on 'Global Conflict Tracker of 12 October 2021' (*Council on Foreign Relations*) <https://www.cfr.org/global-conflict-tracker/?category=usConflictStatus&vm=list> accessed 16 December 2021.

and aspiration.[3] The UN was to become an 'agent for progress' within a global system of governance that would not further strengthen state privileges but rather invigorate individual empowerment.[4]

In practice, the international commitment to the protection of civilians has centered around two fundamentally different, though interrelated approaches to action. In essence, they differ based on intent. While a conflict-affected country may consent to international engagement on its territory for the sake of civilian protection and the restoration of peace, it may also refuse to tolerate any international intervention based on its sovereign equality. Depending on the situation, the international community thus requires different tools.

The first and predominant of these tools for the protection of civilians is thereby - consensual - peacekeeping. Within the past two decades, such missions have been realigned, optimized, and - literally - reinforced with the aim of enhancing civilian protection. In that realm, the UN has indeed been an agent for progress. As of today, the organization maintains twelve active peacekeeping missions, of which five are robust Protection of Civilians (PoC) missions. While their overall evolutionary path has been far from glorious, the concept has nonetheless prevailed. More than that, recent empirical research substantiates that peacekeeping missions significantly contribute to the (re-)establishment of peace and security in conflict regions. Not only do they prevent prolonged violence but also reduce the intensity of ongoing conflicts and preclude their reescalation. Most importantly, the data reveals that regions that receive aid through peacekeeping suffer fewer civilian deaths.[5] This is one of the reasons why, after all the setbacks the concept had to endure, peacekeeping still plays such a prominent role in UN engagement. For the period from July 2021 to June 2022, the overall peacekeeping budget is 6.37 billion US Dollars.[6] Robust peacekeeping missions are, with that, therewith particularly central to the UN's engagement for endangered civilians.

Nevertheless, the UN's role as a mediator is limited where states have no interest in outside interference. In addition to the consensual engagement in the form of peacekeeping, the international community has therefore developed a complementary approach. It is intended to provide individual states with the means to react to gross human rights violations of states against their own people. The so-called Responsibility to Protect (R2P) is an international pledge to uphold basic human rights, if

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[3] Kofi Annan and Nader Mousavizadeh, *Interventions: A Life in War and Peace* (The Penguin Press 2012) 372.

[4] ibid 371.

[5] see Barbara F Walter and others, 'The Extraordinary Relationship between Peacekeeping and Peace' [2020] British Journal of Political Science 1, 2, cited in Katharina P Coleman and Paul D Williams, 'Despite Challenges, UN Peace Operations Will Evolve, Not Disappear' (*IPI Global Observatory*) <https://theglobalobservatory.org/2021/02/despite-challenges-un-peace-operations-will-evolve-not-disappear/> accessed 16 December 2021.

[6] 'Fifth Committee Approves $6.37 Billion Budget for 12 Peacekeeping Missions from July 2021 to June 2022, Concluding Resumed Session' (*United Nations Meetings Coverage and Press Release*) <https://www.un.org/press/en/2021/gaab4368.doc.htm> accessed 16 December 2021.

necessary, by force, and it is intended to provide a basis for unilateral interventions to protect endangered civilians.

While these two mechanisms are mutually exclusive, they also have the potential to complement each other. The emphasis of this work will thus not solely lie on robust PoC-missions and their role in the protection of civilians but take the broader framework of international engagement into consideration as well.

I. The Aim of This Research

Peacekeeping and its role in international security policy have already been the subject of extensive research. Nonetheless, these missions and their various approaches to protection are in a state of constant flux. After all, and despite multiple reformation approaches and initiatives,[7] there is still no general legal standard that would generate a comprehensive system of civilian protection, applicable to today's disparate conflict situations. It thus remains vital to further engage in approaches that aim at legally substantiating current developments in robust peacekeeping.

With this in mind, the aim of this research is to look at the past and future direction of robust PoC-mandated peacekeeping missions. These missions are to be categorized within the UN security system itself, as well as in conjunction with another concept of international responsibility, R2P. In relation to both of these levels, the continuing search for civilian safety by the UN and its member states has given rise to altogether new dimensions of protection that are to be closely analyzed.

Proposals as to an overall reformation of protection practices by UN blue helmets thereby exceed the scope of this work. The objective is rather to reevaluate the validity and feasibility of such measures as well as the required legal bases. It is thus the idea to think beyond the boundaries of the existing legal mechanisms. Ultimately, this work aspires to optimize current practices within the realms of legal possibility.

II. The Central Research Questions

The guiding theme of this work is the evolution of robust UN peacekeeping missions with a PoC-mandate. Their development, from first implementations to current manifestations shall be delineated, legally classified, substantiated, and refined.

[7] the most recent being the 'Action for Peacekeeping: Declaration of Shared Commitments on UN Peacekeeping Operations' (*United Nations Peacekeeping,* 28 March 2021) <https://peacekeeping.un.org/sites/default/files/a4p-declaration-en.pdf> accessed 16 December 2021; and 'Future Of Peacekeeping' (*United Nations Peacekeeping*) <https://peacekeeping.un.org/en/future-of-peacekeeping> accessed 16 December 2021.

In the first part, it will be established how UN peacekeeping missions have historically progressed. This examination will not solely focus on legal developments, but also consider the respective political backgrounds. In so doing, the peacekeeping missions can be contextualized and classified in their distinct evolutionary phase. The legal embedding will thereby provide the necessary framework of analysis.

In the second part, two new dimensions of international civilian protection through the UN shall be established and assessed. This evaluation will be twofold.

Firstly, a contemporary example of a robust PoC-mission, UNMISS to South Sudan, will be introduced and analyzed regarding its factual and legal background. It will then be delineated how UNMISS is not only an example of current peacekeeping practice but has furthermore set a precedent in civilian protection mechanisms. Due to compelling necessities on the ground, the mission invented a wholly new form of physical protection, to be circumscribed as passive protection. This form of safeguard exemplifies one new dimension of current civilian protection efforts. Secondly, a broader, systematic perspective will be taken into account. In this, the relationship between robust peacekeeping in its current form and R2P will be examined. This requires an account of the development and the current status of R2P. Subsequently, it can be analyzed how R2P and robust PoC are intertwined and whether they can culminate - at least in parts - in one coherent system of international engagement for the purpose of civilian protection.

Lastly, it will be demonstrated how these two new dimensions of protection can form essential components of a new, all-encompassing UN civilian protection standard.

III. The Methodology

The adoption of a methodological approach is generally difficult in jurisprudence, but especially so in international law. By its nature, this field lives from a strong interdependence of different scientific areas. However, since this work aims at designing a theoretical construct and not at conducting empirical analyses, a methodological definition is essential. This is to be found in the recent approach of Jan M. Smits.[8]

His legal doctrine aims at a description of the existing law, as well as a prescription directed towards new solutions that may be harmonized with the legal system, and lastly a justification for the current

[8] Jan M Smits, 'What Is Legal Doctrine? On the Aims and Methods of Legal-Dogmatic Research' (2015) Maastricht European Private Law Institute Working Paper No. 2015/06 <https://ssrn.com/abstract=2644088> accessed 16 December 2021.

law.[9] For this purpose, the relevant material must first be chosen and explained[10], the techniques to be used to describe the law must then be laid down[11], and the conception of the system that is deemed relevant must lastly be set forth.[12]

The present work both targets the characterization and classification of the law that governs UN peacekeeping missions, as well as the indication of possible future approaches. Consequently, it aims at description and prescription. The relevant material mainly consists of primary sources, foremost the Security Council mandates that established the peacekeeping missions in question. These are the sources of law that must pass the test applied by description. They will be accompanied by other UN documents, such as reports and statements by the relevant organs. Lastly, great recourse is made to the existing literature on the subject matters to outline the past and current debate and subsequently propose revised solutions. This material sets the legal framework for the conduct to be analyzed and is thus vital to both understand current phenomena and shortcomings, and derive solutions.

The respective technique will be one of deduction. Based on a thesis, observations will be described, and prescriptions suggested, thereby lastly testing the thesis. When it comes to the comparison of different concepts, specific factors that aim at fully covering the relevant characteristics will be presented and then applied. The choice of these factors shall ensure a comprehensive presentation.

The relevant legal system in which the following norms and concepts are to be described and prescribed is to be deemed the international security system for the protection of civilians. It comprises the entirety of international law bases under which states, alliances of states, or the United Nations act for the sake of civilian protection. This system is thereby defined by its transnational character and formed into a scheme by its common goal of, lastly, international security.

Overall, the following examination will thus center on an internal exploration of the existing and prospective laws. Therewith, an understanding of the regulation within the system and, consequently, an insight into the system itself will be established. Subsequently, prescriptions in the form of concrete approaches can be developed from that. In parts, however, this approach will have to be complemented by an external perspective. Evaluating the laws in their practical contexts, such as UNMISS in South Sudan, will be essential to place the findings of the internal analysis into their larger context.

[9] ibid 8 ff.; for a more in-depth discussion of the various objectives of legal doctrine, see ibid 5-15.
[10] ibid 14-15.
[11] ibid 15.
[12] ibid.

B. United Nations Peacekeeping - A History of Integration

From the very beginning, United Nations peacekeeping operations have been the topic of heated debates. Initially greatly contested as to their authority, they have nevertheless evolved to become one of the most powerful instruments of the world community in the maintenance and restoration of peace. Today, peacekeeping missions in many different shapes and sizes form the foundation and centerpiece of most UN efforts.

However, as is the case for many fundamental transformations, the evolutionary path of these missions has also been characterized by many drawbacks and disappointments. Not everyone, therefore, draws a positive balance for the UN's efforts. As Shaw concluded in 2008: 'The functioning of the United Nations system for the preservation and restoration of world peace has not been a tremendous success in the broadest strategic sense'.[13]

Whether one agrees with this rather sober result or not, it can anyhow only be a snapshot. While peacekeeping has already come a long way from its origins to current applications, its evolution is nowhere near completion. To understand contemporary peacekeeping, it is therefore essential to grasp its roots and origins. This look into the past will reveal that peacekeeping has not only greatly evolved over the past years but that it has changed its character and purpose entirely. This applies both regarding different means of peacekeeping, referring to the newly evolved robust mandates, as well as to advanced objectives of peacekeeping, considering that civilian protection has become a centerpiece of many current missions. The system Shaw referred to in 2008 is only remotely related to the first peacekeeping enterprises and differs again from today's undertakings. Without exaggeration, it can therefore be said that peacekeeping is and remains 'at a crossroads'.[14]

This first chapter is intended as an introduction to the broad topic of peacekeeping. Firstly, an attempt at definition is made, after which the concept's evolution shall be traced. The aim is thereby to present the development of peacekeeping missions from their early stages towards contemporary manifestations within the relevant historical, political, institutional, and legal context. Of special relevance here will be the emergence of robust peacekeeping missions and their focus on civilian protection. The respective mandates, called PoC-mandates, shall form the heart of analysis as to their development, significance, and normative scope. This analysis will then pave the way for both an

[13] Malcolm N Shaw, *International Law* (Cambridge University Press Eighth Edition 2017) 945.

[14] as formulated by Mr. Faki Mahamat on the 8218th Security Council Meeting, UNSC 8218th Meeting [28 March 2018] UN Doc S/PV.8218 6.

evaluation of one concrete example of a current protection mechanism as well as a reclassification of contemporary robust peacekeeping within the broader framework of international responsibility.

I. The Early Years - First Steps in Keeping the Peace

The early years of peacekeeping were guided by the cautious attempt of the UN to resume the role of a mediator and arbiter in interstate conflicts. The newly found organization had yet to find its function in the quest for world peace. Compared to today's peacekeeping missions, however, these undertakings were still cautious and discreet. The most effective means to achieve the organization's ambitious goals had yet to be explored.

In one form or another, peacekeeping missions have existed as long as the UN itself exists. The rationale and guiding motive of all peacekeeping undertakings up until today is the ambition to prevent war and diminish all factors that could prompt it to occur.[15] They thereby correspond to the fundamental objectives of the UN according to Article 1 (1) UN Charter (UNCh) and thus symbolize the organization's very essence more than any other instrument.

The following introduction shall present an approach in delineating what UN peacekeeping is and in this way form a common understanding for the ensuing evaluation. Subsequently, the first peacekeeping enterprises shall be presented and classified as to their significance for all further developments.

1. What is Peacekeeping?

Authors have struggled with a uniform, clear, and concise definition of peacekeeping all along. The ever-changing nature and number of activities that can be summarized under this term make one concrete definition encompassing all peacekeeping endeavors seem impossible. Most characterizations, therefore, leave it at a broad circumscription of activity and ambition, such as: 'Essentially, peacekeeping involves the deployment of armed forces under UN control to contain and resolve military conflicts'.[16] That is not to suggest that there have not been attempts to determine the efforts more specifically. In 1984, the International Peace Academy defined peacekeeping as 'the prevention, containment, moderation and termination of hostilities between or within states through the medium of third-party intervention, organized and directed internationally, using multinational military, police and civilian personnel to restore and maintain peace'.[17] This definition only reveals its full significance when read in the historical context. In 1984, peacekeeping missions had long since

[15] see Mats Berdal, 'The Security Council and Peacekeeping' in Vaughan Lowe and others (eds), *The United Nations Security Council and War* (Oxford University Press 2008) 176.
[16] Shaw (n 13) 939.
[17] International Peace Academy, *Peacekeeper's Handbook* (Pergamon Press 1984) 22.

outgrown their infancy but were also still far away from the multidimensional tool they are today. They were rather just entering a transition phase, triggered by the approaching end of the Cold War. While this decade long conflict still deeply shaped international relations in the mid-eighties, it had already passed its peak. This would also have serious consequences for peacekeeping missions, as they had been substantially restrained due to the presence of the Iron Curtain. This containment would thus gradually subside from 1985 onward and make space for a strategic as well as doctrinal reorientation. In 1984, however, it was still somewhat audacious to speak of '*intervention*' in international relations, when every political endeavor was characterized by a defensive rather than an offensive attitude. The Peace Academy nevertheless captured the essence of peacekeeping missions as well as their further direction in a striking manner. The approach, therefore, displays such a high degree of clarity and foresight that the definition has lost nothing of its precision even today.

As already indicated, the end of the Cold War initiated a rapid change in strategy and doctrine regarding peacekeeping, where by the turn of the century, not only scholars but also the UN itself had intensively dealt with a definition of these much-valued enterprises. However, this new surge in development had not only been initiated by the end of the East-West blockade, but also and in particular by the serious failures of the peacekeeping missions to Bosnia and Rwanda. The first large-scale report on peacekeeping was thereupon commissioned by Secretary-General Kofi Annan and concluded in 2000 by the Panel on United Nations Peace Operations.[18] It was chaired by Mr. Lakhdar Brahimi, so that document gained international attention as the Brahimi Report.

On a general note, the Report summarized peace operations as the umbrella term for measures in conflict prevention and peace-making, peacekeeping, and peace-building.[19] Whereas conflict prevention mostly takes place on the diplomatic stage and is hence a continuous activity, peacemaking is only triggered once a conflict unfolds.[20] Its purpose is, therefore, to grasp the confrontation at its roots to avert aggravation. Peacebuilding, then again, circumscribes a broad concept with the aim of constructing a functioning society and therefore shaping the foundation of lasting peace. In this regard, the Report enumerates measures like strengthening the rule of law, providing electoral assistance, reintegrating former combatants into society, and promoting respect for Human Rights.[21]

The second - and in this regard central - pillar is that of peacekeeping. It is delineated as follows:

Peacekeeping is a 50-year-old enterprise that has evolved rapidly in the past decade from a traditional, primarily military model of observing ceasefires and force separations after inter-state wars, to

[18] Panel on United Nations Peace Operations, *Report of the Panel on United Nations Peace Operations* (UN Doc A/55/305-S/2000/809, 21 August 2000).
[19] ibid para 10.
[20] ibid paras 10-11.
[21] ibid para 13.

incorporate a complex model of many elements, military and civilian, working together to build peace in the dangerous aftermath of civil wars.[22]

This construction pointedly outlines the broad development peacekeeping missions had undergone until that point, but it is less specific than the Peace Academy's approach when it comes to the concrete activity of peacekeeping. It is therefore more a summary than a definition.

Lastly, peacekeeping has been simply referred to as 'an instrument which provides security, political and peacebuilding support to help countries make the difficult transition from conflict to peace'.[23] By 2019, peacekeeping had apparently turned into such a broad enterprise that not even an attempt at a comprehensive definition has been made.

In summary, it can be said that all these approaches relate to peacekeeping in its purpose and in reference to principal means of action. While it is therefore quite possible to gain a basic understanding of the concept of *peacekeeping* as a generic term for *peacekeeping missions,* these missions vary greatly as to their focus and operational framework. In their concrete form, they are therefore not susceptible to a uniform definition.

It might thereby be true that every mission newly shapes and further defines both practice and precept, so that the theory continuingly changes with its application.[24] However, it is nevertheless possible to roughly divide peacekeeping missions into certain development phases. The precursors of these phases took their beginning more than 70 years ago.

2. Back to the Beginnings – A Centennial Project

In one form or another, peacekeeping missions have existed for as long as the UN itself exists. They directly correspond to the fundamental objectives of the UN according to Article 1 (1) UNCh; in that, they symbolize the organization's very essence more than any other instrument. To grasp the roots of peacekeeping, it is therefore essential to first trace the organization's inception itself.

In 1945, significant parts of the world lay in ruins once again, and the rest was at least deeply affected by the experience of two consecutive world wars. Already in June 1941, representatives of Great Britain, Canada, Australia, New Zealand, the Union of South Africa, and nine exiled European governments[25] had met in London to discuss a post-war world order. The outcome of this inter-allied

[22] ibid para 12.

[23] United Nations Department of Peace Operations Policy, *The Protection of Civilians in United Nations Peacekeeping* (1 November 2019) para 12.

[24] Siobhàn Wills, *Protecting Civilians* (Oxford University Press 2009) 3.

[25] see United Nations Documents 1941 – 1945 9 <https://histdoc.net/pdf/United_Nations_docs_pp.9-11.pdf> accessed 16 December 2021.

meeting, the Declaration of St. James' Palace,[26] laid the foundation for a realigned international community, whose main goal was - once again - to prevent future wars. Admittedly, the League of Nations as the UN's direct predecessor had already failed in this same endeavor. Established as part of the Treaty of Versailles in 1919 in the shadow of the First World War,[27] its foundation was indeed a major step in international relations. The organization nevertheless did not gain enough influence to prevent World War Two from unfolding.

Shortly after the London meeting, the President of the United States, Franklin. D. Roosevelt, and the Prime Minister of the United Kingdom, Winston Churchill, came together and concluded the Atlantic Charter.[28] This declaration of intent included the abandonment of the use of force, basic principles of international justice, and '[...] a peace [...] which will afford assurance that all the men in all the lands may live out their lives in freedom from fear and want; [...]'.[29]

Then, in 1942, a document called the Declaration by United Nations, already suggesting the name of the future organization, was signed by 26 countries at war with Hitler's Germany and its allies.[30] It affirmed the aims of the Atlantic Charter and prohibited the signatories from individually making peace with opponents in the war.[31] After several more conferences, at which the principles and foundations of the United Nations were discussed and prepared, the UN Charter was finally drafted and adopted in 1945, at the San Francisco Conference.[32] In its most basic notions, this document not only stipulated the sovereign equality of all Nations, but it furthermore provided for the non-use of force in all international affairs, except in cases of self-defense or on the grounds of a Security Council resolution.[33] Apart from that, it provided for a graduated international response system in case of threats or breaches of the peace, which nevertheless did not provide for any specific mission forms or mechanisms. Rather, it circumscribed the general means of actions, which could take the form of 'recommendations'[34], 'measures not involving the use of armed force'[35] as well as forceful action[36].

Although there would never be a clearer or more concise legal basis for peacekeeping missions, any express reference to those undertakings is nowhere to be found within the Charter. This fact did not

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[26] ibid.

[27] 'Predecessor: The League of Nations' (*United Nations*) <https://www.un.org/en/about-us/history-of-the-un/predecessor> accessed 16 December 2021.

[28] 'Milestones in UN History' *(United Nations)* <https://www.un.org/en/about-us/history-of-the-un/1941-1950> accessed 14 April, 2021.

[29] United Nations Documents 1941 - 1945 (n 25) 9-10.

[30] 'Milestones in UN History' *(United Nations)* (n 28).

[31] United Nations Documents 1941 - 1945 (n 25) 11.

[32] 'Milestones in UN History' *(United Nations)* (n 28).

[33] Charter of the United Nations and Statute of the International Court of Justice, San Francisco 1945 (UNCh) Arts. 2 (1), (4).

[34] e.g ibid Art. 11 (1).

[35] ibid Art. 41.

[36] e.g. ibid Art. 42.

prevent the organizational machinery from being set in motion. It remains, however, one source of uncertainty.[37]

3. Initial Practical Experience in Keeping the Peace

With the inauguration of the United Nations, the groundwork for peacekeeping was laid, and initial practical realizations were not long in coming. Early on, these missions were construed as non-interfering observer missions, which aimed at countering a threat to the peace before it could turn into a breach. By means of their mere presence in a tense situation, those missions were intended to remind the parties of the goals and principles they had recently agreed upon and thereby keep the peace.[38] Two of these precursors were UNSCOB and UNTSO.

a) UNSCOB – A Cornerstone of Contemporary Peacekeeping

The very first operation associated with peacekeeping was established in 1947 by the General Assembly.[39] After Albania, Yugoslavia, and Bulgaria were accused of supporting guerilla fighting against the Greek government, the General Assembly inaugurated the United Nations Special Committee on the Balkans (UNSCOB). Prior to that, the Security Council had been tasked with the matter and had established a Commission of Investigation[40] when the Greek government had officially complained about interferences at their northern borders. While this Commission did produce different records, documents,[41] and a report,[42] it could not substantially solve the conflict. In September 1947, the matter was officially renounced by the Security Council.[43] Therefore, the General Assembly subsequently took up the question and adopted resolution 109 (II), in which it prompted Albania, Yugoslavia, and Bulgaria to 'do nothing which could furnish aid and assistance' and called upon all parties to 'co-operate in the settlement of their disputes by peaceful means'.[44] To foster that, the Special Committee was established with the sole purpose 'to observe' and 'be available to assist [...] in the implementation of such recommendations'.[45] It was, therefore, to act as a mediator and a gentle reminder of what the

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[37] see Gary Wilson, *The United Nations and Collective Security* (Routledge 2014) 116–17; for more on that challenge, see e.g. text to n 47-60 in chapter B and text to n 417-437 in chapter B.

[38] It is therefore at this early stage that peacekeeping missions have most lived up to their name, although they did not even have it at that time, see Trevor Findlay, *The Use of Force in UN Peace Operations* (sipri and Oxford University Press 2002) 47.

[39] UNGA Resolution 109 (II) [3 November 1947] S/RES/109(II).

[40] UNSC Resolution 15 [19 December 1946] UN Doc S/339.

[41] see 'United Nations Commission for the Investigation of Greek Frontier Incidents (1947)' (*United Nations Archives and Records Management Section*) <https://search.archives.un.org/united-nations-commission-for-investigation-of-greek-frontier-incidents-1947> accessed 16 December 2021.

[42] see a reference to that report in UNGA Resolution 109 (II) (n 39) paras 2, 3.

[43] UNSC Resolution 34 [15 September 1947] UN Doc S/555.

[44] UNGA Resolution 109 (II) (n 39) paras 4-5.

[45] ibid para 6.

combative parties had undertaken to do: 'practice tolerance and to live together in peace with one another as neighbors'.[46]

UNSCOB is widely considered to be the first precursor of current peacekeeping missions, even though they share little more than their overall goal. Having said that, apart from forming the cornerstone of contemporary peacekeeping, this mission is also particularly interesting in light of two aspects.

For one, it was as early as this first mission that controversy on the legal basis of such enterprises arose. The debate thereby did not develop around the prior Security Council resolution establishing the Commission of Investigation, whose explicit legal basis lay in Article 34 UNCh.[47] Instead, it provoked resistance in that the General Assembly subsequently addressed the issue and did not refer to any specific competence in its establishment of the Special Committee.[48] Today, it can only be speculated why the drafters did not mention any legal basis in their resolution. Even though this could indicate that they did not know what to base their action on, it might also indicate that they merely took it for granted and did not see any necessity for clarification.[49] It is thereby important to bear in mind that the General Assembly's competences are not determined enumerative, but are limited in the negative by provisions such as Articles 2(7) and 12 UNCh.[50] As long as the Assembly does not take contradicting action, it is free to address any matter within the scope of the Charter it considers relevant, Article 10 UNCh. It is, therefore, reasonable to assume that the inauguration of UNSCOB constituted a recommendation and was thus in conformity with Chapter IV UNCh.[51] The powers of the General Assembly could, however, only have encompassed the establishment of the mission, not any unconsented forceful operation.[52] Be that as it may, at this stage, the dispute over the correct anchoring in the Charter was of a rather formal nature and far from being as decisive as it would later become.

Delving deeper, however, the question of authority was intrinsically linked to political motivations. This is where the second relevant aspect of UNSCOB takes action. Even though the development of peacekeeping in the era of the Cold War will be of explicit importance in the next chapter, the political dimension of this first mission already deserves a short side note here. The Greek civil war, in which the alleged support of guerilla fighting took place, started only a few months after the Nazi occupation

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[46] ibid para 1.
[47] UNSC Resolution 15 (n 40).
[48] see N.D. White, *The United Nations and the maintenance of international peace and security* (Manchester University Press 1990) 183.
[49] cf. Wilson (n 37) 121, 122, who considers the fact that the Security Council only later explicitly referred to UNCh Chapter VII could mean, by implication, that the Council previously assumed its earlier peacekeeping activities to UNCh Chapter VI.
[50] see White (n 48) 183.
[51] see ibid.
[52] ibid.

had left in October 1944 and therewith almost simultaneously with the Cold War. This civil war was mainly driven by the Greek communist movement, who were trying to gain control and overthrow the conservative government.[53] When the Security Council first dealt with the issue in 1946, a blockade would have been easy to imagine, considering the clashing political ideas of the United States and the USSR. And indeed, from the Repertoires as to the Security Council meetings at issue, it can be concluded that there was neither initially nor permanently a uniform attitude to the case.[54] Yet, resolution 15 and with it the establishment of the Commission of Investigation has not failed because of any veto. What, in the end, probably tipped the scale in favor of joint action was the fact that the USSR, despite favoring the communist movement, had an interest in their own right to further monitor the situation. They aimed at a withdrawal of British troops from Greece,[55] as those forces - at least partly - prevented a takeover of power by the communists. However, neither was the investigation itself subsequently backed by unity in the Security Council[56], nor could the Commission produce satisfying results in the end. While the issue was thereby nevertheless closed for the USSR, the majority in the General Assembly took a different position and put the issue on their agenda. In this organ, however, the USSR had no veto, so even though it did vote against the installation of the Special Committee,[57] it did not have any mechanism to inhibit it. The only way forward for the USSR was now to attack the mission's legitimacy in general and question the General Assembly's authority in that matter.

UNSCOB thereby not only exemplifies how deeply rooted the struggle as to a consistent anchoring of peacekeeping within the UN Charter is, but foremost that this mechanism was never free from political motivations, even in its earliest forms.

b) UNTSO - Tasked to Observe

This continues in the second and following mission of its kind, the United Nations Truce Supervision Organization (UNTSO). Established only one year later, UNTSO's task was to supervise the Armistice Agreement between Israel and its Arab neighbors.[58] Even though this mission was as much of a mere

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[53] for a detailed account of the emergence of the conflict, see Nikos Marantzidis, 'The Greek Civil War (1944-1949) and the International Communist System' [2013] Journal of Cold War Studies, vol. 15, no. 4, 25, 27 ff <www.jstor.org/stable/26924363> accessed 16 December 2021.

[54] e.g. see the 'Repertoire of the Practice of the Security Council 1946 – 1951' United Nations Department of Political and Security Council Affairs (New York 1954) 24 Case 37, 71-72 Case 17, 93-98 Case 57.

[55] indicative for this position ibid 167-168 Case 116.

[56] e.g. see ibid 461 Case 5.

[57] see the record of votes at 'Threats to the political independence and territorial integrity of Greece : resolution / adopted by the General Assembly 1947' (*United Nations Digital Library*) <https://digitallibrary.un.org/record/671149?ln=en> accessed 16 December 2021.

[58] UNSC Resolution 50 [29 May 1948] UN Doc S/801 para 6.

observer mission as UNSCOB was, it is still referred to as the beginning of peacekeeping.[59] This is probably due to the fact that the mission had a direct link to a specific international conflict, in which the UN actively intervened to pacify. Additionally, UNTSO was the first mission of its sort to be established by the Security Council.[60]

Therewith, it represented the ideal opportunity to be the first Cold War showground. What had been inherent in UNSCOB could have now finally come to light. While an open power struggle within that first mission could be prevented by the intervention of the General Assembly, the establishment of UNTSO by resolution 50 required unanimity within the permanent Security Council members. It may therefore seem all the more surprising that such unanimity was achieved without any major obstacles. Quite the contrary, UNTSO serves as a precedent of effective collaboration among the permanent Security Council members during the Cold War, and it is in that way a positive counterexample to the later stalemate. The reasons for that may be manifold, but foremost it is to be assumed that the national interests of the political opponents regarding this conflict were insignificant enough and thus not worth risking a show of strength for.

This already indicates the duality of peacekeeping missions during the Cold War. It would be too hasty a judgment to deem the Cold War era on the whole as one of standstill that prevented any international cooperation. Regarding peacekeeping, especially, it rather encouraged an astonishing development.

The first steps in maintaining international unity by means of peacekeeping had thus been taken. Not only had the foundational competencies been set, but initial practical experiences had furthermore brought first practical insights. These were not only characterized by primary successes but also gave a preview of the future strategic thrust and impending conflict lines. Traditional peacekeeping was therefore waiting in the wings.

II. Between two Poles – Peacekeeping Amid the Cold War

Shortly after UNSCOB and UNTSO had prepared the ground, the peacekeeping development gained momentum. Moving away from pure supervision missions, their successors formed what is now considered to be the first phase of peacekeeping. These missions began to operate in a much more

[59] 'Our History' (*United Nations Peacekeeping*) <https://peacekeeping.un.org/en/our-history> accessed 16 December 2021.

[60] Equally interesting is that UNTSO is not only one of the first peacekeeping missions but also the longest one in service, as the observers have remained in the Middle East until today, 'UNTSO Fact Sheet' (*United Nations Peacekeeping*) <https://peacekeeping.un.org/en/mission/untso> accessed 16 December 2021. That this does not exactly speak for the success of the mission is certainly a different matter.

targeted manner and with their own agenda. Through this, they gave rise to the pillars of peacekeeping, which still form the basis of such missions today.

However, they were not just formed by the international conflict structure, but just as much by the political and geostrategic context of the second half of the 20th century. From 1945, all international relations were overshadowed by a conflict, which followed almost seamlessly after the Second World War: The Cold War.

1. The Tension is Rising

After the Second World War had finally come to an end, hopes were high that the international community could now finally enter a new world order, a post-war era that would bring lasting peace to all Nations.[61]

These hopes were soon greatly dampened. Practically with the end of the Second World War, another contest began to loom on the horizon. Even if this conflict would take a completely different form than its predecessors, it was no less harmful to international cooperation and collaboration. Marked by blockade and competition for influence between the western and the eastern powers, the Cold War inhibited the newly contemplated system envisaged by the UN founders. In retrospect, it is difficult to confirm what path peacekeeping would have taken if it was not for the Cold War. In any case, the initial missions were deeply marked by this unique political setting. So, when the world order changed, it also ushered in a new, first phase of peacekeeping as such.[62] This was not only to replace the rather preliminary phase of peacekeeping as a mere observer activity but also to introduce a structure, whose basic features are still to be found in missions today.

While the years from 1945 to around 1985 were not characterized by distinct episodes of massive bloodshed, as was the case for the beginning of the 20th century, the period was far from peaceful in many parts of the world.[63] All the while, the main eastern and western blocs were entangled in powerful wrestling over political systems and, ultimately, their respective sphere of influence. As a result, many international affairs were shaped by deadlock. This also had a significant impact on the

[61] As General Romulo from the Philippines very passionately expressed in his speech at the fourth plenary session of the San Francisco Conference on 28 April 1945: '[...] Ladies and Gentleman: Let us make this floor the last battlefield. We are here to determine whether the human race is going to exist or whether it is to be wiped out in another world holocaust. [...] This may be our last opportunity to achieve peace. We are here to fight for our lives', The United Nations Conference on International Organization Plenary, Verbatim Minutes of the Fourth Plenary Session Opera House, April 28, 1945, 3:50 p.m., Doc. 24 P/8 [April 29, 1945] 12, in Documents of the United Nations Conference on International Organization San Francisco, 1945, Volume I General 292.

[62] Berdal (n 15) 177, 179.

[63] examples for that are the Korean War from 1950-1953 and the Vietnam War from 1954 to 1975, which were to a great extent also manifestations of the Cold War, as well as recurring border conflicts between India and Pakistan since 1947 or the Arab-Israeli wars that have been erupting since 1948.

Security Council, which by its very construction reinforced the stalemate. Intended as a 'board of directors of the world'[64], the composition of the Security Council reflected the balance of power in 1945.[65] The United States, the United Kingdom, France, China, and Russia as the five victorious countries thereby equipped themselves with the capabilities to make a decisive impact on future world events by anchoring a veto right into the Charter.[66] For the main actors in the Cold War, the United States, and the Soviet Union, this primarily meant that they would be protected from having a contrary worldview imposed on them,[67] paired with the hope that their respective views would ultimately prevail.

Between 1945 and 1985, the veto of the five permanent members of the Security Council was used 194 times, at first mostly by the USSR and later by the United States as well.[68] The exercise of the veto right thereby reflects the ups and downs of Cold War international relations in general, which resemble a tidal wave.[69] At times, each of the great powers alternately used the Security Council as a tool in their power struggle, mostly by inhibiting advances of the respective opposing side. Then again, the attitude shifted from quiescence up to unanimity, which aimed at calming the conflict and relaxing the tense relations.

Naturally, these fluctuating attitudes also had an influence on the adoption of resolutions and implementation of peacekeeping missions. Despite the occasional silver lining, the overall progress in international relations was thereby rendered extremely difficult. Almost every question could be reinterpreted into a question of communists against non-communists and be used to extend the respective spheres of influence as far as possible.[70] It was, for example, neither possible for the UN to take decisive action during the Cuban Missile Crisis nor in reaction to the Vietnam War.[71]

In view of these obvious shortcomings, one could effortlessly come to the conclusion that the UN was overall powerless during the Cold War. Instead, it is even more surprising that the organization did indeed find its role and place[72] and was not worn down between the two superpowers. In fact, quite the opposite happened: through peacekeeping, the UN could take preventive action and contain newly arising conflicts so that they would not evolve into another hotspot of bloc conflict. Findlay even goes

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[64] at least by President Roosevelt, Henry A Kissinger, *Diplomacy* (Simon & Schuster 1994) 395.
[65] Shaw (n 13) 926.
[66] UNCh (n 33) Art. 27 (3).
[67] see Shaw (n 13) 926.
[68] an extensive list to be found at 'Security Council - Veto List' (*Dag Hammarskjöld Library*) <https://research.un.org/en/docs/sc/quick/veto> accessed 16 December 2021.
[69] Haslam describes this overall pattern as 'fluctuated', Jonathan Haslam, 'The Cold War as History' [2003] Annu. Rev. Polit. Sci. 6:77-98, 77.
[70] cf. also Shaw (n 13) 937; This also illustrates the exceptional nature of UNTSO, see above B I 3 b, p. 15-16.
[71] see Shaw (n 13) 945.
[72] see Berdal (n 15) 179.

as far as to assume that the Cold War itself gave rise to contemporary peacekeeping missions, as they were the only feasible tool of acting quasi-militarily, while simultaneously avoiding the use of force.[73] In any case, even though the UN was not as active as it probably could have been without the Cold War, the years from 1945 until 1985 did not represent a downtime for peacekeeping.

a) UNEF I – The Beginning of 'Peacekeeping as Such'

The existing development can be determined based on various missions. The first operation in this regard, which also became known as the cornerstone of 'peacekeeping as such',[74] was installed in reaction to the Suez Crisis in 1956.[75] When Egyptian President Nasser, backed by the USSR, had claimed this major waterway for Egypt alone, Israel, France, and Britain intervened militarily. The General Assembly subsequently established the United Nations Emergency Force (UNEF I), an armed troop, which was deployed along the border between Egypt and Israel.[76] Its task was to monitor the retreat of British, French, and Israeli forces from the Suez Canal and the Sinai Peninsula, as well as form a buffer on the front line.[77] Considering that civilian protection was not yet a key objective of this undertaking,[78] it was a traditional peacekeeping mission. As such, it is solely characterized by the aim of monitoring compliance with ceasefires, withdrawals, buffer zones, and such.[79] UNEF I is relevant from various points of view, three of which will be examined in more detail below.

aa) UNEF I and the 'Uniting for Peace' Framework

The first of these relates, again, to the question of authority. Contrary to what one might have expected considering the purpose of the mission and its armament, UNEF I was not mandated by the Security Council but by the General Assembly. In contrast to UNSCOB, this constituted a major hurdle, as the establishment of an armed force and its stationing in another country could no longer be regarded as a mere 'recommendation'.[80] The Security Council, who would have undisputedly had the necessary competence, did not prove helpful, as it was split and blocked by France and Britain, who were both involved in the conflict themselves.[81]

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[73] Findlay (n 38) 1; in a similar vein, see Christine Gray, *International Law and the Use of Force* (4th Edition, Oxford University Press 2018) 270.
[74] Shaw (n 13) 940; also cf. Berdal (n 15) 179.
[75] first referred to by the General Assembly in UNGA Resolution 997 [2 November 1956] UN Doc A/RES/997.
[76] Wills (n 24) 6.
[77] UNGA Resolution 997 (n 75) para 5; UNGA Resolution 1000 [5 November 1956] A/RES/1000 (ES-I) para 1.
[78] Wills (n 24) 6.
[79] Findlay (n 38) 5.
[80] cf. UNCh (n 33) Article 11 (2); The International Court of Justice would subsequently also deal with the matter, see n 96.
[81] 'Establishment of UNEF, General Assembly's first emergency special session' (*United Nations Peacekeeping*) <https://peacekeeping.un.org/en/mission/past/unef1backgr2.html> accessed 16 December 2021. This also proves that it was not necessarily the United States or the USSR to prevent coaction.

The solution lay in the Uniting for Peace Framework that had been established just a few years ago[82] and was ideally fitted to be first applied to this case.[83] To understand the purpose of this framework, one must take a step back to 1950. When communist North Korea attacked its southern neighbor in June of that year, joint action to help South Korea was blocked by the USSR. With that, Korea became a typical example of a proxy war between 'western' capitalist and 'eastern' communist powers.[84] Nevertheless, the United States managed to work around a Soviet blockade by taking advantage of a USSR boycott in the Security Council.[85] The USSR had been working on the assumption that the Council could not take any affirmative decision while they themselves were refusing to take part in the Council meetings.[86] The Council, on the contrary, saw itself very much capable of acting[87], and, with the USSR abstaining through non-presence, unanimously tasked the United States to intervene in Korea.[88] Having been made to look like a fool, the USSR subsequently persistently blocked any further decision-making on the Korea question.[89] In order to circumvent such blockades in the future, the United States subsequently persuaded the General Assembly to determine that it had an emergency competency to consider situations that were relevant for the maintenance of international peace and security, over which the Security Council was split.[90] Within that Uniting for Peace Framework, the General Assembly determined the authority to meet in emergency special sessions.[91] However, in order not to exceed the competencies of the General Assembly under the Charter and safeguard the key role of the Security Council, it only trusted itself with the power to make recommendations.[92]

Equipped with that authority, the General Assembly passed resolution 997, almost to the day, six years later. In there, it called for an immediate cease-fire and the withdrawal of all forces from Egyptian territory.[93] Additionally, the Secretary-General was requested to report on the matter.[94] After he had

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[82] UNGA Resolution 377 A (V) [3 November 1950] UN Doc A/RES/377(V)AA.

[83] cf. 'Establishment of UNEF, General Assembly's first emergency special session' (*United Nations Peacekeeping*) (n 81).

[84] see Shaw (n 13) 42.

[85] Christian Tomuschat, 'Uniting for Peace Assembly Resolution 377 (V) New York, 3 November 1950' (*United Nations Audiovisual Library of International Law*) <https://legal.un.org/avl/ha/ufp/ufp.html> accessed 16 December 2021.

[86] ibid.

[87] a view that was later confirmed by the ICJ in *Legal Consequences for States of the continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970),* Advisory Opinion, I.C.J Reports 1971, 16, para 22; cited by Tomuschat (n 85).

[88] for the not cast vote, see 'Security Council resolution 84 (1950) [on the Korean Question and a unified command under the United States]' <https://digitallibrary.un.org/record/280537?ln=en> accessed 16 December 2021; the result was UNSC Resolution 84 [7 July 1950] UN Doc S/RES/84.

[89] cf. Tomuschat (n 85).

[90] ibid; the result was UNGA Resolution 377 A (V) (n 82).

[91] UNGA Resolution 377 A (V) (n 82) para 1.

[92] Tomuschat (n 85); UNGA Resolution 377 A (V) (n 82) para 1.

[93] UNGA Resolution 997 (n 75) paras 1, 2.

[94] ibid para 5.

done so five days later, the General Assembly established the United Nations Command upon his recommendation,[95] which was to operate with the consent of Egyptian authorities on their territory.[96] Therewith, UNEF I was strictly dependent on the consent of the relevant actors and consequently not an enforcement mission. Considering that Israel did not consent to the mission, no troops were stationed on their side of the border.[97]

Although technically legal, the application of the Uniting for Peace Framework and the associated extensive interpretation of the General Assembly's competencies did, nevertheless, spark a debate. However, considering that it was firstly utilized in the context of peacekeeping rather than enforcement action[98], it was largely tolerated. To further substantiate this, the International Court of Justice (ICJ) took a stance on the issue a few years later. In its Advisory Opinion on *Certain Expenses,* it ruled that the General Assembly could mandate peacekeeping operations on the grounds of Article 11 (II) UNCh.[99] Holding that a peacekeeping mission was nothing more than a 'recommendation', compliance with which was voluntary, the Court could justify the General Assembly's mandate.[100] The Uniting for Peace Framework thus received retroactive confirmation.

Altogether, the inauguration of UNEF I was therefore somewhat unusual, but successful in the end. For one, it exemplified that there is no one uniform way of establishing peacekeeping missions, but that, instead, each mission must be adapted to the specific requirements of its time. For another, in the turmoil of the Uniting for Peace Framework's first application, it is often forgotten that UNEF I is also one of the rare examples of mutual collaboration between the United States and the Soviet Union. Together, they opposed two other permanent Security Council members, France, and Great Britain, which was a rather unusual alliance. So, although it would certainly remain the exception, cooperation was possible after all.

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[95] UNGA Resolution 1000 (n 77) para 1.

[96] Hans J Münk, *Die Vereinten Nationen sechs Jahrzehnte nach ihrer Gründung: Bilanz und Reformperspektiven* (Peter Lang 2008) 23.

[97] Wills (n 24) 6 fn. 23.

[98] Simon Chesterman and others, *Law and Practice of the United Nations: Documents and Commentary* (2nd edition Oxford University Press 2016) 321.

[99] *Certain expenses of the United Nations (Article 17, paragraph 2, of the Charter),* Advisory Opinion of 20 July 1962, ICJ Rep 1962, 151 (International Court of Justice), 164.

[100] ibid.

bb) UNEF I and the Question of Armament

Turning to the second point of interest, UNEF I was also the first peacekeeping mission to be armed.[101] This, in turn, implied the follow-up question as to the acceptability of the use of force by peacekeepers.[102]

On a strategic level, the underlying controversy here was to what extent peacekeepers should interfere with the events on the ground. Secretary-General Dag Hammarskjöld had a very clear position on this. He specifically stated that 'there is no intent in the establishment of the Force to influence the military balance in the present conflict and, thereby, the political balance affecting efforts to settle the conflict'.[103] This assurance illustrates the fundamental concept envisaged by the founders of peacekeeping. The basic idea was to delegate a troop that could build a passive shield between two warring parties and take a neutral position in all its actions. Creating breathing space by its mere presence, its aim was to allow the heated minds to calm down and subsequently pursue their concerns more placidly.

On a legal level, UNEF's armament raised the question of necessary competencies. In view of his general position on peacekeeping, Hammarskjöld rated such missions as belonging to a 'Chapter VI 1/2', as they went beyond the mere non-coercive measures of Chapter VI but at the same time did not constitute Chapter VII enforcement action.[104] In light of the geopolitical situation at the time, this was indeed a position that was most likely to achieve results, as it was both cautious and assertive. In this way, such dual-natured peacekeeping missions could form a '[…] functional adjustment […]' to handle the political system and reality.[105]

In view of the situation at that time, the term peacekeeping would indeed have been somewhat 'aspirational'.[106] These first missions were certainly not created to bring any peace; instead they were designed to allow the parties to find a nonviolent solution themselves,[107] despite any armament. After all, they were not equipped to actually keep any peace. The term peacekeeping had, however, not yet been established in 1956. It was attached to these missions later.[108]

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[101] 'Our History' (n 59).
[102] Findlay (n 38) 20.
[103] UNGA, *Second and Final Report of the Secretary-General on the Plan for an Emergency International United Nations Force Requested in the Resolution Adopted by the General Assembly on 4 November 1956 (A/3276)*, (UN Doc A/3302, 6 November 1956) para 8.
[104] Berdal (n 15) 180.
[105] ibid.
[106] Wills (n 24) 5.
[107] cf. Chesterman and others (n 98) 320.
[108] see Findlay (n 38) 47.

cc) UNEF I and the Principles of Peacekeeping

Thirdly and lastly, UNEF I has determined a set of standards, which in their substance prevail to date. For this reason alone, there is no other early peacekeeping mission that has left such a fundamental and lasting footprint as UNEF I. Already in its implementation, Hammarskjöld had paid close attention to the observance of certain basic guidelines that were intended to clearly separate the operation from any form of enforcement action.[109] In the aftermath of the mission, he then took the opportunity to conduct a summary study, in which he set out these standards as '[…] certain basic principles and rules which would provide an adaptable framework for later operations [...]'.[110] In particular, these basic principles were the consent of the host state,[111] the non-interference with internal matters,[112] which would become the principle of impartiality, and lastly, the prohibition against any 'initiative in the use of armed force'.[113] Particularly, Hammarskjöld deemed every use of force, exceeding that of self-defense, as constituting enforcement.[114]

Just as Hammarskjöld had intended, these principles would indeed provide a framework for all further peacekeeping missions. With his 1958 study, he laid the foundation for what we now understand as the pillars of peacekeeping. They are so essential that most of the current challenges of UN peacekeeping can be traced back to diverging views on the pillars' interpretation and understanding. Following the timeline from UNEF I onward, it is thus time to study these pillars more closely.

b) The Pillars of Peacekeeping - A Common Baseline

The pillars of peacekeeping have been a common baseline for peacekeeping undertakings from the start. Today, they consist of the consent of the host state, the impartiality of the peacekeepers as well as the non-use of force, except in self-defense. Individually, they all face specific challenges and have, despite their intrinsic connection, undergone their own developmental stages. The formation process of the separate pillars and their substance will therefore be outlined chronologically, based on the subject-related evolution and debate over time.

aa) The Early Transformations – From UNEF I to UNEF II

With UNEF I, an early precursor to the pillars of peacekeeping had made an appearance on the international stage. Although Hammarskjöld's principles were farsighted and comprehensive, in their

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[109] Wills (n 24) 6.

[110] UNGA, *Summary study of the experience derived from the establishment and operation of the Force: report of the Secretary-General* (UN Doc A/3943, 9 October 1958) para 154; cited in Findlay (n 38) 47.

[111] ibid para 155.

[112] ibid paras 166-67.

[113] ibid para 179.

[114] ibid.

substance they soon proved to still be too narrow, and they were thus inadequate in practical implementation. This fact came to light especially in regard to the non-use of force requirement. The third pillar was thus the first to be subject to a practical test.

The principle of non-use of force except in self-defense is both 'a hallmark' and 'a key characteristic' of UN peacekeeping,[115] but it is also a standard that is surrounded by multiple myths and ideologies. Some of them are the result of past experiences with unsuccessful missions and some are rooted in general assumptions on the role of the UN in international conflict management. In the end, it boils down to certain, central questions: what can, may, and should blue helmets do on the ground to fulfill their mandate?

The general attitude towards these questions is mostly characterized by reticence. In all its phases, peacekeeping was conceived as a non-military tool that did not aim at the defeat of the other party but - at most – constituted a coercive means to invoke peaceful behavior.[116] A purely reactive use of force is therewith embedded in the DNA of peacekeeping. This is mostly based on the concern for an escalating conflict, in which peacekeepers incite the parties using force, and thus shift from being part of the solution to being part of the problem and conflict.[117]

This risk of becoming involved was also recognized by Dag Hammarskjöld. Therefore, he formulated an absolute prohibition of the use of force except in self-defense for UNEF I.[118] The peacekeepers were therewith only allowed to react forcefully once they or their colleagues were attacked.[119] However, this left them with very little room for maneuver and in many situations even unprotected. In the end, it endangered the effective exercise of the mandate as a whole.[120]

Although it did not take long for the UN to realize that this restriction was too narrow, the subject remained a hot potato for a long time. Neither the individual officials nor the UN as a whole wanted to take a clear position. At the same time, however, the practical need for expanded uses of force intensified. This resulted in a factual use of force beyond mere self-defense, while this fact was denied at the same time. Within the United Nations Operation in the Congo (ONUC), this particularly

[115] Findlay (n 38) 14.

[116] Findlay refers to 'peace enforcement' in that regard, although he admits that the term overlaps with 'expanded' or 'robust' peacekeeping, see ibid 6.

[117] as Brian Urquhart indicates, cited in ibid 15.

[118] UNGA, *Summary study of the experience derived from the establishment and operation of the Force: report of the Secretary-General* (n 110) para 179.

[119] Findlay (n 38) 14.

[120] On a practical note, it also reduces the number of troop-contributing countries. When the blue helmets are not equipped with a right to wider self-defense, their safety is additionally endangered and their deployment harder to justify within the national governments, ibid 16.

manifested itself[121] and became so obvious, that the mission turned into a prominent example for a self-deceiving UN. Subsequently, the organization could no longer deny the need for adjustment.

Consequently, with the inauguration of UNEF II in 1973, Secretary-General Kurt Waldheim issued a Report on the Implementation of Security Council Resolution 340. Therein, he laid down: 'Self-defence would include resistance to attempts by forceful means to prevent it [the Force; note from the author] from discharging its duties under the mandate of the Security Council'.[122] Henceforth, the use of force was no longer restricted to immediate self-defense but could also be applied in defense of the mandate.[123] At the time, and within the rather uncontroversial UNEF II operation, this proposal did not run into major headwinds; still, it has since been recognized as a 'sea change in the UN's use-of-force "doctrine"'.[124]

Contemporaneously with this extension, however, the principle was also subjected to strict regulations. Apart from being a last resort mechanism, force must only be used when it is necessary and in proportion to the hazard.[125] Findlay further notes the 'provisional character of such self-defence'.[126] First, it is only triggered in the face of imminent threat and second its legality is only assessed with hindsight by the international community and not the states involved in the operation itself.[127]

Therewith, the third pillar had emerged in a form in which it would last for a long time. The other two pillars were only subject to revision much later. For many years, they were applied, more or less, in the structure in which they had been formulated by Hammarskjöld. This only changed with the end of the Cold War. This historical milestone initiated a new development phase in peacekeeping that induced a strategic and conceptual reorientation at the end of the 1990s. Regarding the first two pillars, the post-millennial decades are therefore crucial.

bb) The Second Transformation Phase – The Brahimi Report

The first result of this comprehensive reorientation was the Brahimi Report of 2000. This report dedicates one large section to what it calls 'Implications for peacekeeping doctrine and strategy'.[128] By

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[121] For a detailed analysis of this mission, see text to n 151-176 in chapter B.

[122] UNSC, *Report of the Secretary-General on the Implementation of Security Council Resolution 340* (UN Doc S/11052/Rev. 1, 27 October 1973) para 4 (d).

[123] The evaluation as to what is necessary for the defense of the mandate is nevertheless still highly controversial and is initially left to the force commanders. Depending on what the mandate is bound to achieve, many different forceful measures can be justified in the defense thereof, up to forceful intervention and therewith, peace enforcement, see Findlay (n 38) 19.

[124] ibid 100.

[125] ibid 16.

[126] ibid.

[127] Stanimir A Alexandrov, *Self-Defense Against the Use of Force in International Law* (Kluwer Law International 1996) 296; cited in Findlay (n 38) 16.

[128] *Report of the Panel on United Nations Peace Operations* (n 18) paras 48 ff.

this alone, the authors broke new ground, as there have been few approaches to summarize peacekeeping principles in a doctrine before.[129] The 'Implications' for a doctrine are therefore rather the first approach by the UN to formulate and shape such a doctrine at all.[130] They have a particular bearing on the further two principles of peacekeeping.

(1) The Consent of the Host State

To begin with, the pillar of consent is both the best-known cornerstone of peacekeeping, as well as the least transparent requirement. The Brahimi Report does not aim to reinvent the wheel. Rather, the authors do not even see a reason to provide a definition, instead referring to the 'consent of the local parties' remaining a basic principle of peacekeeping.[131] How, when, and by whom exactly this consent is to be declared is not clarified here or elsewhere. Instead, the authors point to a concrete obstacle in practical implementation: considering how easily consent can be forced, withdrawn, or otherwise manipulated, it is a rather unreliable characteristic.[132]

The basic challenge of this pillar is therewith that it might be a prerequisite that is generally intelligible, but which, concretely, is very difficult to nail down. It is fluent both in its granting and in its revocation; its existence is dependent on diverse external circumstances and may thus vary continually. It is probably for that reason that the Peace Academy denoted consent as a 'prerequisite', but not a 'binding prerogative'.[133]

To further complicate the matter, the notion of consent is additionally an important factor in the delimitation of (in principle defensive) peace*keeping* and (offensive) peace *enforcement.*[134] The latter is thereby understood to involve 'the application of a range of coercive measures, including the use of military force', mostly with the aim to restore international peace and security.[135] In light of today's

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[129] The Peacekeepers Handbook of 1984 by the International Peace Academy is one early attempt to summarize recognized principles and procedures, see International Peace Academy, (n 17) 21 ff; Even though widely acknowledged, however, this handbook is no official UN document. Nonetheless, the International Peace Academy had been the only institution that scrutinized the development of peacekeeping for many years, see Findlay (n 38) 121.

[130] The attempt itself is thereby highly controversial, as every doctrine bears the risk of being shaped by political attitudes and motivations, e.g. see the discussion in Findlay (n 38) 384 ff.

[131] *Report of the Panel on United Nations Peace Operations* (n 18) para 48.

[132] ibid.

[133] International Peace Academy (n 17) 26.

[134] cf. Department of Peacekeeping Operations, Department of Field Support, *United Nations Peacekeeping Operations: Principles and Guidelines* (18 January 2008) 31-32; cited in Mona Ali Khalil, 'Legal Aspects of the Use of Force by United Nations Peacekeepers for the Protection of Civilians' in Haidi Willmot and others (eds), *Protection of Civilians* (Oxford University Press 2016) 218.

[135] 'Terminology' (*United Nations Peacekeeping*) <https://peacekeeping.un.org/en/terminology> accessed 16 December 2021.

robust peacekeeping activities, it becomes particularly clear why host state consent is a vital further criterion for demarcation.

(2) The Impartiality of Peacekeepers

Turning to the last of the three pillars, the notion of impartiality, the authors of the Brahimi Report make the following statement:

Impartiality for such operations[136] must, therefore, mean adherence to the principles of the Charter and to the objectives of a mandate that is rooted in those Charter principles. Such impartiality is not the same as neutrality or equal treatment of all parties in all cases for all time, which can amount to a policy of appeasement.[137]

Other than what one might have expected at first, impartiality is, therefore, no passive characteristic but on the contrary, requires an active positioning. Whereas 'equal treatment' would not require any distinction, impartial behavior requests the peacekeepers to make an evaluative assessment of each situation and the proper reaction. The uncertainty that is introduced by this margin of appreciation is thereby the price to be paid for an effective case-to-case application.

The report leaves it at this negative definition, without elaborating on what impartiality then *is* exactly, and which standards are to be set in its evaluation. The formulation of universal criteria was either classified as impossible or unnecessary.

Although conclusive in many regards, the Brahimi Report has therewith rather stressed the relevance and consistency of the peacekeeping principles instead of developing them further. It was, however, only the first approach to a new doctrine.

cc) The Third Transformation Phase – The Capstone Doctrine

In reaction to the Brahimi Report, the Security Council called for a more comprehensive concept of UN peacekeeping operations, but most developing countries opposed this advance. Their dismay related to the fact that the development of peacekeeping missions could lead to more and more robust appearances, which would ultimately result in interventions by the global north, concealed as peace enforcement operations.[138] Whether or not this fear was well-founded, the opposition stemmed the tide of innovation for a few years. It took the Department of Peace Operations (DPKO) another eight years before taking the matter up again. The result, a report on the status of peacekeeping doctrines,

[136] i.e. peacekeeping operations; note from the author.
[137] *Report of the Panel on United Nations Peace Operations* (n 18) para 50.
[138] Chesterman and others (n 98) 351.

was then, however, very well received and became known as the Capstone Doctrine.[139] Even though it does not constitute an official UN document, it was accepted as reflecting peacekeeping principle guidelines.[140]

In large parts, the Capstone Doctrine does not differ significantly from the findings of the Brahimi Report. At least, that is, until it comes to impartiality, where the authors take a stronger position by elaborating on the exact difference to neutrality. Therewith, they at least partly filled the gaps the Brahimi Report had left open. In their view, a peacekeeper acts like a referee, who is even-handed, but not blind to breaches of the rules. In translation, this means that peacekeepers are requested to apply equal standards while simultaneously adopting a clear stance on compliance with international standards before all parties.[141] These are criteria that can claim general validity, while at the same time they may be applied in a nuanced way to individual cases.

With this progress, however, it becomes clear that the challenges of impartiality, like those of consent, are not rooted in the theory, but lie in the practical implementation. While it may seem convincing to apply the same standards to all parties, in practice it may be difficult or even impossible to oppose the host country's behavior with reference to the pillar of impartiality and be simultaneously strictly dependent on its approval according to the pillar of consent.

Apart from that, the Capstone Doctrine is also quite informative on the use of force, as it reaffirms the former finding that peacekeeping missions are not to be confused with enforcement missions, but that they do need to use force at a tactical level.[142]

dd) The Fourth Transformation Phase – The HIPPO Report

The last comprehensive study on the current status of peacekeeping is the HIPPO Report, conducted by the High-Level Independent Panel on UN Peace Operations, which was established by Secretary-General Ban Ki-moon.[143] It was completed in 2015 and aimed at taking stock fifteen years after the Brahimi Report.

By that time, yet another peacekeeping era was in full progress, and the focus of peacekeeping missions had changed significantly. The new approach that was now openly being pursued was that of

[139] *United Nations Peacekeeping Operations - Principles and Guidelines* (n 134).
[140] Chesterman and others (n 98) 351.
[141] see *United Nations Peacekeeping Operations - Principles and Guidelines* (n 134) 33-34.
[142] ibid 34-35; This opens a debate, the whole of which will be dealt with in text to n 1116-22 in chapter D.
[143] High-Level Independent Panel on Peace Operations, *Uniting Our Strengths for Peace - Politics, Partnership and People* (16 June 2015).

civilian protection. The HIPPO Report consequently reflects this shifted focus and stresses the need for clear mandates and strategies.[144]

The pillars of peacekeeping are now likewise evaluated through the glasses of civilian protection. The approach within the Capstone Doctrine is in that way much broader and less deterministic. Even though the authors acknowledge the wish of many states to hold on to the principles, they call for a 'flexible and progressive interpretation'.[145]

This concerns, in particular, the pillar of consent. Whereas the consent of the government ought to be pursued under every circumstance, the consent of other actors only 'remains an important objective of any mission and should be pursued to the extent possible'.[146] Taking into account the nature of modern-day conflicts, which are non-international in the majority of cases, this constitutes a rather broad interpretation that, nevertheless, pursues a clear objective. To avoid past mistakes, peacekeepers should never again have any grounds to refuse protection to civilians in need.[147] Therefore, the Panel also stresses the need to actively employ the power to use force when it comes to the protection of civilians.[148]

Overall, the HIPPO Report thereby expands the peacekeepers' scope for action in two directions: for one by inducing that an opposing will of individual parties might be disregarded, if the situation so requires; and for another by reinforcing the call for active use of force when it comes to the protection of civilians.

Regardless of whether one supports this broad interpretation or not, the HIPPO Report has in any case advanced the importance of the peacekeeping pillars. Despite the stipulated change, the authors have nevertheless adhered to and thus stressed their fundamental importance. The adaptation to changed circumstances must thereby not be recognized as an indication of weakness, but rather as a guarantor of progress.

c) To conclude – The Early Years of Cold and the Rise of the Peacekeeping Pillars

All in all, the peacekeeping pillars have thus not only defined peacekeeping missions from the very beginning but have continued to form them until today. Considering that peacekeeping itself lacks a concrete legal basis within the UN Charter, the pillars can, to some extent, therefore, be regarded as a

[144] ibid para 113; Recent developments in civilian protection are, however, neither specified nor legally assessed within the HIPPO Report. In this respect, it remains very vague and hardly meaningful.
[145] ibid para 122.
[146] ibid para 124.
[147] see ibid para 122.
[148] ibid para 125.

gap-filler in the provision of fundamental guidelines. By that, they can provide at least some direction through otherwise quite murky waters.

The common starting point for all peacekeeping principles was thereby UNEF I. Even more, this mission was a cornerstone for contemporary peacekeeping. Altogether, it was mostly rated as a successful mission.[149] However, when the Cold War entered its high phase, peacekeeping missions as well went one step further. The ink on Hammarskjöld's summary study on UNEF I had therefore hardly dried when the next opportunity to apply these newly formulated principles arose.

2. The Cold War High Phase

Going back in time again, it is the year 1960 and the Cold War has reached its high phase. While the situation had eased a little with the death of Soviet dictator Joseph Stalin, in 1953, tensions increased again when both the USSR as well as the United States started to develop intercontinental ballistic missiles.[150] When the Soviets began to secretly station them in Cuba, the conflict reached a boiling point and in 1962, the world was on the brink of nuclear war. More by luck than wise judgment, however, such an escalation could still be prevented, and an agreement was reached to withdraw the missiles.[151]

This so-called Cuban Missile Crisis was thereby no hour of glory for the UN. With a deadlocked Security Council, the organization was paralyzed and, in its significance, reduced to that of a spectator on the sidelines. This revealed a general birth defect in the construction of the organization that gained special significance during the entire Cold War. Being simply not equipped to resolve conflicts among its five permanent members with their respective veto competencies, the Security Council reinforced the overall power struggle and deadlock in international relations during that time. This impeded the UN from solving one of the most urgent threats to international peace and security of the 20th century.

However, every cloud has a silver lining. Despite its apparent incapacity in the general bloc conflict resolution, the UN still left a significant mark with its peacekeeping efforts during that time.

[149] e.g. by Findlay (n 38) 44.
[150] cf. Haslam (n 69) 78.
[151] cf. 'What was the Cold War?' *(National Geographic)* <https://www.nationalgeographic.com/culture/article/cold-war> accessed 16 December 2021.

a) ONUC – Along the Cold War Conflict Lines

At the heart of these efforts was ONUC, the United Nations Operation in the Congo. This undertaking was immensely important for the further development of peacekeeping missions, revealing from an analytical perspective and perceived as highly controversial. Furthermore, it led to the somewhat mysterious death of Hammarskjöld himself and therefore not only turned into a personal tragedy but also triggered a succession conflict within the UN itself, which again followed the Cold War conflict lines.

aa) The Original Mission

ONUC was authorized, this time by the Security Council, in 1960 with resolution 143.[152] Its initial task was to safeguard the peaceful withdrawal of Belgian troops from the Congo, who had been stationed in the region of Katanga. Induced by unrest that broke out in the resource-rich region after the former Belgian colony had become independent on 30 June 1960, the foreign troops still did not enjoy the consent of the Congolese government.[153] Despite the declared purpose of restoring law and order and protecting civilians, the Belgian advance was seen as an intervention and therefore not recognized by the newly independent state.[154] Consequently, on 12 July 1960, it asked the UN for military assistance against interference from outside. After the Security Council had called upon the Belgian troops to withdraw, the UN forces were tasked with providing the Congolese Government with the necessary military (!) assistance it needed to regain and maintain control of their territory.[155] Nevertheless, in the beginning, Secretary-General Hammarskjöld was very clear in his attitude towards the use of force in reiterating that the UN personnel was not to take the initiative in using armed force but might only respond with force to violent attacks and their attempts.[156]

bb) The Progression of Conflict

However, this attitude was difficult to maintain in an ever-worsening situation on the ground. During the period from mid-1960 to early 1961, the conflict intensified, until finally the Prime Minister, Patrice Lumumba, was killed.[157] A reassessment of the situation therewith became urgently necessary. Thus, at the end of February 1961, the Security Council recommended that 'immediately all appropriate

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[152] UNSC Resolution 143 [14 July 1960] UN Doc S/4387.

[153] Berdal (n 15) 182; 'Background' (*Republic of the Congo - ONUC*) <https://peacekeeping.un.org/en/mission/past/onucB.htm> accessed 16 December 2021.

[154] 'Background' ONUC (n 153).

[155] UNSC Resolution 143 (n 152) para 2.

[156] UNSC, *First Report by the Secretary-General on the Implementation of Security Council Resolution S/4387 CF 14 July 1960* (UN Doc S/4389, 18 July 1960) 5.

[157] cf. 'Background' ONUC (n 153).

measures to prevent the occurrence of civil war in the Congo […]' be taken.[158] However, after the Congolese parliament had reconvened in August 1961, efforts of the province of Katanga to secede from the Congo began, which led to further violent clashes between the secessionists and UN forces. In an attempt to pacify the situation, Secretary-General Hammarskjöld, therefore, planned to bring the opposing parties together in today's Zambia, where he meant to moderate peace talks.

Sadly, he was never to arrive. On 17 September, 1961, Hammarskjöld's airplane crashed on its way to the meeting, and 16 people including the crew, UN advisors, and Hammarskjöld himself lost their lives. To this day it is unclear whether the crash was caused by human error or precipitated by an external attack.[159]

Either way, the accident plunged the entire UN into a crisis, just as it worsened the conflict in the Congo. While the debate about Hammarskjöld's succession provided the Western and Eastern powers with an ideal stage for continuing their power struggle, all attempts at a peaceful settlement of disputes in Congo were put on hold. In fact, it would take until February 1963 for the province of Katanga to be reintegrated into the Congo. Only then could a gradual withdrawal of UN troops be initiated.[160] In the meantime, the General Assembly fought over the Secretary-General's succession. In the end, the Burmese U Thant was the only candidate both powers could agree upon, and in 1961, he was appointed as acting Secretary-General by the General Assembly[161]. He was subsequently appointed for two further terms[162] and therewith became the longest-serving Secretary-General of all time.

cc) The Question of Force

Returning to the Congo crisis, Hammarskjöld's original stance on the use of armed violence could hardly be sustained in view of the deteriorating circumstances. When no agreement could be reached, the Secretary-General was therefore finally authorized 'to take vigorous action, including the use of the requisite measure of force'[163], in November 1961.

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[158] UNSC Resolution 161 [21 February 1961] UN Doc S/4741, para 1.

[159] The latter being classified as '*plausible'* by the UN Investigation Commission in their 2017 report, UNGA, *Investigation into the Conditions and Circumstances Resulting in the Tragic Death of Dag Hammarskjöld and of the Members of the Party Accompanying Him* (UN Doc A/71/1042, 5 September 2017), para 18.

[160] 'Background' ONUC (n 153).

[161] UNGA Resolution 1640 (XVI) [3 November 1961] UN Doc A/RES/1640(XVI).

[162] 'U Thant' (*United Nations Secretary-General*) <https://www.un.org/sg/en/content/u-thant> accessed 16 December 2021.

[163] UNSC Resolution 169 [24 November 1961] UN Doc S/5002 para 4.

This decision was by no means undisputed.[164] Effectively, resolution 169 turned ONUC into the first peacekeeping mission that was not only authorized to use force in self-defense but also to do so proactively in order to achieve the mandated goals. The mission was thereby the first to implement the extended understanding of the third peacekeeping pillar.[165] This change was, however, not officially recognized within an adapted agenda or underpinned by reference to any concrete legal basis within the UN Charter[166]. The conventional understanding of the prohibition on the use of force therefore prevailed. In failing to concretely reconnect the newly presumed tasks to the Charter,[167] ONUC induced the unfortunate misunderstanding in public opinion that it had turned into an enforcement mission rather than a modified peacekeeping mission. For observers, '[...] ONUC's interpretation of 'self-defence' became virtually indistinguishable from enforcement action'.[168]

It is thus not remarkable that ONUC's conduct is predominately assessed as having exceeded the limits of traditional peacekeeping.[169] From today's perspective, it is, however, considerably less challenging to rather classify ONUC as a future-oriented, early advancement of the peacekeeping principles, instead. Despite all the valid criticism, it ushered in a new phase, in which force could also be applied to defend the mandate.

Hammarskjöld did not live to see any of this. Thus, it remains unclear how he would have assessed the deteriorating situation in the Congo (or whether it would have deteriorated at all had the organized peace talks actually taken place.) Thus, it can only be speculated to what extent his death initiated or at least enabled the changed approach. What is clear, however, is that compared to Hammarskjöld's strong attitude, U Thant took a wholly different position on the adequacy of the use of force within peacekeeping missions.

dd) The Realigned Context and Focus

As if this was not enough in terms of relevance for the development of peacekeeping, ONUC also marked the beginning of two further, not so trivial, matters.

For one, it was the first peacekeeping mission to be confronted with a situation of ongoing civil war.[170] Even if it was not yet clear at the time, this would become the standard situation for peacekeeping just

[164] Findlay (n 38) 54.
[165] A change that was to be made official by Waldheim only in 1973, see text to n 122-24 in chapter B.
[166] Findlay (n 38) 54.
[167] ibid.
[168] Wills (n 24) 10-11; Findlay (n 38) 51.
[169] cf. Findlay (n 38) 85-86; cited in Wills (n 24) 11-12; also cf. Berdal (n 15) 183-84; Gray (n 73) 272; The mission's expansion is also an early example of a so-called mission-creep.
[170] Berdal (n 15) 183.

a few years later.[171] Hence, the mission likewise gave an early perspective of future developments in this regard.

Secondly and lastly, it was also as early as ONUC that the Secretary-General recognized the special protection needs of the civilian population.[172] In that, ONUC was also one of the first precursors of today's protection of civilians' missions. Even though its initial mandate varied widely from contemporary PoC-mandates, as it did not directly refer to civilian protection, it did contribute to the cause by significantly reducing attacks on civilians through protective measures[173].

ee) The Result – ONUC as a Milestone

Therewith, it should have become clear why ONUC is considered to mark a 'milestone in the history of United Nations peacekeeping in terms of the responsibilities it had to assume, the size of its area of operation and the manpower involved'.[174] Admittedly, this evaluation took its time. At first, ONUC was rather classified as a maldevelopment that had to be counteracted, rather than a precursor of a new peacekeeping era.[175] In retrospect, this assessment changes. Only from today's perspective, does the dual nature of ONUC become fully apparent: it was both a traditional peacekeeping mission in its aims and initial means, as well as an early manifestation of an advanced mission- and peacekeeping principle interpretation[176].

Moreover, the mission exemplified that even UN internal processes could at any given time be subject to political capture. The Cold War thereby permeated every broader international relation.

More than almost any other mission, ONUC exemplifies that there has never been anything close to a 'typical' peacekeeping mission. Rather, each individual undertaking has itself advanced and shaped the ongoing evolution.

b) Conclusion – Peacekeeping During the Cold War

To summarize, even the very first years of UN peacekeeping have been characterized by a major evolution. The missions developed from executing traditional observer functions to affording active

[171] In 1984, when the peacekeeper's handbook was published, intrastate conflicts were already acknowledged as one conflict type, for which peacekeeping could provide a solution, see International Peace Academy (n 17) 22–23.

[172] cf. UNGA Official Records: Sixteenth Session Supplement No. 1, *Annual Report of the Secretary-General on the Work of the Organization 16 June 1960 - 15 June 1961*, (UN Doc A/4800) 11.

[173] Wills (n 24) 10.

[174] 'Background' ONUC (n 153).

[175] Findlay (n 38) 88.

[176] called 'expanded peacekeeping' by Findlay, ibid 5.

protection and were now guided by fundamental principles, the pillars of peacekeeping. At the same time, however, there had been little in-depth analysis of the relationship between peacekeeping and the use of force.[177]

The main incentives for change were thereby the constantly evolving conflict structure and the distinctive conditions on-site, rather than structured realignments or comprehensive doctrines.

The Cold War, in all its effects, was thereby a considerable hurdle that often bared the way to progress. Still, and even more surprising, peacekeeping was anything but unsuccessful during that time. In fact, unlike in many other relations, the UN was able to mark a relevant footprint in that regard. Two particularly relevant missions were selected here to illustrate that impact before 1989. Further examples can be found, although they are few. This is because the experiences of Congo had led to greater caution and an assumption that the UN should not engage itself in chaotic internal conflicts anymore. Within the next years, therefore, only two new missions saw the light of day, UNFICYP to Cyprus, and UNIFIL to Lebanon.[178]

The driving force behind this new agenda was certainly the United States and it had considerable leverage on its side: money. Beginning with the Reagan administration in 1981, the administration withdrew more and more into an attitude of skepticism and restraint. It became widely accepted in US policy that the whole UN was more of a propaganda tool for the Soviet Union and communist values, whilst rejecting capitalism and 'western values'.[179] The United States, still one of the largest funders of the UN, thus attempted to extend its powers and control within the UN and steer it in an ideologically inclined direction by withholding due payments. This, in turn, plunged the organization into a major financial crisis that mainly led to numerous dismissals as well as project cutbacks.[180] Further peacekeeping undertakings were therefore hardly conceivable.

With this game plan, the United States touched a raw nerve at the UN. Like all international organizations, the UN consists of willing members and is as such dependent on their trust and goodwill. As an inherent structural deficit, a few large donors can thus de facto exercise full control and direct the action according to their best interests. As unfavorable as that is, in the end, someone must pay the bills, and there are too many member states who cannot take that lead.

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[177] Wills (n 24) 18; As Findlay notes: '*Despite having engaged in peacekeeping for more than 30 years, the UN still had no use-of-force doctrine for such operations by the time the cold war ended in 1989'*, Findlay (n 38) 121.

[178] ibid 87.

[179] 'Background & History' (*GPF Global Policy Forum*) <https://www.globalpolicy.org/component/content/article/224-general/27260-background-a-history-.html> accessed 16 December 2021.

[180] see ibid.

Finally, when Ronald Reagan left office and handed it over to George Bush in 1989, the United States owed over 500 million US dollars to the UN, which was almost 90% of the total outstanding amount.[181] Despite this deficit, the UN still managed to reinvent itself with the coming of the new decade. The ending Cold War gave peacekeeping the opportunity not only to further refine its approach and strategy but mainly to expand its means and sphere of influence.

III. Transition – The Dawn of a New Era?

It is the year 1989. After a long period of rather slow development and internal power struggles, which inhibited any major progress, the 1980s had brought with them a wind of change. With the Iron Curtain slowly lifting, a new era began to appear on the horizon. The Security Council saw itself freed more and more from decade long restrictions and ready to take on new challenges. In terms of peacekeeping, this led to the launch of multiple small-scale observer operations,[182] as well as several armed peacekeeping missions[183] in the years from 1989 to 1992. Overall, this second phase of peacekeeping was rather short and, as a precursor for the third phase, characterized mainly by transitions.

1. Peacekeeping – The Next Tool of Choice

Several developments can be identified in the context of this transition. The most significant of these being that peacekeeping was now substantially gaining in importance. This meant that the missions swiftly became the 'tool of choice' in conflict resolution.[184] Suddenly, the Security Council also demonstrated a greater willingness to rate internal struggles and humanitarian distress as a possible threat to international peace and security,[185] an attitude that fully reversed the prior policy from the Reagan administration.

Furthermore, and linked to that, the strategic focus of peacekeeping shifted, giving ever greater attention to humanitarian concerns. The missions moved away from a singular spotlight on keeping the peace to a multifunctional approach that included wider tasks and aims, including civilian protection.[186] At the same time, the missions between 1987 and 1991 were also still marked by a

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[181] Liz Sly, 'U.S. Refusal to Pay UN Dues Could Prove Embarrassing', 24 September 1990 (*Chicago Tribune*) <https://www.chicagotribune.com/news/ct-xpm-1990-09-24-9003200013-story.html> accessed 16 December 2021.

[182] see Berdal (n 15) 184-85.

[183] Findlay (n 38) 124.

[184] ibid.

[185] Wills (n 24) 21.

[186] see Jacob Bercovitch and Richard Jackson, *Conflict Resolution in the Twenty-First Century: Principles, Methods, and Approaches* (University of Michigan Press 2009) 106.

rather reduced engagement approach with minimum use of force and a firm basis on the principles of impartiality and consent.[187] An exception to this, however, was UNTAG to Namibia.

2. UNTAG – A Peacekeeping Undertaking?

UNTAG is an exception in many respects but is nevertheless exemplary of second-phase peacekeeping. Although the mission was short-term it was strongly staffed, with the aim of guaranteeing a stable transition from South African rule to full independence in Namibia.[188] It was deployed in April 1989 and withdrawn in March 1990, with a troop strength of almost 8000.[189]

Already the establishing mandate exemplifies the changed approach within this mission. It neither authorized the deployment of peacekeepers to supervise the cessation of hostilities[190] nor did it provide for military assistance to solve a temporary threat to peace and security,[191] even though both would have been conceivable. Instead, it aimed at ensuring 'conditions in Namibia which will allow the Namibian people to participate freely and without intimidation in the electoral process under the supervision and control of the United Nations [...]'.[192] As such, UNTAG appeared to be a comprehensive nation-building project, rather than a peacekeeping undertaking. The fact that it is nevertheless classified as such is only revealed in consideration of the background and genesis of this special mission.

a) The Namibian Independence – An International Legacy Project

The developments leading to the inauguration of UNTAG began many decades before 1989. At that point, the country that nowadays constitutes Namibia had already been on the UN's radar for over four decades. Furthermore, the League of Nations had already been concerned with Namibian independence. Having been unable to conclusively solve the issue, it thus became part of the initial UN agenda and therewith developed into an international legacy project.

Its beginnings date back to the 19th century. Commencing with German colonial rule in 1884, the inhabitants of present-day Namibia, like those of many other African states, can tell a long story of foreign control. In 1915, South African forces took control and established the territory as South West Africa. Then, in 1920, the League of Nations officially granted South Africa the administration of the territory by mandate. However, after the Second World War ended and the United Nations had been

[187] as Berdal (n 15) 185 concludes.
[188] see UNSC Resolution 632 [16 February 1989] S/RES/632 para 2.
[189] Berdal (n 15) 185-86.
[190] As it was the case for UNEF I, UNGA Resolution 1000 (n 77) para 1.
[191] As it was done within ONUC, UNSC Resolution 143 (n 152) para 2.
[192] UNSC Resolution 632 (n 188) para 2.

established, the situation changed, as a separate institution was set up to deal with such cases: The Trusteeship Council. Its main purpose was to process the peaceful transition of entrusted territories to independence.[193] Namibia was considered an ideal fit for this by everyone except South Africa, who had gotten used to their extended territory. It thus refused to hand it over to the Trusteeship Council and instead promoted the integration of the territory as one of its own provinces.[194]

Following a few years of unsuccessful negotiations, the ICJ addressed the question and ruled that while South Africa could not be forced to place the territory under the UN Trusteeship System, it also had no competence to modify the status of this territory,[195] i.e., to fully incorporate it. Even if this brought some clarity, it did not to any extent solve the deadlocked situation. To complicate matters further, the patience of the Namibian population slowly came to an end and resistance began to form. Foreign rule seemed no longer acceptable.

Nevertheless, another 16 years had to pass before the General Assembly finally revoked the former League of Nations mandate and placed Namibia under its own responsibility.[196] South Africa, however, was still anything but willing to play along. A final solution to the dispute thus remained a distant reality.

This did not change again until 1978. The Security Council had approved a Settlement Proposal to the Namibian question, [197] which basically provided for a peaceful transfer of power from the South African administration to the Namibian people. It also enacted a 'United Nations Transition Assistance Group' (UNTAG), which was to supervise the elections organized by South Africa.[198] In essence, resolution 435 provided for the final plan for independence in its entirety. With that, the implementation could have started.

However, even at that point, the parties were still playing for time with a series of further conferences and negotiations that produced new approaches and concepts.[199] UNTAGs implementation was thus factually delayed until February 1989. Then, finally, the Assistance Group, not to mention any election, was finally put into action.

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[193] 'Trusteeship Council' (*United Nations*) <https://www.un.org/en/sections/about-un/trusteeship-council/> accessed 16 December 2021.

[194] 'Background' (*Namibia - UNTAG*) <https://peacekeeping.un.org/sites/default/files/past/untagFT.htm> accessed 16 December 2021.

[195] *International Status of South West Africa,* Advisory Opinion of July 11, 1950: I.C.J. Reports 1950, 128, 144.

[196] UNGA Resolution 2145 (XXI) [27 October 1966] A/RES/2145(XXI) para 4.

[197] UNSC Resolution 435 [29 September 1978] A/RES/435 para 1; as referred to in 'Background' UNTAG (n 194).

[198] 'Background' UNTAG (n 194).

[199] of which a useful summary can be found ibid.

b) *In the Midst of Democratization – UNTAG's Objective*

With resolution 632, the Security Council at last decided to 'implement its resolution 435 (1978) in its original and definitive form [...]'[200] and this time, the words were translated into practice. The mission's start date was set for 1 April 1989.

Anyhow, it would not be UNTAG if this deadline had been met. As the exact specifications concerning the budget and the military equipment offered reasons for further discussions, both in the Security Council as well as in the General Assembly, the actual deployment of troops was significantly delayed. The ongoing financial crisis, which was caused by outstanding payments from certain members[201] did not facilitate the mobilization of necessary funds.[202] So, while the Special Representative of the Secretary-General did indeed arrive on 31 March 1989, the mission was far from ready and functioning. Despite this practical inability, the fact that the mission was finally established was already a success in itself. Thus, while UNTAG may have been short term, given its history, it was one of the UN's longest-running projects.

What is striking in the conception of UNTAG is that it was not only in essence, but quite clearly a political mission.[203] Identified as key to the formation of a newly independent state, the execution of free elections was its main aim. All other tasks provided for were designed with a view to forward that 'central objective of a democratic exercise in self-determination'.[204] It was thus for the first time that the UN openly pursued their own agenda through a peacekeeping mission, which was characterized by the desire for democratization. While such an undertaking had little in common with its neutral supervision predecessors, it was also undeniably guided by the aim to establish and maintain peace in the whole region. After all, UNTAG was therefore still a fully-fledged peacekeeping mission.

c) *From Bad to Worse – An Inauguration with Obstacles*

On its official inauguration date, 1 April 1989, UNTAG was both established and at the same time incapacitated. Even though all components had been preparing at full speed, it was effectively impossible that UNTAG would be fully functional on its 'D-Day'.[205]

Nevertheless, hopes had been high that all parties would adhere to the settlement plan and, in particular, to the cease-fire, which had informally been in place for 7 months and had then been reaffirmed in writing, also starting from the morning of 1 April 1989.[206] This did, however, not prevent

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[200] UNSC Resolution 632 (n 188) para 2.
[201] see text to n 179-80 in chapter B.
[202] 'Background' UNTAG (n 194).
[203] as referred to by the UN itself, see ibid.
[204] ibid.
[205] ibid.
[206] ibid.

forces of the South West African People's Organization (SWAPO), the driving political force behind the independence movement, from crossing the northern Namibian border from Angola on the night before, heavily armed and with sufficient reinforcements behind them.[207] The trigger and exact sequence of the events that followed are controversial.[208] What is clear is that large scale and violent incidents occurred throughout the northern region in the course of the next day. Even though they violated the original ceasefire agreement and demanded intervention, UNTAG was far from ready to respond.

Hence, before they had even finished setting up, UNTAG was catapulted into a situation in which it had to decide on the use of force, which it could not even exercise itself. In that distress, the UN Special Representative and head of the mission proposed to release the South African Defence Forces from their duties under the ceasefire agreement and secure the border in place of UNTAG. This proposal was accepted by the Secretary-General and accordingly executed. It still took until mid-May until the situation was sufficiently resolved. By that time, the personnel and most of the necessary material for UNTAG had finally arrived, so that the mission was ready to proceed with its actual mandate.[209]

UNTAG had thus set new standards even before it had officially resumed its tasks. Once again, it became clear that traditional peacekeeping that rejected any use of proactive force had become obsolete. It was about time for a rethink.

d) At Long Last – The Implementation of the Mandate Objective

After dealing with these difficulties, UNTAG had weathered the worst. From then on, further implementation went more or less smoothly.

Among other tasks, UNTAG monitored the withdrawal of South African troops from Namibian territory, as well as the overall termination of hostilities. It initiated the release of political detainees and the abolition of discriminatory laws, coordinated the return of refugees, and, ultimately, organized the long-awaited elections. More peacefully than expected, 97% of Namibians voted until 11 November 1989, when the polls closed.[210]

The UN Special Representative subsequently confirmed that the electoral process had been fair and free, and the newly elected Constituent Assembly could take up work. At last, Namibia was independent and UNTAG had fulfilled its mandate.

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[207] ibid.

[208] ibid; Whereas the South African forces declared that SWAPO initiated the aggression, they again insisted on being provoked and attacked in their attempt to support UNTAG, ibid.

[209] ibid.

[210] ibid.

3. Conclusion – Second-Phase Peacekeeping

Few other efforts in the overall history of UN peacekeeping have taken that long in their realization. At the end of UNTAG, however, not only was a hard-won success awaiting, but, additionally, another milestone on the road to robust peacekeeping had been marked. In assuming a variety of new tasks, the mission had finally made clear that traditional peacekeeping had reached an end. These assignments included involvement in the perpetuation of law and order, in the provision of development aid, the coordination of elections, the documentation of human rights violations, and the assumption of administrative tasks.[211] To top it off, all these efforts mainly benefitted the civilian population, so UNTAG also had a civilian protection focus. Overall, it thus became the forerunner of a new era, the '[…] blueprint for UN multi-functional peacekeeping and peace support operations [...]'.[212]

Thus, however short, the period from 1987 to 1992 was still decisive in peacekeeping development. UNTAG was thereby not the only, but probably the most relevant mission besides others such as ONUSAL to El Salvador or UNTAC to Cambodia. While their influence on the evolution of peacekeeping should not be overrated,[213] its effect should not be played down either. UNTAG and others enabled a fundamental reorientation in the following decade that would not only concern the use and function of force but would also reintroduce the humanitarian question.[214]

Taken together, the following years would, therefore, be defined by continuing expansion of forceful powers within the mandates, as well as by a growing impetus on civilian protection, which would soon dominate peacekeeping altogether.

IV. A New World Order? Peacekeeping After the Cold War

With the beginning of a post-Cold War era, peacekeeping was plunged into a new, third developmental phase. It would be characterized by an extension of the use of force, as well as a growing focus on humanitarian affairs.[215] Finally, this evolution would culminate in the emergence of robust peacekeeping, subsequently with a mandate to protect civilians.

From a historical perspective, this progression came thick and fast. While the past half-century had been characterized by a steady, though slow evolvement, the years from 1992 to 2000 were filled to capacity with transformation. In its evolvement, this progress was not positive. Within only one

[211] Bercovitch and Jackson (n 186) 106.
[212] David J Francis, 'Peacekeeping in Africa' in Rachel E Utley (ed), *Major Powers and Peacekeeping* (Ashgate Publishing 2006) 104; cited in Wills (n 24) 20.
[213] as stipulated by Bercovitch and Jackson (n 186) 106.
[214] see ibid.
[215] see ibid.

decade, the UN security system experienced its harshest setbacks, the most tragic failures, and a structural deficiency on many levels. In turn, however, the phase also heralded an astonishing development boost that thoroughly and lastingly changed the entire character of peacekeeping. Metaphorically speaking, if peacekeeping missions had outgrown their infancy by the end of the Cold War, then they had been forced into full adulthood by 2000.

1. Old Structures, New Powers – First Steps in a Post-Cold War Era

At the beginning of the 1990s, the global balance of power had turned in favor of 'the West'. From 1989 onwards, the Soviet Union began to disintegrate until it was officially dissolved in 1991. This left the United States as the winner of this decade-long showdown and changed the whole world order.

a) Leaving Old Structures – The Collapse of a Nation

The reasons for the demise of the USSR are manifold and have filled entire books. Briefly summarized, the socialist state was economically ruined by year-long proxy wars and communist mismanagement.[216] This caused it to fall further and further behind, both in civil as well as military innovations and technologies. What is more, the once resolute leadership was increasingly undermined by internal power struggles.[217] In the end, Mikhail Gorbachev could not prevail with his efforts at opening up to the West. [218] Lastly, different liberation movements within the Union gained more and more ground. The USSR therefore not only faced a worsening economic crisis but also had to deal with growing efforts towards independence in Poland, Hungary, and finally all Eastern Bloc countries.[219]

Beginning in 1989, the tediously built, decades-long borders thus gradually fell, and over the course of two years, all 15 republics of the Union declared their independence. Like a house of cards, the former great power slowly collapsed until it was nothing more than an empty shell. The official dissolution in December 1991 remained as a mere formality.

b) The Rise of New Powers – A Post-Cold War Security Council

These political developments also had significant consequences for the Security Council and thus for the future of peacekeeping missions.

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[216] see Alex Pravda, 'The collapse of the Soviet Union, 1990-1991, in Melvyn P Leffler and Odd A Westad (eds), *The Cambridge History of the Cold War Volume III* (Cambridge University Press 2010) 361.
[217] ibid 359.
[218] see ibid 361 ff.
[219] ibid 364 ff.

To begin with, the succession of the USSR's seat in the Security Council had to be clarified. In a letter dated 24 December 1991, President Boris Yeltsin informed the Secretary-General that the Soviet Union had ceased to exist, and the Russian Federation would continue the membership as well as all functions within the UN. The last permanent representative of the USSR to the UN, Yuli Vorontsov, also became the first representative of the Russian Federation. Even though some observers were critical of the actual procedure,[220] the process was generally approved within the state community.

However, this was only the formal side of the change. Far more relevant was that the disintegration initiated a renewal of cooperation and collaboration among the P-5. The process of rapprochement within the Security Council, which had been slowly picking up speed from 1987 onwards, could now finally become fully effective. It had been initiated in 1986 after the entire Council could agree on recommending a second term for Secretary-General Javier Pérez de Cuéllar. Subsequently, a practice of informal meetings of the P-5 had been established, on which they discussed pressing issues.[221] While these were by no means marked by mutual consent, they did indicate the beginning of a cautious reconciliation. This way of working not only proved its worth in the termination of the Iran-Iraq war in 1987, but it also paved the way for cooperation in response to the Iraqi invasion of Kuwait in March 1991.

In terms of peacekeeping, these successes and the abandonment of decades-old Bloc rhetoric initiated a spirit of optimism and courageous confidence. The urge for a fresh start was strong and was soon put into action. As Malone points out, the Security Council passed 185 resolutions and established 15 new peacekeeping missions from March 1991 to October 1993 alone, whereas it had adopted 685 resolutions and 17 peacekeeping missions in all of the 46 preceding years together.[222] The age of reluctance therefore turned into an era of unrestrained activism. Probably the most powerful symbol for this new phase was the significant decrease in veto use. While this right had been used extensively between 1945 and 1990,[223] it dropped to only nine in the whole decade preceding the new millennium.[224]

The downside of this development was, however, that the balance of power shifted ever more in the direction of the United States. The equal importance of all Security Council members existed only formally. De facto, an effective UN security strategy could not be implemented without the United States. This reflected the Nations' self-conception. According to its own storytelling, the United States

[220] e.g. Yehuda Z Blum, 'Russia Takes Over the Soviet Union's Seat at the United Nations' [1992] 3 EJIL 354, 359 ff.
[221] David D Malone, 'The UN Security Council in the Post-Cold War World: 1987-97' [1997] Security Dialogue Vol. 28(4): 393, 393.
[222] ibid 394.
[223] 194 times, see text to n 68.
[224] 'Security Council - Veto List' (n 68).

was not only the victorious of the two former superpowers but rather the overall 'supreme power'.[225] This made effective peacekeeping critically dependent on U.S. commitment. Luckily, at the beginning of the 1990s, the overall eagerness was high.

2. Third-Phase Peacekeeping – Off to New Shores?

The newly won optimism not only led to increased operational readiness but also stimulated the overall willingness to consider structural realignments. This was mainly reflected in broadened peacekeeping objectives that ultimately gave rise to a revised methodological approach.

a) Ambitious Goals – Peacekeeping Objectives Under Review

By 1992, peacekeeping missions had already long surpassed their original objectives and had assumed an ever more active role in conflict management. The dawn of a new age therewith provided the opportunity to rethink the overall purpose of peacekeeping missions.

This began with the UN recognizing that the promotion of peace would only be sustainable if the governmental structures in the respective country allowed it. The political system of a state and its internal stability could not be considered as two separate spheres any longer. This had been impressively demonstrated by the example of UNTAG to Namibia. As a successful mission, it had set a precedent in the promotion of democracy by means of a peacekeeping mission. This set a new trend for the UN.[226]

Promoting democracy therefore became the means of choice to end or prevent conflicts, and missions with this specific objective were no longer disguised as undue interference into internal affairs (at least not by the majority).[227] This was a major turnaround. In his summary study on UNEF I in 1958, Hammarskjöld had still stated that the 'employment of United Nations elements in situations of an essentially internal nature' would be precluded.[228] The UN Security Council practice of the early 1990s did, therefore, 'change[ed] the way in which sovereignty is perceived'.[229]

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[225] As Malone cites with reference to a confidential interview, Malone (n 221) 396.

[226] cf. ibid 398.

[227] see Gregory H Fox, 'Democratization' in David M Malone (ed), *The UN Security Council From the Cold War to the 21st Century* (Lynne Rienner Publishers 2004) 69 and ff.; cited in Joelle Hageboutros, 'The Evolving Role of the Security Council in the Post-Cold War Period' [2016] Swarthmore International Relations Journal 10, 13; Although it must be admitted that Bosnia is the prime example which illustrates that elections alone can neither pacify a country nor bring a deeply divided population together, see Malone (n 221) 398.

[228] UNGA, *Summary study of the experience derived from the establishment and operation of the Force: report of the Secretary-General* (n 110) para 166.

[229] Malone (n 221) 404.

As the troubled state itself moved further and further into focus, the UN also began to dedicate itself to the promotion of human rights. During the Cold War, any such involvement had proven difficult. The insistence on international universal rights would have been a unifying theme and could thus have blurred the division between East and West, undermining the predominant bloc politics.[230] None of the Security Council members wanted to risk that. An 'ideological barrier' had excluded every discussion on democratization or governance.[231]

Subsequently, with the end of the Cold War, it was not only the existence of democratic structures but also a safe environment for civilians that were pushed forward as prerequisites for a stable security situation. Peacekeeping missions came forth as the best way to promote these new objectives.

b) The Structural Foundation – Robust Peacekeeping under Development

Although these fresh impulses had already been subjected to practical testing in Namibia, they had so far not been backed by the necessary powers to effectively implement them. The end of the Cold War now provided the chance to introduce a revised peacekeeping approach, called robust peacekeeping, with which the new objectives could be productively put in place. Although by and large, these first attempts at implementation have failed,[232] they still paved the way for the subsequent unique rise of robust peacekeeping. What then is robust peacekeeping exactly?

As a variant of traditional peacekeeping, robust peacekeeping missions are still built on the same premises and pillars as their precursors but exceed them regarding their authorization to use force. The main difference lies in the mandate. The UN itself describes it thus:

In certain volatile situations, the Security Council has given UN peacekeeping operations “robust” mandates authorizing them to “use all necessary means” to deter forceful attempts to disrupt the political process, protect civilians under imminent threat of physical attack, and/or assist the national authorities in maintaining law and order'.[233]

Although the term 'necessary' has very distinct meanings in legal doctrine,[234] it is important to note that in the realm of Security Council resolutions, it is not understood as a least-restrictive means test, but that it demands a non-excessive use of force that must relate to the intended goal.[235] This

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[230] see S. Neil MacFarlane and Yuen Foong Khong, *Human Security and the UN* (Indiana University Press 2006), 105.

[231] Fox (n 227) 72.

[232] see text to n 344-47 in chapter B.

[233] ‘Principles of Peacekeeping’ (*United Nations Peacekeeping*) <https://peacekeeping.un.org/en/principles-of-peacekeeping> accessed 16 December 2021.

[234] Mehrdad Payandeh, ‘The United Nations, Military Intervention, and Regime Change in Libya’ [2012] Virginia Journal of International Law 52:355, 384-85.

[235] ibid 385.

understanding was also confirmed by the UN itself.[236] Robust peacekeeping missions are, therefore, vested with enhanced authorities to pursue their aim, and most often, they are either fully or at least partly based on Chapter VII of the UN Charter.[237] Still, and despite certain comparability, they must be clearly distinguished from (peace) enforcement action.

Peace enforcement, for one, aims at restoring international peace and security by means up to the use of military force.[238] Unlike robust peacekeeping, it is thereby guided by the element of coercion, as the aim is to compel an objecting party to adhere to a peace agreement or arrangement.[239] Still, while such missions enforce the peace, they do not aspire to militarily defeat the other state.[240] Another decisive factor in the delimitation is the applicability of the peacekeeping pillars. While these principles prescribe an impartial and consensual engagement in the realm of peacekeeping, peace enforcement operations will only 'attempt to act impartially' without being compelled to do so.[241] The areas of application of the two mission types may, therefore, well overlap,[242] but the engagement can ultimately be delimited by the characteristic of host state approval.[243] There are few examples of pure peace enforcement undertakings, but some missions have revealed components of it.[244]

Pure enforcement missions, for another, are military operations that aim at imposing the will of the international community on a single state or party. They are neither neutral nor impartial and accept the defeat of the enemy as a possible means to an end.[245]

Robust peacekeeping thus appeared to be the ideal middle ground between outdated traditional peacekeeping and highly controversial peace enforcement. Such missions promised to combine the best of both worlds: make peacekeeping a more effective and potent tool in the preservation of international peace while at the same time perpetuating the long-established and approved pillars of peacekeeping.

However, as already indicated, robust peacekeeping was not simply introduced and then implemented. Quite the contrary, in the disrupted world order, there was no general agreement on

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[236] *The Protection of Civilians in United Nations Peacekeeping* 2019 (n 23) para 57.
[237] Chesterman and others (n 98) 333.
[238] 'Terminology' (n 135).
[239] Findlay (n 38) 6.
[240] ibid.
[241] ibid.
[242] ibid.
[243] with regard to R2P in particular, see Frédéric Mégret, 'Between R2P and the ICC: "Robust Peacekeeping" and the Quest for Civilian Protection' [2015] 26 Criminal Law Forum 101, 19.
[244] i.e. UNOSOM II, UNPROFOR, and UNAMSIL, Findlay (n 38) 7; the concept of R2P is furthermore most likely to be assigned to the peace enforcement realm, cf. Susan Breau, 'The Impact of the Responsibility to Protect on Peacekeeping' [2006] Journal of Conflict & Security Law 11:3 429, 444; this can also be derived from the definition of Findlay, cf. Findlay (n 38) 6; see also text to n 1090-92 in chapter D.
[245] Findlay (n 38) 7.

the future of peacekeeping. At the same time, however, conflicts kept on evolving and required action. The strategic realignment that finally resulted was therefore just as much the outcome of debates as of mere trial and error. Initially, in fact, the error predominated; the beginnings of robust peacekeeping were anything but a success. In 1992, the 'new shores' were still a long way off.

3. A Difficult Start – Third-Phase Peacekeeping Missions

In hindsight, it is simple to assess third-phase peacekeeping missions as a succession of disastrous failures. Indeed, the UN'S engagement in the years from 1992 to 2000 was characterized by deficiencies at all levels. Decisive engagements failed so terribly and tragically that much of the trust in peacekeeping was lost; the UN was left basically paralyzed.

However, albeit at a too high toll, this phase also paved the way for robust peacekeeping and provided crucial insights into existing inadequacies. If nothing else, this has triggered an intensive internal debate.

The central, third-phase missions were UNPROFOR to Bosnia, UNOSOM I and II, UNITAF to Somalia, and, lastly, UNAMIR to Rwanda.

a) UNPROFOR – The Root Failures

After the Iron Curtain had fallen and ended many years of rather cautious engagement, the UN was ready to engage in broader missions again. The collapse of the former Yugoslavia provided the perfect occasion for that.

In February 1992, the United Nations Protection Force (UNPROFOR) was established in relation to Croatia,[246] then extended to include Bosnia in June 1992[247] and finally also Macedonia from December 1992 on.[248] Its task was to '[…] create the conditions of peace and security required for the negotiation of an overall settlement of the Yugoslav crisis'.[249] Considering that the mission was initially not provided with any enforcement authorities, this was quite an ambitious task.[250] All too soon, the mission would thus become embroiled in a conflict that it was unable to resolve with the resources and competencies at its disposal.

[246] UNSC Resolution 743 [21 February 1992] UN Doc S/RES/743 para 2.
[247] UNSC Resolution 758 [8 June 1952] UN Doc S/RES/758 paras 2 ff.
[248] UNSC Resolution 795 [11 December 1992] UN Doc S/RES/795 para 2; Recognizing that the UN deployment to Croatia and Bosnia most significantly contributed to the emergence of robust peacekeeping, it will be in focus here.
[249] UNSC Resolution 743 (n 246) para 5.
[250] Gray (n 73) 290.

aa) Too Little, Too Late – A Disaster Unfolds

When UNPROFOR was established regarding Croatia, it was essentially a military force with Rules of Engagement that provided the peacekeepers with a right to forceful self-defense in order to deter threats against the mission and the mandated aims.[251] The mission was deployed in designated United Nations Protected Areas and targeted their demilitarization.[252] Despite the name of these areas, however, UNPROFOR neither had a specific mandate to protect civilians, nor the explicit authorization to do so.[253] In addition, the Secretary-General refused to extend the mandate in order to establish a peace enforcement mission, even when assaults became more and more frequent.[254] Within the first sixteen resolutions in regard to UNPROFOR, there is, accordingly, no reference to Chapter VII UNCh to be found whatsoever.

In the meantime, the conflict in Bosnia between the Muslim-dominated government, the Bosnian Serbs (supported by Serbia), and the Bosnian Croats (supported by Croatia) deteriorated. Accompanied by a worsening humanitarian situation, the conditions became more and more uncontrollable for the blue helmets, being headquartered in Sarajevo.[255] In reaction, the Secretary-General finally authorized the use of force in order to ensure the provision of humanitarian aid.[256] This decision then led to a series of resolutions that continuously expanded the mission authorities and subsequently turned the mission into a form of 'wider peacekeeping', causing much confusion on the ground as to what was permissible and what was not.[257]

From February 1993 onward, almost all resolutions consequently contained a reference to Chapter VII,[258] even though the establishing mandate had not done so. This was not met with overall approval. On the contrary, the already existing debate as to the aims and means of UNPROFOR intensified.[259] This led to sometimes absurd and hence hardly helpful compromises. To name just one example, even though the later mandates did allow taking all 'necessary measures',[260] which is generally understood

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[251] Rules of Engagement for UNPROFOR Force Commander's Policy Directive 13, Rules of Engagement, Part I: Ground Forces, issued 24 March 1992, revised 19 July 1993, para 2; cited in Findlay (n 38) 132, 418 Appendix 2.

[252] Findlay (n 38) 131.

[253] ibid 133.

[254] ibid 134.

[255] ibid 135.

[256] UNSC Resolution 776 [14 September 1992] UN Doc S/RES/776 para 2; cited in Gray (n 73) 290; Nonetheless, it was very cautiously formulated and without any concrete reference to the words 'force' or 'Chapter VII UNCh'. Instead, the passage solely referred to a preceding resolution and a Secretary-General's report, UNSC Resolution 770 (13 August 1992] UN Doc S/RES/770 para 2 and UNSC, *Report of the Secretary-General on the Situation in Bosnia and Herzegovina* (UN Doc S/24540, 10 September 1992) para 1.

[257] Findlay (n 38) 263; cf. Wills (n 24) 34.

[258] Gray (n 73) 291.

[259] see ibid.

[260] UNSC Resolution 816 [31 March 1993] UN Doc S/RES/816 para 4; UNSC Resolution 836 [4 June 1993] UN Doc S/RES/836 para 9, 10.

as an authorization to use force under Chapter VII UNCh,[261] this authority was then again restricted to self-defense in the UNCh Chapter VI sense.[262] Under these conditions, a consistent approach was hardly possible.

In the end, the search for such an approach was delayed until a military intervention became inevitable. It was triggered by the raid on Srebrenica, which went down in history as one of the largest European massacres since World War II. In 1995, Bosnian Serbs intruded into the designated safe area in the city of Srebrenica and executed an estimated 8,000 men and boys.[263] As a response, UNPROFOR and NATO prompted a massive attack called Operation Deliberate Force, bombing the Bosnian-Serb forces. After two weeks, this ended the violent conflict.

With that, the mission had finally turned from a peacekeeping mission into a full-fledged peace enforcement mission.[264] Although this enabled the termination of the conflict, it had done so at a massive human cost and by abandoning the mission's initial aims and focus. As such, the mission had thus failed all the way down the line.

bb) In Retrospect – The Road to Srebrenica

In retrospect, it is quite clear that this downfall, if not in detail at least in its fundamental imminence, had been predetermined from the outset. The indications had been strong.

To begin with, there was no peace to keep in the whole region. In fact, such peace was so far in the distance that the establishment of a *peacekeeping* mission can at best be described as wishful thinking. In addition to that, the mission lacked a clear (political) strategy,[265] which could have backed an emerging peace process.

Strategically, the mission tried to compensate for these factual deficits with a steadily increasing use of force.[266] This did not contribute to solving the underlying issues. As Findlay describes it: 'Without a clear game plan other than a halt to the fighting, the UN Security Council and NATO both threatened and authorized the use of force in ways that bore no relation to political realities or the situation on the ground and contained subliminal and confused messages'.[267] In essence, the intended peace

[261] i.e. Khalil (n 134) 209; and Payandeh (n 234) 385.
[262] UNSC Resolution 836 (n 260) para 9.
[263] Mégret (n 243) 4.
[264] see Findlay (n 38) 252.
[265] Robert Schütte, *Civilian Protection in Armed Conflicts: Evolution, Challenges and Implementation* (Springer Fachmedien Wiesbaden 2015) 154; Wills (n 24) 34.
[266] Even before UNPROFOR turned into a full-fledged enforcement mission, it applied force in different areas, Findlay (n 38) 219 ff.
[267] ibid 263.

process and the use of force were formulated as opposites and considered separately, instead of recognizing that the latter could be used to advance the former.[268]

Beyond that, a peacekeeping mission is not the ideal solution for every situation to begin with. It may often seem preferable to solve a conflict through peacekeeping rather than peace enforcement, as it is not only more likely to meet with the approval of the parties but also because it is easier to justify before the principles of the Charter. Then again, depending on the determination of the individual parties, it will not be enough to place hopes in the intimidating effect of blue helmets, when what is really needed is decisive action.[269] In the end, peacekeeping can only depict one side of the coin, while the flip side must be peace enforcement.[270] This was willfully overlooked in the enthusiasm and the post-war optimism of the 1990s. Concerning UNPROFOR, the hesitation and reticence towards a conversion of the mission into peace enforcement ultimately cost many lives and has done far more harm than any gain to peacekeeping development.

What added to these structural deficits was that the mission was completely under-equipped to meet the challenges on the ground.[271] Accordingly, the peacekeeping pillars came under great strain. While consent was continuingly (implicitly) granted and withdrawn, it was almost impossible to maintain an impartial attitude in the mixture of mutually overlapping conflicts.[272]

Overall, peacekeeping and peace enforcement can go hand in hand very well,[273] provided they are supported by clear-cut positioning. Such a definite attitude was, however, missing in regard to UNPROFOR.

cc) Factional Disputes – Robust Peacekeeping in the Making

The lack of clarity primarily resulted from the yet undecided future direction of peacekeeping in general. While from today's perspective, the third phase has been characterized by an extended catalog of objectives as well as by a modified conception, neither of these were fully developed at the beginning of UNPROFOR. The mission was rather the first and rough field test of a revised strategy that was still in the maturing phase.

Opinions thereby already diverged on the fundamental need for a new strategy. Some argued that peacekeeping would have to assert itself in a 'new world order' that faced fundamentally changed conflict structures. This, in turn, led to the question of whether or not mechanisms of enforcement

[268] ibid.
[269] cf. ibid 271.
[270] i.e. in the form of R2P, see text to n 1090 ff. chapter D.
[271] Findlay (n 38) 140.
[272] ibid 140-41.
[273] as UNPROFOR's successor, IFOR, proved, ibid 264.

should be generally incorporated in peacekeeping. Broadly speaking, while the traditionalists maintained the pillars of peacekeeping as the basis of all activities, hence strictly opposed any use of force beyond self-defense and defense of the mission,[274] their opponents called for a third way between traditional peacekeeping and full-fledged enforcement missions, acknowledging that missions were already exceeding the boundaries of peacekeeping.[275]

Both sides, as well as those in between, had prime arguments in their favor. By 1992, and therewith almost contemporaneously with the establishment of UNPROFOR, the UN could no longer ignore the issue. In light of current events and past experiences, there was an urgent need for repositioning. In line with its renewed interest in peacekeeping,[276] it was the United States that then took the lead and encouraged an enhancement of the UN's overall role in the maintenance of peace and security.[277] The process that followed culminated in the adoption of the Agenda of Peace in 1992.[278] In this ambitious document, Secretary-General Boutros Boutros-Ghali designed an aspiring vision of future UN endeavors, consisting of the triad of preventive diplomacy, peacemaking, and peacekeeping.[279]

Peacemaking thereby referred to pacific dispute settlement mechanisms according to UNCh Chapter VI.[280] When necessary, they could be complemented by 'peace-enforcement units'.[281] These small intervention forces would be more heavily armed than peacekeeping troops to take immediate action and restore and maintain cease-fires. Still, they were not to be confused with peace enforcement missions under Article 43 UNCh.[282]

Subsequently, Boutros-Ghali described peacekeeping as the '[...] deployment of a United Nations presence in the field, hitherto with the consent of all the parties concerned […]'.[283] This formulation seriously questioned the so far undisputed requirement of consensual deployment and therefore generated both criticism and confusion.[284] The UN thus appeared to be on course for a fundamental reconceptualization of peacekeeping and peace enforcement. This impression was reinforced when the Security Council published a note on the Agenda shortly afterward. Therein, consent was

[274] ibid 154-55.
[275] ibid 157-58; The nuances of this debate exceed the scope of this thesis. For an in-depth debate, i.e. see ibid 154 ff.
[276] see also text to n 220-25 in chapter B.
[277] Findlay (n 38) 160.
[278] Report of the Secretary-General, *An Agenda for Peace Diplomacy, Peacemaking and Peace-Keeping* (UN Doc A/47/277-S/24111, 17 June 1992).
[279] ibid para 20.
[280] ibid.
[281] ibid para 44.
[282] ibid.
[283] ibid para 20.
[284] see Berdal (n 15) 187-88; Findlay (n 38) 161-62.

merely considered an operational principle, '[…] save in exceptional cases […]'.[285] The principle of consent now clearly seemed to be headed south.

It would not come quite that far. In fact, the principle of consent has lost nothing of its relevance today. Nevertheless, the Agenda for Peace has left a significant footprint. This document not only acknowledged the need for a fundamental reform but also gave a real impetus to the ongoing reorientation, as it was the first comprehensive repositioning of a Secretary-General on peacekeeping.

While the decisive turn for peacekeeping in its third phase of development was thus initiated, it was too late to help UNPROFOR. With regard to the missions that followed, too, it would soon become clear that the mills of the UN grind very slowly indeed. Thus, while the Agenda for Peace aimed at heralding a new peacekeeping age, the factual circumstances and conflict developments soon outpaced the envisaged change; further reevaluations became necessary. With UNPROFOR, third-phase peacekeeping had just begun.

b) UNOSOM I, UNITAF and UNOSOM II – New Game, Same Rules?

Almost concurrently with the conflict in Bosnia, another possibility for a redefined peacekeeping to take action evolved. The events in Mogadishu have thereby left their very own, deep impression, not all of which were negative.

What mainly connects UNOSOM I, II, and UNITAF is their humanitarian character: irrespective of their different structure, they were all mainly aimed at humanitarian relief. As such, they represent the first attempts at implementing this new impulse in peacekeeping and, ultimately, peace enforcement.

Unfortunately, they have made only an extremely inadequate contribution to a sustainable resolution of the conflict. In fact, Somalia turned into the modern-day symbol for a failed state.[286] Despite interim successes, all UN efforts in this region were thus mere attempts and were over the years gradually abandoned without any satisfactory results. Somalia is therewith not a typical symbol of UN failure, but rather one of outright surrender.

In its finality, this was not yet foreseeable at the beginning of the 1990s. Just like with UNPROFOR, however, the UN also tried to apply an old approach to new conflicts when they inaugurated UNOSOM I; and again, this approach would prove to be inadequate.

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[285] UNSC, *Note by the President of the Security Council* (UN Doc S/25859, 28 May 1993) 1; cited in Findlay (n 38) 162 note 167.

[286] Findlay (n 38) 143.

aa) UNOSOM I – Time and Again the Same Dilemma

The United Nations Operation in Somalia I (UNOSOM I), as the first of several missions to this crisis-ridden country, was established in April 1992 to respond to 'the magnitude of human suffering'.[287] The prevailing predicament was immense and induced by a nationwide famine, which had in turn been provoked by prolonged civil warfare, drought and an almost total absence of governmental structures.[288] Although UNOSOM's task was to monitor a ceasefire, which had just been brokered in Mogadishu,[289] the mandate was clearly focused on the provision of humanitarian assistance to the civilian population.[290]

Despite the challenging conditions on the ground, UNOSOM I was inaugurated as a humanitarian operation[291] with a small unit of observers only, which were to monitor the cease-fire.[292] Beyond this, the Security Council only 'in principle' agreed to authorize a 'security force' to perform the functions described in the Report of the Secretary-General from 21 April 1992 (i.e. humanitarian assistance).[293] Even this force, however, was only intended to consist of 500 lightly armed troops in order to provide protection to humanitarian actors by way of deterrence.

In this, a recurring dilemma of third-phase peacekeeping manifested itself. UNOSOM followed, just as UNPROFOR had done, the old impetus of peacekeeping as an essential non-forceful endeavor.[294] The mission drafters initially still assumed that despite the tumultuous conditions on the ground, light armament and action under the UN flag would suffice to fend off possible spoilers.[295]

They were all too soon proven wrong. It took almost no time for the observers to be overwhelmed. Limited to the area of Mogadishu, as the ceasefire applied only there, their range of action was extremely small and their observer functions were reduced to almost zero.[296] To move the mission forward, the provided security force was therefore established and sent in August 1992. However, considering their equally minimal equipment, they too were instantly and completely overstrained.[297]

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[287] UNSC Resolution 751 [24 April 1992] UN Doc S/RES/751 Preambulatory Clause 6.
[288] Findlay (n 38) 142-43.
[289] UNSC Resolution 751 (n 287) para 3; Findlay (n 38) 143.
[290] UNSC Resolution 751 (n 287) para 4, with reference to UNSC, *The Situation in Somalia: Report of the Secretary-General* (UN Doc S/23829, 21 April 1992) paras 27–29; Gray (n 73) 293-294.
[291] Wills (n 24) 28.
[292] UNSC Resolution 751 (n 287) para 3.
[293] ibid para 4; *The Situation in Somalia: Report of the Secretary-General* (n 290) paras 27–29.
[294] Findlay (n 38) 143.
[295] see Boutros Boutros-Ghali, 'Introduction' in United Nations, *The United Nations and Somalia 1992-1996* (United Nations Blue Book Series, Volume III, Department of Public Information, New York) para 5; referred to in ibid 144.
[296] Findlay (n 38) 144; see also Gray (n 73) 294.
[297] Findlay (n 38) 145–46.

bb) UNITAF – The Last Resort

In the face of impending disaster, the Security Council pulled out all of the stops and authorized a non-UN multinational force in December 1992.[298] This Unified Task Force (UNITAF) was equipped with a Chapter VII enforcement mandate.[299] As such, it was the first Chapter VII UNCh enforcement mandate that was not directed against a certain state or actor but aimed at humanitarian relief.[300]

Following close prior cooperation, the United States took the lead in this 'coalition of the willing'; consequently, it assumed command of UNITAF[301]. President George Bush, nearing the end of his presidency, therewith displayed all his courage. After all, the Somalia conflict was already then widely considered to be a dead loss, wherefore the engagement could easily turn into 'another Viet Nam' for the United States.[302] Despite these concerns, two-thirds of the deployed forces were US-Americans (although more than twenty-three states stationed troops).[303]

By and large, UNITAF was successful in calming the acute situation. It was terminated according to plan in May 1993, jointly with UNOSOM I. At first, it appeared as if a disaster similar to the one in Bosnia had only just been averted. Still, however, the overall mission aim had not even remotely been achieved yet.

cc) UNOSOM II – A Fresh Start?

Considering that the real task was still ahead of the peacekeepers, UNITAF and UNOSOM I was collectively replaced by UNOSOM II. This peacekeeping mission was now explicitly equipped with a Chapter VII mandate[304] and as such, it was the very first UN peace enforcement mission.[305] Although originally intended as a traditional peacekeeping force, the United States had made it abundantly clear that they would not invest any more capacities to create a situation in which such a peacekeeping mission would have sufficed.[306] Against this backdrop, UNOSOM II was therewith construed as a peace enforcement mission, ready to pick up from the successes of UNITAF. The mandate still had a strong focus on humanitarian aid, although this time combined with explicit nation-building functions.[307]

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[298] ibid 166; Gray (n 73) 294.
[299] UNSC Resolution 794 [3 December 1992] UN Doc S/RES/794 para 10.
[300] Boutros-Ghali (n 295) paras 3, 66; Gray (n 73) 294.
[301] Gray (n 73) 294; Findlay (n 38) 146-47.
[302] Findlay (n 38) 147.
[303] Gray (n 73) 294; Findlay (n 38) 168.
[304] UNSC Resolution 814 [26 March 1993] UN Doc S/RES/814 part B paras 5 ff.
[305] Gray (n 73) 294; Findlay (n 38) 184.
[306] Findlay (n 38) 184-85.
[307] UNSC Resolution 814 (n 304) para 4.

As promising as this sounded in theory, essential countries were not ready to play a full part in the mission implementation, especially under such troubling conditions.[308] The mission's situation was further complicated by the UN's lack of experience when it comes to operating without any governmental structures in the background.[309]

Successively, the mission lost grip on the situation. The increasing levels and severity of violence, both against the civilian population and UN troops, subsequently led to a further decline in troop-contributing countries. Most importantly, after 18 United States soldiers were killed in an incident in Mogadishu in October 1993, the United States decided to disengage from early 1994 on.[310]

Followed by further retreats during that year, the mission's operations were significantly reduced, until UNOSOM II was fully withdrawn in March 1995.[311] In view of the conflict that continues to this day, it therewith became the first peacekeeping mission to be permanently terminated by the Security Council before its mandated goals were achieved.[312]

Despite the initial glimmers of hope, the whole Somalia operation failed. Lastly, UNOSOM II had to surrender both to the overwhelming circumstances on the ground, as well as to the missing support from member states. The devastating developments in Yugoslavia, which were taking place at the same time and demanded huge attention and resources, had thereby certainly not helped to increase commitment for Somalia.[313]

Regarding Somalia, too, it must be admitted that conventional peacekeeping simply proved to be the wrong means to an end. While it is highly doubtful that an initially robust mission would have significantly changed the outcome, the Somalia engagement did reinforce the understanding that traditional peacekeeping has had its day. As such, the engagement at least advanced the further development of peacekeeping, albeit indirectly. Last but not least, the disastrous humanitarian situation in the country urgently called for action. Both the multinational as well as the UN forces have thereby contributed significantly to improve the situation, at least momentarily.

All in all, Somalia still did not enter the UN annals as a success. While symbolizing the new humanitarian impetus of peacekeeping, the initial expectations had certainly been different, and the UN's reputation was thus further damaged. Sadly still, the bottom was not reached. With the end of UNOSOM II, the

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[308] see Wills (n 24) 28-29.

[309] ibid.

[310] 'Somalia - UNOSOM II Background Summary' (*Completed Peacekeeping Operations*) <https://peacekeeping.un.org/sites/default/files/past/unosom2backgr1.html> accessed 16 December 2021.

[311] Wills (n 24) 30; 'Somalia - UNOSOM - II Background Summary' (n 310).

[312] UNGA/UNSC, *The Causes of Conflict and the Promotion of Durable Peace and Sustainable Development in Africa - Report of the Secretary-General* (UN Doc A/52/871 - S/1998/318, 13 April 1998) para 31; cited in Gray (n 73) 295.

[313] cf. Gray (n 73) 293.

situation in Rwanda unfolded and with it the culmination of a sequence of tragic errors, that left the world community speechless once more.

c) UNAMIR – Hitting Rock Bottom

Together with UNPROFOR, UNAMIR has become the symbol of a collective UN failure. As such, both missions have decisively shaped the perception of third-phase peacekeeping.

The most blatant commonality of UNPROFOR and UNAMIR is the overwhelming number of civilian casualties that were recorded under their watch. Unlike in Bosnia, however, the situation in Rwanda offered little time for reflection. While in the Balkans the events evolved slowly and over the course of two years, eliminating the element of surprise,[314] the Rwandan crisis in the summer of 1994 overturned in its temporal sequence.[315] However, this does not mean that there had not been any room for maneuver.

Especially after UNPROFOR, it is furthermore difficult to accept that it took another downfall for the UN to draw any conclusions. In particular, the devastating experiences of Somalia and Bosnia were one explanation for the halfhearted protection afforded to civilians by UNAMIR.[316] In that way, the Rwandans suffered not only their own fate but additionally, they had to pay a high price for the earlier, wrong decisions on the part of the UN.

aa) The Mission – Doomed to Fail from the Beginning

When the United Nations Assistance Mission for Rwanda (UNAMIR) was established in October 1993, it was intended as a classical peacekeeping mission, deployed to supervise the Arusha Peace Agreement.[317] This accord had been negotiated in August 1993 between the Rwandan government, whose members mainly belonged to the ethnic group of Hutus, and the Rwandan Patriotic Front (RPF), members of the Tutsi minority. The agreement already provided for the deployment of UN troops.[318]

However, the United States especially was still strongly marked by the outcome of the Somalia mission and thus disapproved of an extensive mandate that could endanger its military personnel.[319] Memories of UNPROFOR and UNOSOM were still fresh in the minds of many other states as well and had led to a major reduction of funds. Thus, the peacekeeping department was utterly underfinanced.[320] As a

[314] Mégret (n 243) 4.
[315] ibid 3.
[316] Gray (n 73) 298-99.
[317] UNSC Resolution 872 [5 October 1993] UN Doc S/RES/872 para 2.
[318] Wills (n 24) 30.
[319] ibid.
[320] Findlay (n 38) 277.

result, the UN Secretariat, again, 'fell back on a traditional peacekeeping model which was geared largely to the international aspects of the problem, was dependent on the goodwill of the parties, and had only a symbolic presence and capabilities'.[321]

Here too, this soon proved to be a massive misjudgment of the situation. Although the Force Commander formulated Rules of Engagement (ROE) that permitted the use of force when persons under UN protection would come under attack, these ROE were not approved by the headquarters. Consequently, UNAMIR was only authorized to use force in self-defense. This could not have taken less account of the realities on the ground.

bb) The Conflict – A Catastrophe Takes its Course

These realities soon pointed to an imminent genocide of the Tutsi minority. In early 1994, information about weapon caches[322] and ethnically motivated killings accumulated.[323] Still, even though the Force Commander explicitly asked for further powers to counter this, the Secretariat insisted on its position that 'the overriding consideration is the need to avoid entering into a course of action that might lead to the use of force and unanticipated repercussions'.[324]

In April 1994, the Rwandan president Juvénal Habyarimana was killed, an event that triggered a violent outbreak by government forces against opposition politicians and members of the Tutsi ethnic group.[325] Again and still, the UN headquarters sustained its position that the mission should not interfere in the conflict.[326] The catastrophe could thus take its course.

First, the Prime Minister was shot at a UN compound,[327] together with others under UN protection.[328] Concurrently, the genocide of the entire Tutsi population, probably planned, fully unfolded.[329] Despite all previous indicators, this took the UN Secretariat by surprise.[330] A new mandate was, again, refused.[331] Overall, UNAMIR was therefore unable to offer sufficient protection, and the degree to which ad-hoc help was offered remained disparate, depending on the specific unit.[332] The quick

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[321] ibid.
[322] Wills (n 24) 31.
[323] UNSC, Enclosure, *Report of the Independent Inquiry into the Actions of the United Nations during the 1994 Genocide in Rwanda* (UN Doc S/1999/1257, 15 December 1999) 9.
[324] cited from a cable of the UN Headquarters in ibid 11.
[325] Findlay (n 38) 278; Wills (n 24) 31.
[326] Wills (n 24) 31.
[327] *Report of the Independent Inquiry into the Actions of the United Nations during the 1994 Genocide in Rwanda* (n 323) 16.
[328] ibid 18-19; Wills (n 24) 31-32.
[329] Findlay (n 38) 278.
[330] Mégret (n 243) 3.
[331] Findlay (n 38) 279-80.
[332] see ibid 278-79.

response of some commanders thereby revealed that at least some relief could have come from the UN mission if it had acted unanimously, fast, and with the necessary will.[333]

However, while most officials on-site were increasingly urgent to issue warnings, the Secretariat further pursued its delaying tactics in the hope the conflict would be solved without forceful UN engagement. Due to disagreement on the further strategy and in blatant disregard of the genocide unfolding, UNAMIR's number of troops was even reduced in April 1994.[334] Shortly afterward, as the situation further deteriorated and public pressure mounted,[335] this decision was revoked, and UNAMIR's capacities were increased again.[336] However, reality did not yet seem to have finally sunken in. Even though the right to self-defense was expanded, the new mandate was still no Chapter VII authorization. What is more, it still did not address the most pressing issue of widespread massacres.[337]

The blatant inaction of the UN Secretariat was exacerbated by the fact that there were no countries willing to provide troops anymore and if so, they were mostly not equipped.[338] Due to pure necessity, the Security Council thus finally authorized France to lead an enforcement mission, Opération Turquoise, in June 1994.[339] The mission established a humanitarian zone over large parts of the country. Even though it was deployed after most of the killings had already taken place, it probably still saved thousands of lives.[340]

cc) The Aftermath – All that Remains

In any case, within only three months, 500,000 to one million people had died in Rwanda.[341] The devastating résumé of UNAMIR was thus set. The subsequent reinforcement could not change this. As Wills summarizes: 'UNAMIR II did not enter Rwanda until August, and did not reach its authorized strength of 5500 until November, by which time the genocide was over'.[342]

It must remain speculation whether and to what extent a powerful and effective peacekeeping troop could have prevented the genocide. In any case, the mission's incapacity evidently facilitated every aspect of an unfettered commitment of crimes against civilians.

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[333] Mégret (n 243) 3.
[334] Wills (n 24) 32.
[335] see Findlay (n 38) 281.
[336] UNSC Resolution 918 [17 May 1994] UN Doc S/RES/918 para 5.
[337] Wills (n 24) 33; Findlay (n 38) 281.
[338] ibid.
[339] UNSC Resolution 929 [22 June 1994] UN Doc S/RES/929 para 2-3.
[340] Wills (n 24) 33.
[341] Gray (n 73) 298.
[342] Wills (n 24) 33.

In addition to the individual and manifold human suffering, Rwanda also generated geopolitical repercussions. While peacekeeping had failed both in Bosnia and in Rwanda, efforts in the former Yugoslavia had been visible albeit insufficient; the suffering of the Rwandans had been, more or less, disregarded by the Secretariat. This left the impression that European massacres were more important to the UN and its members and much higher on the agenda than similar events on the African continent. The message sent with this behavior could not have been more catastrophic and still has an effect to this day. From today's perspective, this 'poisonous legacy'[343] is probably one of the most significant failures of UN peacekeeping altogether.

4. Third-Phase Peacekeeping in Retrospect – A Failure Analysis

With the end of UNAMIR, peacekeeping stood at a crossroads. At no time before in its history had it experienced so many and such severe setbacks in such a short time. The major third-phase missions had left deep marks within the organization and had significantly impaired the international perceptions of peacekeeping as a whole. The euphoria of post-Cold-War peacekeeping had passed[344], and the whole concept of peacekeeping was questioned by a clearly traumatized UN.

With a view to the forthcoming new millennium, peacekeeping would have to be rethought completely, if it was not to go down in UN history as a failed and inadequate stability mechanism. However, the third phase of peacekeeping had already commenced with the aim to transform the international security system. Before a way forward could thus be set forth, it required a thorough failure analysis: Why had peacekeeping not been able to assert itself in this much longed-for, post-Cold War world order?

a) The Fundamental Challenge – Peacekeeping Amid a Changed Conflict Structure

With the beginning of the new decade, the international system had decidedly changed. However, the resulting 'new world order' was different to what had been expected. Instead of being marked by newly awakened cooperation, let alone lasting peace, the decade from 1990 onwards gave rise to several different asymmetrical conflicts. The UN was inadequately prepared for this. Although peacekeeping had already evolved through many geopolitical transitions without failing so comprehensively, this transformation was different, both in its complexity and its far-reaching consequences.

To begin with, conflicts after the Cold War had, in the majority, outpaced the 'typical power structure' that had previously existed. 'Classic' confrontations of one state against another had transformed into

[343] *The Causes of Conflict and the Promotion of Durable Peace and Sustainable Development in Africa - Report of the Secretary-General* (n 312) para 11; cited in Gray (n 73) 299.
[344] Wills (n 24) 37-38.

mostly internal, civil-war-like confrontations that were often disorderly and made a clear and impartial response almost impossible.

Conflicts increasingly involved non-state actors, which contributed to the changed conditions on the ground. When peacekeepers were used to explicit demarcation lines and definable parties, the situation of a multi-layered conflict with many parties and battlefields at the same time was overwhelming, especially when it lacks a compelling command and strategy.[345]

The challenges of this new world order itself were therefore multifaceted.

b) The Structural Mismatch – Internal Deficits Obstructing Adaptation

Internally, these challenges were not matched by the necessary capacities.

Firstly, and despite the high-flying ideas and ambitious intentions, the envisaged internal renewal and the external implementation of this strategy were a complete mismatch. While the prevalent euphoria after the Cold War inspired far-reaching decisions, they were often not supported by a coherent substructure. As a result, there was a wide gap between expectations and practical achievements. By way of a reaction, the UN continuously delegated enforcement tasks to regional organizations or individual member states and retreated to the mere mission organization.[346]

In addition, the missions were still not sufficiently equipped and severely understaffed. Although this was not a new problem, it was particularly devastating in light of the recently published, promising Agenda for Peace. Third-phase peacekeeping missions were thus far more theoretically than practically robust.

The changed conflict structures lastly also resulted in an immense stress test for the principles of peacekeeping, which tied up more resources.

The notion of consent proved to be an increasingly difficult condition. When classical interstate conflicts were slowly replaced by asymmetrical conflicts, consent from non-state, belligerent actors could suddenly be required. These groups, however, often act and react with changing motives and plans and therefore prove to be an unreliable counterpart.[347]

To conclude, in its third development phase, peacekeeping missions were confronted with greatly changed conflict structures that were not matched by the necessary internal adaptations. A genuine fresh start was thus impeded.

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[345] see a summary of new challenges in Schütte (n 265) 158-59.

[346] as it happened in Bosnia with NATO, Malone (n 221) 396–97, as well as in Somalia with the United States, and in Rwanda with France.

[347] Schütte (n 265) 158.

Nevertheless, the way was now clear for the UN to finally engage in a broad, strategic realignment. The decline of peacekeeping within its third phase had not only paved the way for the emergence of robust peacekeeping, but it had also theoretically and practically demonstrated how important the humanitarian impetus had become. After all, the huge stress test therewith led to an intensified and finally focused debate, which was to blaze the trail for sustainable and genuine development.

5. The Way Forward – Reforms and Strategic Realignments

A new beginning for peacekeeping missions was now more vital than ever before. The only way forward was thereby through far-reaching reforms and a fundamental strategic realignment. The first step in that direction, the Agenda for Peace, had never been comprehensively translated into action. The time had come to follow up on this effort.

a) The First Stage - Limitation of Damages

In an initial reaction, the UN tried to control the damages it had caused. In 1995, Secretary-General Boutros-Ghali, therefore, reflected on his Agenda for Peace and published a Supplement to it.[348] Essentially, he withdrew many ambitious ideas and thus rather reassessed than complemented the previous submissions.[349] In its cautious tone, the Supplement echoed the general opinion at the time.[350] Boutros-Ghali reinforced the idea that peacekeeping and peace enforcement should be strictly separated,[351] indicating that the UN should altogether not be involved in any enforcement undertakings.[352] In the first stage of damage limitation, the UN therefore aimed at retreating to its traditional peacekeeping approach, in which no peace enforcement was targeted anymore.[353]

b) The Second Stage – Substantial Reform

However, it soon became clear that the past deficiencies had been less rooted in an erroneous approach than in its insufficient implementation. When the new Secretary-General, Kofi Annan took office in 1997, he instantly initiated comprehensive revisions that heralded the second stage of reorientation.

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[348] UNGA/UNSC, *Supplement to an Agenda for Peace: Position Paper of the Secretary-General on the Occasion of the Fiftieth Anniversary of the United Nations* (UN Doc A/50/60, S/1995/1, 25 January 1995).

[349] Malone (n 221) 395.

[350] i.e. see *Supplement to an Agenda for Peace: Position Paper of the Secretary-General on the Occasion of the Fiftieth Anniversary of the United Nations* (n 348) para 33-41; also see Chesterman and others (n 98) 339.

[351] *Supplement to an Agenda for Peace: Position Paper of the Secretary-General on the Occasion of the Fiftieth Anniversary of the United Nations* (n 348) para 35.

[352] as interpreted by Findlay (n 38) 318.

[353] see Chesterman and others (n 98) 338-39.

To begin with, he issued two large-scale reports on the failures of Bosnia and Rwanda in order to complement the revision, learn from the mistakes made, and subsequently open a new chapter.

Subsequently, he initiated comprehensive changes concerning the future strategic focus of peacekeeping missions. Taking into account the experience he had personally made being one of those responsible for the decisions in Bosnia and Rwanda, Annan developed a much broader perception of peacekeeping, which should include the proactive use of force.[354] Yet he was a determined opponent of the commingling of peacekeeping and enforcement. In his 1999 report to the Council on the Protection of Civilians in Armed Conflict, he specifically stressed that the past failures were rooted in unclear mandates. Peacekeeping tasks should therefore be clearly distinguished from enforcement action.[355] All the same, he also stipulated the need for a '[…] comprehensive approach to peacekeeping […]', which would 'strengthen the protection of civilians' and be '[…] multi-disciplinary in nature […]'.[356]

With this basic concept, Annan had finally initiated the reform process that had already been contemplated but not implemented in third-phase peacekeeping. However, it took him the first three years of his term to congregate the Security Council behind him. At first, the member states were reluctant to endorse such reinforced peacekeeping missions.[357]

In 2000 then, the development finally gained momentum. After in April, as the Security Council passed one of its early resolutions on the Protection of Civilians in Armed Conflict, resolution 1296,[358] Annan had a greater scope for action. Seizing the opportunity, he gathered the Panel on United Nations Peace Operations, which would eventually publish the Brahimi Report.[359] In this document, the need for robust peacekeeping as a new mission form was finally recognized: '[...] the key conditions for the success of future complex operations are political support, rapid deployment with a robust force posture and a sound peace-building strategy'.[360] The Report urged that once deployed, military mission units had to be capable of not only defending themselves but also the mandate.[361] This included the proposal of reforms to enhance military effectiveness.[362]

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[354] Findlay (n 38) 326; In doing so, he also made some controversial statements on the pillar of consent, which in his view would become irrelevant, ibid.

[355] UNSC, *Report of the Secretary-General to the Security Council on the Protection of Civilians in Armed Conflict* (UN Doc S/1999/957, 8 September 1999) para 58.

[356] ibid 59.

[357] Findlay (n 38) 327-28.

[358] for details on Resolution 1296, see text to n 377-79 in chapter B.

[359] for details on the Brahimi Report, see text to n 18-22 in chapter B.

[360] *Report of the Panel on United Nations Peace Operations* (n 18) para 4.

[361] Findlay (n 38) 334.

[362] *Report of the Panel on United Nations Peace Operations* (n 18) paras 86–91, 102 ff.; for more details see Findlay (n 38) 334-35.

Robust peacekeeping had finally made it onto the official UN agenda.[363]

6. Conclusion – Peacekeeping in a Post-Cold-War Era

To summarize, peacekeeping missions have only slowly evolved from traditional undertakings that aimed to supervise negotiated peace agreements, towards robust missions with a humanitarian focus. It took many years and, sadly, a significant civilian death toll for the stakeholders to alter their focus. After this change was accomplished, however, nothing barred the way to a new generation of peacekeeping anymore. This new generation did not only lastingly transform the means and methods of peacekeeping, but it subsequently also turned the protection of civilians into a top priority.[364] The history of integration therewith continued.

V. Taking Stock of Failure – The Evolution of Protection of Civilians-Peacekeeping Missions

The turn of the millennium heralded the fourth and most important turn in peacekeeping development to date. Even though continued progress had been a key element of all peacekeeping ambitions, this restart was still different. Taking into account the disastrous record of third-phase peacekeeping, the whole concept had been reformed. Now, the projected transformation had to stand the practical test. The stakes were high, as nothing less than the fundamental role of the UN in the future maintenance of international peace and security was at issue. At the end of the 20th century, it was thus expected that peacekeeping missions would do nothing less than rise like a phoenix from the ashes.

1. Starting From Scratch – PoC-Missions and the Fourth Age of Peacekeeping

The fundamental reorientation, initiated by Secretary-General Kofi Annan in 1999, had turned peacekeeping into a multi-dimensional, robust instrument in the international maintenance of peace. This restructuring, however, was only the first step towards the new, fourth age of peacekeeping. It was to be followed by an increased focus and further expansion of the humanitarian impetus that had already appeared in outlines within the third development phase.

The combination of a structurally changed approach with an adjusted definition of objectives offered peacekeeping the opportunity to find a new role and place in the international security policy. The

[363] Admittedly, it can be criticized that the report lacked the concrete designation of a new type of mission or real 'doctrine', Findlay (n 38) 336-37.

[364] At the same time, the discussion on humanitarian intervention reinforced, which ultimately lead to the creation of R2P. This concept will form the heart of Chapter D. Nonetheless the Brahimi Report still initiated the full development of a new mission type.

protection of civilians through robust peacekeeping mandates now took the center stage. The result was so-called PoC-missions, which in their mandate identified the protection of civilians in all parts of the peacekeeping mission as the main aim.[365]

The fact that this task was assumed by peacekeepers was no matter of course. In fact, following the premise of state sovereignty, the protection of civilians is generally the main responsibility of the state and its officials. A UN mission should only offer support in that regard.[366] Still, since the turn of the century, the UN has developed a strengthened focus on authorizing the use of force to prevent the mistreatment of another state's civilians.[367] This expansion was mainly triggered by the increased demands peacekeepers had to meet in a changed conflict environment. These emerging challenges eventually resulted in a comprehensive, strategic realignment[368] that culminated in the formation of PoC-missions. This new objective offered one decisive advantage. As Mégret puts it: 'Protection of civilians provides a seemingly neutral goal that may seem to be more concrete and immediately achievable than achieving peace, and that may well enhance the UN's authority'.[369] After all, attainable goals were exactly what the UN needed in 1999.[370]

a) One by One – Initial Steps Towards PoC-Missions

From the beginning of Annan's term, he carefully and steadily broke new ground. The most lasting change comprised of his reorientation toward civilian protection. Compared to the hard-fought introduction of robust peacekeeping missions, it was thereby not difficult to put civilian protection on the UN agenda. It was both success-promising as well as image-effective. Rather, the challenge indeed was to bring the mechanism into action. Despite initial shortcomings, the years from 1999 to 2006 still proved to be fertile ground for the PoC-development. One advance after another, civilian protection grew in importance, until it finally formed the basis of an altogether independent mission type.

aa) Resolutions 1265 & 1295 and The Protection of Civilians in Armed Conflict

As part of its altered focus on humanitarian relief, the Security Council initiated a series of resolutions on the Protection of Civilians in Armed Conflict, the very first of which was resolution 1265 from

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[365] cf. 'Protection of Civilians Mandate' (*United Nations Peacekeeping*) <https://peacekeeping.un.org/en/protection-of-civilians-mandate> accessed 16 December 2021.

[366] *The Protection of Civilians in United Nations Peacekeeping* 2019 (n 23) para 29.

[367] Jennifer Welsh, 'The Security Council and Humanitarian Intervention' in Vaughan Lowe and others (eds), *The United Nations Security Council and War*: *The Evolution of Thought and Practice since 1945* (Oxford University Press 2008) 535-36.

[368] see text to n 356 in chapter B.

[369] Mégret (n 243) 10.

[370] cf. ibid.

1999.[371] Like a starting signal, this document officially introduced the adjusted targeting of civilian protection and outlined the increasing efforts to anchor it in peacekeeping mandates.[372]

Already in determining the resolutions' aims and background within the preambular clauses, the Council set new standards. By reference to both the UN's primary responsibility under the UN Charter for the preservation of international peace and security, as well as the protection of civilians during armed conflict, it established a connection between duty on the one hand and responsibility on the other.[373]

Preceded by generalities,[374] the operative clauses further on develop a decisive but broad language when it comes to UN engagement. In clause ten, the Council expresses its '[…] willingness to respond to situations of armed conflict where civilians are being targeted [...], including through the consideration of appropriate measures at the Council's disposal in accordance with the Charter of the United Nations [...]'.[375] It shall, therefore, be considered '[…] how peacekeeping mandates might better address the negative impact of armed conflict on civilians'.[376] However, in the absence of concrete proposals for action, the purpose of this resolution was not so much of an implementational, but rather of a clarifying nature: the Council was now officially seized with civilian protection as one aim of peacekeeping.

Yet, a more concrete approach was not long in coming. Hardly half a year later, resolution 1296 substantiated how peacekeeping could better mitigate the negative impacts of conflict on civilians. In paragraph 13, it stipulates that peacekeeping missions are to be offered '[…] suitable mandates and adequate resources to protect civilians under imminent threat of physical danger [...]'.[377] In paragraph 15 it becomes even more concrete, when the Council indicates its 'willingness to consider the appropriateness and feasibility of temporary security zones and safe corridors for the protection of civilians'. Furthermore, in paragraph 18 it refers to the role mass-media could play in the dissemination of relevant information and affirms the intention to make use of that within future missions. Lastly, it

[371] UNSC Resolution 1265 [17 September 1999] UN Doc S/RES/1265; for further reference to resolution 1265 and it being the first of its kind, see UNSC, *Report of the Secretary-General on the Protection of Civilians in Armed Conflict* (UN Doc S/2005/740, 28 November 2005) para 2; Dan Kuwali, 'Article 4(h), the Responsibility to Protect and the Protection of Civilians' in Dan Kuwali and Frans Viljoen (eds), *By all means necessary: Protecting civilians and preventing mass atrocities in Africa* (Pretoria University Law Press 2017) 20.

[372] indicated by Wills (n 24) 66.

[373] i.e. in UNSC Resolution 1265 (n 371) Preambular Clauses 4 and 5.

[374] such as the condemnation of deliberate targeting of civilians in armed conflict, ibid para 2.

[375] ibid para 10.

[376] ibid para 11.

[377] UNSC Resolution 1296 [19 April 2000] UN Doc S/RES/1296 para 13.

deepens and significantly substantiates issues already addressed within resolution 1265, such as the concern for child soldiers[378] or the situation of refugees.[379]

Altogether, these resolutions did not yet trigger the decisive turnaround towards PoC-missions. What they do demonstrate, however, is that civilian protection as part of peacekeeping ambitions had made it from the Secretary-General's office on to the agenda of the main organ in security policy, the Security Council. Annan's vision therewith slowly took shape.

bb) Trial and Error – UNAMSIL, MONUC, and its After-Effects

The foregoing declarations had laid the ground for an initial approach in implementation. The developments in Sierra Leone soon yielded an opportunity.

Only one month after the adoption of resolution 1265, the UN Assistance Mission to Sierra Leone (UNAMSIL) was brought into being in October 1999 with resolution 1270. It was the first mission to not only focus on civilian protection but additionally on the execution of this new task by force. By authorizing the blue helmets to '[…] take the necessary action [...] to afford protection to civilians under imminent threat of physical violence […]',[380] the Council officially introduced the category of robust civilian protection. Soon after this, resolution 1291 followed and amended MONUC to the Democratic Republic of the Congo (DRC) by a similar wording.[381]

However, neither of these missions can yet be categorized as PoC-missions; they were only initial steps in that direction. As seen above, PoC-missions require the categorization of civilian protection as the main aim *in all parts* of the mandate.[382] These resolutions, however, mandated a variety of different tasks, in which civilian safeguard measures were at most indirectly included.[383] All in all, therefore, these mandates did not differ greatly from other, non-PoC-mandates.[384] This strategy, however, soon proved to be insufficient.

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[378] ibid para 16; UNSC Resolution 1265 (n 371) para 12.
[379] UNSC Resolution 1296 (n 377) para 14; UNSC Resolution 1265 (n 371) paras 7, 14.
[380] UNSC Resolution 1270 [22 October 1999] UN Doc S/RES/1270 para 14.
[381] UNSC Resolution 1291 [24 February 2000] UN Doc S/RES/1291 para 8; for more on MONUC see text to n 441-47 in chapter B.
[382] cf. 'Protection of Civilians Mandate' (n 365).
[383] i.e. in UNSC Resolution 1270 (n 380) para 8 (g); UNSC Resolution 1291 (n 381) para 7 (g); in a similar vein, see also MONUC's constituent resolution, UNSC Resolution 1279 [30 November 1999] UN Doc S/RES/1279 para 5 (e).
[384] cf. Schütte (n 265) 162.

This particularly came to light in Sierra Leone. After heavy confrontations with rebels on the ground, it became clear that effective civilian protection would not be a side product of a general peacekeeping mission, simply because a phrase in the mandate was added.[385]

This was all the more true considering that the local blue helmets often lacked sufficient training. As Wills lays down, peacekeepers are still soldiers and as such human beings. They expect clear rules and instructions and can, especially in the heat of the moment, not work with vague mandate provisions, which in the worst case still require interpretation.[386] The implicit expectation that the new standard of protection would virtually establish itself once included in the mandate was thus not met. Instead, it became increasingly evident that the new objective would have to be underpinned on a practical level by rigorous restructuring and, above all, proper deployment and equipment if it were to become a practical reality.[387]

Apart from these shortcomings, however, UNAMSIL and MONUC have also set new standards in their limitation clauses. In essence, they prevail to this day and were finally incorporated in the United Nations Department of Peacekeeping Operations/Department of Field Support (DPKO/DFS) Policy on Civilian Protection as to the definition of PoC-mandates.[388] The first of these limitations purports that peacekeepers must only react within their capabilities, so when an intervention is feasible and with reasonable prospects of a positive result. Secondly, the mandates are limited in geographical terms, so that an attack has to occur within their area of deployment of peacekeepers.[389]

The impact direction of these restrictions is twofold. On the one hand, they are to guarantee that peacekeepers have the necessary authority to prevent any harm that lies within their means.[390] On the other hand, they are to ensure that the mandated tasks are realistic and achievable. In particular, the focus was on creating realistic expectations. As Khalil put it, the restriction clauses are to '[…] recognize the constraints on the ability of the peacekeeping mission to project its presence and power throughout the entire territory of a host country [...]'.[391] The emergence of such expectations is thereby a natural process that every mission has to be prepared for. Already the independent inquirers to Rwanda had stipulated: 'Whether or not an obligation to protect civilians is explicit in the mandate of

[385] cf. the account of this mission by cited in Gray (n 73) 325 ff.
[386] Wills (n 24) 70.
[387] cf. Schütte (n 265) 163.
[388] United Nations Department of Peacekeeping Operations/Department of Field Support Policy, *The Protection of Civilians in United Nations Peacekeeping* (1 April 2015) para 13.
[389] UNSC Resolution 1270 (n 380) para 14; UNSC Resolution 1291 (n 381) para 8.
[390] Schütte (n 265) 162.
[391] Khalil (n 134) 211.

a peacekeeping operation, [...] the United Nations must be prepared to respond to the perception and expectation of protection created by its very presence'.[392]

Apart from this, however, UNAMSIL and MONUC had not yet been able to demonstrate sufficiently how civilian protection can be practically and effectively embedded in peacekeeping.[393] To bring the idea of robust civilian protection through peacekeeping fully to life, it required a further institutional process.

cc) Brahimi All Over Again – Robust Civilian Protection on the Rise

The Panel on United Nations Peace Operations offered the optimal forum for this process. With the Brahimi Report, a revised strategic analysis of the question on civil protection within the framework of peacekeeping missions was therewith impending.

All in all, the Brahimi Report offered a broad reform- and restructuring approach for peacekeeping missions in regard to strategy, capacities, and resources. It also gave fresh impetus for the debate on civilian protection. The authors stated that peacekeepers, '[…] who witness violence against civilians should be presumed to be authorized to stop it, within their means, in support of basic United Nations principles [...]'.[394]

To begin with, this implied that civilian protection could rather indirectly occur as part of the overall exercise of the mandate, than in the form of PoC-mandates. Nevertheless, the notion does also tie-up with resolution 1265, in that it confirms that the 'basic United Nations principles', according to which the Security Council is responsible for the maintenance of peace and security, can demand civilian protection.[395] In consolidating this connection, the Brahimi Report laid the foundation of broad peacekeeping mandates that pursued an all-encompassing strategy in their aims, i.e., civilian protection, and means, i.e., the use of force.

However, it accomplished even more than that by implicitly integrating civilian protection into a robust peacekeeping structure. The report's focus, thereby, was not on civilian protection. Still, by focusing on the use of force in peacekeeping, while simultaneously referring to civilian protection, it combined the enhanced means with the restructured aims of 21st-century peacekeeping. Although its impact on the development of fourth-generation peacekeeping can be rather described as integrative, than creational, it still generated the thrust that the concept needed to fully emerge. While civilian

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[392] *Report of the Independent Inquiry into the Actions of the United Nations during the 1994 Genocide in Rwanda* (n 323) 51.

[393] UNAMSIL nonetheless finally managed to reach a successful completion and was terminated in 2005, while MONUC was continued and eventually indeed turned into a PoC-mission, see text to n 446-50 in chapter B.

[394] *Report of the Panel on United Nations Peace Operations* (n 18) para 62.

[395] see also Wills (n 24) 44.

protection as a peacekeeping aim was more the exception than the rule in the early 2000s, the concept set an example, and by December 2005, the number of such mandates rose to 6, with approximately 53,000 blue helmets deployed.[396]

dd) Formed by Diss- and Association – Early Robust PoC and R2P

Despite all these changes, one core idea remained prominent: civilian protection through peacekeeping, whether robust or not, had to be strictly separated from civilian protection through enforcement. It is, therefore, no coincidence that with the slow emergence of robust PoC-mandates, another, complementary concept developed: that of R2P.[397]

The basic validity of this concept was confirmed within the 2005 World Summit Outcome[398] and reaffirmed within Security Council resolution 1674 from 2006.[399] It is thereby interesting to note that the latter also marks the transition from the first civilian protection mandates to full-fledged PoC-mandates. To begin with, the resolution '[r]eaffirms its practice of ensuring that the mandates of United Nations peacekeeping, [...] include, where appropriate and on a case-by-case basis, provisions regarding (i) the protection of civilians [...]'. Further on, and even clearer, it stipulates that '(ii) the protection of civilians is given priority [...] and [...] (iii) protection mandates are implemented […]'.[400] Apart from that, the Security Council has specified the heightened assertiveness by demanding that all peacekeeping operations have to 'ensure that all peace support operations employ all feasible measures' to protect civilians from all kinds of violence,[401] instead of merely declaring a 'willingness to respond' or a 'willingness to consider' threatening situations.[402] It was in this way that the protection of civilians was put in the spotlight of UN peacekeeping.

Resolution 1674 was thereby the direct result of a process that had been set in motion half a year earlier. In November 2005, the Secretary-General had initiated a report that aimed at summarizing the developments in civilian protection from the past five years.[403] In addition to the repeated call for increased inclusion of physical protection mechanisms for civilians in the mandates,[404] the Secretary-General envisaged the adoption of a further resolution to fill existing gaps. Concretely, he wishes '[…] to consider adopting a resolution incorporating developments in areas such as a more systematic, comprehensive mandate for peacekeeping and peacebuilding missions, physical protection and,

[396] Schütte (n 265) 167.
[397] which will be of central importance in Chapter D.
[398] World Summit Outcome, UNGA Resolution 60/1 [16 September 2005] UN Doc A/RES/60/1 paras 138 ff.
[399] UNSC Resolution 1674 [28 April 2006] UN Doc S/RES/1674 para 4.
[400] ibid para 16.
[401] ibid para 19.
[402] as it had been stipulated in i.e. UNSC Resolution 1265 (n 371) paras 10 and 11.
[403] *Report of the Secretary-General on the Protection of Civilians in Armed Conflict* (n 371) para 2.
[404] ibid paras 37-38.

especially, protection from sexual violence and child protection'.[405] Resolution 1674 explicitly refers to this report[406] and implements what it demands.

The protection of civilians within peacekeeping missions had finally arrived on the world stage, in that it had created its own, new mandate type. The future of robust peacekeeping was theoretically set and could now, finally, take full effect in practice.

b) Ready, Set, Go – UNAMID to Darfur and the Legal Basis of Robust PoC-Missions

The first mission to not only demand civilian protection as one of many goals, but to commence with a robust PoC-mandate was UNAMID to Darfur. The mission thereby not only lends itself to an exemplary analysis of its mandate structure, but it furthermore illustrates the re-emergence of an old challenge. The beginning of robust PoC peacekeeping begged the question as to a coherent legal basis within the UNCh anew. This time, suffice it to say, a different approach prevailed.

aa) The First Original Robust PoC-Mission – UNAMID to Darfur

Beginning in 2004, the Darfur region in western Sudan became the staging ground for increasing levels of violence, mainly against the civilian population. At first, however, the UN was reluctant to intervene. It already operated several big missions and especially one in close proximity to Darfur: UNMIS to Southern Sudan, which aimed at supporting the implementation of the Comprehensive Peace Agreement.[407] In order not to impede this peace process, it was initially decided not to intervene in Darfur.[408]

However, not only did the humanitarian situation steadily worsen, so did the media coverage of the conflict. This significantly increased the pressure on all parties involved. In 2004, the African Union (AU) had already launched the AMIS mission, supported by the European Union and NATO. While this undertaking had started as a monitoring mission, it soon developed a strong civilian protection focus.[409] However, when the troops proved to be more and more overwhelmed by the worsening situation in the civil war-torn country,[410] the Security Council was finally able to commit itself to a new, strengthened mission. Now in collaboration with the AU, the hybrid mission UNAMID was established

[405] ibid para 36.
[406] UNSC Resolution 1674 (n 399) para 1.
[407] UNSC Resolution 1590 [24 March 2005] UN Doc S/RES/1590 para 4; a detailed account of the missions to Sudan and South Sudan will be presented in the text to n 574 ff.
[408] Wills (n 24) 62 fn. 350.
[409] ibid 62.
[410] ibid 62-63.

in 2007 by resolution 1769.[411] Under Chapter VII UNCh, this mission was authorized '[…] to take the necessary action, in the areas of deployment of its forces and as it deems within its capabilities in order to: [...] support early and effective implementation of the Darfur Peace Agreement, [...] and protect civilians [...]'.[412] It was, therefore, a fully-fledged robust PoC-mission. As such, it was also the first operation to be established as a PoC-mission and not just converted into one later.

In essence, the mission's prime aims were '[t]o contribute to the restoration of necessary security conditions for the safe provision of humanitarian assistance […]'[413] and to '[…] the protection of civilian populations under imminent threat of physical violence […]'.[414] Resolution 1769 thus provided an initial outline for future robust PoC-mandates. Those mandates are characterized by an authorization under Chapter VII UNCh to take the 'necessary action' to protect civilians as the major task. Furthermore, resolution 1769 exemplifies the differences between a peacekeeping mission that merely provides for robust civilian protection and a robust PoC-mission. Compared to resolution 1270, authorizing UNAMSIL, and resolution 1279, authorizing MONUC, the following is noticeable: while both these resolutions set out numerous aims,[415] they only indirectly imply civilian protection.

A PoC-mandate, on the contrary, identifies the protection of civilians as its main aim in all parts of the mandate,[416] so both within the mission's objectives, as well as within the authorized means of execution. Only in this way can the effective and, above all, thorough protection of civilians be ensured.

bb) Robust PoC-Missions and their Legal Embedment in the UN Charter

With UNAMID, the first fully-fledged robust PoC-mission had been established. In fact, not only had a new mission type arisen but also a new mandate standard. The differences were thereby not limited to the general particularities of robust PoC-mandates.[417] Notably, the explicit determination of a legal basis also defined and distinguished these new, modern-day peacekeeping mandates.

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[411] UNSC Resolution 1769 [31 July 2007] UN Doc S/RES/1769.

[412] ibid para 15 (a) (ii).

[413] UNSC, *Report of the Secretary-General and the Chairperson of the African Union Commission on the hybrid operation in Darfur* (UN Doc S/2007/307/Rev.1, 5 June 2007) para 54 (a); UNSC Resolution 1769 (n 411) para 1.

[414] *Report of the Secretary-General and the Chairperson of the African Union Commission on the hybrid operation in Darfur* (n 413) para 54 (b); UNSC Resolution 1769 (n 411) para 1.

[415] i.e. to assist and cooperate with the respective parties, UNSC Resolution 1270 (n 380) paras 8 (a), (b) and UNSC Resolution 1279 (n 383) paras 5 (a), (b); to plan for and supervise ceasefires, UNSC Resolution 1270 (n 380) para 8 (e) and UNSC Resolution 1279 (n 383) para 5 (d); to facilitate the delivery of humanitarian assistance, UNSC Resolution 1270 (n 380) para 8 (g) and UNSC Resolution 1279 (n 383) para 5 (e).

[416] cf. 'Protection of Civilians Mandate' (n 365).

[417] as indicated above, text to n 364-70 in chapter B.

So far, peacekeeping mandates had mostly lacked any such concrete reference. With the emergence of early robust PoC-missions, namely UNAMID and MONUC, this approach had changed.[418] Now, the mandates explicitly referred to Chapter VII UNCh. While this was to clarify and legally underpin the authorization to use 'all necessary means', it also raised many new questions. The general power of the Security Council to impose measures under Chapter VII UNCh was thereby less of a concern. The question was rather where this modification originated from and what it entailed overall.

(1) From Chapter VI to Chapter VII UNCh – The Legal Integration of Robustness

For a long time, the basic assumption was that peacekeeping missions were mandated under Chapter VI UNCh. In 2002 still, Findlay stated: 'Although Security Council mandates rarely mention a specific chapter of the UN Charter under which they are authorized, a convention has arisen whereby peacekeeping forces are assumed to be authorized under Chapter VI on the 'pacific settlement of disputes'.[419] According to Article 36 (I) UNCh, the Security was hence to 'recommend appropriate procedures or methods of adjustment'. Such recommendary decisions were not enforceable, since they were construed as cooperative measures.[420] Additionally, the use of force was restricted to self-defense.[421]

However, it was not just since 2002 that this approach did not reflect peacekeeping reality anymore. Hammarskjöld himself had already contended that peacekeeping could equally be authorized under Article 40 UNCh regarding any 'provisional measures' before the Council could take more drastic measures under Article 39 UNCh.[422] This led to the long-lasting contention that peacekeeping was to be conceptually categorized somewhere between Chapter VI and VII, in a 'Chapter 6 ½ UNCh'.[423]

Over the years, the concept had then been increasingly applied to situations that increasingly exceeded its original scope, but for which no other mechanisms could be found.[424] With the introduction of robust peacekeeping, this advancement was finally put on a legally secure foundation. Based on Chapter VII UNCh, the Council could now '**decide** what measures shall be taken [...]' according to Article 39 UNCh.[425] This does include the use of force in instances other than self-defense.[426]

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[418] UNSC Resolution 1270 (n 380) para 14; UNSC Resolution 1291 (n 381) para 8.
[419] Findlay (n 38) 7.
[420] ibid 7-8.
[421] ibid 8.
[422] ibid 17.
[423] Berdal (n 15) 180.
[424] Findlay (n 38) 17.
[425] emphasis added.
[426] Findlay (n 38) 8.

At this point, one may ask whether such a Chapter VII UNCh authorization is not in conflict with one of the basic principles of peacekeeping, the notion of consent.[427] Without going too deeply into the discussion, a certain contradiction is indeed identifiable here. While some argue that for robust peacekeeping mandates to be legitimate, they have to have such a Chapter VII UNCh mandate,[428] the question then remains how robust missions without such a mandate[429] can be legal.

Ultimately, it can be concluded that the mandate under Chapter VII UNCh fulfills a need for clarification, which can at least promote the legitimacy of the missions. Moreover, it is by now common practice to base robust peacekeeping missions on Chapter VII UNCh, so far without that having undermined the principle of consent.

(2) From Chapter VII UNCh to the Mandate – The Specific Provisions and their Integration Into the Mandate

Robust PoC-missions hence require a Chapter VII UNCh mandate. However, 'Chapter VII UNCh' is not a concrete legal basis. It is rather a reference to either Article 39, 40, 41 UNCh[430], or, most likely, Article 42 UNCh.

While it can be argued that the deployment of a peacekeeping force constitutes a mere 'recommendation' under Article 39 UNCh[431] or Article 40 UNCh[432], this does not precisely reflect the distinct, forceful character of robust peacekeeping missions. Additionally, considering the length of many current missions, it seems rather far-fetched to classify them as 'provisional measures'.[433] Consquently, only Article 42 UNCh provides a sound basis for robust peacekeeping undertakings.

Apart from that, the concrete positioning of a Chapter VII UNCh authorization within the mandate remains debatable. It can either prepend the whole operative mandate[434] or concretely introduce the precise tasks it refers to[435]. The former approach could thereby create the wrong impression of an

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[427] cf. Wilson (n 37) 120; cf. Khalil (n 134) 219.

[428] as has been indicated by the ICJ in *Certain expenses of the United Nations (Article 17, paragraph 2, of the Charter),* Advisory Opinion (n 99) 171, 177; cited in Findlay (n 38) 8.

[429] i.e. UNSC Resolution 1701 [11 August 2006] UN Doc S/RES/1701 para 12; cited in Marco Longobardo, '"Super-Robust" Peacekeeping Mandates in Non-International Armed Conflicts under International Law" [2020] 24 SYbIL 42, 66; with regard to this resolution, however, it can again be objected that the UNSC explicitly refers to a 'request' of the host government, UNSC Resolution 1701 para 12, which is enough to 'overcome the barrier' of Article 2 (7) UNCh, Longobardo 65–66, and render the operation legal.

[430] see Longobardo (n 429) 50.

[431] see Wilson (n 37) 122.

[432] see ibid 122-23.

[433] ibid 123.

[434] i.e. UNSC Resolution 1925 [28 May 2010] UN Doc S/RES/1925.

[435] i.e. UNSC Resolution 1769 (n 411) para 15.

enforcement mission.[436] However, there are different indications in ascertaining the nature of a mandate, of which the legal basis is only one. The positioning of the Chapter VII UNCh authorization can thereby have purely practical reasons or as sometimes happens within the UN, not be subject to any particular standard at all.

To conclude, both the legal foundation itself, as well as its reference within the mandate, have changed with the inauguration of robust PoC-missions. By now, the Security Council itself purports that peacekeeping operations can have mandates authorizing '[…] a range of measures including the use of force under Article 42 of the Charter', whereby '[…] traditional methods of resolving disputes peacefully […]' were mandated under Chapter VI UNCh.[437]

c) Conclusion- UNAMID as the Starting Signal for Robust PoC-Missions

With UNAMID, the robust PoC-mission development further accelerated and took the center stage of all UN peacekeeping efforts. Despite this pioneering role, the mission has been the subject of stern criticism. When the civilian death toll rose, Darfur was even used as another example of the UNs system failure.[438] However, there is only so much a UN mission can accomplish when the warring parties cannot or do not want to come to a solution. In the end, it can thus still be concluded that the stationed blue helmets reached remarkable achievements and, in doing so, promoted all missions to follow, despite the obvious shortcomings.[439] Ultimately, UNAMID set a precedent.

Hereafter, peacekeeping had finally arrived in the 21st century. In its revised shape, it had passed the first practical tests and proved to be an overall successful concept. The fourth developmental phase was initiated by the Brahimi Report and advanced with UNAMID. From now on, civilian protection became indispensable in robust peacekeeping.

2. Taking the Center Stage – Civilians in the Limelight

With UNAMID to Darfur, a completely new mandate type had been inaugurated. Through robust PoC-missions, the protection of civilians had become the primary objective of peacekeeping.

Having arrived in the spotlight of UN efforts, this new objective now slowly took the center stage of all UN efforts. This was not solely - albeit primarily - realized in the context of robust PoC-missions. However, other forms of peacekeeping also contributed to the rise of the civilian protection focus.

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[436] Khalil (n 134) 219.

[437] 'Peacekeeping Operations' (*United Nations Security Council*) <https://www.un.org/securitycouncil/content/repertoire/peacekeeping-missions> accessed 16 December 2021.

[438] Breau (n 244) 453.

[439] cf. Schütte (n 265) 175-76.

Three of these different approaches shall, in the following, illustrate the further course of fourth-phase peacekeeping.

a) MONUSCO – The Blueprint for Robust PoC-Mandates

The United Nations Organization Stabilization Mission in the Democratic Republic of the Congo, MONUSCO, is the direct successor of MONUC, which had already played its role in initial PoC-development.[440] The overall relevance of this mission is not to be underestimated.

aa) UN Assistance in the DRC – From MONUC to MONUSCO

MONUC had been established in 1999 to plan for the observation of the Lusaka ceasefire agreement and the withdrawal of forces between the DRC and five regional states.[441] When inaugurated, civilian protection was only indirectly foreseen in the mandate,[442] and even once the peacekeepers' authority was extended to encompass forceful civilian protection in February 2000,[443] MONUC was still not turned into a PoC-mission.[444] In fact, even in 2009, resolution 1906 still only referred to civilian protection as one aim amongst many and just *emphasized* its importance.[445]

That changed in May 2010, when the mission was extended, restructured, and renamed MONUSCO by resolution 1925. While MONUC had been designed as a typical peacekeeping mission in a post-conflict environment, the Security Council now reacted to the development of a new conflict.[446] Reflecting this '[…] new phase reached in the country'[447] and with the zeitgeist of UNAMID, the mission was ultimately equipped with a robust PoC-mandate.

bb) Setting a Precedent

Despite UNAMID being the first fully-fledged PoC-mission, MONUSCO's mandate became the prototype for all following PoC-resolutions. Other than UNAMID, which still concealed its PoC-mandate by a mere reference to the report of the Secretary-General of 5 June 2007,[448] MONUSCO did not leave the slightest doubt as to its object and purpose. Its mandated tasks, in this order of priority, were the

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[440] see text to n 380-93 in chapter B.
[441] UNSC Resolution 1279 (n 383) para 5.
[442] i.e. in ibid para 5 (e).
[443] UNSC Resolution 1291 (n 381) para 8.
[444] for the relevant characteristic see text to n 365 in chapter B.
[445] UNSC Resolution 1906 [23 December 2009] UN Doc S/RES/1906 para 7.
[446] see Gray (n 73) 331.
[447] 'About MONUSCO' (*United Nations Peacekeeping*) <https://monusco.unmissions.org/en/about> accessed 16 December 2021; see also UNSC Resolution 1925 (n 434) para 1.
[448] UNSC Resolution 1769 (n 411) para 1.

protection of civilians by **ensuring** '[…] the effective protection of civilians […]' and the protection of UN personnel and equipment[449] as well as and **supporting** '[…] the efforts of the Government of the Democratic Republic of the Congo to ensure the protection of civilians […]'.[450]

Stabilization and peace consolidation objectives were subordinated to this major objective.[451] Considering that the situation in the DRC had previously been categorized as a threat to international peace and security,[452] the Security Council hereby strengthened its approach to counter such hazards with effective civilian protection. Overall, the structure and formulation of resolution 1925 would assert itself as the blueprint for future robust PoC-mandates.

b) MINUSMA – A Different Framework for Similar Objectives

Following on from MONUSCO and its rather typical design as a robust, contemporary PoC-mission, a different approach was applied in Mali. Albeit with a comparable objective, MINUSMA is a so-called multidimensional integrated stabilization mission and thus follows a structurally different framework. Even though it is not a PoC-mission, it does present another type of peacekeeping mission that plays a vital role in current UN ambitions and as such also contributes to the protection of civilians.

aa) UN Assistance in Mali

After Mali had been confronted with years of instability, resulting inter alia from weak state institutions, ineffective governance, and marginalized population groups, conflict erupted in 2012 when different groups, some from the Tuareg movement and some with a jihadist background, attacked government forces.[453] Within only two months, this turmoil led to a coup d'état. After negotiations between the heads of states, governments, and the Economic Community of West African states (ECOWAS), the former Malian president resigned, and an interim president was appointed. Following a corresponding offer, the Mali interim authorities then requested UN assistance to '[…] build the capacity of the Malian transitional authorities in the areas of political negotiation, elections, governance, security sector reform and humanitarian assistance'.[454]

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[449] UNSC Resolution 1925 (n 434) para 12 (a), (b).
[450] ibid para 12 (c).
[451] ibid para 12 (d) ff.
[452] ibid Preambular Clause 18.
[453] 'History MINUSMA' (*United Nations Peacekeeping*) <https://minusma.unmissions.org/en/history> accessed 16 December 2021; Gray (n 73) 335.
[454] 'History MINUSMA' (n 453).

bb) A Multidimensional Integrated Stabilization Mission

Due to the existing situation, MINUSMA was therewith structured as a multidimensional peacekeeping mission, and not as a PoC-mission. Born in the early 1990s, this type of mission can be clearly distinguished from a traditional peacekeeping mission regarding its integrated approach.[455] Unlike traditional peacekeepers, the personnel deployed are requested to play an active role in the positive development of the affected state. That includes, but is not limited to, the observation of human rights, disarmament efforts, and humanitarian support.[456]

Even more so, multidimensional peacekeeping additionally aims at peacebuilding by backing political processes, guiding elections, and structuring administrative functions.[457] Thereby, these missions constitute a far greater interference with the sovereignty of the states involved, but they also have the potential to achieve higher aims. They are generally broader and equipped with a wider strategic base but are applied less frequently because the conditions on site must allow for such an approach.

cc) Building Peace and Protecting Civilians

A prime example of such conditions was Mali. Initiated by the assistance request of the Malian authorities, the UN mission could build peace by guiding elections and structuring governmental functions. At the same time, however, civilian protection also played a vital role in this framework. Resolution 2100 explicitly extends the mandate to the protection of civilians under imminent threat of physical violence.[458] However, considering that MINUSMA was to support the transitional authorities of Mali in the broad task of stabilization and state building,[459] the protection of civilians was just one more component rather than the major task of the mission.[460]

Overall, resolution 2100 strongly resembles resolution 1925 in its structure and layout, considering that it is also wholly mandated under Chapter VII UNCh and with a mandate to 'use all necessary means' in addressing threats to the implementation of the mandate.[461] The main difference between this mandate and a classic PoC-mandate is the priority of the assigned tasks.

Concluding, while the protection of civilians can be made a priority within a robust PoC-mission, it can also be part of an integrated concept, which aims at a peaceful transition of power. Although robust

[455] Chesterman and others (n 98) 328.
[456] ibid 329.
[457] ibid.
[458] UNSC Resolution 2100 [25 April 2013] UN Doc S/RES/2100 para 16 (c) (i).
[459] ibid para 16 (a), (b).
[460] to be read from its third-rank position in ibid para 16 (c).
[461] ibid para 17.

PoC-missions constitute the most common means of today's civilian protection, this demonstrates that there are still different approaches even within peacekeeping itself, which have developed in parallel.

c) MINUSCA – Combined Capacities

Lastly, resolution 2149 from April 2014 illustrates yet another form of a peacekeeping mission, almost a hybrid between the two former approaches.

aa) UN Assistance in the Central African Republic

Implementing MINUSCA in the Central African Republic (CAR), resolution 2149 was adopted after the country had witnessed increasingly violent clashes between the government and rebel coalitions. The result was a catastrophic humanitarian situation. According to the UN, as of 2014 more than 650,000 people had been internally displaced and over 290,000 people were forced to flee to neighboring Cameroon, Chad, the DRC, and the Republic of Congo. What's more, about 2.5 million people, more than half of the entire population, needed humanitarian aid.[462]

bb) A Multidimensional Mission Drafted as a Robust PoC-Mission

On the one hand, MINUSCA is a multidimensional integrated stabilization mission[463] that aimed at supporting the political process and thus inducing an end to the conflict.[464] On the other hand, it was implemented with a clear focus on civilian protection. In various forms, this was identified as MINUSCA's first concern.[465] Furthermore, it equipped the peacekeepers with robust competencies in their mandated tasks.[466]

So, while MINUSCA is a multidimensional mission, which takes a broad approach in its state building tasks, it is still formulated as a robust PoC-mission that sets civilian protection as its top priority. This takes account of the dire humanitarian situation the civilian population found itself in.

The approach demonstrates that a clear distinction between '*pure*' PoC-missions and multidimensional peacekeeping missions neither seems possible nor necessary. On the contrary, each approach and type of mandate is strictly case-specific and can be adapted to the local situation. This, in turn, should not

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[462] 'About MINUSCA' (*United Nations Peacekeeping*) <https://minusca.unmissions.org/en/about> accessed 16 December 2021.
[463] UNSC Resolution 2149 [10 April 2014] UN Doc S/RES/2149 para 18.
[464] i.e. ibid para 7.
[465] ibid para 30 (a).
[466] ibid para 29.

be perceived as weakness, imprecision or ambiguity, but interpreted as a lesson learned from an overly formalistic approach in recent decades.

3. Conclusion – Peacekeeping in a New Guise

Beginning with UNAMSIL and culminating in MONUSCO, peacekeeping had developed and emerged in a new guise within this first decade of the 21st century. This reformed approach was the result of a fundamental transformation, induced by the immense malfunctions of third-phase peacekeeping. Taking stock of these failures, the UN had managed to not only overcome its worst crisis but also to make the most of it.

In its comprehensive character, this renewal is symbolic of the whole peacekeeping dynamic, which is built on innovation and integration. In a state of constant flux, peacekeeping managed to stand the test of time and assert itself as a major instrument in the international preservation and restoration of peace.

Attuned to the new century, robust PoC-missions had finally taken a shape that proved to be effective. An outline of the current standard shall conclude this history to date, summarizing both current key elements of robust PoC-missions as well as recurring challenges and threats.

VI. Attuned to the 21st Century – Robust PoC-Missions in the Here and Now

Within the fourth developmental phase, robust PoC-missions had become an integral part of UN peacekeeping; they shaped its appearance all over the world. To date, these missions are the UN's most compelling mechanism to protect civilians.

Finally, a brief account of the key elements of current robust PoC-missions and their recurring challenges and confrontations shall form the last component of this historical UN peacekeeping review.

Equipped with the preceding insights, it will then be possible to submit the defining characteristics of contemporary, robust PoC-missions. These specifications will form the basis for the subsequent analyses of these missions in their different contexts.

1. The Key Elements of Robust PoC – The Physical Protection of Civilians

The process that brought robust PoC-missions into their prominent position was accompanied by recurrent reporting mechanisms of a strengthened DPO and a newly established Department of Field Support (DFS). Little by little, they developed the underlying concepts and principles that PoC-missions

are built on today.[467] Of particular relevance are thereby the understanding of physical protection mechanisms and the definition of civilians.

a) The Physical Protection

The PoC mandate-concept is arguably broad and cannot be reduced to its physical protection mechanisms alone.[468] Still, protection is a key mission element and proves to be integral, especially considering current mission developments.

Generally speaking, the term 'protection' can be understood to cover '[…] a range of issues beyond physical protection in line with that term's general legal humanitarian understanding'.[469] For decades indeed, there has been little other, more specific reference. As a consequence of such a broad understanding, the peacekeepers' protection task has thus been rather vague and undefined.[470] To complicate matters further, protection in the international realm is performed and offered by many different actors and can thus be defined and understood differently by each of those actors. So humanitarian actors, for example, will have a different approach to national relief agencies or military units in adhering to their obligations under International Humanitarian Law (IHL).[471]

However, with the growing substantiation of robust PoC-mandates, this broad frame was specified. Most recently with the 2019 DPO policy on the protection of civilians in UN peacekeeping, the UN has defined a PoC-mandate beyond the general pillars of peacekeeping. To that end, the policy authors refer to the three tiers of civilian protection within peacekeeping that have evolved within and in particular to the fourth peacekeeping phase. Embedded in this framework, the distinct scope and objective of PoC-missions can be clearly delimited.

Tier one thereby circumscribes a protection approach through dialogue and engagement. It aims at the mediation between the actors involved and therefore targets peaceful conflict management.[472] Tier three involves the establishment of a protective environment and includes broader measures that will safeguard civilians on a long-term basis. Such measures encompass the support of political processes, strengthening the rule of law, and the development of an efficient security sector.[473]

It is thus the second tier that refers to physical protection. It '[…] encompasses activities by all mission

[467] see Schütte (n 265) 176.
[468] Mégret (n 243) 7.
[469] ibid.
[470] Victoria K Holt and Tobias C Berkman, *The Impossible Mandate? Military Preparedness, The Responsibility to Protect and Modern Peace Operations* [2006] The Henry L. Stimson Center 5; cited in Kuwali (n 371) 50.
[471] Holt and Berkman (n 470) 35.
[472] *The Protection of Civilians in United Nations Peacekeeping* 2019 (n 23) para 43.
[473] ibid para 71.

components to physically protect civilians, whether through protective presence, interpositioning, the threat or use of force, or facilitating safe passage or refuge'.[474] The parameters of physical protection are thus quite clearly defined.

On the mandate side, tier two transpired to be the most important protection pillar. As just one example, this is illustrated by resolution 1925. Like most PoC-mandates, it includes and combines all three tiers, referring to tier one in paragraph 12 (h) and to tier three in paragraph 12 (c). However, all these referrals are preceded by a paragraph 12 (a) that reads: '[...] MONUSCO shall [...] [e]nsure the effective protection of civilians [...] under imminent threat of physical violence […]'.[475] Tier two is therefore of top priority.

b) The Civilian

The 2019 DPO policy is furthermore conclusive in regard to the definition of a civilian. It makes the following classification:

For the purposes of this policy and the protection of civilians mandate in peacekeeping, everyone is to be considered a civilian, except persons falling in one of the following categories: members of the armed forces; members of an organized armed group with continuous combat function; and civilians directly participating in hostilities, for such time as they do so. In case of doubt whether a person is a civilian, that person shall be considered a civilian.[476]

This definition is closely aligned with that of civilians in IHL, especially considering the separation of civilians and combatants or fighters[477] and with regard to the cases of doubts provision.[478]

Despite this clear-cut definition, however, multiple problems arise in its practical application. To name but a few of these challenges, it can be fairly easy for any kind of combatant to hide amongst a civilian population. Conversely, not every person who carries a weapon may automatically be considered a non-civilian.

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[474] ibid para 54.

[475] UNSC Resolution 1925 (n 434) para 12 (a).

[476] *The Protection of Civilians in United Nations Peacekeeping* 2019 (n 23) para 21.

[477] Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) of 8 June 1977 (1977) Art. 50, 43 (I); Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol II) of 8 June 1977 (1977) Art. 4 (I).

[478] Protocol Additional I to the Geneva Conventions (n 477) Art. 50 (I) (2); indeed the policy also makes an explicit reference to IHL in n 5.

However, at least when it comes to robust peacekeeping missions, these challenges are not so much of a legal-, but rather of a factual nature and, therefore, they need to be solved on a case-to-case basis. At least the conceptual approach is, nevertheless, coherent.

c) Conclusion – A Firm Theoretical Basis

To summarize: while the practical demarcation of civilians is often challenging, the theoretical requirements on which the mandate is based provide a clear framework. Protection, then again, is a multi-faceted concept with potentially many different meanings. In the realms of robust PoC-missions, however, it has been provided with a specification that clearly defines a scope for action.

A firm theoretical basis therewith exists. Notwithstanding, in the practical reality of modern-day conflicts, peacekeepers are often confronted with situations that exceed the standard case. With regard to recent developments, one phenomenon illustrates today's struggle better than any other: the creation of so-called PoC-Sites, i.e., mission compounds that are restructured to accommodate civilians in the face of imminent threats. Before examining this development further, however, some of the prevailing challenges of robust PoC-missions, in general, shall be evaluated.

2. Recurring Confrontations – The Prevailing Challenge of Robust PoC-Missions

Peacekeeping missions have always been shaped by both their successes and by their failures. Consequently, contradictions and confrontations were always an integral part of their development.

Just like all other formative stages, the emergence of robust PoC-missions has thereby both solved existing conflicts as well as raised new challenges. A brief abstract of some of the most pressing contentions below shall complement the classification of robust PoC-missions in the 21st century.

a) Being Able and Willing to Help – The Commitment Gap

One of the aspects that made fourth-phase peacekeeping so much more successful than third-phase peacekeeping was its ability to better implement its set standards. At the same time, however, these requirements had become considerably higher. Even today, one of the biggest challenges of peacekeeping in general and robust PoC-missions in particular is the capability and willingness to translate mandated tasks and competencies into concise action.

Specifically, the use of force has always remained a contentious issue. As important as every form of prevention in conflict situations is, peacekeepers sometimes must actively, thus forcefully, ensure

adequate protection. This reveals a gap between committal and reality that not even robust PoC has yet been able to close.

aa) The Reluctance to Use Force

The competence to proactively use force to protect civilians was overall a major advance for peacekeepers; it not only increases their range of action but also ensures their own safety. Simultaneously, however, each use of force in the field also implies far-reaching consequences. Factually, the blue helmets accordingly often avoid the use of force.

This fact has been emphasized in a report of the UN Office of Internal Oversight Services (OIOS-report) on robust UN-peacekeeping missions in 2014.[479] The report finds clear words when stating that '[…] force is almost never used to protect civilians under attack'.[480] Even more drastically, the authors set forth that '[p]eacekeepers are absent from many locations when civilians come under attack, and when they are present, are unable or unwilling to prevent serious physical harm from being inflicted'.[481] All in all, the peacekeeping architecture as of 2014 is therewith deemed '[…] a systematic failure […]'.[482] Instead of force, peacekeepers would '[…] focus on prevention and mitigation activities […]'.[483]

Little has changed in this regard today.[484] In practice, the authorization to use force is a mixed blessing. Peacekeepers must find the balance between fueling the conflict by proactively intervening and remaining an idle and thus futile spectator of violence. Simply tracing this development back to an unwillingness or even refusal on the peacekeeper's side would, however, not do justice to the complexity of the situation. The reasons lie deeper than that.

(1) The Resource Gap

To begin with, the fundamental reticence to use force can partly be attributed to the fact that peacekeeping missions have in recent years revealed a tendency to be under-resourced and not provided with the proper equipment.[485] In the early peacekeeping years, this was not the case. Quite the opposite; during the UN's first fifty years, the developed states demonstrated great commitment

[479] UNGA, Report of the Office of Internal Oversight Services, *Evaluation of the Implementation and results of protection of civilians mandates in United Nations Operations*, (UN Doc A/68/787, 7 March 2014).
[480] ibid para 79.
[481] ibid para 80.
[482] ibid.
[483] ibid para 79.
[484] UNMISS is a prime example in that regard, see text to n 814-20 in chapter C.
[485] cf. Wilson (n 37) 149-50.

to providing troops and armament.[486] Slowly, however, this burden then shifted towards the developing states, as pay and prospects still offer a sufficient incentive for them.

In contrast, particularly the five permanent members of the Security Council have retreated to missions that '[…] provide a secure environment […]'.[487] This is an engagement that is easier to justify within their respective governments. The result is a 'commitment gap',[488] that in turn is bound to discourage other troop-contributing countries. The result is a vicious circle from which it is difficult to break free.

(2) The Precision Gap

Another reason for the restrained attitude towards the use of force is rooted in a general ambiguity concerning the mandated tasks and the associated expectations. The mandates are often formulated broadly, focusing on the big picture. With a view to the concrete tasks of peacekeepers, however, they are rather inconclusive.

If peacekeepers are thus unsure which measures are within their competencies, they will favor those which are the least intrusive and therefore the most unlikely to create negative repercussions, including the risk of criminal liability and escalation of the conflict.[489] However, this attitude may also have the exact opposite effect and trigger escalation by reinforcing the perception that the UN is unwilling or unable to act.[490]

Rooted both in lacking factual support as well as inconclusive legal specification, robust PoC-missions are thus still struggling to make use of their newly acquired powers.

bb) Aspiration and Reality

The reluctance to use force therewith results in an overall discrepancy between the mandate level, on which increasingly robust authorities are granted, and the implementation level, where the use of force is avoided as far as possible. The mills of change thereby grind slowly in the international realm, meaning that the full application of a new mandate type is simply a gradual process. All the same, there is still an enormous potential for the member states to increase the mission's effectiveness.

Nonetheless, there is every reason to be hopeful. At least with regard to two prominent current missions, UNMISS and MINUSCA, the Secretary-General draws a positive conclusion and offers an

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[486] *Report of the Panel on United Nations Peace Operations* (n 18) para 103; cited in Gray (n 73) 301.
[487] *Report of the Panel on United Nations Peace Operations* (n 18) para 104.
[488] see UNGA Press Release, *Resources sought for Brahimi initiatives would make a significant difference to peacekeeping abilities, Secretary-General tells fifth committee* (GA/AB/3414, 27 November 2000) <https://www.un.org/press/en/2000/20001127.gaab3414.doc.html> accessed 16 December 2021; also referenced to by Wilson (n 37) 149 and Gray (n 73) 301.
[489] Khalil (n 134) 214, 215-16.
[490] ibid 214.

optimistic and largely confident summary of the latest developments in regard to the effective protection of civilians.[491] To close the commitment gap as far as possible, it yet requires constant and prolonged efforts.

b) (Re)Establishment of Unity – The Principle of Consent

The prevailing commitment gap is, in essence, rooted in the third peacekeeping principle, the non-use of force except in self-defense or defense of the mandate. By the same token, the principle of consent and the precept of impartiality recurrently fuel debates in the context of robust PoC-missions.

aa) Host-State Consent as a Prevailing Maxim of Peacekeeping

To begin with, the notion of consent is one of the basic UN peacekeeping pillars and it has shaped the missions from the early days on. Nevertheless, it is far from an old relict but remains - quite the contrary - both an essential as well as debated characteristic. As Sebastián and Gorur ascertain: 'In practice, […] the absence of genuine host-state consent represents one of the greatest threats to the success of modern peacekeeping missions'.[492]

To shortly recapitulate, the notion of consent was referred to as early as 1958 by then Secretary-General Dag Hammarskjöld.[493] Throughout the history of peacekeeping, however, it remained a soft requirement and did not turn into a '[…] binding prerogative […]'.[494] Contrary to Boutros Boutros-Ghali's prognosis in 1992, according to which consent would only 'hitherto' be pursued by the parties,[495] the principle nonetheless prevailed[496]. The authors of the HIPPO report, while referring to voices that deem the core principles of peacekeeping '[…] outmoded […]',[497] stipulate that '[o]btaining and maintaining the consent of the other parties remains an important objective of any mission […]'.[498] Furthermore, within the Capstone Doctrine, the DPKO lays down: 'The consent of the main parties provides a United Nations peacekeeping operation with the necessary freedom of action, [...] to carry out its mandated tasks'.[499]

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[491] UNSC, Report of the Secretary-General, *Situation in South Sudan* (UN Doc S/2019/722, 10 September 2019) para 92; UNSC, Report of the Secretary-General, *Central African Republic* (UN Doc S/2020/124, 14 February 2020) para 42.

[492] Sofía Sebastián and Aditi Gorur, *U.N. Peacekeeping & Host-State Consent: How Missions Navigate Relationships with Governments* (Stimson Center, March 2018) 5.

[493] *Summary study of the experience derived from the establishment and operation of the Force: report of the Secretary-General* (n 110) para 155.

[494] International Peace Academy (n 17) 26.

[495] *An Agenda for Peace Diplomacy, Peacemaking and Peace-Keeping* (n 278) para 20.

[496] i.e. see *Report of the Panel on United Nations Peace Operations* (n 18) para 48.

[497] *Uniting Our Strengths for Peace - Politics, Partnership and People* (n 143) para 121.

[498] ibid para 124.

[499] *United Nations Peacekeeping Operations: Principles and Guidelines* (n 134) 31-32.

bb) Host-State Consent as an Increasing Barrier to Effective Mandate Implementation

Despite the continuous expansion of forceful competencies, the requirement of consensual deployment has continued to guide peacekeeping to this day.[500] Nevertheless, with regard to current robust PoC-missions, the principle's requirements are difficult to fulfill. This is because the more a mission is inclined to accomplish, the greater is its interference with the sovereign rights of the host state. Consequently, the less likely it will be that states and conflicting parties will cooperate and accept such an extensive foreign exercise of power.

If they still do so, however, the consent that is given rests on a shaky foundation and may continuously be subject to critical review or even withdrawal. Triggers for such reevaluations can be a change of political leaders through elections, overall mismatched expectations, or a lack of mission capacity, to name but a few.[501] Concretely, Sebastián and Gorur lay down in their report that the number of disputes between MINUSCA mission personnel and government counterparts in the Central African Republic rose significantly following elections in 2015.[502] South Sudan is facing similar challenges, which will be discussed in more detail below.

Overall, robust PoC puts a high strain on the host state's willingness and understanding.[503]

cc) A Legal Solution Approach

From a legal perspective, resolving this conflict requires clear limits, within which consent can be declared and withdrawn.

Khalil, for example, draws such a temporal boundary. While she asserts that the host state can manifest its consent in different ways within the drafting process of a mandate, once it has provided it and the period of the mandate is determined, also the host state is bound to that resolution based on Article 25 UNCh. It can therefore not officially withdraw its consent within the active period of a mandate anymore, but only as soon as it expires and renewal is discussed.[504] While the notion of consent is surely a position that is apt to constant change and dependent on external factors and developments,[505] those developments must not always take effect in a legal sense. This approach, therefore, conveys legal certainty, at least for one active period at a time. Considering that peacekeeping missions are designed and deployed with a tremendous effort, they must be able to rely on certain planning security.

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[500] see Khalil (n 134) 219.
[501] see Sebastián and Gorur (n 492) 24-28.
[502] ibid 19.
[503] cf. Wilson (n 37) 145-46.
[504] Khalil (n 134) 219.
[505] see Sebastián and Gorur (n 492) 5-6.

Though convincing in theory, the missions are potentially nevertheless confronted with a de facto withdrawal of consent during an active mission. The question of legitimacy may thus still take tangible effect. With regard to today's robust PoC-missions, further concentrated efforts are hence needed to reconcile the expanded mandates with a growing host state restraint.

c) Pro-State-Bias – The Principle of Impartiality

Lastly, also the principle of impartiality has come under pressure in the context of robust PoC-missions. This is due to a contradiction of doctrine and practice that is difficult to resolve.

Throughout all peacekeeping phases, it has been demanding to combine the theoretical groundwork of impartiality with the practical requirements of effective duty performance. On-site, peacekeepers have to be both impartial as well as fully prepared to protect civilians against all possible spoilers. De facto, the latter may time and again entail forceful prevention of attacks against the civilian population by governmental troops. Thus, while faced with a potential aggressive military, the mission is not only bound by the principle of consent but also imperatively dependent on a conducive relationship with the host state. Robust mandate or not, this puts the mission in the dilemma of having to decide between effective civilian protection on the one hand and host state relations on the other hand.[506]

More often than not, this scale will tip towards stability on-site and thus against a confrontation of governmental troops. In the long run, this attitude is indeed more likely to foster the overall effectiveness of the mission and thus promote the fulfillment of the mandate. In the short run, however, it may necessitate unjustifiable failures to mediate and protect civilians.

The general preference granted to governmental actions is thereby called the pro-state bias.[507] So, while close cooperation is a key requirement and also the basis for the consensual performance of duties, it makes it difficult to actively turn against those with whom one has successfully collaborated at another level.[508] In combination with the overall reluctance to use force,[509] that position may seriously harm the mission's reputation and undermine the trust of the population.[510]

To conclude: legally, the peacekeepers' general obligations in regard to the basic principles are quite straightforward. In practice, however, there is a need for constant balancing between the legal obligation to protect civilians, the practical ability to do so, and the overarching goal of making the mission a success.

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[506] i.e. see Schütte (n 265) 148-49, naming the example of UNTAC in Cambodia.

[507] Mégret (n 243) 15 ff.; cf. Alex J Bellamy and Paul D Williams, 'The new politics of protection? Côte d'Ivoire, Libya and the responsibility to protect' [2011] 87:4 International Affairs 825, 828.

[508] see Mégret (n 243) 12, 16.

[509] see text to n 479-84 in chapter B.

[510] see Khalil (n 134) 220-21.

3. The Defining Characteristics of Current Phase-Four Robust PoC-Missions

To conclude this history of peacekeeping, a concise summary of the defining characteristics of contemporary phase-four robust PoC-missions is expedient.

a) The All-Encompassing Protection Approach

Attuned to the 21st century, peacekeeping found a new objective and therewith a unique raison d'être in its fourth development phase: robust PoC-missions.

Today, these missions are mainly characterized by their all-encompassing protection approach that aims at providing civilian protection at all levels and to the greatest possible extent. This approach is marked by a comprehensive protection strategy and a mission constitution that enables the peacekeepers to offer the utmost safety standards.[511] The corresponding mandates are thus not only robust with regard to the authorization of the use of force but pursue the overall aim of generating lasting stability.[512]

This approach is the result of a year-long process that started with the missions in East Timor and Kosovo. Therein, UN deployments established a role in the '[…] administration of civil authority […]'.[513] This laid the foundation for a comprehensive engagement that was continuously expanded over the next years. In the end, an ever-increasing delegation of mission tasks required mandates that aimed at implementing an all-encompassing standard of civilian protection. These are the robust PoC-mandates we know today.

b) The Transformed Understanding of Force

A transformed understanding of the use of force is key to the implementation of this protection approach.

Generally, robust PoC-missions are designed to apply force as little as possible but as often as necessary to achieve the overarching goal of lasting stability. This goal is, in turn, conveyed and facilitated through the protection of civilians. This approach reveals a new combination of the different

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[511] A 'comprehensive' strategy may thereby never entail full protection of all civilians against all possible threats. Rather, such an approach pursues a protection concept that includes as many factors as possible when it comes to possible spoilers and appropriate protection. There with, it achieves the highest safety standard possible.

[512] Wilson (n 37) 142-43.

[513] ibid 143; These two missions, UNTAET and UNMIK, were robust mandates under Chapter VII of the UN Charter but pursued the aim of building statehood and arranging for an interim administration. Similarly, Mohamed therewith concluded that the organization of these missions had '[…] crossed over into comprehensive governance of territories', Saira Mohamed, 'From Keeping Peace to Building Peace: A Proposal for a Revitalized United Nations Trusteeship Council' [2005] Columbia Law Review Vol. 105, No. 3 809, 819; cited in Breau (n 244) 458; and Wilson (n 37) 143.

levels of use of force: it not only focuses on the tactical, micro-level application within individual incidents but further adds the subordinate level of strategic force planning.[514] As such, it already indicates the '[…] new legal and moral dimension' of Chapter VII peacekeeping missions, submitted by Gray with regard to UNAMSIL in 1999.[515] However, the transition went even further. Initiated by the changed operation of force, the inherent *perceptions* on the different levels of use of force and their applications have advanced as well.[516] The originality of contemporary robust PoC-missions thus lies in the fact that they provoked a *transfer of acceptance* concerning the strategic use of force. Formerly, it was attributed solely to the peace enforcement realm, while now it can just as well be integrated into a robust PoC-mission.[517] The real innovation thus lies in the new perception of how and for what purposes force may be used.[518]

In a nutshell, today's 'new dimension' of peacekeeping crystallizes in comprehensive robust PoC-missions, as they combine the different levels of the use of force into one coherent concept. Contrasting Arena in her implication that the strategical and operational use of force might be more biased than the tactical,[519] this development could thereby just as well enhance overall safety standards by improving the acceptability of all forms of force necessary to protect civilians.

Clearly, however, this transformed understanding of the use of force also entails a general increase of armed force within such peacekeeping missions. Not everyone assesses this development positively. Deeming such missions as 'super-robust', Longobardo, for example, discovers an inconsistency with the principles of peacekeeping, as some missions are - at least partly - tasked with the 'neutralization of armed groups'.[520] However, he determines this on the basis of specific missions that installed small, offensive units, whose only task is indeed to combat spoilers. It is thus hardly a generalized conclusion on all phase-four peacekeeping missions. On a substantial level as well, it is debatable whether the application of armed force by such Intervention Brigades cannot be rated as one necessary means to fulfill the mandated aims.[521] After all, the use of force in self-defense has always been an accepted means in peacekeeping, and even the anticipated self-defense does, in the end, foster the main aim of

[514] cf. Scott Sheeran and Catherine Kent, 'Protection of Civilians, Responsibility to Protect, and Humanitarian Intervention and Normative Interactions' in Haidi Willmot and others (eds), *Protection of Civilians* (Oxford University Press 2016) 51-53; for a rather critical conclusion on the integration of these new levels of force, see Maria Do Céu Pinto Arena, 'A Blurring of Roles: Use of Force in UN Peacekeeping' [2017] 17 PJBS 52, 60-61.
[515] Gray (n 73) 325; cited in Sheeran and Kent (n 514) 53.
[516] for a detailed presentation of these different levels see text to n 1117-20 in chapter D.
[517] Sheeran and Kent (n 514) 52-53.
[518] cf. ibid 53.
[519] see Do Céu Pinto Arena (n 514) 60.
[520] Longobardo (n 429) 62.
[521] cf. ibid.

civilian protection.[522] It is true, however, that the concrete design of UNMISS reinforces certain struggles that it faces, both with the government of South Sudan as well as concerning its reputation in the country. These are to be considered below.[523] While 'super-robust' mandates might thus prove to be strategically unwise, Longobardo's conclusions still do not change the defining characteristics of contemporary robust PoC-missions and their allocation to peacekeeping.

c) The Formal Recognition

Most recently, the all-encompassing approach has also found official expression in the DPO policy. The authors built on a '[…] comprehensive approach […]' when it comes to the protection of civilians that '[…] takes into account and addresses the range of factors which influence and underpin threats to civilians in both the short- and long-term, including political, security and economic factors'.[524] Furthermore, they also define contemporary robust PoC-mandates as follows: '[...] integrated and coordinated activities by all civilian and uniformed mission components to prevent, deter or respond to threats of physical violence against civilians within the mission's capabilities and areas of deployment through the use of all necessary means, up to and including deadly force'.[525]

This definition was subsequently taken up within the 2020 Handbook on PoC in UN peacekeeping by the DPO[526] and thus constitutes the current organizational perception of robust PoC-missions. Within the different current UN reform initiatives and processes,[527] the all-encompassing protection approach could be one crucial component of effective and contemporaneous peacekeeping.

4. Conclusion and Outlook

The history of peacekeeping is a chronicle of recurring processes of integration. Robust PoC-missions are only one contemporary outcome of this ongoing cycle. These missions are characterized by many different aspects. Most importantly, they are embedded within a doctrine that takes a comprehensive and all-encompassing approach and aims at the establishment and maintenance of overall peace and stability.

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[522] Lastly, in this author's view, it is exactly the principle of consent that ascribes such missions to the realm of peacekeeping. The intervention upon request, however, is not conflicting but rather a complementary and comparable category of engagement, cf. ibid 65.

[523] see text to n 801 ff. in chapter C.

[524] *The Protection of Civilians in United Nations Peacekeeping* 2019 (n 23) para 8.

[525] ibid para 18.

[526] United Nations Department of Peace Operations, *The Protection of Civilians in United Nations Peacekeeping Handbook* (United Nations 2020) 3.

[527] i.e. 'Action for Peacekeeping: Declaration of Shared Commitments on UN Peacekeeping Operations' (n 7); see also 'Future Of Peacekeeping' (n 7).

This evolution offers both opportunities and challenges. The prime example that illustrates this better than any other is UNMISS to South Sudan. In a unique way, the mission is incorporating the all-encompassing approach and thus reflects how far-reaching the comprehensive civilian protection approach is already established within contemporary robust PoC-missions.

Returning to the beginning, Shaw can only be partly agreed with concerning his rather sober conclusion on peacekeeping.[528] In the broadest strategic sense, peacekeeping operations do indeed play the role of a double-edged sword in the preservation of peace. In part, they have failed immensely. At the same time, though, the mechanism has already undergone massive transformations and remains adaptable. Thus, while it may not yet be a 'tremendous success', it is anything but a complete failure either. History continues to be written and the result is still open.

[528] see text to n 13 in chapter B.

C. Safeguarding Civilians in South Sudan – New Dimensions of Physical Protection?

The protection of civilians, both in international as well as non-international armed conflicts, has become the prime objective of peacekeeping missions in the 21st century. This change in focus has profoundly changed peacekeeping and has given rise to a completely new mandate type, that of robust PoC-missions. Their development has been traced from the very beginnings after the Second World War up to their contemporary design today. Now, it is time to practically exemplify robust protection of civilians through a PoC-mission and the paradigm shift that accompanied the all-encompassing protection approach.

To that end, the UN mission to South Sudan, UNMISS, and its so far unparalleled interpretation of physical protection shall be analyzed. Due to an urgent humanitarian need, UNMISS opened the doors of its own compounds in order to safeguard civilians on a massive scale.[529] From 2014 on, this mission has thus majorly changed its appearance and transformed its compounds from originally classic encampments to so-called PoC-Sites. Their major function is now to shelter, protect and provide for the thousands of Internally Displaced Persons (IDP's) in South Sudan, who are currently unable to return back home.

To that end, the history of the state of South Sudan shall first be briefly summarized, and the UN's long-standing involvement outlined. Subsequently, the path from a de facto implementation of the new protection practice to its official mandate recognition shall be determined. Lastly, the contemporary challenges of passive protection in relation to the peacekeeping principles and the broader factual and legal frame in which the mission operates will be highlighted.

I. The State of (South) Sudan – Caught Between Vision and Reality

For the past few decades, both the Republic of the Sudan and the Republic of South Sudan have been the cause of great concern within the international community. Looking back on the history of events, the approaches to providing assistance to this crisis-ridden region are almost as numerous as the missed opportunities to actually allocate the necessary resources. As a consequence, the only constant

[529] Diana Felix da Costa and Cedric de Coning, 'United Nations Mission in the Republic of South Sudan (UNMISS)' in Joachim A Koops and others (eds), *The Oxford Handbook of United Nations Peacekeeping Operations* (Oxford University Press 2015) 839; Jaïr van der Lijn, 'Protection of civilians: the case of South Sudan' in *SIPRI Yearbook 2017: Armaments, Disarmament and Security* (SIPRI 2017) 196; 'Fearing New Fighting, South Sudanese Pour into UN Camps' (*VOA News*, 3 July 2014) <https://www.voanews.com/a/south-sudan-idp-unmiss-camps-unrest/1950405.html> accessed 16 December 2021.

that remains to this day is the presence of unrest and continued violence. Lasting peace is, on the contrary, not yet in sight.

In order to fully grasp the peculiarities of UNMISS in regard to robust civilian protection, the two countries' histories shall be briefly outlined below. Subsequently, an account of the UN's initial engagement in the region shall pave the way for an intensified debate on the mission's growing impetus on civilian protection.

1. The Birth of a Nation – South Sudan's History

The history of the Republic of South Sudan is, unlike that of many other states, fairly young. Its foundation dates back only a few years. However, the prevailing conflicts take their beginnings much earlier. An understanding of the current UN engagement does not only require an examination of the nations' birth but furthermore an inquiry into its decades-long initiation.

a) Where it all Began – Key Data and Early History on (South) Sudan

South Sudan is a landlocked state in east-central Africa with an estimated population of around 11 million.[530] The capital of Juba is the largest city, located in the south of the country. South Sudan's GDP is subject to severe fluctuations and the country is highly dependent on oil and the oil price.[531] With 76% of the population living below the national poverty line in 2016 and a life expectancy at birth of just below 58 years in 2019,[532] the country is confronted with various demanding challenges. Until 2011, South Sudan belonged to the unitary state of Sudan. In light of this recent separation, the young nation's history can, therefore, not be understood without background knowledge of the single state of Sudan.

The former unitary Republic of the Sudan had access to the Red Sea as well as borders with Egypt, Eritrea, Ethiopia, the Central African Republic, Chad, Libya, Kenya, Uganda, and the Democratic Republic of the Congo.

From the very beginning, Sudan had been a melting pot of different cultural traditions, ethnicities, and religions. In pre-colonial times, the territory was composed of a multitude of small kingdoms and non-centralized societies that did not form one political unit.[533] In 1820, Sudan fell to the Ottoman Empire

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[530] as of 2019, 'South Sudan | Data' (*World Bank*) <https://data.worldbank.org/country/south-sudan> accessed 16 December 2021.

[531] 'Overview' (*World Bank*) <https://www.worldbank.org/en/country/southsudan/overview> accessed 16 December 2021.

[532] 'South Sudan | Data' (n 530).

[533] Magnus Pahl, 'Zeit der Fremdherrschaft 1820 bis 1955' in Torsten Konopka (ed), *Wegweiser zur Geschichte: Sudan und Südsudan* (Ferdinand Schöningh 2018) 31; This variety is furthermore reflected in the language,

and was from then on ruled by the viceroy of Egypt. While most of the north was quickly brought under control, the south of the country was tempting due to its rich deposits of raw materials, but also difficult to geographically develop.[534] At the end of the 19th century, Egyptian rule was replaced by British-Egyptian control. From then on, the two countries constituted the colonial powers.

As so often, colonial rule left deep marks and did not contribute to the positive development of the region. Instead, the deep separation between the two parts of the country persisted and even deepened within this period. At no point had the foreign rulers been able to control the whole area, while in the south, power was mainly in the hands of traffickers who merely exploited the land and its people.[535] Thus, when the colonial powers retreated in the middle of the 20th century, the north had benefited from a flourishing cotton trade, while the south already lacked a comprehensive school system.[536]

Altogether, the country was released into independence without a conclusive future vision. Instead, the integration of different regions to one unitary state, as decided by the colonial powers, was taken for granted and neither discussed nor questioned.[537] It was deliberately ignored that already then, a united nation existed merely on paper. Further conflicts were destined to arise.

b) The Consequences of Hatred – (South) Sudan after Independence

The former unitary Republic of Sudan became independent in 1956 and although this could have meant a new beginning, the burdens of the past, especially those of colonialism, weighed heavily. The new government was established in the north and was thus dominated by northern local interests. The existing dichotomies were thus deepened.

As a result, population groups from the south, mainly the Sudan People's Liberation Movement/Army (SPLM/A), immediately armed themselves out of fear of further deprivation. This enabled them to react directly and forcefully to a government that mainly consisted of representatives of the North and which was, in their view, just another colonial power.[538]

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which is mainly Arabic in Sudan and a variety of different languages belonging to the Eastern Sudanic subbranch of the Nilo-Saharan language family in South Sudan. Even if the conflict should not be simplistically reduced to an 'Arabs against Africans' narrative, cf. Christopher Zambakari, 'Post-Referendum South Sudan: Political Violence, New Sudan, and Democratic Nation-Building' [2013] The Georgetown Public Policy Review 41, 43-44, linguistic, religious, and ethnic differences do play an important role.

[534] ibid.

[535] ibid 31-32.

[536] Andreas Mückusch, 'Der erste Bürgerkrieg und die schwierige Unabhängigkeit des Sudan 1956 bis 2005' in Torsten Konopka (ed), *Wegweiser zur Geschichte: Sudan und Südsudan* (Ferdinand Schöningh 2018) 43-44.

[537] 'Post-Referendum South Sudan: Political Violence, New Sudan, and Democratic Nation-Building' (n 533) 49.

[538] see Mückusch (n 536) 44-45.

As a consequence of this situation, the nation's first civil war broke out, and it lasted more than a decade. In 1972, the Addis Ababa Agreement was concluded to provide a temporary halt to the clashes.[539] It could, however, not permanently pacify the region, and in 1983 a second civil war erupted.[540] Even though there were many approaches and attempts at mediation, negotiation, and cease-fires throughout this period, this war lasted for more than twenty years.[541] In 2005, the Sudanese government and the SPLM/A finally concluded the Comprehensive Peace Agreement (CPA). This officially ended '[…] one of Africa's longest and most intractable civil wars',[542] that had cost more than two million lives.[543]

The CPA now brought new hope. In addition to basic wealth, security, and power redistribution measures, it established South Sudan as a semi-autonomous region and granted it the right to hold a referendum concerning territorial independence.[544] What followed was a six-year intensive peace process,[545] resulting in a referendum held in 2011. The vast majority of the South Sudanese people (98,83%) therein decided in favor of independence for their region,[546] a result that was, of course, predictable. The declaration of independence of the new Republic of South Sudan followed in July 2011.[547] This makes South Sudan the youngest recognized nation in the world up until now.[548]

c) A Clean Slate? South Sudan as an Independent State

With this clean slate, hopes could have been high that the long-awaited peaceful future had finally begun. However, South Sudan's independence soon turned out to be just another act in a continuing tragedy. After all, whole generations had experienced nothing else but civil war. Mutual distrust and hatred were still predominant and prevented any genuine peace process.

Already the transition phase until 2012 had been marked by an increase in violence, unlawful killings, and displacement;[549] that gave an outlook on what to expect in the coming years.

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[539] ibid 51-51.

[540] Bernhard Chiari, 'Der zweite Bürgerkrieg und seine Auswirkungen auf die Gesellschaften des Sudan 1983 bis 2005' in Torsten Konopka (ed), *Wegweiser zur Geschichte: Sudan und Südsudan* (Ferdinand Schöningh 2018) 55.

[541] ibid 56, 69.

[542] 'Post-Referendum South Sudan: Political Violence, New Sudan, and Democratic Nation-Building' (n 533) 42.

[543] ibid.

[544] Chiari (n 540) 68-69.

[545] 'Background' (*UNMISS - United Nations Mission in South Sudan*) <https://unmiss.unmissions.org/background> accessed 16 December 2021.

[546] ibid.

[547] ibid.

[548] 'Overview' (n 531).

[549] 'Post-Referendum South Sudan: Political Violence, New Sudan, and Democratic Nation-Building' (n 533) 43.

aa) New State, Old Conflicts

As early as December 2013, the next civil war broke out; it has not been solved to date. Originally, it was triggered by a political struggle between President Salva Kiir and then-opposition leader and Vice President Riek Machar, which led to the discharge of Machar.[550] That, in turn, prompted violent clashes between the two major ethnic groups in South Sudan, Dinka, and Nuer, of which the first supported President Kiir and the latter sidelined Machar.[551] Lastly, President Kiir announced that Machar had attempted a coup to seize power. That fueled the tension and led to the conflict spreading to most parts of the country.[552]

In the midst of that, both sides displayed their aggression against the civilian population by committing rape and sexual violence, destroying whole villages, and killing members of the other ethnic group. Up until now, this bloody civil war has thus taken an enormous toll on the civilian population. Estimates of the exact number of victims diverge, but they certainly exceed 50,000 and probably go into the hundreds of thousands.[553]

bb) Continued Efforts for Peace

The pressure on the warring factions to find peaceful settlements to this conflict has thereby been high from the very beginning. The international community not only threatened sanctions but also initiated negotiations with different mediators.[554] Nevertheless, it took until August 2015 for a first Peace Agreement to be concluded. As a sign of goodwill, Machar was subsequently allowed to return to the country in 2016, after he had spent the last years in exile. Once more, he was sworn in as Vice President.[555] Again, however, this was only an apparent peace. Just shortly after his return, the conflict resumed and Machar had to flee anew. Following various attempts at cease-fires, all to be broken by either side, the opposing political leaders started fresh negotiations in June 2018.[556]

Subsequently, the Khartoum Declaration of Agreement was concluded. Essentially, it aimed at paving the way for the final Revitalized Agreement that followed in August 2018. This agreement declared the end of the civil war, determined a cease-fire, and restructured the distribution of powers within the

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[550] 'Civil War in South Sudan' (*Council on Foreign Relations - Global Conflict Tracker*) <https://www.cfr.org/interactive/global-conflict-tracker/conflict/civil-war-south-sudan> accessed 16 December 2021.

[551] ibid.

[552] ibid.

[553] ibid.

[554] ibid.

[555] ibid.

[556] ibid.

country that also included another reinstatement of Machar as Vice President.[557] The document was subsequently signed by the government, the Machar opposition, and several other rebel groups.[558]

cc) The Darfur Crisis

Adding to this already tense situation was the parallel conflict in Darfur, a region in western Sudan, which flared up in 2003 and has been smoldering ever since then.[559]

As is the case for the whole state of Sudan, Darfur has been affected by decades of tensions and violent unrest. In Darfur, this manifested itself in clashes between the nomadic Arab population and the sedentary ethnicities that identified themselves as native African. With the new millennium, violence escalated and brought further instability to the region.[560] When rebels from the agrarian population attacked government facilities, the regime responded by initiating an Arab militia force, soon to be known as the Janjaweed, which in return began to attack the settlers in Darfur.[561] A spiral of violence developed, which led to tens of thousands of deaths and more than two million IDPs, as well as a severe humanitarian crisis.[562]

Directly involved in this development was the former president of Sudan, Umar Al-Bashir, against whom an arrest warrant has been issued by the International Criminal Court (ICC). He is suspected of five counts of crimes against humanity, two counts of war crimes, and three counts of genocide allegedly committed in Darfur.[563] In August 2021, Sudan's civilian cabinet finally agreed to extradite Al-Bashir to the ICC,[564] wherefore a trial against him is now more eagerly awaited than ever before. Such proceedings certainly offer great potential to contribute to the ongoing peace and reconciliation process within Sudan.

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[557] ibid.

[558] ibid.

[559] While the peacekeeping mission thereto, UNAMID, has acquired its own meaning in the development of robust PoC-missions, see text to n 407-39 in chapter B, the Darfur conflict is likewise part of the history and development of the whole region. The conflicts can thus not be considered separately.

[560] Elke Grawert, 'Der Sudan nach 2005: Konsolidierung des autoritär-islamischen Regimes und neue Bürgerkriege' in Torsten Konopka (ed), *Wegweiser zur Geschichte: Sudan und Südsudan* (Ferdinand Schöningh 2018) 72.

[561] ibid 72-73.

[562] 'About UNAMID' (*UNAMID United Nations - African Union Hybrid Operation in Darfur*) <https://unamid.unmissions.org/about-unamid-0> accessed 16 December 2021; Wills (n 24) 61.

[563] 'Case Information Sheet: Situation in Darfur, Sudan The Prosecutor v. Omar Hassan Ahmad Al Bashir, ICC-02/05-01/09' (*ICC*) <https://www.icc-cpi.int/CaseInformationSheets/AlBashirEng.pdf> accessed 16 December 2021.

[564] Abdi Latif Dahir, 'Sudan Inches Closer to Handing Over Ex-Dictator for Genocide Trial' (*The New York Times*, August 12, 2021) <https://www.nytimes.com/2021/08/12/world/africa/darfur-omar-al-bashir-sudan.html> accessed 16 December 2021.

d) Conclusion – A Status Report

To conclude, the whole Sudan region is confronted with manifold and serious challenges on all different levels to this day. The societies are deeply polarized and decisively shaped by decade-long conflicts that have determined the lives of generations. Thus, the inherited burdens of colonialism and civil war still weigh heavily.

Nevertheless, former Special Representative of the UN Secretary-General for South Sudan, David Shearer, was cautiously optimistic about the overall development of South Sudan. In his last statement on the situation in South Sudan of 3 March 2021, he referred to the first anniversary of the transitional government that has been successfully formed.[565] However, he admitted, progress was still slow.[566]

Additionally, the trend with regard to acute food insecurity may give a reason for cautious hope, considering that compared to August 2019, the percentage of the population that was threatened by critical food insecurity had significantly dropped by January 2020.[567] Nonetheless, severe flooding has caused the loss of livestock and crops for around one million South Sudanese[568] and thus intensified the severe food crisis that had been caused by a lack of harvest in the midst of war.[569] Furthermore, the whole country faces around 2.0 million IDPs and about 8.3 million South Sudanese are people in need as of November 2021.[570]

Lately, the COVID-19 pandemic has moreover aggravated the already precarious humanitarian situation. According to the United Nations Country Team in South Sudan, the country is 'ranked as the

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[565] UNMISS Press Release 'Statement of the Special Representative of the Secretary-General David Shearer to the Security Council on the Situation in South Sudan (3 March 2021)' (*reliefweb*) <https://reliefweb.int/sites/reliefweb.int/files/resources/Statement%20by%20the%20SRSG%20to%20the%20Security%20Council%20-%203%20March%202021%20-%20%20As%20delivered.pdf> accessed 16 December 2021.

[566] ibid.

[567] cf. IPC classifications from August 2019, 'South Sudan: Acute Food Insecurity Situation for August 2019 and Projection for September – December 2019 and January – April 2020' (*IPC - Integrated Food Security Phase Classification*) <http://www.ipcinfo.org/ipc-country-analysis/details-map/en/c/1152135/> accessed 16 December 2021; with classifications as of January 2020, 'South Sudan: Acute Food Insecurity Situation January 2020 and Projections for February - April 2020 and May - July 2020' (*IPC - Integrated Food Security Phase Classification*) <http://www.ipcinfo.org/ipc-country-analysis/details-map/en/c/1152422/?iso3=SSD> accessed 16 December 2021.

[568] UNMISS Press Release 'Statement of the Special Representative of the Secretary-General David Shearer to the Security Council on the Situation in South Sudan (3 March 2021)' (n 565).

[569] 'Civil War in South Sudan' (n 550).

[570] 'South Sudan: Humanitarian Snapshot (November 2021)' <https://reliefweb.int/sites/reliefweb.int/files/resources/south_sudan_humanitarian_snapshot_november_0.pdf> accessed 16 December 2021; an increase compared to 1,6 million IDPs in December 2020, 'South Sudan: Humanitarian Snapshot (December 2020)' (*reliefweb*) <https://reliefweb.int/report/south-sudan/south-sudan-humanitarian-snapshot-december-2020> accessed 16 December 2021; and 7,5 million people in need between January and September 2020, 'South Sudan: Humanitarian Response Dashboard (January - September 2020)' (*OCHA*) <https://reliefweb.int/report/south-sudan/south-sudan-humanitarian-response-dashboard-january-september-2020> accessed 16 December 2021.

most dangerous country for people to live in during the COVID-19 pandemic'.[571] This is mainly due to the country's structural deficiencies and the unfortunate timing of the pandemic, hitting in times of still prevailing unrest and extensive displacement.[572] All of this culminates in a 'devastating socio-economic impact' of COVID-19 in South Sudan.[573] The country is therefore still far from stable or safe for civilians.

For this reason alone, the UN's commitment to the region remains undiminished. Before turning to the unique and so far unparalleled approach to civilian protection, however, a closer analysis of the overall peacekeeping engagement in Sudan and South Sudan is required.

2. On the Radar – The UN's Engagement in (South) Sudan

In light of this conflictual history, it is not surprising that Sudan and subsequently South Sudan have been on the UN agenda for many years. Peacekeeping in particular has thereby been the method of choice, so that different missions have accompanied the country all along the route, from independence until today.

a) A Seed of Hope – UNAMIS and the Faith in Peace

The continuing fighting and the resulting humanitarian crisis in Sudan had not only captivated the world, it had just as much drawn the attention of the international community. The UN had carefully monitored the cumbersome peace process. Still, while for many years, neighboring states, local alliances, and also the parties themselves had tried to find solutions, the UN had initially limited its involvement to that of a careful observer, supporting the negotiations from the outside.[574]

When in 2002 the Inter-Governmental Authority on Development (IGAD) initiated the conclusion of the Machakos Protocol, however, the time had finally come to raise the level of engagement. Within this protocol, the conflicting parties agreed upon a broad framework of new standards, including principles of governance, structures of governments, and the right of self-determination for the South Sudanese people.[575] Seizing this moment of success, the Security Council established a special political

[571] United Nations South Sudan, *COVID-19 Socio-Economic Response Plan* (2020) 5.
[572] ibid.
[573] ibid; also stressed by UNMISS Press Release 'Statement of the Special Representative of the Secretary-General David Shearer to the Security Council on the Situation in South Sudan (3 March 2021)' (n 565).
[574] see 'Background' (*UNMIS United Nations Mission in Sudan*) <https://unmis.unmissions.org/background-0> accessed 16 December 2021.
[575] Machakos Protocol [20 July 2002] 1.

mission, the United Nations Advance Mission in Sudan (UNAMIS), in order to facilitate the communication between the parties and prepare for a larger UN peace support mission.[576]

This strategy reflected the prevalent understanding of peacekeeping at the time. While the UN had supported the ongoing peace process as an advisor for years, it had saved active engagement until progress was on such positive terms it actually proved promising. Peacekeeping, in its traditional sense, was meant to support and guide an already existing peace process, instead of initiating or creating one itself. After all, this would have required completely different resources. With the clear memory of Rwanda and Srebrenica in mind, low-scale concise missions were still preferred to a large-scale, ambitious engagement.

With the Machakos Protocol now in place, chances were high that UNAMIS could meet this objective and transform the general commitment to a peaceful conflict resolution into a successful task fulfillment. To everyone's detriment, however, the conflict developed differently than anticipated.

b) Darfur and the Next Stage of Conflict – UNAMID and Joint AU/UN Action

One of the first aggravating factors was the Darfur crisis. When this catastrophe began to unfold, UNAMIS was tasked with further humanitarian aid in the region, while at the same time, the AU launched its own mission to Darfur, AMIS. Now, Sudan already hosted two international missions that were both engaged in Darfur. Even though the opportunity arose, a merger of both missions initially failed due to fierce resistance by the government of Sudan, which feared a complete loss of power to the UN.[577]

Before any agreement could be reached on this matter, however, the CPA was signed in 2005. In reaction to that, the UN launched its first peacekeeping mission to Sudan, the United Nations Mission to Sudan (UNMIS),[578] and transferred all UNAMIS functions to this new mission.[579] Its main aim was to support the implementation of the CPA and generally assist in the reorganization after the completion of the civil war.[580] Although it did provide for civilian protection, even by forceful means, it was not a PoC-mission, considering that it lacked the focus on civilian protection, which was only one objective amongst many.[581]

Once again, however, there were two different missions in Sudan. In 2007, a compromise was finally reached in regard to that question, whereupon both UNMIS and AMIS were terminated and the AU/UN

[576] UNSC Resolution 1547 [11 June 2004] UN Doc S/RES/1547 para 1.
[577] see 'Background' UNMIS (n 574).
[578] UNSC Resolution 1590 (n 407) para 1.
[579] ibid para 10.
[580] ibid para 4.
[581] ibid paras 4 (a) (ix), 16 (i).

hybrid mission UNAMID was established in exchange. This solution both satisfied the UN and the AU because, for one, it implied a division of power and thus prevented sole UN control,[582] whereas, on the other hand, it allowed UNMIS to continue its original goal of ensuring the peaceful separation of South Sudan. This was anyway a sizeable enough task by itself.

Although broader and on a larger scale, UNMIS, like UNAMIS, was essentially a political mission designed to maintain rather than create peace. In this respect, it had a very clear focus: the implementation of the CPA.

UNMIS was therefore not altogether unsuccessful. When in 2011 one major concern of the CPA was fulfilled and the referendum on South Sudan's independence was conducted, UNMIS had indeed achieved one of its major objectives.[583] Furthermore, it had also greatly supported the Sudanese authorities in the aftermath of a decade long civil war. On 9 July 2011, its mandate, therefore, ended as planned, six and a half years after the CPA was concluded.

Despite this partial success, however, South Sudan's future after independence was still more than uncertain.[584] A true end to the deeply rooted conflicts was not yet in sight. Finally, the UN had thus no choice but to return and become more actively involved. Its initial plan has thus not proven successful.

c) Knocked Out of the Skies – UNMISS to South Sudan

By 2011, any hopes for an imminent and final solution to the conflict had been destroyed. The ground of hard facts prevailed: South Sudan was in desperate need of outside help. To that end, the United Nations Mission to South Sudan (UNMISS) was brought into being. With resolution 1996 from 9 July 2011,[585] this mission was established with the objective '[...] to consolidate peace and security and help establish conditions for development in the Republic of South Sudan, with a view to strengthening the capacity of the Government of South Sudan to govern effectively and democratically and establish good relations with its neighbors [...]'.[586]

aa) In Continuation of UNMIS?

At first sight, UNMISS could have been perceived as the direct successor of UNMIS for South Sudan. Indeed, comparing both the inaugurating mandates, the differences are not as striking as one might have reasonably expected in view of the previous developments. While UNMIS had centered around

[582] see 'Background' UNMIS (n 574).
[583] see UNSC Resolution 1590 (n 407) para 4 (a).
[584] see text to n 549-64 in chapter C.
[585] UNSC Resolution 1996 [8 July 2011] UN Doc S/RES/1996.
[586] ibid para 3.

the implementation of the CPA,[587] a peace agreement, UNMISS' prime aim was the support for the South Sudanese peace process.[588] After all, both missions therewith aspired pacification in a region that had known nothing but war for decades. Additionally, UNMISS was initially also far away from a robust PoC-mission, even though it did provide for civilian protection through robust means.[589]

Despite these similarities, however, one striking difference does catch the eye: where UNMIS had still focused on *peace*building[590] and thus rather traditional peacekeeping tasks, the UNMISS mandate now forthrightly referred to *state*building.[591] The size and scope of the task ahead had thus increased noticeably.

Subtle but still discernible, the Security Council thus reacted to the strongly changed circumstances in Sudan in 2011, compared to 2005.

bb) The 'Consolidation' of Peace

The conditions on the ground were much more complex indeed. While countless actors had worked relentlessly for many decades towards an independent state of South Sudan, the question was forthwith how this state could function on its own. UNMISS' whole raison d'être was built on the realization that independence alone would not settle the underlying causes of conflict. In fact, there was little peace to 'consolidate', but rather to build from scratch.

In the beginning, the mission took up work for the period of one year.[592] In view of the task assigned, however, it is unlikely that this timeframe was actually ever considered to suffice. It thus came as no real surprise that resolution 2057 subsequently renewed the mandate for another year, in 2012.[593]

Again, this was not enough time by a long way either. In the following years, resolution after resolution therefore extended the mission and increased the number of troops considerably. When initially, the overall number of military personnel was set to 7,000 and that of police personnel up to 900,[594] the latest resolution 2567, which also extended the mission until 15 March 2022[595], maintained a troop ceiling of 17,000 armed forces and 2,101 police personnel[596]. As of August 2021, these altogether

[587] UNSC Resolution 1590 (n 407) para 4 (a).
[588] UNSC Resolution 1996 (n 585) para 3 (a).
[589] ibid para 4; to the difference between a robust PoC-mandate and a peacekeeping mandate that only stipulates civilian protection with all necessary means, see text to n 416 in chapter B.
[590] UNSC Resolution 1590 (n 407) para 4 (a) (vi).
[591] UNSC Resolution 1996 (n 585) para 3 (a).
[592] ibid para 1.
[593] UNSC Resolution 2057 [5 July 2012] UN Doc S/RES/2057 para 1.
[594] UNSC Resolution 1996 (n 585) para 1.
[595] UNSC Resolution 2567 [12 March 2021] UN Doc S/RES/2567 para 1.
[596] ibid para 7.

19101 people are actually deployed.[597] The original hope, expressed within resolution 1996, to reduce the military personnel after one year to 6,000,[598] has thus not materialized.

cc) A Puzzle of Challenges

The increase of troop numbers had been necessitated by a substantial worsening of the situation. When extensive violence broke out again in 2013, the relationship between the mission and the government also deteriorated.[599] The peacekeepers had been accused of aiding anti-governmental forces. These allegations were 'unfounded' from the UN's perspective,[600] but nevertheless led to significant upheavals.

This already strained relationship is today even further burdened by the different sanctions the Security Council has imposed on the country. In reaction to intensified violence, emanating both from the government and opposition forces, sanctions were established in 2015 and inter alia include a travel ban and an asset freeze.[601] Since then, the sanction regime has been continually renewed and strengthened.[602] Unsurprisingly, this regime is not well received by South Sudanese government representatives and thus does not foster any willingness to cooperate.[603]

This already tense situation was soon added to by a development that completely exceeded all predictions and rendered every strategy obsolete. As a direct consequence of the acute violence against the civilian population that unfolded from December 2013 on, hundreds of thousands of civilians desperately sought shelter. Among other places, they found it in the UNMISS' compounds in Juba, Bor, Akobo, Bentiu, Malakal, and Melut.[604] This development eclipsed all previous challenges and introduced a new, unprecedented and passive dimension of physical protection to the mission.

3. Conclusion – The Start of Something New

To summarize, South Sudan had already had a more than troublesome history when it finally became independent in 2011. While the hopes of a peaceful future had been high at that time, the state nevertheless remained caught between an enthusiastic vision and a hard reality.

From the outset, South Sudan was thus heavily dependent on external assistance, and after many actors had played their part in the overall development of the region, the country was now also in the

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[597] 'UNMISS Fact Sheet' (*United Nations Peacekeeping*) <https://peacekeeping.un.org/en/mission/unmiss> accessed 16 December 2021.
[598] UNSC Resolution 1996 (n 585) para 1.
[599] 'Background' UNMISS (n 545).
[600] ibid.
[601] UNSC Resolution 2206 [3 March 2015] UN Doc S/RES/2206 paras 9 ff, paras 12 ff.
[602] for the latest, renewed update, see UNSC Resolution 2567 (n 595).
[603] i.e. see ibid Preambular Clause 19.
[604] 'Background' UNMISS (n 545).

limelight of UN attention and engagement. Under the given circumstances, no one could thereby have reasonably hoped that UNMISS' tasks were to be accomplished quickly. Civilian protection in particular soon turned into a major challenge.

Hence, it remains to be examined how UNMISS has met this challenge, especially how robust civilian protection within the mission was firstly implemented and how it has then evolved and adapted. After all, the result of this evolution paved the way for a wholly new dimension of physical protection. That puts UNMISS to the forefront of contemporary peacekeeping development.

II. Hope for the Hopeless – UNMISS and its Course to a Robust PoC-Mission

When UNMISS took up its work in 2011, the South Sudanese people had already been distressed for decades of political unrest and violent conflict. The constant disputes had inhibited the development of coherent state structures that could, inter alia, provide a social security system. Civil society was thereby highly vulnerable to all sorts of threats.

UNMISS, though initially not conceived as a robust PoC-mission, could not turn a blind eye to this hazardous situation. For the mission to succeed, consolidating peace and security necessarily also implied an identifiable approach as to civilian protection. While the prior mandates had all provided for robust civilian protection, UNMISS had initially still not been a robust PoC-mission. Nevertheless, this mission type would later form the foundation for the unique protection approach that arose within the UNMISS' premises. Before further addressing such a potential new standard, it is thus essential to evaluate the course UNMISS took to a robust PoC-mission. This firstly requires a chronological analysis of selected mandates within their respective historical context of conflict. Subsequently, the transformative PoC-mandate will be identified, and its structure analyzed.

1. From Consolidating Peace to Protecting Civilians – An Evolution of Mandates

The initial focus of UNMISS was quite different from what the mission emphasizes today. From consolidating peace and supporting long-term development, the mission now aims to provide a safe living environment for large groups of the civilian population. This development did not take place overnight. Before the arising PoC-Sites could be fully integrated into a coherent strategy of civilian protection, UNMISS, by means of its mandates, firstly had to evolve from a classic, fourth-phase robust peacekeeping undertaking to a PoC-mission.

a) The Status Quo

UNMISS was found with the intention to '[…] consolidate peace and security, and to help establish the conditions for development in the Republic of South Sudan […]'.[605] To this end, '[…] longer-term state-building and economic development […]' should be fostered.[606] Furthermore, the mission aimed to support the government in exercising its responsibilities for conflict prevention, mitigation, and resolution, as well as in protecting civilians.[607]

Concretely, civilian protection was then considered at three different levels of the mandate. Firstly, as a monitoring obligation in regard to human rights violations and potential threats against the civilian population.[608] Secondly, as an obligation to assist the government 'as appropriate' in its efforts to protect civilians;[609] and thirdly, by the order to protect civilians under imminent threat of physical violence '[…] through proactive deployment […]'[610]. To implement the latter two, peacekeepers were furthermore equipped with an authorization to use 'all necessary means'.[611]

The protection of civilians was thus well recognized within the introductory UNMISS mandate. It was, however, conceived as only one component in the consolidation of sustained peace.

b) The Demand for a Protection of Civilians Strategy

As early as the following year, this focus slowly began to shift. Firstly, resolution 2057 related to the established objectives laid down in its predecessor[612] and refreshed the authorization in regard to robust means.[613] Further on, however, it '[n]otes the priority of UNMISS' mandated tasks in resolution 1996 (2011) for the protection of civilians and for the achievement of an improved security environment […]' and further '[…] welcomes the development of a protection of civilians strategy […]'.[614] Civilian protection was thus en-route to advance from a mere reflex of peace consolidation to a separate mission objective.

Following on from that, resolution 2109 increased the sense of urgency. Therein, the Security Council not only appealed to UNMISS to deploy its assets accordingly,[615] but furthermore '[u]nderscores that UNMISS' protection of civilians mandate as set out in paragraph 3 (b) (v) of resolution 1996 (2011)

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[605] UNSC Resolution 1996 (n 585) para 3.
[606] ibid para 3 (a).
[607] ibid para 3 (b).
[608] ibid para 3 (b) (iii).
[609] ibid para 3 (b) (iv).
[610] ibid para 3 (b) (v).
[611] ibid para 4.
[612] UNSC Resolution 2057 (n 593) para 1.
[613] ibid para 5.
[614] ibid para 3.
[615] UNSC Resolution 2109 [11 July 2013] UN Doc S/RES/2109 para 3.

includes taking the necessary actions to protect civilians under imminent threat of physical violence, irrespective of the source of such violence'.[616]

The increased emphasis on civilian protection was thereby the direct result of a deteriorating conflict situation. With the political struggle between President Salva Kiir and then-opposition leader and Vice President Riek Machar evolving, tensions within the SPLM/A and the population also rose. Eventually, the downside of independence manifested itself. For decades, the political elites in Southern Sudan had been able to attribute all their difficulties to the supremacy of Sudan's ruling. As an independent country, South Sudan was now thrown back on itself and especially on its power struggles.[617] The arising obstacles, such as structural mismanagement, a tendency towards authoritarianism, and a general lack of progress in all aspects of public life,[618] could no longer be easily dismissed as the fault of another.

c) Resurgence of Conflict

In December 2013, the situation finally escalated. The opposing leaders of the SPLM/A government had scheduled a meeting in Juba to discuss further action. What could have been a step towards conflict resolution, however, ended in disaster. After having accused the president of dictatorial behavior, Machar and his followers left the meeting and terminated all negotiations. Predictably, this triggered violent outbreaks and, shortly after, initiated a new civil war.[619]

The superficial peace within South Sudan had hardly lasted for two years. This was not only a major setback for UNMISS and its goals but particularly fatal for the civilian population. Not only did thousands of people die in the following clashes, but an additional 500,000 people lost their homes and had to flee within the first four weeks of fighting. This number increased to over 900,000 IDP's at the end of 2014.[620] Additionally, an estimated 3.2 million civilians and around 500,000 IDP's were put in a state of an acute food emergency.[621]

The erupting violence thereby also affected UNMISS and its peacekeepers. As a consequence, the Security Council increased the military and police capacity of the mission in December 2013 with resolution 2132.[622] While it still did not imply a major turnaround, it was nevertheless directional. In particular, because in paragraph 8 of the preambular clauses, the Security Council commends 'the

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[616] ibid para 4.
[617] see Manfred Öhm, 'Der Südsudan 2005 bis 2013' in Torsten Konopka (ed), *Wegweiser zur Geschichte: Sudan und Südsudan* (Ferdinand Schöningh 2018) 97.
[618] ibid.
[619] ibid.
[620] 'Background' UNMISS (n 545).
[621] ibid.
[622] UNSC Resolution 2132 [24 December 2013] UN Doc S/RES/2132 para 4.

active steps taken by UNMISS to implement its mandate and give refuge in its premises and other forms of assistance to the civilians caught in the fighting [...]'.[623] This is the very first mandate account of a process that would become symbolic for UNMISS and transform the overall status quo of civilian protection in South Sudan.

Overall, the protection of civilians was thus on the verge of becoming UNMISS' principal focus.

2. The Strategic Reorientation – UNMISS as a Robust PoC-Mission

Given the worsening conflict, a strategic reorientation of UNMISS and its targets was forthcoming. So far, the mission had proven largely powerless in the face of the unfolding crisis. As a rather broad mission, it followed an umbrella approach. The fragmented and ever-increasing needs of the civilian population were generally intangible with such a concept. UNMISS literally faced too many fronts at the same time. Although it had not been entirely unsuccessful so far, it henceforth adapted its strategy. Unfortunately, the relations between the mission and the host state were not affected by this renewal.

a) Striking a New Balance

With resolution 2155 from May 2014, the Security Council struck a new balance between the consolidation of peace and the protection of civilians. From there on, UNMISS could thus join the ranks of current robust PoC-missions.

To begin with, the resolution extended the mission for another six months, and it both increased and strengthened the responsibilities and structure of the deployed troops.[624] This also included the implementation of a Monitoring and Verification Mechanism (MVM) pursuant to the Cessation of Hostilities Agreement from 23 January 2013.[625]

Most importantly, however, the whole operation was now fully aimed at civilian protection.[626] Of all mandated tasks, it was henceforth the top concern. Consequently, six detailed subsections were devoted solely to the cause of civilian protection, defining the exact duties.[627] These included, inter alia, physical protection mechanisms,[628] thus fulfilling PoC peacekeeping tier two, exercising good offices and confidence building[629], thus entertaining peacekeeping tier one, and establishing a secure

[623] ibid Preambular Clause 8.
[624] UNSC Resolution 2155 [27 May 2014] UN Doc S/RES/2155 paras 3, 8.
[625] ibid paras 3, 4 (d) (i); IGAD Agreement on Cessation of Hostilities between the Government of the Republic of South Sudan (GRSS) and the Sudan People's Liberation Movement/Army (in Opposition) (SPLM/A in Opposition) [23 January 2014] para 5.
[626] UNSC Resolution 2155 (n 624) para 4 (a).
[627] ibid paras 4 (a)-(vi).
[628] ibid paras 4 (a) (i), (ii).
[629] ibid para 4 (a) (v).

environment for the return of IDPs[630], therewith effectuating tier three. Hence, UNMISS' PoC-strategy hereafter incorporated all three tiers of civilian protection.[631] In addition, resolution 2155 also clarified that civilian protection should from now on constitute the highest priority in all decisions concerning the use of resources.[632]

Lastly, resolution 2155 also refers again to the PoC-Sites that have already been mentioned in resolution 2132. They are recognized both when it comes to the deterrence of violence against civilians,[633] the maintenance of public safety and security,[634] as well as in regard to the right to free movement.[635] This reference proves that the phenomenon of PoC-Sites did factually occur before they were explicitly planned for[636] and the mission had turned into a robust PoC-mission. The emergence of civilian protection sites, through which passive protection is exercised, does therewith not coincide with the systematic turn to civilian protection. However, the relevance of the latter was decisively strengthened by the intensified occurrence of the former. Consequently, both developments are closely linked.

b) A Likewise Strategic Partnership?

With resolution 2155, the path to robust civilian protection was thus taken. At the same time, it became increasingly clear that the government was no longer as reliable a partner as initially assumed. Over the years, the Security Council increasingly criticized the South Sudanese government for its role in the conflict development.

Whereas in the beginning, it had emphasized '[…] the vital role of the United Nations to support national authorities […]'[637], it later found clear words regarding the responsibility for a renewed outbreak of conflict and condemned the '[…] violence caused by the country's political and military leaders'.[638] Thereafter, it went as far as '[s]trongly condemning the continued obstruction of UNMISS by the Transitional Government of National Unity (TGNU) and opposition groups, including severe restrictions on freedom of movement, assault of UNMISS personnel, and constraints on mission

[630] ibid para 4 (a) (vi).
[631] Hilde F Johnson, 'Protection of Civilians in the United Nations: A Peacekeeping Illusion?' in Mateja Peter and Cedric de Coning (eds), *United Nations Peace Operations in a Changing Global Order* (Palgrave Macmillan, Cham. 2019) 136.
[632] UNSC Resolution 2155 (n 624) para 5.
[633] ibid para 4 (a) (ii).
[634] ibid para 4 (a) (iv).
[635] ibid para 16.
[636] see below text to n 674-77 in chapter C.
[637] UNSC Resolution 1996 (n 585) Preambular Clause 8.
[638] UNSC Resolution 2155 (n 624) Preambular Clause 4.

operations, many of which were reported by the Secretary-General as violations of the Status of Forces Agreement (SOFA) by the TGNU'.[639]

The challenges for a renewed UNMISS mission were consequently not limited to a substantive realignment.

3. Conclusion – Robust Civilian Protection and the Hope for Peace in South Sudan

With resolution 2155, the cards regarding civilian protection within UNMISS were thus reshuffled. Although the mission had been unable to prevent another civil war, it had nevertheless successfully adapted to the changed circumstances and transformed into a robust PoC-mission that was more thoroughly positioned to effectively protect civilians than ever before.

The subtle implications for passive protection within PoC-Sites had thereby pointed the way towards a protection strategy that was far greater enhanced than it had ever been predicted. Before long, UNMISS' newly expanded protection approach would thus be supplemented by a new form of protection, with which the mission further approximated an integrated and whole-of-a-mission concept.

III. Heading for New Shores – Passive Protection in the Spotlight

From May 2014 onwards, UNMISS was a robust PoC-mission that combined all three strands of civilian protection. As part of the second tier, however, the mission implemented a wholly new form of safeguard. This new approach to physical protection shall be named passive protection[640] and circumscribes a form of protection in which civilians are admitted into so-called PoC-Sites, i.e., UN mission compounds that are restructured to shield and accommodate IDPs.

Albeit the admission of refugees into UN camps is not a new appearance, both the nature and scale on which UNMISS operates is unique and so far unequaled.[641] While it is considered to be a measure of

[639] UNSC Resolution 2406 [15 March 2018] UN Doc S/RES/2406 Preambular Clause 13.

[640] a term that has been introduced by Stephen Mathias, former United Nations Assistant Secretary-General for Legal Affairs, in his speech for the Asia Pacific Centre for Military Law (APCML), *UN Peacekeeping Today: Legal Challenged and Uncertainties* (2017) <https://www.youtube.com/watch?v=wR0PCHaF-6c> accessed 16 December 2021 (approximately at minute 8.30).

[641] Ralph Mamiya, 'Legal Challenges for UN Peacekeepers Protecting Civilians in South Sudan' (*American Society of International Law (ASIL)*, Volume 18 Issue 269 December 2014) <https://www.asil.org/insights/volume/18/issue/26/legal-challenges-un-peacekeepers-protecting-civilians-south-sudan> accessed 16 December 2021; Caelin Briggs, 'Protection of Civilians (POC) Sites and Their Impact on the Broader Protection Environment in South Sudan' [2017] 68 Humanitarian Exchange: Special feature The crisis in South Sudan 17, 17; Damian Lilly, 'Protection of Civilians sites: a new type of displacement settlement?' [2014] 62 Humanitarian Exchange 31, 31.

last resort, enabled for the shortest time possible,[642] in the UNMISS reality this short-term emergency solution has developed into the steady modus operandi.[643] By December 2020, 125,000 IDPs lived in such PoC-Sites.[644] This suggests that the sites were indeed a '[…] new kind of settlement for internally displaced persons (IDPs)'.[645]

Therewith, this approach to civilian protection is eligible as an illustration of the all-encompassing approach that is pursued by many modern robust peacekeeping missions.[646] The PoC-Sites themselves are an expression of a comprehensive protection strategy that aims to include as many aspects of civil life as possible. After all, their objective is not only to provide direct physical protection against outer threats, but it is to fully move the civilians away from any threat and provide them with food, water, sanitation, and living space.[647]

In the following, the factual and legal incorporation of passive protection within the UNMISS mission shall be delineated. Subsequently, the revised protection mechanism shall be analyzed in light of current challenges. This will ultimately reveal to what extent passive protection can be considered a new standard for civilian protection in robust PoC-missions.

1. Creating Facts – UNMISS and Its Management of Internally Displaced Persons

The UN has a long history of administering displacement and refugee movements, considering that they are a common consequence of violent conflict. In principle, South Sudan was no exception to that. However, already after a short time, it turned out here that the situation was anything but a standard case. A reaction that began as a regular emergency response to large numbers of IDP's soon evolved into a whole new protection approach that has prevailed to this day. The factual developments on-site therewith paved the way for legal adaptation. To understand the latter, it is thus essential to firstly retrace the creation of facts in UNMISS' management of IDPs.

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[642] *The Protection of Civilians in United Nations Peacekeeping* 2019 (n 23) para 65.

[643] i.e. see the reference in UNSC Resolution 2406 (n 639) para 7 (iv); Johanna Greco and Simon Rushton, 'Protecting Civilians in South Sudan: Time to Revisit the Mandate' (*IPI Global Observatory*, June 30, 2016) <https://theglobalobservatory.org/2016/06/south-sudan-protection-civilians-malakal/> accessed 16 December 2021.

[644] 'South Sudan: Humanitarian Snapshot (December 2020)' (n 570); since then, numbers have been dropping. However, by November 2021, still 34,000 IDPs were living in such sites, 'South Sudan: Humanitarian Snapshot (November 2021) (n 570).

[645] Greco and Rushton (n 643); although UNMISS officials would certainly disagree, considering that the camps are formally no IPD- but rather PoC-Sites, thus only intended for those civilians who are in immediate physical danger and not refugees in general, see text to n 735-37 in chapter C.

[646] see text to n 511-13 in chapter B.

[647] see ibid.

a) The Framework in December 2013

To briefly recapitulate, South Sudan had become an independent state in 2011 and the first few months of sovereignty had looked promising. In order to facilitate the process and '[...] consolidate peace and security [...]'[648], UNMISS was established and took up work. However, yearlong struggles over power and influence had not truly been resolved, as in December 2013, severe fighting broke out again.[649]

Starting from the capital Juba, the violence soon spread all over the country. As Hilde Johnson, Special Representative and then Head of UNMISS Mission describes, any attempt by blue helmets to actively intervene militarily during these first days would have been doomed to failure. Most UN capacities were situated in the state of Jonglei when the conflict erupted, as the situation there had initially been most tense. Apart from the fact that any use of force in an active combat situation between two warring parties would not have been covered by the mandate at the time (the mission had not yet been turned into a robust PoC-mission), UNMISS thus had insufficient resources in the affected regions.[650] At first, the peacekeepers were thus as helpless as everyone else in the eye of disaster.

b) Managing the Emergency

To make matters worse, this disaster did indeed develop rapidly. With the exponential growth in largely ethnically motivated violence, thousands of civilians were triggered to flee and seek refuge. The choice at hand, at least for those who were within reach, were the different UNMISS compounds that had been set up throughout the country. As it was mainly government troops who committed the violence, protection within state institutions was not worth considering. Apart from that, most people perceived the peacekeepers as impartial and sent with a duty to protect. It certainly also helped that the UNMISS bases were the only armed premises in the region[651] and thus promised much stronger protection than any other hideout. Consequently, Johnson reports that on the morning of December 16th alone, about 8,000 refugees sought shelter at Tonyping.[652]

Still, this was only the beginning. By the end of January 2014, more than 860,000 South Sudanese had been forced to leave their homes. The majority of these people, around 740,000, remained in the

[648] UNSC Resolution 1996 (n 585) para 3.
[649] see above text to n 619-21 in chapter C.
[650] Johnson (n 631) 139.
[651] Mamiya (n 641).
[652] Johnson (n 631) 140.

country, while around 123,000 had fled to neighboring countries. The IDPs sought protection in various locations, and by 30 January 2014, approximately 80,000 of them had entered UN camps.[653]

Although this short-term intake of civilians in an emergency situation was already a major challenge for the mission, it would not have required any kind of reorientation or restructuring. However, the mission leaders underestimated two developments that would determine the further course of events. Firstly, the sheer numbers of IDP's approaching UN bases were overwhelming. Secondly, they simply did not leave again. Johnson disclosed that at the time, they '[…] weren't thinking five days, but maybe a week, maybe two, maybe three weeks [...]'.[654] This assessment could not have been further from the truth.

c) *From a Temporary Solution to a Permanent Concept*

In the following months, it thus became increasingly clear that the people could not just return to their villages because of the ongoing fighting. Likewise, there were too few adequate alternatives to the PoC-Sites. Hence, while there was a constant influx of IDPs into the camps, few people were able to leave.

By January 2015, just over a year after the outbreak of the conflict, 1.5 million people were internally displaced, of which about 100,000 were sheltering in a total of six different UN bases.[655] By March 2016, there were already almost 1.7 million IDPs in South Sudan and more than 186,000 people living in PoC-Sites.[656] The preliminary peak was reached in August 2017, when the number of IDPs had risen to 1.87 million and nearly 213,000 were living on UNMISS bases.[657] Numbers had slightly dropped by September 2018, with 198,000 South Sudanese sheltering in PoC-Sites[658] and fell further to 180,000 in September 2019[659]. By November 2021, they were down to 34,000.[660]

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[653] 'South Sudan Crisis Situation report as of 30 January 2014 Report number 15' (*OCHA*) <https://reliefweb.int/sites/reliefweb.int/files/resources/South_Sudan_crisis_situation_update_15_as_of_30_January.pdf> accessed 16 December 2021.

[654] cited in Michael Arensen, *If We Leave We Are Killed: Lessons Learned from South Sudan Protection of Civilian Sites 2013–2016* (International Organization for Migration (IOM) 2016) 19.

[655] 'South Sudan Crisis: Humanitarian Snapshot (as of 7 January 2015)' (*reliefweb*) <https://reliefweb.int/report/south-sudan/south-sudan-crisis-humanitarian-snapshot-7-january-2015> accessed 16 December 2021.

[656] 'South Sudan Humanitarian Snapshot (March 2016)' (*reliefweb*) <https://reliefweb.int/report/south-sudan/south-sudan-humanitarian-snapshot-march-2016> accessed 16 December 2021.

[657] 'South Sudan: Humanitarian Snapshot (August 2017)' (*reliefweb*) <https://reliefweb.int/report/south-sudan/south-sudan-humanitarian-snapshot-august-2017> accessed 16 December 2021.

[658] 'South Sudan: Humanitarian Snapshot (September 2018)' (*reliefweb*) <https://reliefweb.int/report/south-sudan/south-sudan-humanitarian-snapshot-september-2018> accessed 16 December 2021.

[659] 'South Sudan: Humanitarian Snapshot (September 2019)' (*reliefweb*) <https://reliefweb.int/report/south-sudan/south-sudan-humanitarian-snapshot-september-2019> accessed 16 December 2021.

[660] ''South Sudan: Humanitarian Snapshot (November 2021) (n 570).

Even though these figures give cautious grounds for hope, they still exceed UNMISS' capacities many times over. Not least because the conflict is now in its seventh year, for many IDPs the PoC-Sites have turned into semi-permanent homes.[661]

d) Same Same But Different

However special the situation in South Sudan was in detail, it was still inherently predictable.[662] As Damian Lilly stipulates: 'Humanitarian crises frequently give rise to new kinds of settlements for internally displaced persons (IDPs)'.[663] What's more, the UN had relevant experiences with the provision of sanctuaries. In the 1990s, humanitarian assistance was provided in collective centers in the Balkans, and in 2005, tent villages were erected in Pakistan.[664] Other, similar examples of IDP settlements from East Timor, Rwanda, Palestine, Darfur, and the DRC can also be found.[665]

Nonetheless, although comparable in essence, the PoC-Sites in South Sudan are still distinct. For one, in contrast to the security zones established in Bosnia, the establishment of PoC-Sites was smaller scaled and initially not planned for.[666] For another, they are not regular refugee or IDP camps, as the civilians live under direct UN command and with armed peacekeepers,[667] who have the authority to use force. They do, however, not have any administrative powers to replace local authorities. Lastly, and other than the mission in Kosovo, it is arguable that UNMISS is not equipped with an executive mandate.[668] Assuring a high standard of security is therefore not only a practical but also a legal obstacle.

e) Conclusion – Mastered With Improvisation

Overall, the first months of IDP management in South Sudan were characterized by improvisation. As there was no long prelude in the establishment of PoC-Sites, it is no surprise that each compound found its individual ways of handling the situation. Generally, however, the military component of each premise was given the task of securing the base against outside threats, whereas UN police personnel

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[661] van der Lijn (n 529) 197.
[662] in fact, it *had* actually been predicted by the UNMISS leadership, see text to n 721-28 in chapter C.
[663] Lilly (n 641) 31.
[664] ibid.
[665] Bart L Smit Duijzentkunst, 'Emerging Voices: What's in a Mandate? Protecting Civilians in South Sudan' (*Opinio Juris,* 11 August 2015) <http://opiniojuris.org/2015/08/11/emerging-voices-whats-in-a-mandate-protecting-civilians-in-south-sudan/> accessed 16 December 2021; Jenna Stern, *Establishing Safety and Security at Protection of Civilians Sites: Lessons from the United Nations Peacekeeping Mission in South Sudan* (Stimson Center Civilians in Conflict Policy Brief 2 2015) 8; van der Lijn (n 529) 195.
[666] Lilly (n 641) 31.
[667] Mamiya (n 641).
[668] ibid; for further details, see text to n 825-29 in chapter C.

were responsible for the security within the camp.[669] Although convincing in theory, van der Lijn nevertheless concludes that '[…] the POC sites are far from safe'.[670] Several attacks, some with devastating losses, have proven him right.[671]

What sadly unites all sites is the catastrophic humanitarian situation. Not having been built as a long-term shelter for thousands of civilians, there is a shortage of just about everything. While the compounds are considerably overcrowded, the people are also unable to leave. The pressure on those responsible is, therefore, high.[672]

Concluding, UNMISS created hard facts with its IDP management - and the law had to follow. Although no one had anticipated it, passive protection had found its way into practice. As a new type of protection, it now required a coherent legal framework.

2. Precedent or Outlier? The Legal Integration of Passive Protection within UNMISS and the Broader UN Strategy

The corresponding legal framework was not long in coming. By 2014, UNMISS' PoC-Sites had emerged as a hard fact and required an adequate regulatory and legal infrastructure. Overall, the subject not only concerned South Sudan, even though the demand there was urgent. Rather, the UN as a whole faced the task of incorporating such a potential new standard into its broader protection strategies - or not. After all, it was not clear from the outset whether UNMISS would be classified as a precedent of a new era, or as a mere outlier situation.

In order to determine this, firstly, the embedment process of passive protection within the UNMISS mandates shall be retraced. In the following, UNMISS' practical approach in administering the PoC-Sites will be analyzed. Lastly, the incorporation of passive protection in broader UN strategies shall be portrayed.

a) On a Bumpy Road – The Embedment of Passive Protection in the UN Mandates

The evolution of UNMISS mandates has already been traced with regard to their development into robust PoC-mandates. With resolution 2155 from May 2014, this evolution was completed. The

[669] Hannah Dönges, 'Protection of Civilians needs to be understood as a collaborative strategy and not a campsite' (*Global Peace Operations Review*, 23 June 2016) <https://peaceoperationsreview.org/thematic-essays/protection-of-civilians-needs-to-be-understood-as-a-collaborative-strategy-and-not-a-campsite/> accessed 16 December 2021; cited in van der Lijn (n 529) 196-97.

[670] van der Lijn (n 529) 197.

[671] see text to n 788-93 in chapter C.

[672] see Johnson (n 631) 140.

references to passive protection within these mandates have already been indicated.[673] So far, however, the account has focused on the factual emergence of PoC-Sites. As another element in the contextualization of passive protection mechanisms in contemporary robust PoC-missions, an examination of the embedment of this protection means in the UNMISS mandates is still pending. The analysis will begin with a general notion of the requirements on a legal basis for passive protection and continue with the concrete embedment of respective clauses in the robust PoC-mandates.

aa) From Mandate to Application – or Vice Versa?

In principle, the application of any kind of measures within a peacekeeping mission follows a prior mandate that provides for the task. The mandates can thereby be broad and leave the peacekeepers with a margin of appreciation. However, the framework is regularly set. Regarding the establishment and operation of PoC-Sites, this rule has been reversed. Before any coherent legal concept could have been enacted, the escalating events required decisive action.[674]

Nonetheless, the response was well within the legal framework. When fighting broke out in December 2013, resolution 2109 was in force and provided for civilian protection. While it was a subsidiary protection standard that did not establish a PoC-mission,[675] the admissions of IDPs was still one conceivable means of safeguard, considering that it was no more intrusive than other forms of forceful protection. Furthermore, resolution 2132, in place when the admission of refugees started, had commended '[…] the active steps taken by UNMISS to implement its mandate and give refuge in its premises and other forms of assistance to the civilians caught in the fighting'.[676] In March 2014, then, the practice was confirmed by the Secretary-General in his Report on South Sudan, where he noted that UNMISS had '[…] assumed the lead in the management of safety and security of civilians in the protection sites within its bases [...]'.[677]

Thus, while the mandates initially lacked an explicit authorization, the operation of PoC-Sites did not take place in a legal vacuum. Consequently, it may be inferred that the legal admissibility of passive protection does not require explicit authorization at all. In view of the dimensions that this phenomenon would soon assume in South Sudan, the need for a serious debate nonetheless soon became decisive. While not a necessary requirement, a robust PoC-mandate with an explicit reference to passive protection would thus turn into a sufficient requirement.

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[673] see text to n 633-36 in chapter C.
[674] see text to n 651-53 in chapter C.
[675] cf. text to n 615-16 in chapter C.
[676] UNSC Resolution 2132 (n 622) Preambular Clause 8.
[677] UNSC, *Report of the Secretary-General on South Sudan* (UN Doc S/2014/158, 6 March 2014) para 26.

bb) Transforming Reluctance Into Acceptance – The Long Path of Incorporating Passive Protection Clauses in UNMISS Mandates

The path from merely referring to passive protection to fully endorsing it as a new means of civilian protection in South Sudan was long and characterized by contradictions. A joint position was not immediately found.

(1) A Cautious Beginning

While PoC-Sites had been referred to in certain precursor mandates, the rethink only really began with resolution 2155. Not only transforming the whole mission into a robust PoC-mission,[678] it furthermore explicitly connected passive protection with PoC. From May 2014 on, UNMISS was to '[…] deter violence against civilians, [...] with particular attention to displaced civilians, including those in protection sites [...]'[679] and to '[…] maintain public safety and security within and of UNMISS protection of civilians sites'.[680] Additionally, the government of South Sudan was called upon to help the mission in the '[…] allocation of land for protection of civilians sites'.[681] In this way, the factual emergence of PoC-Sites had been officially recognized and their operation included in the robust PoC tasks.

Apart from that, however, the attitude of the UNMISS leadership, which reflected that of the entire UN at the time,[682] remained rather cautious. The civilian protection sites were classified as temporary accommodations and while UNMISS carried that burden, a different way forward was nonetheless aspired to. Accordingly, with the situation on the ground worsening, the tone of the resolutions also sharpened. As the influx of IDPs into UNMISS bases had not reduced but instead continuously increased, resolution 2187 from November 2014 expressed appreciation for UNMISS' efforts and repeated the mandated protection tasks from resolution 2155,[683] but also underlined the '[…] necessity to find sustainable solutions for the internally displaced population, including in alternative safe and secure locations [...]'.[684] At the same time, though, the mandate made clear that UNMISS indeed considered it its own genuine mandate to operate the PoC-Sites when it stressed that effective

[678] see text to n 624-36 in chapter C.
[679] UNSC Resolution 2155 (n 624) para 4 (a) (ii).
[680] ibid para 4 (a) (iv).
[681] ibid para 16.
[682] see the reserved attitude coming to light in UN/UNMISS Guidelines, *Civilians seeking protection at UNMISS bases* (30 April 2013) para 2; see also text to n 755-60 in chapter C.
[683] UNSC Resolution 2187 [25 November 2014] UN Doc S/RES/2187 para 4 (a) (ii), (iv).
[684] ibid Preambular Clause 10.

cooperation with local communities in and around of PoC-Sites was vital for the mission '[…] to fulfil UNMISS' Protection of Civilians mandate'.[685]

(2) The Ambiguity Continues

The ambition to effectively fulfill the PoC-mandate while simultaneously applying a cautious IDP approach caused an ambiguity that ran through the mandates that followed as well.[686] UNMISS apparently neither wanted to operate PoC-Sites nor establish any new standard of protection, but in view of the situation, it was compelled to do so and consequently also recognized its protective duties.

With resolution 2223 from May 2015, the worsening security situation in and around the camps was referred to with increased attention.[687] It also became apparent that operating the camps consumed large numbers of resources that were urgently required in different areas. As a reaction to that, resolution 2223 specified that UNMISS' protection was '[…] not limited […]' to those IDPs living in UN camps,[688] while before, displaced persons including those in PoC-Sites were accorded with particular attention in protection.[689]

Next in line, resolutions 2241 from October and 2252 from December 2015 followed in the same vein. With them, however, the rhythm of adoption changed significantly. Not only did they indicate an intensification of the conflict in South Sudan but furthermore revealed internal power struggles at the UN, which time and again dominated the peacekeeping development. As such, the topic deserves a brief side note.

(3) A Proof of Power

Until October 2015, UNMISS had been constantly prolonged for either one year or at least six months. Resolution 2241 then again extended UNMISS for only two months, followed by a renewal for seven months (2252), half a month (2302), four months (2304), and finally one day (!) (2326). Considering that in June 2015, the authors of the HIPPO Report had just proposed a regular mandate review process every six months,[690] this appeared out of the ordinary. An explanation can only be found in the factual developments on the ground.

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[685] ibid Preambular Clause 19.
[686] UNSC Resolution 2223 [28 May 2015] UN Doc S/RES/2223 Preambular Clauses 14, 26.
[687] i.e. ibid para 17.
[688] ibid para 4 (a) (ii).
[689] UNSC Resolution 2187 (n 683) para 4 (a) (ii).
[690] *Uniting Our Strengths for Peace - Politics, Partnership and People* (n 143) para 176; referred to in Johnson (n 631) 144.

In August 2015, the first peace agreement for South Sudan had been signed, the 'Agreement on the Resolution of the Conflict in the Republic of South Sudan'.[691] This agreement established the Transitional Government of National Unity (TGoNU)[692] and brought with it the great hope for peace. President Kiir was appointed President and Executive Head of state for the Transitional Period[693] and Machar was made Vice President again,[694] which allowed him to return from his yearlong exile. Nonetheless, president Kiir soon broke the agreement by dividing the country into 28 (later even 32) states to increase the power of the Dinka ethnic group.[695] The ensuing violence did not only factually end the peace agreement, but furthermore led to a shift in conflict hotspots to the previously rather quiet southwest of the country.[696] It would take until 2018 before another peace agreement would come about.

This turmoil created a great deal of uncertainty for UNMISS. Extending the mission for only a little more than two months, resolution 2241 was to provide the necessary leeway in order to evaluate how the peacekeepers could better support the Agreement.[697] In addition, however, there was considerable disagreement in the Council, mainly between the United States and the Russian Federation, regarding the further procedure. The controversy primarily concerned the sanctions against South Sudan, the installation of a hybrid court in South Sudan, and the interpretation of IHL provisions.[698] It is thus to assume that the process of finding a resolution wording that allowed either party to abstain without losing its face must have been cumbersome.

All of these tensions came to a head in 2016, when first the PoC-Site in Malakal and subsequently the one in Juba were attacked.[699] Although UNMISS' forces had been topped up in December 2015,[700] the mission was profoundly overstrained by this. As a result, the Council internal dispute intensified, so that resolution 2326 could not be adopted until 15 December 2016, the exact date to which the previous resolution had extended UNMISS.[701] Even more astounding is that it prolonged UNMISS for

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[691] UNSC, *Annex to the letter dated 19 August 2015 from the Chargé d'affaires a.i. of the United States Mission to the United Nations addressed to the President of the Security Council*; *Agreement on the resolution of the conflict in the Republic of South Sudan* (UN Doc S/2015/654, 19 August 2015).

[692] ibid para 1.

[693] ibid para 5.1.

[694] ibid para 7.1.

[695] Torsten Konopka, 'Der Bürgerkrieg im Südsudan von 2013 bis zur Gegenwart' in Torsten Konopka (ed), *Wegweiser zur Geschichte: Sudan und Südsudan* (Ferdinand Schöningh 2018) 107.

[696] ibid 108.

[697] see UNSC Resolution 2241 [9 October 2015] UN Doc S/RES/2241 para 4 (e); see also UNSC, 7532nd meeting, Friday, 9 October 2015, 11.20 a.m. [9 October 2015] UN Doc S/PV.7532 6 (Statement of Mr. Deng).

[698] UNSC, 7532nd meeting (n 697) 2–3; UNSC, 7581st meeting, Tuesday, 15 December 2015, 10.20 a.m. [15 December 2015] UN Doc S/PV.7581 2–3.

[699] for further reference to these incidents, see text to n 788-93 in chapter C.

[700] UNSC Resolution 2252 [15 December 2015] UN Doc S/RES/2252 para 7.

[701] UNSC Resolution 2304 [12 August 2016] UN Doc S/RES/2304 para 4.

only one day.[702] In view of the administrative effort involved, this can only exemplify how intense the controversy in the Security Council must have been.

(4) The Growing Impact

Passive protection mechanisms and their consequences were thus not the only challenges for the Security Council in South Sudan. However, while the Council struggled in finding a coherent strategy, the Secretary-General had published a special report, reviewing the mandate of UNMISS. Although he did not stipulate a fundamental reorientation, he officially recognized the PoC-Sites as one mode of protection, while calling for an equal distribution of resources between the sites and the protective mechanisms for civilians outside of such camps.[703] At the same time, the Secretary-General demanded more resources for the protection of these sites.[704] Passive protection had reached the next level of recognition.

From then on, it became increasingly difficult to disguise the approach as short-term and transitional. Consequently, resolution 2304 no longer called for a different, sustainable solution.[705] but acknowledged PoC-Sites as adequate safeguards. Consequently, the resolution contained concrete instructions for the organization of the sites.[706] Given that the number of IDPs in PoC-Sites had almost reached its peak by then,[707] this decision was more than justified.

Resolution 2304 subsequently follows in the footsteps of its predecessors in many respects.[708] It does, however, additionally call for a report by the Secretary-General on the status of UNMISS and its relations to the transitional government.[709] This report followed in November 2016 and also concerned the situation of, in, and around PoC-Sites. While the Secretary-General reaffirmed UNMISS' protection mandate to encompass the sites, he also stressed that the mission will likely only be able to either secure those sites or perform other protective tasks outside the mission, if further displacement should occur.[710] Turning directly to public safety and security within the PoC-Sites, the Secretary-General

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[702] UNSC Resolution 2326 [15 December 2016] UN Doc S/RES/2326 para 1; even though no official reason was provided for this delay, the minutes of the Security Council meeting prove that the Russian Federation disapproved of the short timeframe, accusing its fellow members of having intentionally delayed the process, UNSC, 7838th meeting, Thursday, 15 December 2016, 6.05 p.m. [15 December 2016] UN Doc S/PV.7838 2.

[703] UNSC, *Special Report of the Secretary General on the Review of the Mandate of the United Nations Mission in South Sudan* (UN Doc S/2015/899, 23 November 2015) paras 37-40.

[704] ibid paras 42-44.

[705] recourse to this approach is found only once more with resolution 2327 from December 2016, UNSC Resolution 2327 [16 December 2016] UN Doc S/RES/2327 Preambular Clause 22.

[706] UNSC Resolution 2304 (n 701) para 5.

[707] see text to n 656-57 in chapter C.

[708] i.e. UNSC Resolution 2304 (n 701) Preambular Clause 5-6, para 4.

[709] ibid para 16.

[710] UNSC, *Special Report of the Secretary-General on the Review of the Mandate of the United Nations Mission in South Sudan* (UN Doc S/2016/951, 10 November 2016) para 31.

proposed to increase the overall security situation[711] and the management of the holding facilities within the sites, which he even deemed 'a priority'.[712] The report also demonstrated that at the time, the UN assumed that only the overall security of the camps was their obligation, while the site itself should be run and maintained by humanitarian actors.[713] This vision would, however, never become a reality.

(5) At Long Last

In March 2019, the Secretary-General was lastly called for another report by resolution 2459, this time specifically on future planning for the PoC-Sites.[714] This report followed in September 2019. By that time, the Revitalized Peace Agreement had just been adopted and while implementation remained limited so far, according to the report,[715] the overall security situation did improve.[716] Still, the humanitarian situation remained severe.[717] All the while the Secretary-General drew a rather positive picture of the protection of civilians' situation for UNMISS and described different approaches, with which the mission had adapted to its new role.[718]

At long last, the UN now began to take concrete measures to meet its passive protection standards within their PoC-Sites. After almost ten years of civil war and IDP settlements that proved to be at least semi-permanent, the Security Council accordingly emphasized the '[…] flexibility in UNMISS's posture within and outside POC sites […]' from March 2020 onwards.[719]

cc) Conclusion – Passive Protection as a Mandated Aim

Whether UNMISS' PoC-Sites rather need concerted efforts to function effectively than more flexibility remains debatable. At least, peacekeepers can nowadays refer to a clear legal framework that recognizes passive protection as one main tool to protect civilians in South Sudan. This has not always been the case. While PoC-Sites found their way into the mandates early on, the development up to today's acknowledgment was characterized by a fundamental reticence.

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[711] ibid paras 37-40.
[712] ibid para 54.
[713] ibid para 39.
[714] UNSC Resolution 2459 [15 March 2019] UN Doc S/RES/2459 para 36.
[715] *Situation in South Sudan* (n 491) para 2.
[716] ibid para 22.
[717] ibid paras 38 ff.
[718] ibid paras 48 ff.
[719] UNSC Resolution 2514 [12 March 2020] UN Doc S/RES/2514 Preambular Clause 33; see a similar wording in the latest UNMISS resolution 2567 from March 2021 (n 595) para 3 (a) (iii).

In conclusion, passive protection and robust PoC peacekeeping in South Sudan emerged almost simultaneously and reinforced each other. When the mission was turned into a robust PoC-mission in May 2014, there were already more than 100,000 South Sudanese estimated to be internally displaced.[720] While a robust PoC-mandate has thus not been a necessary condition for the construction of PoC-Sites, it has facilitated the development of long-term shelters that ultimately lead to a new protection approach. Passive protection was thus only reluctantly included in the UNMISS mandates, but it has subsequently transformed the way in which PoC is perceived altogether.

b) Biting the Bullet – The UNMISS Leadership and its Practical Approach to Passive Protection

The piecemeal inclusion of passive protection in the UNMISS mandates reflected the evolving positions within the Security Council. With a constantly changing conflict environment in South Sudan, its members slowly had to transform their reluctance into acceptance and, ultimately, action.

Overall, this was true for the UNMISS leadership as well. In particular, however, it developed its very own approach to passive protection. It thus remains to be analyzed how the UNMISS leadership reacted to the unfolding events and how the mechanism was finally incorporated into the overall protection concept. Setting the first precedent, this approach has ultimately also defined the current status of passive protection within robust PoC-missions.

aa) Conceptual Preparations

In line with the progressive inclusion of passive protection in the UNMISS mandates the embedding of strategic approaches in the mission concept developed only gradually. The underlying challenges in relation to IDPs in non-international armed conflicts were, however, well-known. In fact, both the scholars and the UNMISS leadership were aware of the fact that IDPs could potentially seek shelter in UNMISS bases. In an early assessment of the mission's civilian protection strategy, Jort Hemmer referred to protection actions, ranging '[…] from advising and assisting the GRSS security forces in protecting civilians and the preventive deployment of UN troops in high-risk areas, to offering refuge to civilians who seek protection at a UN compound'.[721]

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[720] 'South Sudan Crisis: Humanitarian Snapshot (as of 12 May 2014)' (*reliefweb*) <https://reliefweb.int/report/south-sudan/south-sudan-crisis-humanitarian-snapshot-12-may-2014> accessed 16 December 2021.

[721] Jort Hemmer, 'We are laying the groundwork for our own failure': The UN Mission in South Sudan and its Civilian Protection Strategy: an early assessment (CRU Policy Brief 25, January 2013) 4; in a similar vein, cf. also *Civilians seeking protection at UNMISS bases* (30 April 2013) (n 682) para 6.

Additionally, UNMISS had admitted a considerable number of IDPs into its camps before. Between October 2012 and November 2013, there were a total of 12 individual cases in which more than 12,000 civilians had taken shelter in UNMISS bases.[722] However, these incidents had been met with rather improvised solutions that were not backed by any kind of policy.

Even before the conflict worsened in December 2013, this level of preparation had been judged to be inadequate. In order to increase it, UNMISS developed guidelines on civilians seeking protection at UNMISS bases in April 2013 (reviewed in 2015).[723] First of all, these guidelines declared that passive protection was considered to be a means of last resort.[724] It could only be a '[…] temporary measure, with the civilians preferably not admitted inside the base, except in extreme situations'.[725] In such an extreme situation, minimal relief assistance was to be provided for a maximum of 72 hours, until other humanitarian actors could take control.[726]

Nonetheless, the authors also requested '[p]roposals for an alternative longer-term solution […]' other than accommodation inside UN bases.[727] However, these proposals were never made.

Lastly, the guidelines required each UNMISS base to generate contingency plans that would equip them for a future influx of IDPs.[728] While such plans were indeed produced, they contributed only marginally to the preparation for what was to come.

bb) The Practical Trial

The mission was thus, at least in theory, prepared for the influx of IDPs into its compounds. What this theory had not assumed, however, was the scale of the unfolding events; it had been grossly underestimated. The existing plans had anticipated the arrival of no more than 500 IDPs.[729] In addition, too few staff members were sufficiently informed about the existence of any existing guidelines and their scope.[730]

Factually, the mission was thus fully overwhelmed by the masses that approached different bases in December 2013. When whole villages arrived, the compound officials literally let the gates be broken instead of proactively opening them. As Toby Lanzer, Deputy Special Representative of the Secretary-

[722] Lilly (n 641) 31.
[723] *Civilians seeking protection at UNMISS bases* (30 April 2013) (n 682).
[724] ibid para 11.
[725] ibid para 12.
[726] ibid para 20.
[727] ibid.
[728] ibid; see also Lilly (n 641) 31; and the reference in Arensen (n 654) 16.
[729] Arensen (n 654) 17; Why they had calculated for so few IDPs only can only be guessed, especially after they had experienced groups of more than 5000 people seeking entrance in the UNMISS base in Wau before, *Civilians seeking protection at UNMISS bases* (30 April 2013) (n 682) para 8.
[730] Arensen (n 654) 17.

General, Resident Coordinator, and Humanitarian Coordinator at the time, stated: 'first of all, there was no alternative in at least two ways. We never “opened the gates,” it was an attitude that if there are people under threat, under stress, jumping over the fence, which was what the vast majority were doing, we will welcome them and we will protect them'.[731]

In spite of everything, the UNMISS leadership was subsequently forced to position itself and develop a strategy to approach the situation. After all, no one could realistically estimate how long it would last. Insofar as being in conformity with the Security Council, the initial strategy focused on damage control. As the true dimensions of the events could not yet be foreseen, the primary aim was to enable the quick and safe return of the people.

cc) Administering an Exception

To begin with, the UNMISS leadership thus focused on the management of a situation it rated as a mere exception. The 2013 guidelines on Civilians Seeking Protection at UNMISS Bases were consequently characterized by a reserved attitude that focused on an early suspension of IDP accommodation. It read: 'In the event that civilians do seek protection at a UNMISS base, the Mission should avoid providing any unwarranted incentive that might lead to a long-term presence of the civilians or induce a pull factor for further civilians to come to the base'.[732]

In order not to facilitate any conditions under which IDPs could settle permanently, the bases provided nothing more than the absolute minimum for living[733] and sometimes not even that. Sooner than later, severe overcrowding led to insufficient sanitary facilities that in turn promoted the outbreak of diseases. Together with general malnutrition, constant violence among camp residents, and lack of space, this created a situation that was hardly sustainable in the long run.[734]

The defensive attitude was also reflected in the language used. While the designation 'IDP camp' could have indicated an intentional accommodation, one decided in favor of 'PoC-Sites', which is as technical and thus neutral as possible. In theory, UNMISS was only obliged to help civilians under imminent threat of physical violence,[735] and not generally all displaced persons.[736] In fact, however, this made little difference, as almost all IDPs seeking shelter were under acute threat and in any case, there were not capacities to verify any such condition. Effectively, Greco's and Rushton's assertion that these

[731] Toby Lanzer, cited in ibid 19.
[732] *Civilians seeking protection at UNMISS bases* (30 April 2013) (n 682) para 12.
[733] van der Lijn (n 529) 197.
[734] Greco and Rushton (n 643); Lilly (n 641) 33.
[735] Lilly (n 641) 32.
[736] for example, as defined in the OCHA, United Nations, *Guiding Principles on Internal Displacement* (June 2001, OCHA/IDP/2004/01) Introduction para 2.

camps are a '[…] new kind of settlement for internally displaced persons […]' is thus not so far-fetched after all.[737]

In the end, civilians even had to be rejected at UNMISS bases.[738] This certainly fueled discussions about UNMISS' understanding of protection and camp management.[739] As Greco and Rushton pointedly note: 'There is no point in protecting civilians from violence if they are then left to die from infectious diseases, malnutrition, or violence within the compound itself'.[740] After all, the requirements for humanitarian care are different for semi-permanent settlements than they are under an emergency mechanism.[741] In principle, it is intelligible that the mission leaders did not want to offer any further incentives for IDPs to seek protection within the already overcrowded compounds. Nevertheless, it remains debatable whether this purpose actually justified such a vigorous strategy of deterrence.[742]

dd) In Their Best Possible Manner?

What thus motivated the UNMISS leadership to entertain this approach?

To begin with, the actual capabilities of the mission left little room for differentiated solutions. That made the leadership cautious. As described in the protection guidelines from 2013, the failures of protection within the safe areas of Srebrenica have '[…] led to a general reluctance within UN peacekeeping to create such areas without the adequate capabilities to defend them'.[743] However, while it is indeed convincing to invest in assurance, prevention, and pre-emption even before people are forced to flee their homes,[744] there is also a need for a coherent *protection* strategy in case this has not been done. Likewise, it is certainly correct that the mass intake of IDPs does result in a security risk for the UNMISS personnel, its assets, and the IDPs themselves.[745] Yet, reading the 2013 guidelines on Civilians Seeking Protection at UNMISS Bases, it is difficult to avoid the impression that the mission leaders' top priority was to avoid such responsibility[746] or rather to '[…] further prioritize its PoC activities […]'[747].

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[737] Greco and Rushton (n 643), cf. above text to n 645.
[738] The IOM Report tells of at least one incident in Western Equatoria, in which IDPs were refused entrance into the UN bases and were instead redirected to an NGO compound nearby, Arensen (n 654) 31.
[739] see ibid.
[740] Greco and Rushton (n 643).
[741] ibid.
[742] see also van der Lijn (n 529) 197.
[743] *Civilians seeking protection at UNMISS bases* (30 April 2013) (n 682) para 7.
[744] see the targeted measures in ibid paras 18–22.
[745] ibid para 27.
[746] e.g. see ibid para 12.
[747] Hemmer (n 721) 1; cited in Arensen (n 654) 32.

Beyond that, it can be assumed that the expectations for what the sites could achieve should be kept low. When the mission was established, critical voices already noted that 'UNMISS's broad and ambiguous mandate and overly ambitious PoC objectives have created and perpetuate expectations that it will never be able to meet'.[748]

Thus, while the deterrence strategy remains undesirable from a protection point of view, it is all the more comprehensible from a practical point of view. In the end, the action, which had been taken within the first few months of conflict had, howsoever improvised it was, saved many lives. This, in turn, prevented the UNMISS leadership from engaging in any profound analysis of the underlying deficits and structures that were misguided to effectively cope with the situation on a long-term basis.[749]

ee) Conclusion - Endorsed as a Measure of Last Resort

Different from the original plan, the PoC-Sites could not be dispersed in good time. Rather, the UNMISS leadership had to bite the bullet and accept that passive protection rose to become the primary means of civilian protection in South Sudan. This recognition was granted only very reluctantly.

Even today, while passive protection is recognized as one major strategic aim of UNMISS, it is the least targeted objective. As current Special Representative of the Secretary-General for South Sudan and Head of UNMISS mission David Shearer elaborated:

The joint strategy identified four key areas of work. First, to advance the state responsibility to protect civilians by engaging with, and influencing, key political actors to set the policy and legal framework to secure the safety of their own population. Second, to foster a positive protection environment, we needed to support conflict-resolution and mediation, proactively deploy forces as a deterrent against violence, and support the legal, security and judicial systems. The third area of focus was to directly assist survivors of violations and abuses by working to investigate and publicly report serious crimes, advocate for the perpetrators to face justice and ensure that humanitarian assistance reached those in need. Finally, in situations when authorities were unwilling or unable to protect their own people, 'UNMISS would secure civilians in protection sites and beyond'.[750]

At least by now, a specialized unit has been created that administers the PoC-Sites, called RRP.[751]

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[748] ibid.

[749] Matt Wells, 'The Mixed Record of UN Peacekeeping in South Sudan' [2017] Number 68 Humanitarian Exchange Special Feature: The crisis in South Sudan 13, 14.

[750] *The Protection of Civilians in United Nations Peacekeeping Handbook* (United Nations 2020) (n 526) 44.

[751] 'Relief, Reintegration and Protection' (*UNMISS United Nations Mission in South Sudan*) <https://unmiss.unmissions.org/relief-reintegration-and-protection> accessed 16 December 2021.

To conclude the account of the legal integration process of passive protection, it remains to be analyzed how the greater puzzle of general UN protection strategies has incorporated the mechanism.

c) Passive Protection and the Broader UN Protection Strategies – One Piece of the Puzzle?

Passive protection, as applied within several PoC-Sites, defines and shapes UNMISS in a unique way to this day. As a protection standard, it is, however, neither new nor limited to the South Sudan mission. The phenomenon has thus also been analyzed and classified by different UN organs before and during UNMISS, first and foremost the DPKO/DPO and the Security Council.

To take an even wider perspective, it hence remains to be analyzed how passive protection has been perceived by these units. This will reveal the extent to which the protection standard is incorporated in the general concept of civilian protection, expressed within PoC-missions, which has developed and evolved in recent years.

aa) UN Peacekeeping Policies and their Comprehensive Approach to the Protection of Civilians

On a broad level, the DPKO/DPO has engaged with the implementation and strategic assessment of passive protection within peacekeeping. By means of two comprehensive policies, its initial regulatory status was thus transformed.

(1) The Initial Regulatory Status

Albeit the protection of civilians has continuously grown in importance in the UN peacekeeping framework, it took years before a coherent framework as to their systematic protection in the form of robust PoC-missions had been established.[752] It should, therefore, come as no surprise that passive protection as a fairly young phenomenon has only very recently been included in any strategic assessment. While internal displacement and the protection needs of IDPs have been UN issues for many years, it was not majorly associated with UN peacekeepers and especially not on UN bases.

This can be particularly well clarified by the second edition of the Guiding Principles on Internal Displacement, published by the United Nations Office for the Coordination of Humanitarian Affairs (OCHA) in 2004. There is no reference to anything comparable to PoC-Sites or even any special UN responsibility when it comes to the protection of IDPs. While the primary responsibility of the national

[752] see text to n 364 ff.

authorities for protection and the provision of humanitarian assistance is reaffirmed,[753] the mere *right* of '[i]nternational humanitarian organizations and other appropriate actors' to offer services is stipulated.[754]

The initial regulatory status was thus beyond vague.

(2) The DPKO's Approach to Passive Protection of 2015

However, by 2015, there was sufficient reason to make a start and address the subject. PoC had already taken the center stage of peacekeeping and the events in South Sudan were unfolding rapidly. Consequently, the DPKO published a policy on the Protection of Civilians in United Nations Peacekeeping.[755] This policy not only established the three tiers of PoC[756] but also laid down four operational phases of response within such missions. These are prevention, pre-emption, response, and consolidation.[757]

Within this classification, the operation of a PoC-Site is most likely to be categorized as a mechanism of pre-emption that applies once a threat is identified and is likely to affect civilians.[758] The situation may then require '[…] deterring a party or person(s) from committing hostile acts, or affecting their capacity to do so, including through the use of force'.[759] The authors thus assessed PoC-Sites as one mechanism to avert imminent dangers for civilians.

Nonetheless, it was not the preferred mechanism to that end. Firstly, the mission was to prevent any kind of forced displacement. Only if that was not possible, the mission should provide direct physical protection to the civilians. In this order of priority, the peacekeepers were then to provide support outside UN premises, either in IDP or refugee camps, or adjacent to such facilities. Only as a last resort, were they to build PoC-Sites within their premises. Such a measure was thus reserved for exceptional cases in which the mission had no time to prepare any other solution. Even then, PoC-Sites are only to be implemented for a minimum amount of time.[760]

In theory, this appeared to be a coherent approach. One look at South Sudan will suffice, however, to ascertain that the envisaged strategy has not in the least been reflected in reality. It is also worth considering that although passive protection mechanisms have been continuously extended since

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[753] *Guiding Principles on Internal Displacement* (June 2001, OCHA/IDP/2004/01) (n 736) Principles 3 (1), 25 (1).
[754] ibid Principle 25 (2).
[755] *The Protection of Civilians in United Nations Peacekeeping* (2015) (n 388).
[756] The Protection through dialogue and engagement, the provision of physical protection, and the establishment of a protective environment, see above text to n 472-74 and ibid para 30.
[757] *The Protection of Civilians in United Nations Peacekeeping* (2015) (n 388) para 31.
[758] at least this is stipulated by the insertion on forced displacement in ibid para 31 (ii).
[759] ibid.
[760] ibid.

2015, they have already been visibly in place when the policy was drafted. Consequently, the DPKO intentionally refused to accept UNMISS as a precedent for future protection mechanisms.

(3) The DPO's Approach to Passive Protection of 2019

Be that as it may, the 2015 policy was merely the first regulatory attempt. The latest PoC policy, now from the DPO, is from 2019. It '[…] incorporates best practices and lessons learned from peacekeeping operations, developments in Security Council practice and the recommendations of internal and external reports [...]'.[761] In terms of passive protection, this did sound promising.

The 2019 policy did then indeed constitute a turning point. To begin with, it adopts a '[…] comprehensive approach to the protection of civilians […]' that aims to '[…] achieve strategic protection objectives'.[762] Evidently, the DPO has therewith adopted the all-encompassing approach to civilian protection.[763]

At an operational level as well, the 2019 policy actively incorporated passive protection. Firstly, it tied in with its predecessor in referring to the three tiers of PoC action.[764] Concerning tier two, however, the policy differs significantly from its forerunner. While the latter had stipulated the provision of physical protection as '[…] those activities by police and military components involving the show or use of force to prevent, deter, pre-empt and respond to situations in which civilians are under threat of physical violence',[765] the former denoted '[…] activities by all mission components to physically protect civilians, whether through protective presence, interpositioning, the threat or use of force, or facilitating safe passage or refuge'.[766] Therewith, it officially acknowledged passive protection through the establishment of PoC-Sites as one form of physical protection within a PoC-mission and thereby recognized the extension of the scope of tier two.

Further on, the policy acknowledged the fact that the displacement of population groups within conflicts is taking place and, associated with that, civilians may seek entry to UN premises.[767] While such an admission was still classified as a measure of last resort, the 2019 policy nonetheless confirmed the necessity for all peacekeeping bases to '[…] have contingency plans in place to provide physical

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[761] *The Protection of Civilians in United Nations Peacekeeping* 2019 (n 23) para 6; for the sake of comparison, the two policies are taken into account here; however, a similar line of reasoning is then continued in *The Protection of Civilians in United Nations Peacekeeping Handbook* (United Nations 2020) (n 526).

[762] *The Protection of Civilians in United Nations Peacekeeping* 2019 (n 23) para 8.

[763] for the term, see B VI 3 a, p. 88.

[764] see text to n 472-74.

[765] *The Protection of Civilians in United Nations Peacekeeping* 2015 (n 388) para 30.

[766] *The Protection of Civilians in United Nations Peacekeeping* 2019 (n 23) para 54.

[767] Albeit the respective response strategy remained the same compared to 2015, cf. ibid para 65; and *The Protection of Civilians in United Nations Peacekeeping* 2015 (n 388) para 31 (ii).

protection in both scenarios in consultation with relevant partners [...]'.[768] All the while, the reference to the minimum duration possible had been abandoned. After all, it had not proven realistic.

(4) Conclusion – The Bigger Picture

All in all, the 2019 policy on the Protection of Civilians in United Nations Peacekeeping did represent a major rethink. Within this framework, the DPO incorporated passive protection into the broader UN protection approach and validated it as a renowned means to protect endangered civilians.

In essence, the DPO's approach thereby did not differ significantly from the UNMISS leadership's stance. As the governing body, the DPO could, however, consider the bigger picture. In this respect, it could forward the integration process of passive protection with the necessary foresight and frankness.

bb) The UN Security Council in Handling Passive Protection – An Integrated Approach?

Lastly, the body that is most intensively concerned with civilian protection in the context of peacekeeping missions is the Security Council. Naturally, the Council does with that also have a view on passive protection. Over the past years, it has thereby approached the issue in different resolutions, reports, and contexts.

(1) Civilian Protection in Armed Conflict Under Security Council Review

Beginning with resolution 1674, which put civilian protection in the centre of UN peacekeeping missions, the Council repeatedly stressed the respective state's responsibility to ensure safety in IDP camps/PoC-Sites. At the same time, it encouraged existing missions '[…] where necessary and in the context of existing peacekeeping operations and their respective mandates, to take all feasible measures to ensure security in and around such camps and of their inhabitants'.[769]

Even earlier, in 2000, the Security Council had passed one of its early resolutions on the Protection of Civilians in Armed Conflict, resolution 1296. In there, it revised the vulnerable situation of many refugees and IDPs and expressed its '[…] willingness to consider such situations and, where necessary, adopt appropriate steps to help create a secure environment for civilians endangered by conflicts [...]'.[770] At that point, PoC-missions were only in the development, wherefore PoC-Sites were not under discussion yet. It is, therefore, all the more revealing that resolution 1296 already indicated a willingness '[…] to consider the appropriateness and feasibility of temporary security zones and safe

[768] *The Protection of Civilians in United Nations Peacekeeping* 2019 (n 23) para 65.
[769] UNSC Resolution 1674 (n 399) para 14.
[770] UNSC Resolution 1296 (n 377) para 14.

corridors for the protection of civilians […]'.[771] This further underlines the general idea that PoC-Sites within UNMISS was not as revolutionary as one might have assumed.

(2) UN Peacekeeping Operations Under Security Council Review

Almost simultaneously with the emergence of passive protection in the context of UNMISS, the Security Council initiated a resolution series on UN peacekeeping operations. Starting in 2013 with resolution 2086, the Council more or less annually evaluated the question of how peacekeeping had developed and where it was headed next.

Although the inauguration of this series coincided with the emergence of passive protection in South Sudan, however, these resolutions were not overly significant in relation to this concept. To begin with, the Council's initial stance on all matters of civilian protection was rather reserved. The Council only referred to the task as one of many peacekeeping aims.[772] IDPs were solely mentioned with regard to humanitarian assistance.[773] Even in 2013, the yardstick for civilian protection remained resolution 1674 of 2006.

Following on from resolution 2086, the resolutions all demonstrated a changing thematic focus.[774] It took until 2017 for the Council to develop a renewed focus on civilian protection,. The first and only mention of '[…] internally-displaced persons and refugee sites […]' in the whole document series is found in resolution 2272.[775]

Altogether, these resolutions were still too broad and superficial to cover passive protection even rudimentarily. It would indeed take until 2018 before the Council developed a renewed focus on civilian protection.[776]

[771] ibid para 15.
[772] UNSC Resolution 2086 [21 January 2013] UN Doc S/RES/2086 para 8 (h).
[773] ibid para 8 (f).
[774] i.e. resolution 2167 from 2014 that dealt intensively with the cooperation between regional organizations and the UN, UNSC Resolution 2167 [28 July 2014] UN Doc S/RES/2167 paras 1 ff; Resolution 2272 from 2016 then again focused on sexual exploitation by UN members, UNSC Resolution 2272 [11 March 2016] UN Doc S/RES/2272 paras 1 ff.
[775] UNSC Resolution 2272 (n 774) para 12.
[776] i.e. with UNSC Resolution 2436 [21 September 2018] UN Doc S/RES/2436 Preambular Clauses 8, 10, 15 and para 6; UNSC Resolution 2447 [13 December 2018] UN Doc S/RES/2447 Preambular Clauses 3, 13; followed by UNSC Resolution 2518 [30 March 2020] UN Doc S/RES/2518 Preambular Clause 5.

(3) Reports of the Secretary-General on the Protection of Civilians in Armed Conflict

The Council's review of UN peacekeeping operations was thus still too broad to concretely consider civilian protection. However, the Secretary-General does have a more specific framework at hand for that matter. Regularly, he releases reports on the protection of civilians in armed conflict.

The fifth report dates back to November 2005 and includes a section on the security for displaced persons. In there, the Secretary-General once more stressed the primary responsibility of the national authorities to protect civilians and urged both member states as well as peacekeeping missions to primarily provide protection in the civilian's places of origin, whereas the '[…] establishment of camps […]' (which is not further specified) was a '[…] last resort'.[777]

Irrespective of the cautious tone, this proves that the increased role of peacekeepers in the protection of displaced persons was already recognized by the UN in 2005. Following, the Secretary-General went even further:

In the light of the extreme vulnerability of most internally displaced populations, the Security Council **should pursue all possible options** [emphasis added] at its disposal to prioritize, support and respond to the immediate protection needs of internally displaced persons and other conflict-affected populations. [...] In some cases peacekeeping forces may also be the only means of ensuring that the civilian character of camps for displaced populations is maintained by preventing the infiltration of armed elements and combatants.[778]

That expressed broad commitment and was soon to be partly withdrawn.

Consequently, the tone of the 2015 report was far more moderate and essentially curbed the previous ambitions. While internal displacement was as much a topic as in 2005, the comparability ended with the renewed accent on the responsibility of the national governments.[779] From thereon, and in light of the developments of the ten years in between, the Secretary-General did not mention any enhanced responsibility of peacekeepers in the protection of IDPs anymore. While he did acknowledge the responsibility of the international community, he solely referred to the strengthening and coordination of humanitarian organizations.[780] PoC-Sites, although in place by that time, were not mentioned at all.

The subsequent report put the protection of IDPs on priority three and dedicated one whole section to the issue, but it still did not recognize PoC-Sites as one form of robust civilian protection.[781] The

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[777] *Report of the Secretary-General on the Protection of Civilians in Armed Conflict* (n 371) para 21.
[778] ibid para 23.
[779] UNSC, *Report of the Secretary General on the Protection of Civilians in Armed Conflict* (UN Doc S/2015/453, 18 June 2015) para 43.
[780] ibid para 44.
[781] see UNSC, *Report of the Secretary General on the Protection of Civilians in Armed Conflict* (UN Doc S/2017/414, 10 May 2017) paras 60 ff.

same applied to the 2018 report,[782] although the provision of physical protection in South Sudan has at least been deemed a '[…] challenging circumstance[s]'.[783]

By now, protracted displacement is well acknowledged as a major threat to civilians all over the world, so that the Secretary-General recognized a need to '[…] improve their efforts […]', however still without endorsing passive protection as one means in physical civilian protection.[784] Nonetheless, at least the '[…] integrated approach […]' to ensure civilian protection has finally been officially recognized.[785]

(4) Conclusion – On Detours to an Integrated Protection Approach

The Security Council's road to such an 'integrated approach' has thus been characterized by different detours. Back and forth, the engagement has been stipulated and then deemphasized. How 'integrated' this approach really is will only become apparent in the coming years.

In light of the DPO policy, passive protection has nonetheless by now been acknowledged as one form of civilian protection. Beyond the individual case of UNMISS, the relevant UN organs have embraced the topic, albeit with initial restraint. Civilian protection has thereby developed into a whole-of-a-mission task and passive protection became one piece of this puzzle. Nevertheless, doubts and reluctance still prevail among most parties today with regard to a proactive promotion of the new standard.

3. Contemporary Challenges of Passive Physical Protection of Civilians

It has thus been demonstrated that passive protection is both recognized within the UNMISS mandates, as well as by the UNMISS leadership, and at least cautiously acknowledged in broader UN protection strategies as well. Albeit reluctantly, the new approach has thus been established as an integral part of civilian protection within peacekeeping.

Nevertheless, passive protection still presents a major challenge to peacekeepers and policymakers. The requirements it poses are intrinsically linked to the principles of peacekeeping and the structural demands of effective civilian protection in crisis regions.

The best example of this is UNMISS to South Sudan. To conclude the account of passive protection as a contemporary protection standard in robust PoC-missions, some of the most pressing current

[782] UNSC, *Protection of Civilians in Armed Conflict Report of the Secretary-General* (UN Doc S/2018/462, 14 May 2018) paras 16 ff.
[783] ibid para 34.
[784] UNSC, *Protection of Civilians in Armed Conflict Report of the Secretary-General* (UN Doc S/2020/366, 6 May 2020) para 19.
[785] ibid paras 46–47.

challenges shall thus be depicted and evaluated. While they are unique to passive protection and UNMISS, they still touch upon fundamental issues of prospective physical civilian protection in the realm of peacekeeping.

a) The Worst Enemy? Passive Protection in a Climate of Tension

Since its formation, South Sudan has never been a safe country overall, neither for its civilian population nor for any external supporters. From the beginning, UNMISS and its peacekeepers, in particular, were thus targets of attacks, both physically and verbally. This situation has hardly improved to date. More than ever, UNMISS operates in a hostile environment - and the PoC-Sites are especially exposed to external threats. This raises the question as to who actually the UN's worst enemy in South Sudan is - the rebellious factions or the government itself.

The tangible assaults are thereby directly connected to one of the fundamental principles of peacekeeping, that of impartiality. In the following, the most serious attacks on PoC-Sites in South Sudan shall be delineated, and UNMISS' deficits in that respect demonstrated. Based on the principle of impartiality, the reasons for and triggers of the tense relations between the mission and its host state can subsequently be evaluated.

aa) In a Hostile Environment – PoC-Sites Under Pressure

However nonpartisan the PoC-Sites aspire to be, they have always been part of the interethnic tensions that dominate the conflict in South Sudan. Time and again, these tensions were thereby expressed in violence against the UNMISS sites. As early as December 2013, two peacekeepers and several civilians had been killed in the UNMISS base of Akobo, when approximately 2000 armed Nuer attacked.[786] The majority of the members of this population group support the Machar opposition, whereas their opponents, the Dinka, mainly side with the government and Kiir.[787] The dividing line between these groups never stopped at compound gates.

(1) The Malakal Incident

In February 2016, the hazardous situation of PoC-Sites in South Sudan was then fully brought to the world's attention. Two government soldiers tried to transfer weaponry into the site located near the town of Malakal, which is situated in the main conflict zone. Like most camps, it sheltered members of

[786] Lilly (n 641) 32-33.
[787] see text to n 551.

both Dinka and Nuer. The incident subsequently led to small-scale confrontations within the camp.[788] When violence intensified over the course of the next day, government troops finally seized the opportunity and entered the camp under the accusation that the blue helmets could no longer guarantee its safety. UNMISS leaders were unable and unwilling to stop them by lethal force and therefore left the troops in control of the camp for several hours, during which Nuer houses were burned down, 123 people injured, and 30 killed.[789] In the end, roughly one-third of the camp was destroyed.[790]

After that event, the trust in UN capabilities and forces had been significantly diminished. The fact that the responsible UN officials had not only allowed Nuer to be harassed within the base but subsequently also permitted returning Dinka to reenter the camp strengthened Nuer's belief that the blue helmets were truly biased.

(2) The Juba Incident

Shortly afterward, an even greater confrontation occurred in the capital Juba. With no imminent military target nearby, government forces shot and shelled the PoC-Sites at UNMISS headquarters in July 2016, as well as the surrounding housings, mostly of non-Dinka civilians.[791]

The peacekeepers present were utterly helpless and in some cases were even reported to have watched the assaults without taking action.[792] In the end, there were 217 documented cases of rape and 73 deaths within four days of prolonged attacks, whereby the real figures are probably even higher.[793]

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[788] van der Lijn (n 529) 198; also cf. Arensen (n 654) 46.

[789] van der Lijn (n 529) 198; Christopher Zambakari, Tarnjeet K Kang and Robert A Sanders, 'The role of the UN Mission in South Sudan (UNMISS) in protecting civilians' in Derrick K Hudson and Steven C Roach (eds), *The Challenge of Governance in South Sudan: Corruption, Peacebuilding, and Foreign Intervention* (Routledge 2019) 102; comparable figures can be found in Arensen (n 654) 46.

[790] Wells (n 749) 15, van der Lijn (n 529) 198.

[791] 'South Sudan: Killings, Rapes, Looting in Juba' (*Human Rights Watch*) <https://www.hrw.org/news/2016/08/15/south-sudan-killings-rapes-looting-juba> accessed 16 December 2021; cited in van der Lijn (n 529) 199.

[792] Jason Patinkin, 'Witnesses say South Sudan soldiers raped dozens near UN camp' (*Associated Press,* 27 July 2016) <https://apnews.com/cee432b613424b7391e34492ced4aad8/witnesses-say-south-sudan-soldiers-raped-dozens-near-un> accessed 16 December 2021; cited in van der Lijn (n 529) 199; cf. also Arensen (n 654) 33.

[793] 'SPLA committed widespread violations during and after July fighting in South Sudan – Zeid' (*OHCHR,* 4 August 2016) <https://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=20339> accessed 16 December 2021; cited in van der Lijn (n 529) 199.

(3) The Résumé – Protection Under the Most Testing Conditions

These incidents in particular left deep marks. By 2017 then, a total of four PoC-Sites had been seriously attacked and around 180 IPDs had been killed during these incidents.[794] Even though the respective reaction of the different UNMISS units varied significantly, some being proactive, while others in need of an impulse to provide a robust response,[795] this could not lead to an overall positive conclusion. Designating PoC-Sites as safe has thus not only proven untrue, but it may also have additionally provided the IDPs with a 'false sense of security […]'.[796]

Nonetheless, UNMISS must be given some credit for operating under very testing conditions. Its position in South Sudan is more than sticky from a military point of view. Firstly, the mission has to operate in a very large country, which is already a strategic disadvantage. To make matters worse, the number of troops deployed has not been set relative to the size of the area to be protected.[797] As a result, UNMISS only has approximately one soldier per 100km at its disposal, which is three times less than other comparable missions.[798] Secondly, South Sudan is overall extremely difficult to access. Sixty percent of its territory is impassible for at least six months per year during the rainy season. Without adequate means of transportation (namely river transport, all-terrain vehicles, or helicopters), the troops are 'literally stuck in the mud'.[799] Even with a few of these transportations at hand, the mission can only move small numbers of troops and supplies at a time.[800] Calls for short-term assistance in other parts of the country, therefore, often had to be denied. While this cannot excuse the failure to protect UNMISS compounds, it does at least partly explain the malfunctions.

Concluding, the South Sudanese government is far from uninvolved. Turning from the factual to the legal points of friction, it will become apparent how UNMISS is struggling to meet the requirements of a successful partnership. Balancing effective civilian protection with the principle of impartiality has, as of yet, proven to be a hard-to-reach ideal.

bb) New Standard, Old Principle – Passive and Impartial Protection?

The peacekeeping principles build the basis of every peacekeeping activity around the world. Their fundamental purpose is to guarantee the success of the mission. In an operation that is built on cooperation between all actors and mostly with the host state, this success crucially depends on a fruitful relationship between the government and the mission leaders. What appears to be self-evident

[794] Briggs (n 641) 19.
[795] Johnson (n 631) 144.
[796] Briggs (n 641) 19.
[797] Johnson (n 631) 142–143.
[798] ibid 143.
[799] ibid.
[800] ibid.

is, however, often one of the most critical issues. Determined by a variety of different hard and soft factors, this relationship goes far beyond the mere provisions of the mandate or the SOFA and may thus cause serious difficulties for any operation, especially a PoC-mission. Part of the hostile environment in which the PoC-Sites are operating is therewith also the struggle between effective (passive) protection and impartiality.

(1) The Principle of Impartiality and the Practical Realities of Civilian Protection in South Sudan

It all begins at the most basic level of a PoC-mandate. Principally, such a mandate provides for the protection of civilians from any kind of threat. The UNMISS mandate explicitly states that civilians under threat of physical violence are to be protected '[…] irrespective of the source of such violence […]'.[801] It should, therefore, make no difference to the troops whether a threat emanates from non-governmental troops, civilians, or government forces. At the conceptual level, this determination reflects the principle of impartiality. While the peacekeepers are to make an assessment of each situation and thus not take an indifferent, neutral position, they are to make no distinction in their protective or defensive actions when it comes to their opponents and protected subjects.[802]

So much for the theory. In practice, however, it can be difficult to impossible for blue helmets to counter government troops with force.[803] Jort Hemmer cites a UNMISS official who admitted that they would not step in if it was the South Sudanese army that turned on communities.[804] What's more, it is also the Security Council and the mission leadership that have a considerable influence on the decision as to which conflict groups are classified as partners and which as opponents of the peace process.[805]

In the context of passive protection in South Sudan, this PoC-inherent imbalance has led to a dangerous distortion. Considering that the supporters of the government predominately belong to the ethnic group of Dinka, they also constitute the majority of the members of the government forces. The Dinka have, accordingly, far greater control of the territory, whilst their opponents, the Nuer, are more often the target of attacks. This has led to mostly Nuer approaching PoC-Sites and in turn incited the accusation on the part of the government that UNMISS would mainly offer support to government opponents.[806]

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[801] UNSC Resolution 2567 (n 595) para 3 (a) (i).
[802] see text to n 136-37.
[803] *The Protection of Civilians in United Nations Peacekeeping* 2019 (n 23) para 61; Khalil (n 134) 220-21.
[804] Hemmer (n 721) 4.
[805] Longobardo (n 429) 67–68; He argues that this dilemma is intensified in light of the “super-robust mandates” he identifies inter alia in South Sudan. The proactive use of force within these missions could thus contradict the principle of impartiality.
[806] Wells (n 749) 14.

While factually, the mission will thus act in favor of the government by not attacking government forces, it is still perceived as impartial in the opposite direction. This contradiction is difficult to resolve.

(2) The Civil Nature of UNMISS' PoC-Sites

This balancing effort is complicated by the fact that the mission is indeed struggling to maintain the civil character of its PoC-Sites. Although the mission leaders follow a strict no-weapon-inside-the-camps-regime, it cannot be completely prevented that weapons are still smuggled in. Furthermore, the site inhabitants do indeed also include former fighters on all sides, who were seeking refuge in large numbers.

However, such admissions are not only legal but also mandatory, as by surrendering their weapons, the former fighters obtain civilian status and had thus to be protected.[807] Irrespective of the legal circumstances, however, the South Sudanese government still widely perceives the PoC-Sites as settlements of the enemy. The arising negative propaganda aggravates the climate of tension in which passive protection is afforded.

cc) Conclusion – A Deep-Seated Vicious Circle

UNMISS is therefore caught between a rock and a hard place. While the government accuses the mission of building enemy camps instead of PoC-Sites, thus collaborating with the Nuer, they, in turn, felt abandoned and not sufficiently protected against forceful attacks by the Dinka majority. This tense situation further increases UNMISS' reticence to confront government troops by force. They, in turn, continue to impede the overall work of the mission, especially, and most effectively, the progress of UN troops within the country.[808] Today, UNMISS forces can thus de facto only move when and in so far as the government permits it.[809] The PoC-Sites through which UNMISS affords passive protection thus form the root cause of a confrontation that is adding to the existing conflict.

The DPO has thereby addressed the core issue of impartiality towards government troops by prompting the mission to enhance and support the '[…] intent, capacity and accountability of the host state to respect international humanitarian law (where relevant) and international human rights law [...]'.[810] While this contention is correct, it is far from groundbreaking and promises little practical transformation.

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[807] Lilly (n 641) 33.
[808] Johnson (n 631) 145.
[809] Wells (n 749) 14.
[810] *The Protection of Civilians in United Nations Peacekeeping* 2019 (n 23) para 61.

Through the prism of passive protection, the already present conflict between effective and impartial mandate execution hence regains influence. Therewith, the PoC-Sites in South Sudan remain under verbal and physical pressure.

b) How Much is Too Much? The Interplay Between Supplementation and Replacement of Government Authorities

UNMISS' PoC-Sites are not only prone to become the target of attacks and conflict with the principle of impartiality, but they also raise major questions with regard to another principle: that of consent.

While it is generally the responsibility of every state to provide for the security of its civilians, a PoC-mission can assume this duty if and to the extent that the host state has consented to the task. Every peacekeeping mission in that way partially assumes state functions and by degree replaces the host state in these authorities.

With passive protection, however, this trade-off is intensified. Through PoC-Sites, the mission is taking over such elemental tasks in the administration of civil society and in the provision of basic human needs, that the question arises whether the mission is actually still performing its limited protection mandate or whether it is already fully claiming a key role and responsibility of the state.

This friction is reinforced by the fact that the host state, although still technically responsible for protection, is not assisted in developing such lacking capacities by the UN.[811] When a UN mission like UNMISS takes the helm in such a situation, using not only classical and tested forms of protection but passive protection, is it then still supplementing the host state in its very own tasks or is it already replacing it? Differently put, how much is too much in the realm of consent and protection?

aa) The Root Conflict

A great danger already lies in the general practice of establishing PoC-Sites, as their mere existence implies a relief of responsibility. Instead of increasing the state's obligation, it allows the government to withdraw more and more from the protection of its own civilian population because protection is provided for in other ways. From the outset, one could thus critically ask whether the mission should not better use its resources to train and equip the host state in order to enable it to take over the tasks again in the future.[812]

[811] Johnson (n 631) 147.
[812] cf. ibid.

This argument is not convincing for several reasons. To begin with, one could then reject any intervention by peacekeepers to protect civilians, as it always preempts public intervention. Furthermore, and as is the case in South Sudan, the threats for the civilian population will often mainly emanate from government troops themselves. In such a (typical) constellation, it would precisely not suffice to better train and equip these forces in order to protect civilians.

In principle, the mission has thus no choice but to take over at least some of the host state's tasks. This in no way negates its immanent responsibility for the protection of civilians. The goal of any protection effort, whether active or passive, is not to replace the state, but to make itself obsolete.

bb) All a Matter of Consent?

Consequently, PoC-Sites do indeed take over the state's role in certain protection aspects, and to a much greater extent than has ever happened before in the realm of non-executive, robust PoC-mandates. As long as such measures are covered by the consent of the host state, however, that is no problem within the peacekeeping pillars. Peacekeeping doctrine principally assumes that every task agreed between the mission and the host state within the mandate, or the SOFA, corresponds to the purpose of the mission. In this regard, it is indeed all a matter of consent.

This does not negate the general and structural challenge to obtain and maintain the necessary consent in the course of each mission. Consent remains a fluid prerequisite that is difficult to grasp and retain.[813] The solution thereto must, once more, lie in a continuous examination of the various interests, with the aim of bringing them into a compatible balance and thus creating both consent and cooperation.

c) The Easy Way? Passive Protection as a Possible Means of Preventing the Use of Force

Having elaborated on the peacekeeping principles of impartiality and consent, the use of force within passive protection remains to be addressed. In that regard, the new protection mechanism raises two issues.

For one, passive protection might function as an amplifier of a process that has been recognized within robust PoC-missions for some time: the general reluctance of peacekeepers to use force. For another, PoC-Sites create a general imbalance of resources that might reinforce a mitigation strategy regarding a proactive, forceful troop engagement.

[813] For a possible solution approach, see text to n 504-05.

Altogether, the establishment of PoC-Sites may thus not constitute a means through which an innovative, different protection standard is applied, but rather an easy way out of a dilemma that has concerned the UN since the inauguration of robust peacekeeping missions.

aa) Passive Protection and the Reluctance to Use Force

While peacekeeping missions have become increasingly robust over the past decades[814], the peacekeepers themselves have progressively abstained from actually applying such force. This general reluctance to use force is a phenomenon that is characteristic of fourth-phase peacekeeping altogether.[815]

In regard to passive protection, the argument could now go as follows: protecting civilians not in a proactive, on-site manner, but within the PoC-Sites has the potential to serve as a negative amplifier in the overall reluctance to use protective force. The more the focus of protection would shift to passive methods, the less the mission would have to use proactive force. Passive protection could thus serve as an excuse not to engage with the issue of technically robust, though practically rather 'unrobust' mandates.

This danger is real and should be vigilantly monitored. It is, however, not an argument against passive protection, but rather a further reason to make the use of force an actual possibility. UNMISS peacekeepers are indeed very reluctant in their use of force, having factually '*ruled out the use of force as a realistic option*'.[816] As dramatic as this is, it does not change the fact that the decision in favor of a passive protection mechanism, i.e. opening the UNMISS compound doors in a compelling emergency situation,[817] has saved tens of thousands of lives.[818] At the same time, this accomplishment neither exempts the mission from investing much more in their 'proactive deployment' or 'active patrolling [...]'.[819] In the end, active and passive protection can and must exist side by side and reinforce one another. The challenge in that regard is not one of a competition between the two approaches but an appropriate allocation of resources for different mechanisms.[820]

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[814] Some would even say they have become 'super-robust' in that their use of force is '*unprecedented, extremely proactive, and clearly offensive in nature*', Longobardo (n 429) 43.

[815] see text to n 479-90.

[816] *Evaluation of the Implementation and results of protection of civilians mandates in United Nations Operations* (n 479) para 45; cited in Khalil (n 134) 221.

[817] see text to n 648-54.

[818] see Khalil (n 134) 221.

[819] UNSC Resolution 2155 (n 624) para 4 (a) (ii); cited in Khalil (n 134) 221; reinforced in UNSC Resolution 2567 (n 595) para 18 (c).

[820] for a concrete proposal, see text to n 1180 ff.

To conclude, passive protection might not encourage a proactive use of force, but it is not the product of such an attitude either. After all, the mechanism does itself build on the use of force, albeit in a defensive, static form.

bb) Passive Protection and the Distribution of Resources

Nonetheless, passive protection does indeed have an impact on the mission's overall ability to use force, considering that the operation of the PoC-Sites factually preempts any additional use of proactive force elsewhere. Within UNMISS, a massive imbalance in the troop and resource distribution between PoC-Sites and all other vulnerable local communities can be observed, as the contingents are fully bound to their bases. Such a focus on PoC-Sites at least questions the aptness of UNMISS' civilian protection approach.[821]

This applies all the more since out in the field, the need for resources and troops is even higher than inside the bases. As Johnson elaborates:

In classic military thinking, one would need two to three times the number of forces as the enemy to successfully counter the threat. One can compensate for the lack of numbers of troops with force multipliers such as attack helicopters and more advanced weaponry or high-performance mobile and technologically advanced military units. In most cases peace operations have neither; both troops and force multipliers are lacking.[822]

This assessment is precise in regard to UNMISS. Again, one could claim that the mission is using the operation of the camps as an excuse for its inability to deploy enough resources in the field and thus achieve successes there.[823]

However, one look at the actual capabilities of the mission within its compounds suffices to counter that assumption. One cannot exactly find that the mission is keeping its materials and capacities within its bases. The question is, therefore, less one of resource *distribution* than of resource *availability* to begin with. This is a fundamental challenge that is amplified but not triggered through passive protection, and it requires a uniform solution for the whole mission.

[821] Briggs (n 641) 17.
[822] Johnson (n 631) 142.
[823] see Arensen (n 654) 31.

d) Safe Haven or Guardhouse? The Rule of Law Behind the Fences of PoC-Sites

Finally, the operation of the PoC-Sites themselves represents a major challenge. The peacekeepers must not only defend these camps against external attacks,[824] but they must also ensure a level of security within the sites. UNMISS thereby not only struggles to maintain the minimum humanitarian standards, but it must furthermore also administer a large community of people.

Designed as regular UN bases, the PoC-Sites turned into places of refuge overnight. This included the assumption of tasks for which the peacekeepers were neither prepared nor equipped, both factually and legally. UNMISS is therefore constantly struggling to find a steady modus operandi when it comes to the Rule of Law inside its premises. While these premises are a safe haven for most, they can turn into a guardhouse for others. Corresponding rules exist only sparsely.

aa) The (Inadequate) Legal Framework

The challenge of a coherent approach to the Rule of Law within PoC-Sites starts, again, on the most basic level of every UN peacekeeping mission, namely the mandate. While this legal framework had slowly adapted to include passive protection as an explicit mission objective,[825] it had not changed substantially. In their structure and nature, the mandates were still classical PoC-mandates. In particular, they were no executive mandates that would allow the peacekeepers to overtake administrative or executive state functions.[826] To exemplify the difference, the mandate that established the Kosovo mission allowed the peacekeepers to effectively administer the territory that was to become Kosovo, and it was thus an executive mandate type.[827] UNMISS' blue helmets, on the contrary, are solely sent to help and not replace the government of South Sudan.[828] Technically, they are thus not allowed to execute administrative functions within the PoC-Sites, such as the prosecution of criminals.

However, considering that the PoC-Sites have taken on dimensions equal to those of small towns, their organization requires the performance of tasks that would otherwise fall to a regular administration. Nonetheless, a local governmental administration is often not available or accused of human rights violations and the targeting of certain ethnic groups.[829] In practice, this leaves only the peacekeepers as law enforcers, albeit without the necessary authority.

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[824] see text to n 786-96.
[825] see text to n 673 ff.
[826] Stern (n 665) 10; citing Mamiya (n 641).
[827] UNSC Resolution 1244 [10 June 1999] UN Doc S/RES/1244 paras 9-11; cited in Mamiya (n 641).
[828] Mamiya (n 641).
[829] ibid; see also i.e. text to n 550-53.

bb) The Core of Rule of Law – Criminal Prosecution Within PoC-Sites

This loophole is particularly striking in the area of criminal prosecution. Different to the UN Mission to the CAR, MINUSCA, where the lack of an executive mandate has been compensated for by an authorization to '[…] adopt urgent, temporary measures [...] to maintain basic law and order [...]',[830] UNMISS peacekeepers can only refer back to their robust PoC-mandate. The committal of crimes by compound residents is therewith generally dealt with under South Sudanese criminal law.[831] South Sudan has the entire legal responsibility to prosecute criminals.[832]

Within its premises, however, UNMISS may exercise its exclusive control, as far as the SOFA provides for it.[833] The mission may thus ensure the highest possible standard of safety and security. Additionally, using all necessary means to protect civilians, peacekeepers may also hold those in custody who pose a risk to others.[834] Nevertheless, the UN's role is only a temporary one, as they are '[…] not mandated or resourced to be judges or jailers'.[835] After 72 hours, detainees are thus to be handed over to national authorities.[836]

In light of past incidents, however, it is not very likely that the national authorities will maintain the same degree of independence with regard to detainees of all ethnic groups.[837] Additionally, there is the risk of immediate release by local police, whereby serious and repeated offenders may directly return to the camp.[838] Thus, if it is feared that the suspects will not receive a fair trial and might even be subject to the death penalty or other human rights violations, UNMISS runs the risk of violating the principle of non-refoulement if it still surrenders the accused.[839] This applies all the more to IDPs who had sought protection from prosecution within UNMISS premises in the first place. To address these risks, each case of potential handover is reviewed by a risk assessment committee within UNMISS, which makes an evaluation as to whether the detainee can be handed over safely.[840]

As a result, however, UNMISS is often obliged to guard the accused. In so doing, the mission is again placed between a rock and a hard place. Apart from the fact that it does not have the resources to

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[830] UNSC Resolution 2149 (n 463) para 40; cited in Mamiya (n 641).
[831] Mamiya (n 641).
[832] Stern (n 665) 10.
[833] *The Status of Forces Agreement Between The United Nations and the Government of the Republic of South Sudan Concerning the United Nations Mission in South Sudan ("SOFA")* [8 August 2011] para 16; cited in Mamiya (n 641).
[834] Miguel de Serpa Soares, *International Law Commission* (United Nations Office of Legal Affairs, 14 May 2014) 11; cited in Stern (n 665) 14.
[835] Mamiya (n 641).
[836] Stern (n 665) 14, referring to 'UN Mission in South Sudan battles crime in its IDP camps' (*United Nations News*) <https://news.un.org/en/audio/2014/08/590952> accessed 16 December 2021.
[837] see Mamiya (n 641); Stern (n 665) 10; Arensen (n 654) 51.
[838] Arensen (n 654) 51.
[839] Mamiya (n 641).
[840] Stern (n 665) 11, 14.

effectively detain persons within the camps and supervise them, it can neither release them nor transfer them to local authorities. Combined with the lacking ability to prosecute them, the peacekeepers are incapable of acting in either direction. Technically, they have to detain the accused indefinitely, which in turn, however, violates international human rights law, namely the right to due process.[841]

cc) The Immediate Answers – Interpretative Solution Approaches and Dispute Resolution Mechanisms

The immediate answers to this dilemma lie both in interpretative approaches as well as in a specific dispute resolution mechanism.

(1) A Question of Interpretation

The most immediate solution is to be found in a new understanding of the mandates. Duijzentkunst argues that categorizing a mandate as being executive is nothing more than a label, as this term is nowhere to be found in the resolution. It is thus a matter of interpretation to determine the mandate's scope in each individual case.[842] If a robust PoC-mandate thus provides for the maintenance of '[…] public safety and security of and within UNMISS protection of civilians sites; [...]',[843] the peacekeepers should be able to regulate law and order within their facilities. If this required prolonged detention, then this would be covered.[844]

However, this proposal does not address the heart of the problem. While UNMISS could enhance their detention facilities and thus provide for prolonged detention for the sake of site-internal safety, the PoC-mandate could still not exempt it from its human rights obligations. A solution to this problem could only be sought in a mandate interpretation that allows peacekeepers to carry out simplified trials and impose penalties. Although such measures can be *necessary* to create long-lasting safety and security within the sites, it is questionable whether such behavior would be covered by the consent and thus be tolerated by the South Sudanese government. Beyond that, such an assumption of new tasks would be in need of clarification within the mandates. Lately, this has not been the case.[845]

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[841] Universal Declaration of Human Rights, 10 December 1948, Article 10; cited in Stern (n 665) 14.
[842] Smit Duijzentkunst (n 665).
[843] UNSC Resolution 2514 (n 719) para 8 (a) (iv).
[844] Smit Duijzentkunst (n 665).
[845] see UNSC Resolution 2567 (n 595) para 3 (a) (iii) with the well-known general references to 'public safety and security of and within UNMISS protection sites […]'.

(2) The IMDRM as a Dispute Resolution Mechanism

Be that as it may, the problem is not as serious in practice as it appears in theory. As the Secretary-General laid down in his 2015 report, in May 2014 a total of 856 offenders had been detained in all PoC-Sites and the majority of these offenses were '[…] being handled under community-led informal mitigation and dispute resolution mechanisms'.[846] Such a mechanism, called the Informal Mediation and Dispute Resolution Mechanism (IMDRM), had been installed by UNMISS. It is comprised of members of the communities living in the PoC-Sites, who can pursue minor incidents, although without any legally binding force.[847] Only in isolated cases, and if this decision would not endanger them, were offenders expelled from the PoC-Sites.[848] This unveils an interim solution that could reduce the problem to a few cases.

Nevertheless, the scope of the IMDRM is overall limited, as it is inspired by the so-called customary courts. Outside the camps, these courts would enforce all kinds of penalties within their communities. However, as punishments for adultery, death penalties on the one hand and mere reparations for murders on the other hand, for example, are not permissible inside the camps, the requirements for a penal system under international law and the system of the customary courts often diverge.[849]

dd) The Long-Term Solutions – Authority and Perspectives

On a long-term basis, solutions can also be sought, both on a conceptual legal level as well as in regard to the root causes of crimes within the UN compounds.

(1) The Required Authority

For the sake of legal certainty, it would be most advisable to revise the UNMISS mandates following the example of MINUSCA.[850] The fact that this has not happened yet, although the problem has been known for years, illustrates, however, that such an approach is either not wanted or not feasible, as not acceptable for the South Sudanese government[851].

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[846] UNSC, *Report of the Secretary-General on South Sudan (covering the period from 18 November 2014-10 February 2015)* (UN Doc S/2015/188, 17 February 2015) para 33; referred to in Conor Foley, 'What Are the Human Rights Obligations of UNMISS to Those Sheltering on Its Protection Sites?' (*ACCORD*) <https://www.accord.org.za/conflict-trends/human-rights-obligations-unmiss-sheltering-protection-sites/> accessed 16 December 2021; see also Lilly (n 641) 33.

[847] Stern (n 665) 11–12.

[848] *Report of the Secretary-General on South Sudan (covering the period from 18 November 2014-10 February 2015)* (n 846) para 33; referred to in Foley (n 846).

[849] cf. Arensen (n 654) 51-52.

[850] see Mamiya (n 641).

[851] see Stern (n 665) 11.

(2) Providing Protection and Perspective

One could also tackle the deeper causes of crime in the first place. The ongoing lack of employment, education, or training increasingly – and understandably - leads to frustration among the camp residents.[852] Considering that PoC-Sites are at least semi-permanent living facilities, PoC-Sites should therefore, also from a human rights perspective, invest in the provision of more than just the most basic needs in the long run.

This, again, requires increased cooperation with humanitarian actors. Therefore, the competencies and areas of responsibility between UNMISS and those actors, both within as well as outside of the PoC-Sites, must first be clarified.[853] This is directly linked to the question of who takes on the role of the leader. While UNMISS officials are often sensitive when it comes to the foreign performance of tasks on their premises,[854] there is also a general reluctance to take bold decisions and to be responsible for the use of force.[855] Thus, actions often become lost in the swamp of primary state responsibility and secondary responsibility of the UN and humanitarian actors.[856]

e) Conclusion – The Recurring Challenge of Integration

On different levels, passive protection within PoC-Sites in South Sudan is thus coming - in part literally - under fire. Just as every innovation, it faces the recurring challenge of integrating into an existing system. Frictional losses are inevitable in such a process.

As has been demonstrated, some of the current challenges tie in with the conception of passive protection itself, and others are rooted in underlying issues of robust peacekeeping in general. A recurring theme is thereby the relationship between the mission and the host state. Successful passive protection is, equal to every other form of protection, mainly dependent on productive cooperation and trustful exchange. While the blame for the lack thereof cannot only be placed on one of the parties in South Sudan, it is still up to both of them to repair the strained relations. At present, this requires more diplomatic than legal efforts.

Passive protection as a concept, on the contrary, is certainly in need of legal clarification. In particular, an evolved framework that identifies and addresses the key practical aspects is required. These aspects include an explicit division of responsibilities among the various international actors, appropriate resource allocation, and a legal foundation to fully administer inner camp life.[857]

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[852] Smit Duijzentkunst (n 665).
[853] see Arensen (n 654) 24.
[854] see ibid 24–25.
[855] ibid 39.
[856] cf. ibid.
[857] for a more detailed account on possible ways forward, see text to n 878-82.

Conceptually, passive protection is nonetheless more than fit to adapt to contemporary peacekeeping missions. The existing conflicts do not negate this, but rather provide an impetus for development. The objective should now be to create an integrated system in which the most effective possible protection mechanisms complement each other. By way of gradual integration and adaptation, the new principles can thus be embedded as one part of a comprehensive international protection strategy.[858]

IV. Conclusion – Passive Protection as a 'New Standard' for Civilian Protection in Robust PoC-Missions?

It is now possible to submit a conclusion as to whether passive protection is a new standard for civilian protection within contemporary, robust peacekeeping missions.

For this purpose, it will first be tested to what extent passive protection can be incorporated into the comprehensive civilian protection approach presented above. A short review of UNMISS' performance in implementing passive protection within its PoC-Sites shall subsequently clarify whether the mission may serve as a pioneer model for future implementations. Taking UNMISS seriously, the ways forward for the mission, passive protection and robust peacekeeping altogether will then complete this third chapter.

1. Passive Protection Within the Comprehensive Civilian Protection Approach

As part of the 'evolving nature of mandates and operating environments',[859] passive protection through PoC-Sites has risen from a mere marginal phenomenon to a main part of ongoing PoC activities[860]. In view of the far-reaching implications this entails, it now appears possible that the new protection approach has also heralded a new, fifth generation of peacekeeping. This new phase would not only specify but also partly reverse the classical protection approach of fourth-generation peacekeeping, as it would focus on the provision of centered, stationary help instead of a locally distributed, specific support. As this is not only a passive form of protection but also a more direct form of safeguard,[861] this transformation would represent an extensive development, the effects of which cannot yet fully be assessed.

In that sense, passive protection would indeed have set a new standard. This is primarily supported by the fact that the mechanism is ideally in line with the comprehensive protection approach that has

[858] see below Chapter E.
[859] cf. Khalil (n 134) 218.
[860] see 'Protection of Civilians Mandate' (*United Nations Peacekeeping*) (n 365).
[861] Mamiya (n 641); in a similar manner Andrew Gilmour, 'The Future of Human Rights: A View from the United Nations' [2014] Ethics & International Affairs, 28, no. 2 239, 244.

been stipulated as the future in contemporary peacekeeping.[862] It blends perfectly into an understanding of protection that aims to encompass as many different aspects of civilian life as possible, in order to ensure effective protection. As such, it is also prone to promote '[…] tailored, context-specific peacekeeping approaches to protecting civilians […]',[863] as stipulated within the Action for Peacekeeping-Declaration of 2018.

The establishment of PoC-Sites in South Sudan was thereby neither a willful, strategic decision nor the demonstration of a greater strategy.[864] With the evolving embedding of this protection method in both mandates and strategy,[865] it has, however, developed into one such component, that now brings first life to such a new protection approach. In concert with other forms of physical protection, it may prospectively contribute to an overarching civilian protection concept.

Thus, UNMISS can be seen as a crucial precedent for such an all-encompassing approach, which is slowly coming into existence. Far from optimal, important lessons can still be learned from the missions' implementation and deficiencies, in order to improve performance and produce a safer system. Concluding on UNMISS with an overall performance result is therefore crucial to mark the way forward.

2. PoC-Sites in South Sudan – Success or Failure?

The evaluation of UNMISS' success or failure is already difficult because the mission has not yet been completed. Nevertheless, first conclusions, both evident and subjacent, can still be drawn from the mission performance.

a) At a First Glance – Failures and Drawbacks

The résumé of civilian protection in South Sudan can, easily, be quite sober. In light of the, for the most part preventable, attacks on PoC-Sites, UNMISS has certainly not met its own standards. Adding the civilian victims that resulted from insufficient leadership, it has indeed partly failed in its protection tasks. Today still, the local PoC-Sites accommodate around 34,000 residents as of November 2021.[866]

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[862] i.e. see UNSC, *Report of the Secretary-General to the Security Council on the Protection of Civilians in Armed Conflict* (n 355) para 59; and *The Protection of Civilians in United Nations Peacekeeping* 2019 (n 23) paras 7, 8, 33.

[863] 'Action for Peacekeeping: Declaration of Shared Commitments on UN Peacekeeping Operations' (n 7) para 10.

[864] see text to n 648 ff.

[865] see text to n 624 ff.

[866] 'South Sudan: Humanitarian Snapshot (November 2021) (n 570); although the numbers dropped considerably from 180.000 in September 2019, 'Statement of the Special Representative of the Secretary-General David Shearer - Briefing to the Security Council on South Sudan' (*UNMISS Press Release,* 18 September 2019)

Even in light of the fact that the mission did not receive the support it should have, it has nonetheless often not met its mandate.[867]

Indeed, the PoC-Sites were initially the result of a major UN failure in South Sudan, namely to effectively protect civilians otherwise.[868] Having been caught completely off guard by the outbreak of renewed fighting, UNMISS lastly had no choice but to safeguard the endangered civilians within their bases. Quite unintentionally, South Sudan therewith became the lab for a new civilian protection mechanism.

More alarming than the lacking preparedness is, however, the fact that UNMISS is still today highly dependent on external factors. Considering that the mission may in most parts not even leave their camps to fetch water, let alone fly or conduct any other military mission without the permission of the government forces,[869] it is hard to imagine how they could protect civilians outside their camps. This applies all the more if these civilians are attacked by the same government troops that have hindered the mission's free movement beforehand.

In the end, it would thus not be far-fetched to conclude that UNMISS' critical voices have been proven right. The ambitious mandate could certainly not keep all the promises,[870] and the UN might, in a way, have indeed laid the ground for their own failure themselves.[871]

b) Below the Surface – Success and Chances

However, one could also take another perspective. In light of the impact that passive protection had on the overall development in South Sudan and the thousands of lives saved, it is also feasible to declare that PoC-Sites are a '[…] visible, very tangible expression of a peacekeeping mission fulfilling its security council mandate', as former Deputy Special Representative of the Secretary-General to South Sudan, Toby Lanzer, has done.[872] Even more, in his last Statement on the Situation in South Sudan, from March 2021, David Shearer states that many PoC-Sites are currently transformed into conventional displacement camps, considering that the intense conflict situation in the country has abated.[873]

<https://unmiss.unmissions.org/sites/default/files/statement_by_the_srsg_to_the_security_council_on_the_situation_in_south_sudan_-_18_september_2019_.pdf> accessed 16 December 2021 3-4.

[867] as stipulated by Wells (n 749) 13.

[868] Arensen (n 654) 31, citing an interview with an UNMISS staff member.

[869] see Wells (n 749) 14.

[870] see Hemmer (n 721) 1; cited in Arensen (n 654) 32.

[871] as cited by Hemmer (n 721) 7.

[872] as cited in Arensen (n 654) 31.

[873] UNMISS Press Release 'Statement of the Special Representative of the Secretary-General David Shearer to the Security Council on the Situation in South Sudan (3 March 2021)' (n 565) 3.

By opening the compound doors to fleeing masses, UNMISS has opened '[…] a new chapter on the UN's commitment to the protection of civilians'.[874] It would therefore be neither fair to reduce UNMISS to its failure alone, nor to let PoC-Sites serve as a scapegoat for every mismatch or defeat.[875] The expectation that a peacekeeping mission may fully protect all civilians at all times can never be more than a utopia.[876]

The final evaluation of UNMISS' performance is thus still pending. Preliminarily, the balance is two-fold. The leadership, both on the ground and in New York, has neither always acted jointly nor expediently. Still, the erection and operation of the PoC-Sites must be recognized as the incredible act of humanitarian aid that they are. Glimpsing beneath the surface, a multi-layered picture unfolds. Although far from optimal, PoC-Sites are still '[...] an important protection model in extreme situations, and in South Sudan they were undoubtedly responsible for saving tens of thousands of lives'.[877]

In the end, they are just as much a failure as they are a success. Their continuing existence does, in any case, provide passive protection with a factual dimension and thus underpins the process towards a comprehensive protection approach in robust peacekeeping. The outcome of this process is, nonetheless, still open and will depend on the implementation of certain critical improvements.

3. Taking UNMISS Seriously – Ways Forward

These improvements can be subdivided into three subject areas.

a) Peacekeeping Mandates and UN Strategies

To begin with, the relevant mandates should be adapted in such a way that they not only acknowledge the PoC-Sites as existing, but that they fully include and recognize passive protection as an equal mode of protection. That entails the necessity to adopt further competencies that are required in order for peacekeepers to effectively fulfill their tasks, such as authorities in criminal prosecution.

The DPO should furthermore develop internal strategies concerning the handling of IDPs in PoC-Sites, specifically as one component of its physical protection efforts. This would include realistic contingency plans for all missions where there is a potential for IDP movements like in South Sudan. It would also include concrete definitions as to the framework of admission, from reception to the residence, including the living conditions to be provided and safe returns.[878]

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[874] Smit Duijzentkunst (n 665).
[875] the latter being stipulated by Arensen (n 654) 31; and Wells (n 749) 17.
[876] as Johnson (n 631) 141 reasons, resources will never be enough to that end.
[877] Briggs (n 641) 19; in a similar vein Wells (n 749) 17.
[878] see Briggs (n 641) 19-20.

b) *Resources, Resources, Resources*

Physical protection in whatever form always '[…] is about resources [...]'.[879] On the mandate side, these resources must be provided for, and on the execution side, they must be made available. In the end, the mandates must thus go hand in hand with the available resources.[880] If that were the case, peacekeepers would be enabled to actually protect the PoC-Sites and still perform other tasks in the rest of the country.

c) *Cooperation With Allies and Partners*

Lastly, the cooperation with the humanitarian actors must be established where nonexistent and enhanced where first approaches exist. Being much better prepared and trained to operate camps like the PoC-Sites, the peacekeepers are dependent on their expertise and should acknowledge that. This could not only dramatically enhance the living conditions in the camps, but it would also provide the mission with the leeway to focus on its primary tasks: securing and protecting the sites and people inside.

Subsequently, the UNMISS troop structure could thus be adapted. Freed from the task of organizing all inner camp life, the blue helmets stationed at PoC-Sites could return to their 'classical' protection work in a '[…] static modus operandi […]',[881] thus solely focus on safeguarding the camp's internal and external security. Meanwhile, highly mobile units adapted to both geographical conditions and conflict structures could be sent to the countryside and protect civilians wherever needed.[882]

All these steps apply to South Sudan in particular, but they can be applied to any other robust PoC-mission in the world. With their help, passive protection could be lifted out of the trial-and-error phase and actually become a new standard of civilian protection, in line with other forms of physical protection and within a comprehensive strategy for robust PoC-missions.

4. Peacekeeping Rethought – A New Impulse

The road forward has thereby been mapped. Finally, however, the reader shall not be deprived of some food for thought, which ties in with a completely new impulse on the structure and purpose of peacekeeping, by Saira Mohamed.

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[879] Johnson (n 631) 142.
[880] van der Lijn (n 529) 201.
[881] Johnson (n 631) 146.
[882] ibid 147.

Mohamed argues that the UN crucially transformed its assignments with the end of the Cold War, now focusing not only on ending conflicts and preventing the resurgence of violence, but furthermore actively engaging in peacebuilding.[883] She then contends that this expanding practice has raised questions as to the legitimacy of the existing legal foundations. Instead of further increasing the peacekeeping tasks, she subsequently proposes a new division of tasks. This could look as follows: 'While the Security Council should continue to control the military and police aspects of UN intervention, the Trusteeship Council should assume exclusive responsibility for the governance tasks that fall within the category of postconflict peacebuilding'.[884]

The Trusteeship Council aimed at fostering the political, social, economic, and educational improvement of countries that struggle with achieving self-governance.[885] While this system proved to be important and efficient over the decades following World War II, it lost its significance with the advancing decolonization. Therefore, as Matz puts it, '[...] the UN Trusteeship System is to some extent a victim of its own success'.[886]

Mohamed's approach to reviving this Council appears advantageous. Firstly, one could indeed create a significantly higher level of legitimacy if the Security Council were to be replaced by a panel of states that do not suffer from the same deficits as the Council.[887] Secondly, the proposal could strengthen accountability for abuses by UN staff members, as it would effectively install a neutral, third observer.[888]

Against the approach, however, the very clear wording of Article 78 UNCh opines. According to this norm, UN members shall not be put under any kind of UN trusteeship system. Mohamed proposes that this hurdle could be taken by way of interpretation. In fact, other Charter inaccuracies have indeed been circumvented through interpretation, and also the history of the origin of this specific norm may be understood as not precluding such application.[889]

However, this is not the only difficulty that arises with the approach. Mohamed further admits that for the Trusteeship Council to resume its work, the respective territory would need to be put under the UN's trust, wherein its rights and privileges of UN membership would have to be suspended.[890] For failed states this might be an option, but certainly not for every state requiring the help of a

[883] Mohamed (n 513) 810.
[884] ibid 812.
[885] cf. Nele Matz, 'Civilization and the Mandate System under the League of Nations as Origin of Trusteeship' [2005] 9 Max Planck Yearbook of United Nations Law 47, 48.
[886] ibid.
[887] Mohamed (n 513) 823-27.
[888] ibid 827-30.
[889] ibid 831–32.
[890] ibid 833–34.

peacekeeping mission. What Mohamed notes, however, is that in fact, many peacekeeping missions today already assume governmental functions, however without any legal basis whatsoever. UNMISS in South Sudan is indeed a prime example of that.[891]

Be that as it may, the lack of a sufficient legal basis can be resolved much more easily than through the re-establishment of the Trusteeship Council. The mandate structure of MINUSCA exemplifies that.[892] Admittedly, the MINUSCA approach would still not solve any lack of legitimacy and accountability. However, even if sovereignty is seen as a '[…] fluid concept […]' today,[893] it is very hard to imagine how Mohamed's approach could be reconciled with the peacekeeping principles.

Applying this thought experiment to South Sudan, the enormous struggles it would entail are furthermore revealed. The relations with the host government are strained as they are. Factually annulling the country's UN membership status does, therefore, not seem a recommendable approach. Having said that, with regard to future scenarios, the idea should not be too hastily discarded.

In the end, it can thus be summarized that passive protection illustrates the enormous development peacekeeping missions have gone through, not only from their traditional manifestation towards a robust interpretation but furthermore from 'classical' robust PoC-missions towards a comprehensive, all-encompassing interpretation thereof. While such a perception offers many advantages in terms of effectiveness, it does pose great challenges in the context of wider UN protection strategies as well. These hurdles are, however, not insurmountable. As a new standard, passive protection and with it an all-encompassing civilian protection approach, are thus dawning on the horizon.

Having looked deeply into South Sudan and UNMISS, it is now time to widen the horizon. Taking into account the larger picture, the practical implications of contemporary robust PoC peacekeeping shall be analyzed in the light of different concepts of international responsibility.

[891] see text to n 811-13.
[892] see text to n 830.
[893] Mohamed (n 513) 835.

D. Seeing the Bigger Picture – Implications of Contemporary Robust Peacekeeping Missions for the Responsibility to Protect

The presented search for civilian safety in crises has so far focused on peacekeeping and evolving concepts of protection within contemporary PoC-missions. The overall picture is, however, larger.

Taking a step out of the realm of peacekeeping, a different international approach to safeguard civilians unfolds. The Responsibility to Protect, R2P, is both deeply connected and fundamentally different from PoC.

The specific relationship between the two concepts has thereby been researched many times and in great detail. However, with the renewed understanding of physical protection within contemporary robust PoC-missions, the debate takes on a different form. It is thereby submitted that the stipulated all-encompassing civilian protection approach does not only affect the perceptions of peacekeeping but that the concept can furthermore serve as a basis for an even wider system of concerted, international protection of civilians.

To substantiate this, the concept of R2P and its current manifestations will first be presented. Following this, R2P and PoC will be put into context by way of highlighting their similarities and differences. This will subsequently allow for a reassessment of their relationship. Lastly, the practical effects of this relationship for contemporary robust peacekeeping missions and specifically the passive protection approach will then be presented and analyzed. The overarching question is thereby if and how R2P can be linked, and perhaps even combined, with peacekeeping.

I. The Responsibility to Protect Revisited

The protection of civilians in armed conflict remains a hot topic in contemporary conflict situations around the world. Despite all the effort the international community has undertaken within the past twenty years, armed conflicts are still characterized by high levels of civilian death.[894]

In that regard, peacekeeping is only one - albeit the prevalent - means of international engagement. This is mainly because the Security Council does indeed readily authorize the use of force to protect civilians, albeit unwillingly, so when the consent of the host state is not achievable.[895] Part of the problem is that the UN Charter itself does not explicitly foresee the use of military force to counter a humanitarian crisis.[896] Nonetheless, the concurring opinion is that the Security Council can very well

[894] UNSC, *Protection of Civilians in Armed Conflict of the Secretary-General* [3 May 2021] UN Doc S/2021/423 para 2.
[895] Welsh (n 367) 535, 535-36.
[896] ibid 536.

authorize such a procedure.[897] Indeed, many instances in which the Security Council decided to mandate a robust PoC-mission were actually those of humanitarian distress.[898]

Yet, peacekeeping is no one-size-fits-all-solution. On the contrary, there are manifold situations in which other approaches are required. While there is always room for entirely new conceptions,[899] there is yet another, complementary concept to robust peacekeeping that is subject to equally strict, though different conditions: The Responsibility to Protect.

Before the specific relationship between the two approaches can be examined, a general understanding of R2P in its conception, roots, and its current status is required.

1. The Last Straw in Civilian Protection? The Basic Construct and Roots of R2P

Few other approaches in international relations have generated a debate as intense as R2P. It is such a buzzword that, to begin with, it deserves a profound examination as to its conception and roots.

a) The Common Denominator

Although the concepts are quite different, R2P and robust PoC still share a common denominator. Just as robust peacekeeping, R2P was developed from the failures of peacekeeping engagements at the turn of the last century. After thousands of civilians had died under the watchful eyes of blue helmets, the UN stood at a crossroads.

In answer to the urgent need for reform, peacekeeping missions were subsequently transformed into the robust shape we know today. Nonetheless, the question of alternative instruments to counter extreme human rights violations was still pressing. It was not only the UN, but also the whole world community that was thereby desperate for new concepts with which they could set fresh paradigms for a modern age of international conflict.

b) A Bold Advance – The ICISS' Construction of R2P

Setting the ball rolling, the International Commission on Intervention and State Sovereignty (ICISS), an independent body based in Ottawa, Canada, published a report in 2001. Commissioned by the Canadian government, this document, titled '*The Responsibility to Protect*', contained an answer to the question of how states could justify military intervention on the territory of other states in the face of

[897] Christine Gray, 'The Charter Limitations on the Use of Force: Theory and Practice' in Vaughan Lowe and others (eds), *The United Nations Security Council and War* (Oxford University Press 2008) 96.
[898] see examples in Welsh (n 367) 538 ff.
[899] i.e. Breau (n 244) 430, who foresees a future of peacemaking missions.

gross human rights violations.[900] In doing so, it tied in with the construct of humanitarian intervention and thus shed new light on a discussion that had been deadlocked for many years.

aa) Three in One – The Responsibilities and Their Requirements

To begin with, the 2001 ICISS' conception of R2P was based on two fundamental principles. By virtue of sovereignty, each state is responsible for the protection of its civilians. If a state is, however, either unable or unwilling to meet this responsibility, and its population is suffering serious harm, '[…] the principle of non-intervention yields to the international responsibility to protect'.[901] Consequently, the state community is then entitled to take action, regardless of the non-intervention principle.

In a subsequent step, the ICISS divided these basic principles into three specific state responsibilities. These are the responsibility to prevent, the responsibility to react, and the responsibility to rebuild. Though distinctive in its concrete approach, the Commission did thereby build upon concepts concerning the preservation of international peace and security that had already been expressed in the Agenda for Peace and the Brahimi Report.[902] In line with these reports, the Commission construed R2P as a triadic, holistic concept, consisting of preventive, immediate, and post-conflict measures. This construct shall now be examined in more detail.

(1) The Responsibility to Prevent

In view of the Commission, the responsibility to prevent conflict and the human suffering relating thereto is primarily that of each sovereign state.[903]

It must nonetheless be admitted that '[…] conflict prevention is not merely a national or local affair […]', as '[t]he failure of prevention can have wide international consequences and costs'.[904] Therefore, the responsibility to prevent cannot end at the national borders but must also entail a corresponding responsibility of the international community. This commitment aims to address the root causes of conflict.[905] To this end, the report suggested the creation of an early warning system on evolving conflicts, proposed a 'toolbox' with different policy measures at hand, and last but not least, underlined the need for readiness to apply all these measures.[906]

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[900] International Commission on Intervention and State Sovereignty, *The Responsibility to Protect: Report of the International Commission on Intervention and State Sovereignty (ICISS Report,* December 2001).
[901] ibid XI.
[902] Breau (n 244) 431.
[903] *ICISS Report* (n 900) para 3.2.
[904] ibid para 3.3.
[905] ibid para 3.4.
[906] ibid paras 3.1 ff., 3.9.

(2) The Responsibility to React

Supplementing the responsibility to prevent, the second responsibility within the ICISS' R2P conception implied active engagement. In a situation of compelling need for the civilian population, coercive measures and military intervention by the state community should be indicated.[907]

With this determination, the exceptions to the prohibition of the threat or use of force from Article 2 (4) UNCh were effectively extended. The Commission did not deny the importance of the principle of non-intervention.[908] However, it stipulated that, in extreme cases of violence, limited exceptions to this principle must be allowed.[909] Hence, while not replaced, the non-intervention principle can be surpassed in exceptional situations and under strict conditions.[910]

These conditions are, according to the Commission, to be found in six criteria: the right authority, a just cause, the right intention, last resort, proportional means, and reasonable prospects.[911] The just cause is thereby limited to 'large scale loss of life, actual or apprehended, with genocidal intent or not, which is the product either of deliberate state action, or state neglect or inability to act, or a failed state situation; or large scale “ethnic cleansing,” actual or apprehended, whether carried out by killing, forced expulsion, or acts of terror or rape'.[912] The Commission had thus agreed on a narrow R2P scope, consisting of the worst crimes against mankind, and therewith set the threshold for an intervention accordingly high. In all other instances, in which this limit is not reached, measures short of military action would prevail.[913]

With these conditions, the Commission lastly also distanced itself from interventions for the purpose of political overthrow.[914] Regime change was initially not perceived as a legitimate objective of R2P.

(3) The Responsibility to Rebuild

Finally, the Commission stipulated a number of rebuilding measures that refer to the provision of resources and assistance in building a durable peace after a military intervention.[915] While not the most controversial in practical terms, this third component does raise different issues.

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[907] ibid para 4.10.
[908] ibid paras 4.11-4.12.
[909] ibid para 4.13.
[910] ibid para 4.13.
[911] ibid para 4.16.
[912] ibid para 4.19.
[913] ibid paras 4.3 ff.
[914] ibid para 4.26.
[915] ibid paras 5.1 ff.

(a) 'Peace Building' Under Different Regimes

These begin with the terminology. The Commission summarized their rebuilding measures under the title of '*Peace Building*'. With this term, they referred to the provision of basic security guarantees, the implementation of a functioning judicial system, and the promotion of economic growth.[916] In UN doctrine, however, '*peace-building*' is also a recognized category of engagement. It circumscribes a variety of measures that lay the foundation for lasting peace, such as strengthening the rule of law and respect for human rights, as well as fostering conflict resolution techniques.[917]

In comparison, the respective range of tasks within the two systems is thus quite similar. This already indicates the extent to which R2P and PoC might complement each other overall.[918]

(b) The Necessary Foundation?

Rather difficult in regard to the responsibility to rebuild is, however, its legal foundation. So far, it has remained ambiguous where the necessary authority to implement such far-reaching measures is to come from, considering that lasting and sustainable transformational projects deeply encroach on sovereign governance and the fundamental governmental organization of a state. Even if the corresponding suspension of sovereign rights would only apply '[…] *de facto* for the period of the intervention and follow-up […]',[919] it would still occur in a legal vacuum, if R2P as a concept itself was the sole basis.

Addressing the issue, the ICISS proposed a '[…] constructive adaptation […]' of UN Charter provisions, namely Chapter XII with Article 76.[920] This chapter provides for an International Trusteeship System. While this construct has been raised as a legal approach within robust peacekeeping as well,[921] there are no recognizable ambitions by the international community to revive the mechanism. On the contrary, the High-level Panel on Threats, Challenges, and Change proposed the abolition of the Trusteeship Council in 2004.[922] This Council had formerly supervised the administration of the Trust Territories and had already suspended its operations in 1994.[923]

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[916] ibid paras 5.7 ff.
[917] *Report of the Panel on United Nations Peace Operations* (n 18) para 13.
[918] see text to n 1174-79.
[919] *ICISS Report* (n 900) para 5.26.
[920] ibid para 5.22.
[921] see text to n 883-93.
[922] UNGA, *A more secure world: our shared responsibility: Report of the High-Level Panel on Threats, Challenges and Change* [2 December 2004] UN Doc A/59/565 para 299.
[923] 'International Trusteeship System' (The United Nations and Decolonization) <https://www.un.org/dppa/decolonization/en/history/international-trusteeship-system-and-trust-territories> accessed 16 December 2021.

In the end, the ICISS recognized the obstacles within their own approach.[924] While a coherent legal basis for possible Peace Building measures within R2P is thus still missing, in practice, the stipulated tasks are mainly performed within the existing framework of peacekeeping anyhow. The factual relevance of this challenge is thus negligible.

However, also apart from that, it must be noted that the ICISS' approach to Peace Building is not entirely persuasive. The Commission claims that their responsibility to rebuild would also aim to '[…] better accustom the population to democratic institutions and processes if these had been previously missing from their country'.[925] Considering that the '[…] constitutional arrangements [...]'[926] of a state may very well be a dictatorship, however, Peace Building may precisely not change that unless R2P were to pursue regime change after all. This stipulation was, therefore, bound to cause unease at the very least.

bb) The Question of Authority

Having elaborated on the three specific responsibilities constituting R2P, the Commission continued to elaborate on the matter of authority.[927] Considering that all R2P responsibilities entail an interference with the internal affairs of another state, the question as to who is responsible and thus in charge to initiate and monitor the stipulated process was crucial.

(1) The Security Council as the Principal Authority

The Commission considered the Security Council to be the predestined organ to conduct R2P.[928] Its approval was thus to be '[…] sought […]'.[929] Conversely, though, this implied that such approval was not mandatorily required. Indeed, the Commission subsequently proposed the General Assembly as an authority under the 'Uniting for Peace' procedure[930] or regional organizations[931] as appropriate decision-makers, if the Security Council failed to act.

However, as Lee put it: 'The Commission's ICISS Report did not discuss these two alternatives in terms of legality but rather as policy options consistent with R2P'.[932] This is particularly evident from the fact

[924] *ICISS Report* (n 900) para 5.24.
[925] ibid para 5.25.
[926] ibid para 5.26.
[927] ibid paras 6.1 ff.
[928] ibid para 6.14.
[929] ibid para 6.15.
[930] ibid para 6.29.
[931] ibid para 6.31.
[932] Thomas H. Lee, 'The Law of War and the Responsibility to Protect Civilians: A Reinterpretation' [2014] 55 Harvard Int'l L.J. 2, 251, 287.

that a use of force that is not authorized by the Council is in breach of the UN Charter. The Uniting for Peace Framework, especially, has been acknowledged in the realm of peacekeeping, but it was not created to allow for enforcement action[933] In the end, any action taken under the Uniting for Peace Framework may thus only 'encourage it [the Security Council, note from the author] to act decisively and appropriately'.[934] It may not replace a corresponding mandate.

The final authority must therefore remain with the Security Council. In practice, this is highly precarious, considering that the Council is usually deeply divided on R2P. The hope that the commitment of grave atrocities would generate an overall unity within the world community still remains far from realistic today. Alternatives must thus at least be considered.

(2) Alternative Approaches to Derive Legality

One such approach was developed by Anne Peters. She argued that a state's power to exercise sovereignty is not a self-sustaining entitlement, but a justifiable position.[935] As a principle, sovereignty follows from the respect for human rights, where the existence of the former depends on the adherence to the latter.[936] It may then be argued that a state loses its external sovereignty once it violates its duty to adhere to human rights standards. In regard to R2P, this would indicate that an external intervention on humanitarian grounds would not need prior authorization by the Security Council, as it would not be in breach of an already forfeited sovereignty.[937]

Peters is not the only one to justify humanitarian interventions beyond the exceptions intended by the UN Charter. In a similar line of reasoning, there have been attempts to justify aforesaid action with the Charter text itself. Stating that such an intervention would not be directed against the territorial integrity or political independence of a state, it would not be within the scope of Article 2 (4) UNCh.[938] Furthermore, submitting morality as an overriding guiding principle and value has likewise been tried.[939] Similarly, it has been argued that the principle of non-intervention is only one out of many values on which the international order is built. Others are human rights and human

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[933] see text to n 98-100.

[934] *ICISS Report* (n 900) para 6.30.

[935] Anne Peters, 'Humanity as the A and Ω of Sovereignty' [2009] EJIL Vol. 20 No. 3, 513, 518 <https://academic.oup.com/ejil/article/20/3/513/402328> accessed 16 December 2021.

[936] ibid 521-22.

[937] ibid 524.

[938] Anthony Aust, *Handbook of International Law* (Cambridge University Press 2005) 231–32; cited in Payandeh (n 234) 359.

[939] Fernando R. Tesón, *Humanitarian Intervention: An Inquiry Into Lay And Morality* (Dobbs Ferry, NY : Transnational Publishers 1988) 130 ff.; cited in Payandeh (n 234) 359.

dignity, and they need to be reconciled with each other.[940] Humanitarian intervention would then at least not be prohibited by CIL.[941]

Although these might be viable alternatives, a majority opinion in this respect has not yet been formed. The basic dilemma concerning conclusive authority thereby dates back to the precursor construct of R2P, that of humanitarian intervention. Before R2P can be assessed in its current status and challenges, it is necessary to go back to the beginning and take a look at its conceptual roots.

c) Back to the Roots – The UN and Humanitarian Intervention

While R2P was a revolutionary approach in many regards, it nonetheless tied in with a much older concept: that of humanitarian intervention. This controversial approach stipulates that humanitarian emergencies in one state can trigger forceful, unilateral action by other states.

While it is well established that the Security Council can authorize the use of force in order to protect civilians and prevent a humanitarian catastrophe,[942] it is just as disputed how the situation is to be assessed when the Security Council fails to reach an agreement. One or more states may then take unilateral action, for example on the basis of humanitarian intervention.[943]

aa) The Origins of Humanitarian Intervention

The idea of humanitarian intervention originally stems from an ancient principle that stipulated a unilateral right of states to use force in order to protect their own nationals or those of allies on foreign territory. This right had been recognized by international law.[944] As a law of war, it was robust and permitted the use of force to protect human lives and even property.[945]

With the Second World War, however, the interest in such a far-reaching right declined, while the assumption that a state had the right to protect the physical integrity of its nationals prevailed.[946] Finally, and in light of the grave violations committed during the Third Reich,[947] the community of

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[940] Christopher Greenwood, 'International Law and the NATO Intervention in Kosovo' [2000] The International and Comparative Law Quarterly Vol. 49, No. 4, 926, 929; cited in Payandeh (n 234) 359.
[941] Greenwood (n 940) 931; As such different approaches will be discussed in depths in the following, both for humanitarian intervention in general and R2P in particular, this is only a short review.
[942] Gray (n 897) 96; see the examples thereto in Welsh (n 367) 538 ff.
[943] Gray (n 897) 96.
[944] Lee (n 932) 252-53.
[945] ibid.
[946] ibid 253.
[947] Alex J. Bellamy, 'The Responsibility to Protect: Towards a "Living Reality"' (*United Nations Association-UK, April 2013*) 6.

states adopted the Genocide Convention in 1948. It thus determined genocide as the gravest of crimes and obliged all parties to prevent and punish its commission.[948]

Based on this, the construct of humanitarian intervention as we know it today was formed. Although it is difficult to grasp, one definition thereof could be:

[T]he protection by a state or group of states of fundamental human rights, in particular the right to life, of nationals of, and residing in, the territory of other states, involving the use or threat of force, such protection taking place neither upon the authorization by the relevant organs of the U.N. nor upon invitation by the legitimate government of the target state.[949]

It is thus stipulated that for the overarching goal of protecting human lives, a breach of the sovereignty of an unwilling or incapable state through intervention can be justified. However, it is exactly this absence of both an authorization by the Security Council and an invitation from the state concerned that raises the fundamental question of the construct's legal basis.

bb) Legal Bases of Humanitarian Intervention

Over the years, there have been repeated attempts to derive and substantiate the legality of humanitarian intervention on different grounds.[950] An exception for gross human rights violations does not exist explicitly in the UN Charter. Hence, one could argue that a right of humanitarian intervention must be read into the Charter, therefore averting a violation of Article 2 (4) UNCh. Indications that would support this approach are rather scarce, however.

Alternatively, this right could also be derived from a rule of customary international law that exists parallel to the collective security system.[951] Lastly, humanitarian intervention could also be the expression of a general principle of law.

(1) Humanitarian Intervention as Customary International Law?

One could stipulate that the promotion of human rights is the major purpose of the UN Charter; when this objective collides with state sovereignty, the latter would thus have to yield.[952] As this is not laid

[948] *Convention on the Prevention and Punishment of the Crime of Genocide* (9 December 1948), Article I.

[949] Wil D Verwey, 'Humanitarian Intervention' in Antonio Cassese (ed), *The Current Legal Regulation of the Use of Force* (Martinus Nijhoff Publishers 1986) 59.

[950] see for example Bartram S. Brown, 'Humanitarian Intervention at a Crossroads' [2000] 41 William & Mary Law Review 1683, 1686 ff.; and Thomas Behuniak, 'The Law of Unilateral Intervention by Armed Force: A Legal Survey' [1978] 79 Mil. L. Rev. 157, 186 ff.; and Tesón (n 939) 157 ff.

[951] Simon Chesterman, *Just War or Just Peace? Humanitarian intervention and international law* (Oxford University Press 2001) 53 ff.; cited in Sheeran and Kent (n 514) 35.

[952] Aust (n 938) 231.

down in the Charter, however, such an understanding would have to constitute a rule of CIL. Therefore, both opinio juris, as well as a corresponding state practice would have to be established.

Relevant state practice can indeed be found. In 1860, France invaded Syria to protect Christians from being massacred.[953] Additionally, US-American troops were sent to Cuba in 1898 to assist the rebels in their fight against Spanish domination, which ultimately led to the foundation of the Republic of Cuba.[954] Lastly, one could even claim that the Second World War itself was a huge humanitarian intervention on the part of the Allies.[955] Be that as it may, these early incidents do at least not allow for any conclusion on a corresponding opinio juris.

This remains the case despite more recent state practice since the Second World War.[956] The most prominent example thereof is probably the NATO intervention in Kosovo in 1999. A clear reference to any rule of international law concerning humanitarian intervention is, however, again not to be found.[957] Even those favoring a legal humanitarian intervention return to '[…] moral, historical and policy arguments […]'[958] to make their claim. state practice or not, humanitarian intervention has never been uniformly respected or accepted as CIL.

(2) Humanitarian Intervention as the Result of a General Principle of Law?

Therefore, humanitarian intervention may at most be conceived as a general principle of law, based on overriding values such as humanity and a general human conscience.[959] Its application would thus be technically illegal but morally compelling.[960] As the Kosovo Report concludes: '[T]he nato military intervention was illegal but legitimate'.[961]

At first sight, also the ICJ appears to confirm the fundamental illegality of humanitarian intervention. In their Nicaragua judgment, the judges determined that the use of force cannot specifically be justified by human rights violations of the other side.[962]

Nonetheless, it has to be critically noted that the conduct in question was essentially the training and funding of paramilitary forces.[963] Such a specific form of intervention is difficult to generalize, while

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[953] Tesón (n 939) 157; Behuniak (n 950) 160 f.
[954] Tesón (n 939) 158; Behuniak (n 950) 163.
[955] Tesón (n 939) 158.
[956] cf. ibid 159 ff.
[957] cf. Sheeran and Kent (n 514) 35-36.
[958] Brown (n 950) 1739.
[959] cf. Sheeran and Kent (n 514) 34, who nevertheless note that this '[…] does not reflect a positivist legal basis'.
[960] Martti Koskenniemi, ''The Lady Doth Protest Too Much': Kosovo, and the Turn to Ethics in International Law' [2002] MLR 65:2, March, 159, 162; cited in Sheeran and Kent (n 514) 35–36.
[961] The Independent International Commission on Kosovo, *The Kosovo Report* (2000, Oxford University Press) 4.
[962] *Case concerning Military and Paramilitary Activities in and against Nicaragua*, Judgement of 27 June 1986, ICJ Rep 1986, 14 (International Court of Justice), para. 268.
[963] see ibid.

the ruling is also difficult to apply to other forms of humanitarian intervention. From such an individual case, it thus cannot be concluded in principle that the ICJ would classify any form of humanitarian intervention as illegal.

The reserved attitude of the international community towards humanitarian intervention is quite understandable. After all, the construct bears the potential to undermine the UN collective Security System, as it is prone to serve as a fig leaf for activities that would otherwise be contrary to the Charter. Being both practically indispensable but unjustifiable in international law, humanitarian intervention is, not least since the Kosovo intervention, in a tight spot.

cc) Common But Differentiated – Humanitarian Intervention and R2P

With R2P, there was now a prospect of resolving this dilemma. The new concept appeared optimal to stimulate the debate anew. After all, Kofi Annan had already asked the theoretical question of how the UN should react to gross human rights violations like those of Rwanda and Srebrenica, if humanitarian intervention was '[…] an unacceptable assault on sovereignty […]'.[964]

However, R2P had to prove its novelty. It was not to be misunderstood as an old idea in a new guise. The Commission specifically recognized the risk that such a commingling would entail. It, therefore, noted that '[…] the concepts which lie behind particular choices of words […]' should not '[…] become a barrier to dealing with the real issues involved'.[965]

This assessment prevailed. In 2008, Secretary-General Ban Ki-Moon clarified: 'RtoP is not a new code for humanitarian intervention'.[966] Later on, Gareth Evans, former Australian Foreign Minister stipulated: 'R2P is primarily about prevention, whereas humanitarian intervention is only about reaction'.[967] The roles were thus clearly defined.

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[964] UNGA, *We the peoples: the role of the United Nations in the twenty-first century, Report of the Secretary-General* (UN Doc A/54/2000, 27 March 2000) para 217; cited in Yasmine Nahlawi, *The Responsibility to Protect in Libya and Syria: Mass Atrocities, Human Protection, and International Law* (Routledge Research in International Law 2020) 1.

[965] *ICISS Report* (n 900) para 2.4.

[966] 'Secretary-General Defends, Clarifies 'Responsibility to Protect' at Berlin Event on 'Responsible Sovereignty: International Cooperation for a Changed World', U.N. Press Release SG/SM/11701 (15 July 2008) <https://www.un.org/press/en/2008/sgsm11701.doc.htm> accessed 16 December 2021.

[967] Interview with Gareth Evans by Alan Philips for *The World Today*, Chatham House, October 2012, 'Gareth Evans on 'Responsibility to Protect' after Libya' http://www.gevans.org/opeds/oped132.html accessed 16 December 2021.

d) Conclusion – The Birth of a Concept

Apparently, the ICISS' proposal had hit a nerve. The Commission had presented a comprehensive concept and demonstrated the importance and role of each step in a critical, reflective, and vivid manner. Being aware of the sensitivity that is attached to all force-related issues, the Commission highlighted the importance of measures short of military action, such as sanctions or embargoes. The use of force, on the contrary, was allocated a place at the very end of a long list of possible reactions to human rights violations.[968] In so doing, they have striven to ensure that R2P was not misunderstood as a right to intervene but recognized as a responsibility that comes with the possibility and ability to help those in need of protection.

Notwithstanding, the R2P that Evans referred to in 2012 was different from the one developed by the ICISS in 2001. All the framing had not disguised the fact that R2P '[…] implies above all else a responsibility to react to situations of compelling need for human protection'.[969] In the aftermath of the Kosovo intervention, the report, unsurprisingly, laid a focus on armed force and with it the responsibility to react.[970] While the ICISS had set the ball rolling, the UN soon followed.

2. R2P Today – A review After Twenty Years

After the ICISS had paved the way, the international community picked up the threads and further developed R2P. Firstly, this institutional framing shall thus be delineated. Secondly, the practical implementations of the concept shall be demonstrated. This will further on allow for an assertion as regards the concept's legal status. Finally, conclusions on current R2P may thus be drawn.

a) The Institutional Framing of R2P – In Between the Grindstones of International Law-Making

The ICISS' conceptualization of R2P was carefully designed and well placed at the international level. Although it was only a proposal, it struck the right chord. At the 2005 World Summit, the concept was put on the agenda of the General Assembly. It was discussed, adapted, and then officially adopted by the UN member states within the Outcome document.[971] This new R2P shared its roots with the ICISS' conception but was, after all, heavily summarized and broken down to the lowest common

[968] i.e. see *ICISS Report* (n 900) para 2.3.
[969] ibid para 4.1.
[970] Lee (n 932) 284.
[971] World Summit Outcome (n 398) paras 138-40.

denominator.[972] Both the nuanced differentiation and the depth of the approach fell irrevocably by the wayside within this process.

aa) The 2005 World Summit Outcome – A Redesigned R2P

Derived from the ICISS conception of R2P, the General Assembly agreed on a threefold R2P-approach.[973]

Firstly, it was stipulated that each state has a responsibility to protect its own population from genocide, war crimes, ethnic cleansing, and crimes against humanity.[974] While this primary level referred to the domestic state perspective, it nevertheless set the framework for the responsibilities to come, in that it introduced the relevant core crimes.

Secondly, the General Assembly concluded that every state has a corresponding responsibility to assist other states in discharging their primary duty. On an inter-state level, the international community was thus to '[…] encourage and help states […]' in regard to their own, basic responsibility, as well as foster an '[…] early warning capability'.[975]

Thirdly and lastly, a residual willingness of the international community to take collective action was enacted. The focus was thereby on non-forceful, '[…] diplomatic, humanitarian and other peaceful means, [...] to help to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity'.[976] Only as a last resort, the states declared themselves '[…] prepared to take collective action, in a timely and decisive manner, through the Security Council, in accordance with the Charter, including Chapter VII [...]'.[977]

bb) The Preparedness to Take Collective Action – A Comprehensive Analysis

No matter how cautiously the General Assembly formulated the third contention, it still remained the decisive commitment. A closer look in view of the differences to the ICISS' approach is thus indicated.

The most striking difference from the ICISS' submission in regard to collective action is thereby the narrowed scope of application. This can be determined by means of distinct elements.

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[972] cf. Carsten Stahn, 'Responsibility to Protect: Political Rhetoric or Emerging Legal Norm?' [2007] The American Journal of International Law, Vol. 101, No. 1, 99, 108; also cf. Sheeran and Kent (n 514) 39.

[973] Which was later affirmed in a report of the Secretary-General on the implementation of R2P, UNGA, *Implementation of the Responsibility to Protect: Report of the Secretary-General* (UN Doc A/63/677, 12 January 2009) paras 11 ff.; cited in Nahlawi (n 964) 25.

[974] World Summit Outcome (n 398) para 138.

[975] ibid.

[976] ibid para 139.

[977] ibid.

For one, the General Assembly neither referred to a 'just cause' nor did it require a 'large scale loss of life' to provoke collective action.[978] Instead, it identified the commission of the core crimes as the sole trigger for action. This threshold is not only higher than the one proposed by the ICISS; it is furthermore not nearly as differentiated. Rather, the General Assembly therewith linked R2P to a set of conditions that have so far been associated with humanitarian intervention.[979] Albeit the core crimes may provide a useful indication, the choice was therewith rather made for the known instead of the individualized approach.

Narrowing the scope of application remained a proven means in other respects as well.[980] While the General Assembly also construed its third contention as a subsidiary means in case the nation-state fails to protect its civilians itself, the ICISS' report was sufficient to conclude that a state has to be 'unwilling or unable to act'. Within the Outcome document, however, it was now required that the national authorities are '[…] manifestly failing to protect their populations […]'.[981]

Furthermore, the General Assembly employed a linguistic trick. While the '[…] responsibility […]' of every state to protect its own population was expressly established,[982] the residual duty of the international community to intervene was designed differently. In this respect, the states merely declared their '[]… preparedness […]' to become active.[983] This contention cannot be equated with a responsibility.[984] In the draft document of just a few months earlier, the states had still '[…] recognize[d] […]' a shared responsibility to take collective action.[985] In the end, all that remained of such responsibility was thus mere good will.[986]

Lastly, the General Assembly made a clear constriction with respect to the necessary authority. Considering that action is solely taken '[…] through the Security Council […]' and '[…] in accordance with the Charter […]',[987] R2P was adopted as an instrument that is tightly integrated into the UN's collective security system.

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[978] see Sheeran and Kent (n 514) 39–40.
[979] a concept from which R2P was formerly to be differentiated from, see text to n 964-67.
[980] see Sheeran and Kent (n 514) 40; also see Welsh (n 367) 558.
[981] World Summit Outcome (n 398) para 139.
[982] ibid para 138.
[983] ibid para 139; see also Saira Mohamed, 'Taking Stock of the Responsibility to Protect' [2012] 48 Stan. J. Int'l L. 63, 71.
[984] Mohamed (n 983) 72.
[985] UNGA, *Revised Draft Outcome Document of the High-Level Plenary Meeting of the General Assembly of September 2005 Submitted by the President of the General Assembly* UN Doc A/59/HLPM/CRP.1/Rev.1 [22 July 2005] para 113.
[986] see Mohamed (n 983) 71.
[987] World Summit Outcome (n 398) para 139.

cc) Conclusion - Narrow But Precise?

Altogether, the General Assembly thus significantly restricted the scope of application for R2P. In doing so, it limited its potential, but also provided an unambiguous and clear-cut framework. After all, this R2P had to gain the acceptance of the broad state community.

Even though R2P had therewith been severely curtailed, it was nonetheless recognized and approved by the main decision-making organ of the UN. This was already a major achievement.

Its factual power of action now hinged on the practical implementation by the international community. Finally, R2P had to step out into the real world to prove whether it could assert itself as a meaningful mechanism in the toolbox of international security efforts.

b) R2P in Action – Out of the Cradle and Into the Chaos

At the 2005 World Summit, the state community had recognized a responsibility to protect populations from genocide, war crimes, ethnic cleansing, and crimes against humanity. The question now was how, when, and where this R2P would be translated into practice.

Conceptually, missions on the basis of R2P belong to the realm of peace enforcement. They aim at restoring international peace and security by means of military force, though without aspiring to militarily defeat the other state.[988] Since they do not require the consent of the host state and may only take place in cases of an acute emergency, the applications are by far not as frequent as those of (robust) peacekeeping. Nonetheless, relevant examples can still be found.

aa) A New Endeavor – First Steps Towards an Effective R2P Application

The first steps towards an effective R2P application were rather tedious. Hastily proclaimed and highly contentious, these initial references held no promise of great success.

In 2008, France rushed ahead with a request to the Security Council to mandate a mission to Myanmar after Cyclone Nargis had caused devastations and the government refused to receive international

[988] see 'Terminology' (n 135); cf. Findlay (n 38) 6; although it should be noted that Findlay considers humanitarian operations, such as humanitarian intervention, as 'wider peacekeeping', Findlay (n 38) 387. This term circumscribes the robust peacekeeping missions that emerged after the end of the Cold War and did not only aspire to de-escalate but furthermore to tackle the root causes of conflict. For clarification purposes, however, R2P will firstly be differentiated from such humanitarian peacekeeping operations, considering that R2P implies the use of force against a non-consenting State. Subsequently, this delimitation will provide the basis for integrative approaches, see text to n 1179 ff.

support.[989] The request was denied, however, not least because China and Indonesia rejected the categorization as an R2P situation.[990]

Subsequently, Russia invoked R2P as a justification for their invasion of Georgia, based on a proclaimed genocide, taking place in South Ossetia.[991] Considering the mission's interruptive character, this attempt was even more strongly rejected and dismissed as an excuse for Russia to pursue its geopolitical interests.[992]

While at that point, R2P had not once been successfully applied, at least its limits had been tested and confirmed in practice. Hopes were high that such an affirmation would '[…] persuade cautious Member states that the principle could not be used in an expansive way to justify unilateral coercion'.[993]

In 2007, the concept was then again referred to in Kenya. When Secretary-General Kofi Annan subsequently persuaded the two opposing political leaders to peacefully settle their dispute, this was not only the first successful R2P implementation but also a manifestation of the concept's preventive dimension.[994]

Though slowly at first, the development of R2P appeared to then gather momentum. R2P was not only recognized and confirmed by the Security Council in resolution 1674 (2006)[995] and the General Assembly,[996] but also referred to in the Preambular Clauses of resolution 1894 (2009)[997] and resolution 1706 (2006), the latter concerning the situation in Darfur.[998]

In the end, the willingness to draw actual consequences from these invocations was nonetheless limited. In Darfur, for example, the dire circumstances of the civilian population were recognized and even assumed to meet the R2P threshold.[999] Still, no further action was taken due to concerns for ' […] diplomatic pressure […]'.[1000]

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[989] Peters (n 935) 524; Asia-Pacific Centre for the Responsibility to Protect, *Cyclone Nargis and the Responsibility to Protect: Myanmar/Burma Briefing No. 2* (16 May 2008) <https://r2pasiapacific.org/files/582/briefing_no2_cyclonenargis_r2p_myanmar.pdf> accessed 16 December 2021; Bellamy (n 947) 18; Sheeran and Kent (n 514) 40.

[990] Peters (n 935) 524; *Cyclone Nargis and the Responsibility to Protect: Myanmar/Burma Briefing No. 2* (n 989) 2.

[991] Bellamy (n 947) 18; Sheeran and Kent (n 514) 40.

[992] cf. ibid.

[993] Bellamy (n 947) 18.

[994] ibid.

[995] UNSC Resolution 1674 (n 399) para 4.

[996] UNGA Resolution 63/308 [7 October 2009] UN Doc A/RES/63/308.

[997] UNSC Resolution 1894 [11 November 2009] UN Doc S/RES/1894 Preambular Clause 7.

[998] UNSC Resolution 1706 [31 August 2006] UN Doc S/RES/1706 Preambular Clause 2.

[999] Peters (n 935) 524; UNGA/Human Rights Council, *Implementation of General Assembly Resolution 60/251 of March 2006 Entitled "Human Rights Council": Report of the High-Level Mission on the Situation of Human Rights in Darfur Pursuant to Human Rights Council Decision S-4/101* [9 March 2007] UN Doc A/HRC/4/80 para 76.

[1000] Bellamy (n 947) 18.

bb) R2P in Libya – The Game Changer

The overall restraint in regard to R2P ended abruptly with the Libya intervention in 2011. By all means, this venture was a real game-changer in terms of R2P application. From today's perspective, no other intervention is more strongly associated with the concept. Both its potential and its pitfalls now became clearly visible.

(1) The Libyan Revolution and the Trigger for R2P

To fully grasp the significance of the Libya operation, it first requires a basic understanding of the local conflict development.

When the so-called Arab revolution hit the country in 2011, the protests quickly became violent in the North African state.[1001] After the negotiation efforts of regional organizations had failed, the Security Council passed resolution 1970 at the end of February. It provided for non-coercive measures only and was therefore rather uncontroversial.[1002] At this point, it seemed relatively unlikely that another, more rigorous resolution would make it through the Council, in particular after Russia had already made clear that it would deem any '[…] forceful interference […]' as not useful.[1003]

Subsequently, however, the circumstances on the ground changed. To begin with, the Libyan regime did not even try to comply with resolution 1970, so that the situation deteriorated significantly. Next, France and the United Kingdom demanded stricter measures, and NATO also admitted its willingness to engage in the region. When, additionally, different regional organizations called for a more intense engagement, pressure on the Security Council increased.[1004] Finally, even the League of Arab states (LAS) called for an intervention.[1005] The Council could now no longer remain still.[1006]

The engagement of the LAS finally persuaded the United States to favor another resolution, which in turn influenced other members.[1007] Despite many, partly reasonable counterarguments,[1008] resolution 1973 was finally passed, with the five major opponents China, Russia, Brazil, Germany, and India abstaining.[1009]

[1001] Nahlawi (n 964) 83; Bellamy and Williams (n 507) 838.
[1002] Bellamy and Williams (n 507) 840.
[1003] UNSC 6491st meeting [26 February 2011] UN Doc S/PV.6491 4.
[1004] Bellamy and Williams (n 507) 841.
[1005] Payandeh (n 234) 377; Letter Dated 14 March 2011 from the Permanent Observer of the League of Arab States to the United Nations Addressed to the President of the Security Council, UN Doc S/2011/137 [15 March 2011].
[1006] Bellamy and Williams (n 507) 841.
[1007] ibid 843.
[1008] i.e. that the use of force could prolong the conflict by leading to more violence and that questions of enforcement had not yet been fully answered.
[1009] Bellamy and Williams (n 507) 844.

In view of the fundamentally different attitudes of the Security Council members, this result was nothing short of miraculous. For R2P, it was a major step forward, considering that it was explicitly referred to in perambulatory clause four. Additionally, and for the first time ever, the Security Council adopted such a wide-ranging mandate without the consent of the affected state.[1010]

The real test case for R2P had thereby finally materialized. Libya bore the potential to become the concept's stepping-stone and promised to drag it from mere theory out onto the global stage of international law.

(2) The Operation – A Preprogrammed Disaster

These expectations were, however, not met. The reasons for that had already been preprogrammed in the process of adoption.

Looking back, it is difficult to ascertain why resolution 1973 had been pushed through the voting process by so many abstentions in the first place. As for China's and Russia's acquiescence, Bellamy and Williams suggest that they '[…] abstained because they believed that they could not legitimize inaction in the face of mass atrocities'.[1011] That they additionally wanted to provide R2P with one chance of proving itself in practice is possible but highly unlikely. In regard to the United States' engagement, Mohamed makes a point in arguing that their approval was motivated less by a general belief in R2P and much more by their own national interests.[1012]

Anyhow, when push came to shove, the major inconsistencies could no longer be compensated for. When the operation began, the shallow consensus that had allowed resolution 1973 to be passed quickly crumbled away.

To begin with, there was no common understanding of what R2P concretely entailed and how its objectives should be enforced. Some states took the mandate's authorization to use '[…] all necessary means […]' to protect civilians[1013] and enforce the No-Fly Zone[1014] as a basis for all kinds of military activities, including direct attacks against the regime and its leader Muammar al-Gaddafi. Others, however, opted for a narrow interpretation of the mandate.[1015] This disagreement was complicated by the fact that both positions seemed compatible with the wording of the resolution. Ultimately, it was thus a question of political will. Philippe Sands, professor of law at the University College of London, for example, elaborated:

[1010] ibid 846.
[1011] ibid 844.
[1012] Mohamed (n 983) 78 ff., 83.
[1013] UNSC Resolution 1973 [17 March 2011] UN Doc S/RES/1973 para 4.
[1014] ibid para 8.
[1015] Bellamy and Williams (n 507) 845.

The protracted lessons of Iraq and Afghanistan weigh heavily, and the language of the resolution appears to allow more than only defensive or reactive military measures. The authorization of "all necessary means" is broad and appears to allow the targeting of Gaddafi and others who act to put civilians "under threat of attack", words that go beyond the need to establish a connection with actual attacks.[1016]

Other well-renowned scholars, such as Malcolm Shaw and Ryszard Piotrowicz, supported such a wide interpretation of resolution 1973.[1017]

However, while China and Russia had refrained from blocking the resolution, they were still not in favor of military intervention. Russia insisted on '[…] strict compliance with resolution 1973 (2011)',[1018] which in their view implied a limitation to explicitly discussed measures, such as the enforcement of a ceasefire and the establishment of a No-Fly Zone. China furthermore stressed that they were '[…] not in favor of any arbitrary interpretation of the Council's resolutions or of any actions going beyond those mandated by the Council'.[1019]

In the end, all these remarks did not halt the United States, the United Kingdom, and France from launching a separate offensive. It consisted of direct attacks against pro-Gaddafi forces.[1020] These actions went far beyond what other states considered permissible and what had been agreed upon in the negotiations of the resolution.[1021] By the end of March 2011, NATO had joined in the action and taken over the military operation.[1022] Effectively, this helped the insurgents to take power over the country.[1023] Gaddafi was killed in battle[1024] and the end of a political era was sealed.

The image of R2P had therewith changed. Henceforward, it was perceived as a unilateral intervention mechanism, applied to circumvent an opposing Security Council. Even worse, it was associated with regime change. These - quite predictable - repercussions of the Libya operation caused permanent damages to the concept of R2P.

[1016] Philippe Sands, 'UN's Libya resolution 1973 is better late than never' (*The Guardian,* 18 March 2011) <https://www.theguardian.com/law/2011/mar/18/libya-un-resolution-1973> accessed 16 December 2021.

[1017] Dapo Akande, 'What Does UN Security Council Resolution 1973 Permit?' (*EJIL: Talk!*, 23 March 2011) <https://www.ejiltalk.org/what-does-un-security-council-resolution-1973-permit/> accessed 16 December 2021; in a similar line of reasoning, see Nahlawi (n 964) 108 ff.

[1018] UNSC 6528th Meeting [4 May 2011] UN Doc S/PV.6528 9.

[1019] ibid 10.

[1020] 'Libya: US, UK and France Attack Gaddafi Forces' (*BBC News*, 20 March 2011) <https://www.bbc.com/news/world-africa-12796972> accessed 16 December 2021; Payandeh (n 234) 379.

[1021] Interview with Gareth Evans (n 967); Bellamy (n 947) 19.

[1022] 'NATO Secretary General's Statement on No-Fly Zone over Libya' Press Release (2010) 035' (*NATO,* 23 March 2011) <https://www.nato.int/cps/en/natolive/news_71722.htm> accessed 16 December 2021.

[1023] Payandeh (n 234) 358.

[1024] i.e. Tim Gaynor and Taha Zargoun, 'Gaddafi caught like "rat" in a drain, humiliated and shot' (*Reuters,* 21 October 2011) <https://www.reuters.com/article/us-libya-gaddafi-finalhours-idUSTRE79K43S20111021> accessed 16 December 2021.

(3) An Open Secret – R2P and Regime Change in Libya

The adverse effects mainly resulted from the fact that in Libya, resolution 1973 and with it R2P had been rather openly used to advance regime change.[1025] While such an objective had not been explicitly excluded within the World Summit Outcome Document,[1026] the General Assembly had nonetheless restricted R2P measures to situations of grave and distinct atrocities, namely genocide, war crimes, ethnic cleansing, and crimes against humanity.[1027] At first sight, this focus is difficult to reconcile with regime change.

Nonetheless, it has been argued that while regime change cannot be the objective of an R2P operation, it may well be a means of reaching the mandated goal, thus the protection of civilians against the committing of further core crimes.[1028] If this protection requires attacks against governmental forces, a resulting regime change would be covered by R2P.[1029] This would nonetheless require that all attacks were directed against those state institutions that are involved in the persecution of civilians.[1030]

In Libya, it indeed became more and more apparent that a peaceful solution and therefore the reestablishment of safety for civilians would not be possible with the old regime.[1031] In the end, all measures that impeded the Gaddafi forces from attacking civilians did, however, automatically support the opposition. A strict separation between civilian safety and regime change measures thus became impossible.[1032]

Even though such an approach appears permissible, it has still not prevailed. On the contrary, Libya is firmly anchored in the collective memory as an example of how the interventionist ambitions of a few states can initiate a regime change under the guise of a civilian protection mandate.[1033] This affirmed the concerns of many critics, namely that R2P would be used as an excuse to circumvent the sovereign equality of all states and offer the most influential players the opportunity to better assert their interests. After all, the R2P recognized by the World Summit was rather one of multilateral, collective

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[1025] Payandeh (n 234) 358.
[1026] as it had been within the ICISS report, see text to n 914 and *ICISS Report* (n 900) para 4.26.
[1027] World Summit Outcome (n 398) para 139.
[1028] Payandeh (n 234) 388.
[1029] cf. Interview with Gareth Evans (n 967).
[1030] cf. Payandeh (n 234) 390.
[1031] ibid 389.
[1032] Ibid; it is still debatable whether this argument can also be used to justify the targeted killing of the head of government, Gaddafi. As Supreme Commander, he was ultimately in charge of all civilian targeting, whether or not he was personally involved in concrete attacks, ibid 390; to reach a conclusive answer in that matter, however, it would be necessary to clarify whether Gaddafi was actually killed in battle or was rather executed in custody. For lack of a concrete threat, the latter would most likely not have been covered by any mandate interpretation, ibid 390-91; this factual question is, however, unresolved to date.
[1033] i.e. Bellamy and Williams (n 507) 846; cited in Sheeran and Kent (n 514) 41; also see Interview with Gareth Evans (n 967).

collaboration than courageous solo efforts. The Libya intervention had not coincided with this perception.

cc) In Sum – R2P in Libya

The R2P intervention in Libya has thus left behind a divided community of states. The concerted initiative of the United States, the United Kingdom, and France lead to considerable '[…] bruises […]' in international relations[1034] that have resulted in a decreased willingness to support any further R2P mandates[1035].

No one has felt that as intensively as the Syrian people. Thirteen out of fifteen Security Council members voted in favor of a 2012 resolution that merely called on Assad to resign. Even though the document did not imply any military intervention, Russia and China still inhibited its adoption.[1036] Russia stated that while it '[…] was committed to finding a solution to the crisis, some influential members of the international community had been undermining the possibility of a peaceful settlement by advocating regime change […]'.[1037] A 'second Libya' was namely to be avoided under all circumstances. Lee summarizes: 'NATO's conduct in Libya virtually ensured that a Security Council resolution authorizing forcible R2P against an autocratic regime would never happen again barring significant regime change in China and Russia, or a procedural reform of Security Council voting rules to eliminate the veto'.[1038]

Notwithstanding, the concept somehow prevailed. In 2018, for example, the Secretary-General of the Organization of American States, Luis Almagro, invoked R2P concerning the deteriorating situation in Venezuela. He proclaimed: '[W]e must act in accordance with public international law - including the UN's 2005 Responsibility to Protect commitment to prevent genocide [...]'.[1039] Further on, he specifically rejected the assumption that this must include military intervention: '[t]he responsibility

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[1034] Interview with Gareth Evans (n 967); also cf. Adrian Gallagher, 'We need to understand the Responsibility to Protect before we (mis)apply It in Venezuela' (*LSE Latin America and Caribbean Blog*, 11 March 2019) <https://blogs.lse.ac.uk/latamcaribbean/2019/03/11/we-need-to-understand-the-responsibility-to-protect-before-we-misapply-it-in-venezuela/> accessed 16 December 2021.

[1035] Lee (n 932) 300; also indicated by Nahlawi (n 964) 118.

[1036] Lee (n 932) 303; Paul Harris and others, 'Syria resolution vetoed by Russia and China at United Nations' (*The Guardian,* 4 February 2012) <https://www.theguardian.com/world/2012/feb/04/assad-obama-resign-un-resolution> accessed 16 December 2021.

[1037] 'Security Council Fails to Adopt Draft Resolution on Syria as Russian Federation, China Veto Text Supporting Arab League's Proposed Peace Plan', U.N. Press Release SC/10536 (*United Nations Meetings Coverage and Press Releases*, 4 February 2012) <https://www.un.org/press/en/2012/sc10536.doc.htm> accessed 16 December 2021.

[1038] Lee (n 932) 302.

[1039] Luis Almagro, 'The world has a responsibility to protect the people of Venezuela' (*Financial Times*, 27 September 2018) <https://www.ft.com/content/af68e6e2-c0b4-11e8-84cd-9e601db069b8> accessed 16 December 2021.

to protect commitment requires leaving all options on the table. This is not a message of violence; it is the opposite'.[1040] The R2P controversy is, thereby, far from settled.

c) *From Application to Legal Status – Approaches to Derive R2P as Customary International Law*

Despite the dichotomous findings of the Libya intervention, it was nonetheless the first practical application of the new concept. Since 2005, the Security Council has subsequently invoked R2P more than 80 times in its resolutions, while the Human Rights Council and the General Assembly have done so more than 50 and the 13 times respectively.[1041] It thus remains to be ascertained if and to what extent R2P has grown into a legally binding concept since Libya.

Having been adopted by the General Assembly at the 2005 World Summit, R2P had initially constituted a principle whose legal effect was solely derived from a collective pledge, rather than a binding treaty or commitment. So, while it was an officially recognized law, it was still far less firmly established than other, explicit Charter obligations. It remained a mere 'law without norm[s]'.[1042] In order to confer a legal status from its initial application, fresh approaches were now required.

aa) In Continuation of Established Principles?

The first of these approaches was, however, not fresh after all. In the most straightforward fashion, one could construct R2P as a continuation of the traditional and customary right of every state to protect its own nationals.[1043] Omitting all '[…] features of exclusive sovereignty', it could then also apply to foreign nationals.[1044] Such a reconstructed CIL could then permit the use of military force against another state without its consent and for the safety of its nationals.[1045]

However, this interpretation represents a significant extension of the long-established CIL rule and can, therefore, not be derived without a corresponding new practice and legal conviction. The procedures and invocations that can be found in regard to humanitarian intervention[1046] or R2P[1047] are, however,

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[1040] ibid.

[1041] 'What Is R2P?' (*Global Centre for the Responsibility to Protect*) <https://www.globalr2p.org/what-is-r2p/> accessed 16 December 2021.

[1042] for the term see Gehan Gunatilleke, 'R2P and the Normative Accountability of the UN Security Council' (*E-International Relations*, 9 September 2016) <https://www.e-ir.info/2016/09/09/r2p-and-the-normative-accountability-of-the-un-security-council/> accessed 16 December 2021.

[1043] for more on that, see text to n 944-49.

[1044] Lee (n 932) 318.

[1045] ibid.

[1046] see text to n 953-55.

[1047] see text to n 1041.

characterized by such a blatant divergence of legal appreciations that they are a testimony of anything but a consistent opinio juris.

bb) R2P and the Obligation to Prevent Genocide

Taking a closer look at the World Summit's construction of R2P, however, it appears that in large parts, the concept refers to other, well-established rules of international law. Mainly, this is the prevention of genocide.

Glanville, therefore, argues that '[…] customary law developments in recent years do provide grounds upon which at least some aspects of the 'responsibility to protect' beyond borders can be rightly understood to rest'.[1048] These aspects relate to the obligation to prevent genocide.[1049] Admittedly, however, this obligation is a binding rule anyway,[1050] regardless of R2P.

Others have furthermore stipulated that R2P represents a '[…] political and moral commitment built on pre-existing international legal agreements like the 1948 UN Convention on the Prevention and Punishment of the Crime of Genocide and the 1998 Rome Statute [...]'.[1051] While this stipulation might also be true, it still does not substantiate an independent and legally binding R2P obligation.

cc) The Opposing Majority Opinion

Contrarily, the opposing opinions are all the stronger. Just recently, Alfred De Zayas, former United Nations Independent Expert on the Promotion of a Democratic and Equitable International Order, tweeted: 'The R2P 'doctrine' is nothing but a pretext for military aggression which remains prohibited and a crime under the ICC statute, because the R2P cannot replace the UN Charter and a pertinent Security Council resolution'.[1052]

This perception might be based on a wrong understanding of what R2P aspired to be,[1053] but it does shed light on how the principle is perceived today. Over the past years, authors have repeatedly referred to the lack of coherent state practice and opinio juris and have thus dismissed any claim as to the emergence of CIL.[1054]

[1048] Luke Glanville, 'The Responsibility to Protect Beyond Borders' [2012] Human Rights Law Review 12:1, 1, 31.
[1049] see ibid 63 ff.; for a similar line of reasoning, see Nahlawi (n 964) 51 ff.
[1050] Brown (n 950) 1698.
[1051] Gallagher (n 1034).
[1052] 'Alfred de Zayas on Twitter' (*twitter*, 2 March 2019) <https://twitter.com/Alfreddezayas/status/1101829152045441027> accessed 16 December 2021; cited ibid.
[1053] Gallagher (n 1034).
[1054] i.e. Dapo Akande, 'The Legality of Military Action in Syria: Humanitarian Intervention and Responsibility to Protect" (*EJIL: Talk!*, 28 August 2013) <https://www.ejiltalk.org/humanitarian-intervention-responsibility-to-protect-and-the-legality-of-military-action-in-syria/> accessed 16 December 2021; cited in Gunatilleke (n

dd) R2P as a Combination of Individual Responsibilities

As of yet, the legal status of R2P can thus only be derived in terms of its three, individual pillars.

The primary responsibility of each state is thereby to protect its own civilians in conflicts. This duty can indeed be perceived as constituting a binding principle of international law, as violating this obligation would simultaneously contradict various other international legal instruments. These include the Genocide Convention, IHL in general, and the Rome Statute, to name but a few.[1055]

In regard to the other two pillars, the case is not that clear, however. Currently, they can at most be perceived as partly international law, partly political obligation.[1056]

Currently, R2P overall, therewith, represents an '[…] emerging legal norm […]' only.[1057] Whichever way one looks at it, any conclusive legally binding nature to the whole concept cannot yet be deduced. This does not deny the principle of any of its validity, but much of its effectiveness.

3. Conclusions – The Responsibility to Protect Revisited

Therewith, preliminary conclusions on R2P and its current status in international law can be drawn. A short recapitulation of R2P nowadays will thereby lead to different proposals for reformation approaches. Lastly, a feasible way forward shall be presented, which also builds a bridge to robust peacekeeping.

a) R2P in the 2020s – The Widening Gap Between Expectation and Reality

More than 25 years after Rwanda and 20 years after Kosovo, there is still not much more than a '[…] formal consensus […]' on R2P.[1058] Moreover, even that consensus comes under attack on a regular basis, when divergent approaches on how to create lasting peace come into conflict.

1042); cf. Simon Chesterman, 'Responsibility to Protect and Humanitarian Intervention: From Apology to Utopia and Back Again' in Robin Geiß and Nils Melzer (eds), *The Oxford Handbook on the International Law of Global Security* (Oxford University Press 1 February 2018) 4 ff.; Nahlawi (n 964) 23.

[1055] Hugh Breakey and others, *Enhancing Protection Capacity: Policy Guide to the Responsibility to Protect and the Protection of Civilians in Armed Conflicts* (Griffith University, 2012) xxi; Anne Peters, 'The Responsibility to Protect: Spelling out the Hard Legal Consequences for the UN Security Council and Its Members' in Ulrich Fastenrath and others (eds), *From Bilateralism to Community Interest: Essays in Honour of Judge Bruno Simma* (Oxford University Press 2011) 303-04; Nahlawi (n 964) 40.

[1056] Breakey and others (n 1055) xxi; by way of comparison to other, similar legal frameworks, Nahlawi furthermore argues that R2P pillar two might grow into a legally binding principle within the next years, Nahlawi (n 964) 44 ff.

[1057] Peters (n 1055) 304; see also UNGA 89th plenary meeting [8 April 2005] UN Doc A/59/PV.89 4, 22; cited in Nahlawi (n 964) 24.

[1058] Bellamy and Williams (n 507) 826.

The interplay of civilian protection with underlying, geopolitical interests within one mission thereby still generates the toughest debates.[1059] Moreover, a clear distinction between those spheres, as proposed by the ICISS, has so far been unfeasible.

Nevertheless, the UN's willingness to uphold the concept remains steadfast. This is not least demonstrated in its R2P report from 2021. In there, the Secretary-General focused on 'Operationalizing atrocity prevention',[1060] mainly by strengthening early warning systems and helping other States to do the same.[1061] The importance of 'grass-root efforts' and the involvement of regional actors is thereby emphasized.[1062]

As positive as this sounds, it is not to say that the '[…] a widening gap between the high-level plenary meeting of the sixtieth session of the General Assembly (2005 World Summit) commitment to the responsibility to protect and the daily experience of vulnerable populations around the world',[1063] diagnosed by the Secretary-General in 2019, is actually closing. As, in its reactive form, it requires a level of consensus among the states that has so far been unattainable, the gap between expectation and reality rather continues to widen. Even in the case of Libya, the once reached formal consensus lasted just as long as it took the parties to become active on the ground. Where exactly the stipulated 'preparedness'[1064] is thus to be found continues to be a mystery today. Even this reduced standard, therefore, remains mere lip service.

Hence, it must be concluded that neither the institutional inclusion of R2P nor its subsequent practical implementation has so far lead to the achievement of any of the objectives formulated in the 2001 ICISS report or the World Summit Outcome. At this point, R2P is trapped in a dead-end.

b) Approaches to Reformation – A Policy Decision

However, this need not be the end of it. As the air is becoming thinner and the need for action greater, the pressure to protect the concept from slowly vanishing into thin air is on.

Conceptually, three different approaches to reformation are conceivable. They all revolve around the fundamental question of what role R2P should prospectively play and what place the concept should

[1059] cf. ibid 847–48.

[1060] UNGA/UNSC, *Advancing atrocity prevention: work of the Office on Genocide Prevention and the Responsibility to Protect: Report of the Secretary-General* [3 May 2021] UN Doc A/75/863-S/2021/424 paras 11 ff.

[1061] ibid para 16.

[1062] ibid paras 21 ff., 28 ff.

[1063] UNGA/UNSC, *Responsibility to protect: lessons learned for prevention: Report of the Secretary-General* [10 June 2019] Un Doc A/73/898–S/2019/463 para 31.

[1064] see World Summit Outcome (n 398) para 139.

take in the structure of international security mechanisms. One can either focus on the transformation of external circumstances, reform the concept from within, or rethink it completely.

aa) External Transformation – All a Matter of Persistence?

It cannot be denied that R2P as a concept is both well-designed and rigorously thought through. The problems might therefore rest less on any design defects of the principle itself than on an overall inadequate implementation thereof. Following that, an adequate reformation approach is rather to be found in improved adoption mechanisms, than in a wholly new conception.

As conceived by the ICISS and the World Summit, R2P builds on the responsibility of the states to recognize and implement the principle. As long as the international community withholds such approval and, in so doing, refuses a unified and targeted answer to a humanitarian emergency, even the finest concept cannot offer tangible protection.

In order to generate higher effectiveness, the first step would hence be for states to change their overall approach to R2P. Domestically, they would have to subordinate their geopolitical and strategic interests to the overarching goal of temporary humanitarian protection. This would also require a fundamental rethinking as to prejudices against the principle and thus a renewed commitment to the intentions declared at the World Summit. On the international level, this fresh approach would be supplemented by 'more dialogue' between the actors involved, mainly as to what a resolution authorizing an R2P-mission entails and how its provisions are to be interpreted.[1065] As a result, R2P situations would not be as frequently inhibited by a divided Security Council.[1066]

While its simplicity and clarity speak in favor of this approach, it is also neither new nor revolutionary. In the end, it is nothing more than a repetition of what the states already committed themselves to do, both within the World Summit Outcome and again in the latest UN R2P reports[1067]. The fact that the demand for more cooperation has not changed significantly since 2005 already heavily compromises this approach's effectiveness. It is precisely the fundamental change in attitude that is repeatedly called for, but just as little in prospect, that bars the way to progress.

In the end, an approach that builds on external transformation therefore does not imply significant change, but rather business as usual. It can thus not assert itself as the preferred solution to prevent the continuing disintegration of R2P.

[1065] see Bellamy and Williams (n 507) 849.

[1066] in a similar vein, see Gallagher (n 1034).

[1067] *Responsibility to protect: lessons learned for prevention: Report of the Secretary-General* (n 1063) para 31; *Advancing atrocity prevention: work of the Office on Genocide Prevention and the Responsibility to Protect: Report of the Secretary-General* (n 1060) para 48.

bb) Renewal from the Inside – A Process of Continued Adaptation?

Acknowledging that external transformation is practically impossible to attain at the moment, the question of alternatives remains. In contrast to an approach that builds on the transformation of external circumstances, the concept of R2P itself could thus also be reformulated.

The ways in which such restructuring may be addressed are manifold. The main question is thereby how to dissolve recurring deadlocks in the Security Council that currently bar R2P implementations. In the end, this calls into question the overall competence of the Security Council regarding R2P implementation.

(1) R2P as an Altogether Autonomous Instrument

One approach would be to conceive R2P as a fully autonomous instrument that is not bound by the recognition or implementation of the Security Council. Instead, it would be independent of the Council and its members' aspirations, which would free it from much of its political ballast.

Interestingly, the possibility to remove the Security Council from the decision-making process was not categorically excluded by the ICISS. Foremost, the authors built on consensus in the Council as the main organ in regard to questions of international security; if such consensus is unattainable though, they express their discomfort and concern as to a circumvention of the Council, but they do not categorically reject it.[1068]

The World Summit, on the other hand, took a categorically different view and clearly referred to the Security Council's sole authority.[1069] Additionally, there are no indications that a majority of states would agree on a new understanding of authority that runs the risk of both fostering legal uncertainty as well as encouraging willful misinterpretations.

(2) A New Level of Dialogue

However, while the overall replacement of the Security Councils' authority is a very profound approach, there are viable alternatives.

In particular, Gunatilleke has developed a solution in which the traditional competencies are not fully abandoned but instead supplemented with a new level of dialogue within the General Assembly.[1070] As a first step, the General Assembly would therefore have to consent to clear criteria as to when R2P is

[1068] *ICISS Report* (n 900) paras 6.36-37.
[1069] World Summit Outcome (n 398) para 139.
[1070] Gunatilleke (n 1042).

militarily triggered.[1071] In this regard, the ICISS report with its just cause test could prove helpful.[1072] If an R2P situation subsequently arises and a permanent Security Council member blocks a decision in the Security Council, it would at least be forced to provide reasons for that decision and thus feel pressured.[1073]

By way of a supplementary mechanism, Gunatilleke further proposes enhanced diplomatic means (following a proposal by Joyner), in which reluctant states could be convinced to 'acquiesce' to R2P interventions.[1074] This is to be achieved by emphasizing that any one-time consent will not lead to a ground-breaking precedent that would bind the states in the future.[1075]

As a last resort, Gunatilleke proposes that the UNGA should '[…] formally call upon […]' a state which is not cooperating so that it is compelled to '[…] provide reasons for its decision to veto the proposal'.[1076]

This approach does have a lot to be said for it, mainly that it would not require extensive dogmatic contortions and thus be relatively easy to implement. At the same time, however, it would probably also not herald a significant turnaround for R2P. The lack of trust between the states is deep-rooted, and it is not clear which new diplomatic means could change this situation at the moment. Without the cooperation of the states, however, the construct collapses, as a means of coercion is generally lacking. While the General Assembly may well play a mediating role, it is still not the organ that can effectively implement R2P at the end of the day.[1077]

Thus, while probably increasing the individual state's accountability, this approach would not necessarily lead to real R2P implementations.

cc) Replacing R2P – A New Approach to International Responsibility?

Thirdly, one could also approach the problem from a completely different angle. Accepting that R2P has failed so far and that neither a shift in outer perception nor an inner concept transformation is currently conceivable, the core idea behind the label of R2P could also be expressed differently. Instead

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[1071] ibid.

[1072] ibid.

[1073] ibid; this first part of Gunatilleke's approach therewith picks up and converts one of the ICISS' ideas on the Uniting for Peace Framework as an alternative authority once the Security Council fails to act, see *ICISS Report* (n 900) para 6.29.

[1074] Daniel H Joyner, 'The Kosovo Intervention: Legal Analysis and a More Persuasive Paradigm' [2002] EJIL Vol. 13 No 3, 597, 615 <http://www.ejil.org/pdfs/13/3/487.pdf> accessed 16 December 2021; cited in Gunatilleke (n 1042).

[1075] Joyner (n 1074) 615; cited in Gunatilleke (n 1042).

[1076] Gunatilleke (n 1042).

[1077] unless in reference to the Uniting for Peace Framework and to call this a shaky legal basis would be an understatement, see text to n 930-34.

of investing more time and resources into a seemingly failed principle, it could thus be time to fully redesign, or rather: replace it.

One approach in that direction is the so-called 'Responsibility while Protecting' (RwP), inaugurated by Brazil in 2011. Novating R2P, the idea was to foster recognition and rebuild trust by strengthening the R2P inherent restricting factors.[1078] As R2P is increasingly associated with a suspension of sovereignty, RwP emphasized the legal criteria to be met before the Security Council can authorize any use of force.[1079] This aimed at tying the concept back to its regulatory underpinnings. The relevant yardsticks included the classification as a measure of last resort and the principle of proportionality.[1080] Additionally, the RwP concept stressed the need for monitoring and review processes after operations have been launched, to foster the rule of law and counteract assumptions of legal vacuums, governed by arbitrariness and political positions.[1081]

However, as Gareth Evans pointed out, these seemingly 'new' criteria were originally an inherent part of R2P anyway, as proposed by the ICISS.[1082] Thus, there was not so much novelty in the RwP-approach after all. In any case, it has not experienced a major, international breakthrough. What remains unclear is whether it failed to gain more traction because it was too similar to R2P - being more an internal transformation approach than a new concept - or because it was too profound.

While RwP might thus have been the right response to Libya, it could not solve the inherent struggles R2P still faces today. Taken the last years as a reference, the Security Council's problem is less one of overuse of R2P, but of blockades and vetoes. This, however, is not where RwP sets in. Libya was, regardless of its relevance and repercussions, rather the exception than the rule.[1083]

c) Preservation and Integration – The Way Forward

Overall, the presented approaches do therefore offer their individual advantages but are still unsatisfactory in one way or another. All the while, though R2P remains a principle, it is one without any real consequences. Whether the preceding approaches to solution are fit to counter this dilemma, and both preserve what has been achieved and integrate what needs to change remains highly questionable.

The reality in which R2P would have to operate today is thereby fundamentally different to the one in 2001, not least because the perception and understanding of what the concept is about have deeply

[1078] see Sheeran and Kent (n 514) 47.
[1079] ibid.
[1080] Interview with Gareth Evans (n 967); Breakey and others (n 1055) xxiii.
[1081] cf. ibid.
[1082] Interview with Gareth Evans (n 967).
[1083] Sheeran and Kent (n 514) 48.

changed. In particular, R2P has evolved from a holistic approach that equally combined preventive and reactive action towards a mainly precautionary principle. While prevention has commonly been an important factor in R2P conception, in recent years it has been continuously enhanced, and that at the expense of supplementary, forceful responses to humanitarian disasters. Today the most relevant part of R2P is heavily dependent on cooperation with the host state.[1084] In that regard, it bears a certain resemblance to contemporary, robust PoC-missions.

However, it is by no means certain anymore whether the further pursuit of a holistic implementation approach is necessary or even desirable. In its short existence, R2P has never successfully operated on that basis. Hence, it could be time to shift the focus and aspire to constructive individualism of the separate elements instead. Therein, the individual R2P components could be fostered and strengthened, without negating their belonging to one generic concept, however.

The focus may well then be on one of the parts, thus recognizing instead of annihilating an unequal distribution of resources. Tying in with Evans' vision, R2P could hence reintegrate into an implemented, mainly prevention-focused strategy. Such an approach would not only be in line with current developments but would also stand a prime chance of being actually realized by the states. After all, peaceful prevention regularly receives larger support than forceful reaction.

And yet, the question of how to react to acute threats to civilians still remains. When R2P is largely thrown back to its preventive roots,[1085] which tool is to replace its forceful character? Rethinking R2P does therefore not only imply leaving developed perceptions behind but furthermore to think bigger. To some extent, this has already met with approval in the 2019 R2P report. When elaborating on the proposed prevention measures by the international community, the deployment of PoC-missions is named as one form of direct action to reduce the vulnerability of the civilian population.[1086] Thus, although within the realm of prevention, this indicates a form of interaction between the two concepts. Taking into account R2P's current state, it thereby seems urgently indicated to further evaluate its relationship to other forms of international responsibility, such as PoC.

To establish such a link, the theoretical foundations as to the relationship between R2P and PoC-missions will therefore need to be evaluated. As a result, it will be possible to reconceptualize R2P and PoC-missions and thus include a new dimension of protection in the ongoing quest for civilian safety.

[1084] Mégret (n 243) 16.
[1085] see Interview with Gareth Evans (n 967).
[1086] *Responsibility to protect: lessons learned for prevention: Report of the Secretary-General* (n 1063) para 23 (b).

II. Competition of Concepts? R2P and Robust PoC-Missions in Relation

In light of both its genesis as well as its current reception within the international community, it is feasible to reason that R2P is one of the most debated approaches to civilian protection. For exactly that reason, however, it is also hardly implemented.[1087] Thus, civilian protection as the prime motive of most UN activities does not manifest itself today within any R2P action, but rather in the form of robust PoC-missions.

Consequently, having elaborated on robust PoC-missions and R2P as partly related, but still fundamentally different approaches to civilian protection, it remains to be analyzed what intrinsic links connect and characterize, but also separate them in concept and practice. Over the past decade, a growing body of literature has investigated this connection under various auspices.[1088] It can therefore already be stipulated that the relationship between R2P and PoC, whether perceived as intertwined or as contrasting, is one that offers considerable dogmatic and practical difficulties.

The aim of the following chapters is, therefore, to legally reassess existing ties and thus to draw new conclusions for the future performance of robust PoC- missions. In particular, this chapter seeks to address the following questions: whether it is possible to specify anew the current relationship between the two concepts based on a systematic comparison; and how this redefined connection can be transferred into a legal concept that practically integrates existing similarities and differences, thereby reflecting current PoC practice. The end result will be two-fold. For R2P, it will outline a realistic practical implication of contemporary peacekeeping and simultaneously indicate a way out of the factual insignificance. At the same time, and all the more important, a different and holistic legal approach as to civilian protection in the 21st century by means of robust PoC-missions will be introduced.[1089]

1. R2P and PoC in Comparison – Two Sides of the Same Coin?

In recent years, most research on R2P in relation to other concepts of civilian protection has emphasized the respective separating factors and peculiarities of R2P. As will be demonstrated, a large and growing body of literature has also investigated the concrete demarcations between R2P and robust PoC-missions. The former is thereby routinely considered as belonging to the realm of peace enforcement, while the latter is said to constitute an explicit peacekeeping measure. Centered around the fear of intermingling these two, traditionally distinct areas of international involvement, the

[1087] see text to n 1058-64.

[1088] i.e. Breakey and others (n 1055); and Sheeran and Kent (n 514) 49 ff., to name but a few.

[1089] the term 'R2P' is thereby consistently used to describe the principle agreed upon within the World Summit Outcome Document of 2005, whereas the references to 'PoC/PoC-mission[s]' relate to robust, contemporary peacekeeping missions with a PoC-mandate, as introduced in text to n 511 ff.

debate has become highly strained. The main concern seems to be that undue association between two fundamentally different concepts would generate unrealizable expectations in both directions and, as a result, obstruct international acknowledgment.[1090] The UN is likewise clear on the separation of PoC-missions and R2P, as well as on peacekeeping and peace enforcement in general. In his 2012 R2P-report, the Secretary-General found that: 'While the work of peacekeepers may contribute to the achievement of RtoP goals, the two concepts of the responsibility to protect and the protection of civilians have separate and distinct prerequisites and objectives'.[1091] Within the Capstone doctrine, it is furthermore stated:

Although on the ground they may sometimes appear similar, robust peacekeeping should not be confused with peace enforcement, as envisaged under Chapter VII of the Charter. **Robust peacekeeping** [emphasis added] involves the use of force at the tactical level with the authorization of the Security Council and consent of the host nation and/or the main parties to the conflict. By contrast, **peace enforcement** [emphasis added] does not require the consent of the main parties and may involve the use of military force at the strategic or international level [...].[1092]

The Capstone doctrine thus focuses on certain decisive differentiation criteria that will be examined in more detail below. In doing so, the assumption that the two concepts are fundamentally different, so that they must be separated both at the conceptual as well as the practical level, shall be tested. The aim is finally to develop a new definition of the relationship between the two concepts.

At present, the debate on relating and differing elements of R2P and PoC is characterized by a tremendous and almost unwieldy amount of opinions and counter-opinions. This fact renders it impossible to achieve a complete presentation of the controversy. The demonstration must therefore focus on specific factors, which aim at delineating the relevant legal frame. These factors are the conception of both approaches, their overall objectives, the parties involved, and lastly, the legal effect generated.

a) The Conceptions of R2P and PoC – Construction and Design Within the International Legal System

As already indicated, the conceptions of R2P and PoC in international law differ significantly at various levels. The comparison under the auspice of conception can therefore be subdivided into three further

[1090] i.e. Mégret (n 243) 13; Benjamin de Carvalho and Ole Jacob Sending (eds), *The Protection of Civilians in UN Peacekeeping* (Nomos, 1st Edition 2013) 61; and Wilson (n 37) 145.

[1091] UNGA/UNSC, *Responsibility to protect: timely and decisive response: Report of the Secretary-General* [25 July 2012] UN Doc A/66/874–S/2012/578 para 16.

[1092] *United Nations Peacekeeping Operations - Principles and Guidelines* (n 134) 34.

categories. These are their overall categorization within the international legal system, their distinctive prerequisites allowing for the lawful use of force, and the available means therefor.

Before entering into this comparison, however, one clarification is required. It is important to note that there is a degree of uncertainty as to the terminology of R2P in contemporary literature. When generally using the term R2P, many authors actually only refer to its third pillar, which circumscribes the residual responsibility of all states to take appropriate measures to protect civilians, who are not sufficiently protected by their home state due to unwillingness or inability. This is commonly understood as the reactive R2P, which contains the right to use force against another state. Generally, and especially in regard to the following chapters, it is, however, important to integrate the whole concept of R2P and therewith all three pillars. Only in this way can its structure and role within the international legal system be comprehensively categorized and analyzed.

aa) An Initial Categorization – Reconciling Separation With Integration

The first question that arises is how R2P and PoC are perceived as concepts in the international legal system. To begin with, and as already indicated, R2P as a holistic concept cannot be uniformly conceived and classified within one of the renowned categories. It features both a peace enforcement element, reflected in its third pillar, as well as individual obligations of the states and general prevention mechanisms. In concrete, the first pillar, thus the duty of each state to protect its own civilians, is thereby a governmental responsibility, which is mainly rooted in international human rights obligations. The duty to assist others in effecting that duty, thus the second R2P-pillar, can, however, be reasonably fitted into the spectrum of peace operations[1093] and therein be either identified as a conflict prevention mechanism or as a peacekeeping instrument. By contrast, PoC-missions are much more definite in their conceptual design. They form an integral part of peacekeeping as one form of UN engagement in the preservation of peace.

This basic categorization results in several levels of differentiation, on which the concepts can be compared, as well as offering the possibility of integration.

(1) Levels of Differentiation – Consent

The level of differentiation that is most directly connected to that categorization - and is also the most common criterium - is that of consent.[1094] When PoC-missions belong to the realm of peacekeeping

[1093] as categorized within the Brahimi Report, see *Report of the Panel on United Nations Peace Operations* (n 18) paras 10 ff.

[1094] see *Responsibility to protect: timely and decisive response: Report of the Secretary-General* (n 1091) para 16; see *The Protection of Civilians in United Nations Peacekeeping* 2019 (n 23) 21.

and R2P is, at least partly, based on peace enforcement mechanisms, then the former can only operate with the consent of the host state, whereas an intervention according to R2P pillar three can be initiated precisely against the will of the affected state. Thus, and according to Carvalho and Sending, 'R2P is interventionist […]'.[1095] Although this classification is to be rejected in its absoluteness,[1096] this can serve as a conceptual demarcation criterion, as R2P is at least partially interventionist, whereas PoC is not.

(2) Levels of Differentiation – Internal Nature

Another level of differentiation that follows from the categorization of the concepts refers to their internal nature. Within his 2012 PoC-report, the Secretary-General suggested that while the protection of civilians within PoC-missions is a legal concept, R2P is at its core a political concept.[1097] Sheeran and Kent describe this distinction as a '[…] horizontal relationship […]'.[1098] As they note, however, this distinction is not fully conclusive. In his R2P-report, published only two months after the PoC-report in July 2012, the Secretary-General refers to R2P as being both '[…] based on fundamental principles of international law […]' and as providing a '[…] political framework […]'.[1099] While this is not necessarily contradictory, it does indicate that a clear distinction between political and legal nature is - as so often in international law - also difficult here.

On the one hand, it can hardly be denied that at least the adoption process of PoC-mandates is influenced by complex political considerations, just as the support or prevention of R2P missions is. The DPKO thereby refers to the '[…] both political and physical […]' freedom of action, which is required for a PoC-mission to fully function and guaranteed through the consent of the parties,[1100] which must be negotiated in advance. Additionally, it is pointed out that the use of force by UN peacekeeping '[…] always has political implications […]'.[1101] Lastly, as Mégret indicates, peace in its entirety is also a political undertaking.[1102]

For PoC, the fact that politics have an impact on the decision-making process must not imply that the operation of a PoC-mission itself is of a mainly political nature. It would be difficult to reconcile the

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[1095] Carvalho and Sending (n 1090) 60; considering the three, equally important pillars of R2P, however, the focus is exactly not on intervention, but on responsibility.

[1096] after all, action according to R2P pillar one and two will not remotely resemble an intervention.

[1097] UNSC, *Report of the Secretary-General on the protection of civilians in armed conflict* [22 May 2012] UN Doc S/2012/376 para 21.

[1098] see Sheeran and Kent (n 514) 51.

[1099] *Responsibility to protect: timely and decisive response: Report of the Secretary-General* (n 1091) para 59; cited in Sheeran and Kent (n 514) 50.

[1100] identical in wording in *United Nations Peacekeeping Operations - Principles and Guidelines* (n 134) 32; and 'Principles of Peacekeeping' (n 233).

[1101] *United Nations Peacekeeping Operations - Principles and Guidelines* (n 134) 35.

[1102] Mégret (n 243) 10.

assumption of a 'political PoC' with the pillars of consent and impartiality. While UN peacekeeping shall thus foster political progress, it can be no substitute for it.[1103] The same, however, applies to R2P as well. While the general concept is the result of a political process and encompasses measures that are directed at strengthening the political process, the pure R2P mission should no longer be guided by political considerations.

As a result, one must conclude that neither concept can be clearly assigned to one sphere, as they both unite parts of each realm. This is also reflected by the authors of the 'Policy Guide to the Responsibility to Protect and the Protection of Civilians in Armed Conflict'.[1104] They conclude, that '[…] both R2P and [broad] POC have elements describing legal obligations, and they have elements guiding and informing policy, practice and institutional development'.[1105] In the end, Sheeran and Kent also come to this conclusion.[1106] This is convincing in light of the complexity of the individual measures that can be taken within each concept. Ultimately, the question of political motivation and legal basis can only be answered with regard to each of these individual procedures, and not for the concepts as a whole. This level of differentiation can, therefore, at best provide a rough guideline, albeit one that rather points in the direction of parallelism than of contrast.

(3) Level of Association – Conceptual Concurrence

Lastly, the general categorization made above not only offers the possibility for separation, but also for assimilation of R2P and PoC. If PoC-missions are a specific peacekeeping activity, they may be integrated into the broader concept of R2P by considering them as one tool within its second pillar. This pillar refers to the responsibility of all states to help others in fulfilling their primary duty to protect their civilians and is of a preventive nature. PoC is indeed also a mechanism to help peacekeeping missions to 'assist states in fulfilling their primary responsibility' of protecting their populations.[1107] Both concepts therewith share a preventive level of peacekeeping activity, but so far only one of them, R2P, also includes peace enforcement measures. This stipulation is also mirrored in the Secretary-General's analysis on PoC from May 2012, when he elaborates on the '[…] common elements […]' of both concepts, coming to light '[…] particularly with regard to prevention […]'.[1108]

[1103] as has already been indicated by the Secretary-General in his Supplement for an Agenda for Peace from 1995 *Supplement to an Agenda for Peace: Position Paper of the Secretary-General on the Occasion of the Fiftieth Anniversary of the United Nations*" (n 348) para 36.

[1104] Breakey and others (n 1055).

[1105] ibid 44.

[1106] Sheeran and Kent (n 514) 50, i.e. referring to ibid.

[1107] Sheeran and Kent (n 514) 50, citing Khalil (n 134).

[1108] UNSC, *Report of the Secretary-General on the protection of civilians in armed conflict* (n 1097) para 21.

This integration is supported by other connecting factors, such as the fact that both concepts mostly rely on the primary responsibility of the state to protect their civilians.[1109] This is clearly expressed in most PoC-mandates[1110] and the central statement of the first R2P pillar.[1111] Additionally, the exercise of force is in general only acceptable as the last resort, which perpetuates the subsidiarity of an international engagement to that of the local government.[1112]

Without negating the above-found differences, it can be thus concluded that connecting elements in regard to the conception of R2P and PoC can also be found.

bb) The Prerequisites Allowing for a Lawful Use of Force

Turning from the categorization to the distinctive prerequisites allowing for the lawful use of force under each mechanism, the contrasts prevail. Based on their mandate, peacekeepers within robust PoC-missions are authorized to use force as a last resort to protect civilians from any form of harm and any kind of source. Robust PoC-mandates, therefore, span all kinds of physical violence against civilians as a trigger to action. R2P, on the contrary, is only provoked in the face of atrocity crimes,[1113] namely genocide, war crimes, ethnic cleansing, and crimes against humanity.[1114] This is a much higher threshold compared to that of PoC-missions. As to their conceptions, and in the words of the Secretary-General, the concepts do therefore also differ in their scope.[1115]

cc) The Central Means to Protect Civilians – The Use of Force

Finally, and directly following the different prerequisites allowing for the use of force, the method itself has to be inspected more closely. Much of the confusion surrounding an alleged and undue mingling of R2P and PoC is connected to the potentially illegitimate use of force.

However, the assumption that the use of force is generally solely reserved for peace enforcement action must be rejected. Robust PoC-mandates specifically provide authorization to use all necessary means to protect civilians.[1116] A distinction can nevertheless still be made, considering that the use of force within both realms differs notably as to its purpose and type. While within peacekeeping missions

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[1109] i.e. Mégret (n 243) 14; and Sheeran and Kent (n 514) 50, i.e. citing *ICISS Report* (n 900) para 2.29 and UNSC Resolution 1674 (n 399) Preambular Clause 9.
[1110] i.e. see UNSC Resolution 2100 (n 458) para 24; UNSC Resolution 2149 (n 463) para 30 (a) (i).
[1111] see text to n 974.
[1112] text to n 976-77; also cf. Mégret (n 243) 15.
[1113] Khalil (n 134) 210.
[1114] World Summit Outcome (n 398) para 139; ibid.
[1115] UNSC, *Report of the Secretary-General on the protection of civilians in armed conflict* (n 1097) para 21.
[1116] for a detailed analysis of the development of robust peacekeeping missions and the associated disputes, see text to n 215-363.

it is strictly limited to foster the aim of civilian protection, the use of force within enforcement action is reason in itself.[1117] One could thus stipulate that R2P describes a very narrow though abstract idea of how to react to gross human rights violations, particularly: ultimately with force, whereas PoC-missions are a broad tool, within which force may, however, only be applied very specifically.

Differently put, peacekeeping missions and R2P can be categorized within different types of use of force. Peacekeeping missions, on the one hand, are allocated within two of these categories: firstly, on the operational level, which refers to the planning stage for a concrete mission, in which a military concept is created that sets the frame for the subsequent concrete use of force. Secondly, this concrete application then takes place on the tactical, micro-level of use of force.[1118] This perpetuates the notion that within robust PoC-missions the use of force is strictly limited and not the goal of the mandate; it is rather a possible result.[1119] R2P, on the other hand, is located within the strategic force realm as the broadest type. It refers to the macro level of intervention, thus the planning stage of intervention in another state.[1120] The use of force is already pre-determined at that level, as the whole operation centers around it.

While this classification is also sustained within the Capstone doctrine,[1121] it cannot be an exclusive allocation. This is implicated by Sheeran and Kent when they only argue that one concept is '[…] more concerned […]' with one level of use of force, while the other '[…] relate[s] significantly' to another level.[1122] In fact, both concepts require the planning of the use of force in a broad, systematic sense, thus on the strategic level, as well as on an operational level, and on the micro stage of the application. Nevertheless, they do so to a varying degree. This differentiating factor can therefore not offer an absolute, but at most a relative frame.

To conclude, the conceptions of both R2P and PoC-missions are therewith governed by significant differences, but they also leave considerable room for integration. The often-stipulated separation does not appear to be set in stone and may thus be approached anew within a restructured framework of mutual complementation.

[1117] Wilson (n 37) 146-47.
[1118] Sheeran and Kent (n 514) 51–52.
[1119] ibid 52.
[1120] ibid 51.
[1121] *United Nations Peacekeeping Operations - Principles and Guidelines* (n 134) 34-35; also cited in Sheeran and Kent (n 514) 52.
[1122] Sheeran and Kent (n 514) 51-52.

b) The Objectives Pursued by R2P and PoC – Civilian Protection as an End in Itself or a Means to an End?

Next to their conceptions within international law, R2P and PoC can also be compared as to the main objective they pursue. What may seem identical at first glance proves decisively different upon closer examination.

As a concept, R2P was created to provide a last-resort, forceful protective mechanism for highly threatened civilians. This core objective coincides with the ostensible aim of robust PoC-missions, whose mandate is targeted at the effective protection of threatened civilians, if necessary, by force.

However, within those PoC-missions, this direct objective is integrated into a wider strategic context. Regionally, the PoC-mission serves as one piece of the puzzle that is to result in the establishment or re-establishment of governmental structures. The mission is thus to support an overall process of pacific conflict settlement[1123] and thus create lasting peace and stability in the affected country and region. Beyond this, every PoC-mission is furthermore incorporated into the UN's security policy, which addresses the creation and preservation of global peace and security.

R2P, in turn, is freed from any such broader peace strategy and focused on the specific aim of civilian protection, for which it provides three specific pillars. Therein, forceful protection constitutes an emergency response to grave situations that bear no delay. Without serving any superordinate goal, these actions are solely directed at acute protection. The only overarching objective that could possibly be attributed to R2P as a whole would be the establishment of a general protection culture,[1124] in which every state takes responsibility for its own civilians. However, unlike within a PoC-mission, this goal would not be pursued through the forceful protection measure itself, but rather through the existence and recognition of the concept as such. The concrete forceful action can, however, then only be a sign of any such failed protection culture since international intervention would not be necessary if each state had fulfilled its own obligations.

Therewith, R2P and PoC also contextualize the concrete use of force differently, which alters their respective objective both substantively and in magnitude. The PoC-targets are overall larger and of a comprehensive nature, and while civilian protection is the mission's immediate aim, it is altogether only one means to an overarching goal, instead of an end in itself. In regard to R2P, the opposite is true. Both its overall and its concrete objective are much more specialized, and forceful action is solely taken for the sake of civilian protection as such.

[1123] Wilson (n 37) 148.

[1124] the term introduced by Carvalho and Sending (n 1090) 58, referring to Kofi Annan in UNGA, *In larger freedom: towards development, security and human rights for all: Report of the Secretary-General* [21 March 2005] UN Doc A/59/2005.

c) The Parties Involved in R2P and PoC – Civilians Between States and the Security Council

The third factor within this comparison centers around the parties involved in both R2P and PoC operations. These parties can be divided into those initiating and operating the action, and those to whom the missions apply, thus the people in need as the mission's subjects.

At the operational level, the deployment of a PoC-mission requires both the initiation by the Security Council in the form of a resolution, as well as a consenting host state and troop-contributing third states, who operate the mandate.

In contrast to that, R2P missions can be initiated by the Security Council plus one or more willing states alone, while the consent of the affected state is not required.[1125]

On the opposite side are those people, whose protection the missions reach for. They are the ones the missions are directed at and thus to be defined as the subjects of protective activities. However, aside from this singular level, a different standard of distinction is conceivable here as well, which refers to the subjects as certain groups instead of individuals. Breakey and others, for example, have determined PoC-missions to apply to crimes against civilians, whereas R2P would apply to crimes against populations. The difference between both recipients is one of scale. Whereas assaults against civilians do not require any threshold to be crossed, those against populations must reach a certain quantitative or qualitative dimension (in form of specific intent).[1126] This can be substantiated in so far as it reflects the threshold of action for R2P, laid down by the World Summit,[1127] namely the commission of specific core crimes.

As a counterpart to the horizontal relationship, introduced above,[1128] and attributable to Sheeran and Kent, this distinction may reflect a 'vertical relationship' between both concepts.[1129] They, however, also dismiss this separation, deeming it '[…] blurred […]'.[1130] This can be agreed to the extent that the line between civilians and populations as reference objects is difficult to draw with regard to the commission of core crimes. While not all civilians amount to a population, all populations - in this understanding - consist of civilians. R2P does therefore - at least also and indirectly - concern civilians. This, the authors explain, makes the distinction more one of '[…] scale and aggregation'.[1131]

However, this alone does not contradict the assumption of a vertical relationship between R2P and PoC. Although this criterium might not define the connection in an exclusive way either, it at least

[1125] see text to n 1094-96.
[1126] Breakey and others (n 1055) xi.
[1127] World Summit Outcome (n 398) para 139.
[1128] see text to n 1097-1106.
[1129] Sheeran and Kent (n 514) 51, referring to Breaky and others (n 1055).
[1130] ibid.
[1131] ibid.

specifies the threshold from which R2P is worth considering at all. This must not mean that a PoC-mission could not apply to the same group of individuals as subjects, then however deemed as civilians and not populations. In that sense, the distinction offered within the Policy Guide is convincing, even if it does not so much open up a new perspective as it underlines the difference based on the existing threshold for action.

Altogether, and regardless of the definition of the affected subjects, there is a significant overlap concerning the parties involved in both R2P and PoC action. The practically most relevant difference in that regard is, however, the role of the host state. Intrinsically linked to the notion of consent, the distinction made on the conceptual level therewith pervades the entire relationship between the two concepts.

d) Commitment Issues – PoC and R2P Betwixt and Between Compulsory Obligations and Directive Guidelines

Lastly, the question of whether and to what extent both R2P and PoC are legally binding is not to be omitted within this comparison. Since the language often used in this context is neither uniform nor consistent, this requires a terminological clarification first.

The key determinations in that regard are the notions of binding force on the one hand and the legal effect of a rule of international law on the other hand. The former refers to the question of whether a certain rule of international law is *applicable* in a specific case, thus if it exerts mandatory effectiveness. Subsequently, the specific *legal effects* of this rule may be clarified. In the context of treaties, this dividing line is drawn between the binding force of an agreement for one thing, and the content, which is to circumscribe the legal effect of the subject matter, for another.[1132] Sticking to these different levels, both obligations and responsibilities do therefore constitute the legal effect of a rule, for which it was first determined that it exerts a binding force. Conversely, is this legal effect ensured precisely by the rule's normative standards, which are binding.[1133] Lastly is this legal effect only '[…] relational […]',[1134] as it can only bind the contractual partners (with the exception of erga omnes obligations).

[1132] Malgosia Fitzmaurice, 'Treaties' (*Oxford Public International Law*) paras 14, 8 <https://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1481> accessed 16 December 2021.

[1133] cf. Volker Roeben, 'Responsibility in International Law' [2012] 16 Max Planck UNYB 16, 99, 101, 110 ff.

[1134] ibid 106.

In the following, an attempt will be made to take this separation into account. The binding force of both PoC and R2P shall therefore be - albeit briefly - discussed prior to the obligations that respectively arise, which constitute the legal effects and thus form the focus of the subsequent chapter.[1135]

aa) The Binding Legal Force and Effect of PoC-Missions

Considering that much of the following discussion is relevant for the analysis as to R2P, PoC-missions shall be the first research object this time and be evaluated concerning their binding legal force and the effect they generate.

The question of binding legal force is thereby a straightforward one to answer. As robust PoC-missions are consistently established in Security Council resolutions, they are binding on all UN members according to Article 25 UNCh. This does not imply that all states are obliged to actually contribute troops and thus take part in the mission, but the defined goals are binding, and once states commit themselves, they are bound by Article 25 UNCh.[1136] Hence, this is a case in which the challenge is not the binding force of the mandates. Instead, it is quite debatable whether the mandate only *authorizes* the protection of civilians with forceful measures, or whether it actually *obliges* the participating states to do so. This is a question of legal effect. The duties and obligations of peacekeepers have thereby already been the topic of many heated debates, both within[1137] and outside the UN[1138]. In order to narrow this broad debate down and to identify the relevant aspects for a systematic comparison with R2P, some further clarifications and limitations are needed here.

Firstly, does much of the debate revolve around the question of whether the missions are bound to international law in general and how the UN is accountable in cases of failure. This will, however, not be the scope of the following analysis. It is rather aimed at finding out whether there is a concrete obligation to be deduced solely from the PoC-mandate, as this question alone is suitable for a meaningful comparison with R2P.

[1135] In contemporary literature, however, many references to the obligations arising from either R2P or PoC actually imply their binding force, rather than their legal effect.

[1136] *Opinions of the Lords of Appeal for Judgement in the Cause R (on the application of Al-Jedda) (FC) (Appellant) v Secretary of State for Defence (Respondent)* [2007] UKHL 58, Lord Bingham of Cornhill para 34; cited in Hanna Bourgeois, 'Failure to Protect Civilians in the Context of UN Peace Operations: A Question of Accountability?' (*EJIL: Talk!*, 5 September 2018) <https://www.ejiltalk.org/failure-to-protect-civilians-in-the-context-of-un-peace-operations-a-question-of-accountability/> accessed 16 December 2021.

[1137] i.e. see 'Accountability' (*Conduct in UN Field Missions*) <https://conduct.unmissions.org/enforcement-accountability> accessed 16 December 2021; or UNSC Resolution 2436 (n 776).

[1138] i.e. see 'The Accountability System for the Protection of Civilians: A Shared Responsibility' (*International Peace Institute,* 3 December 2018) <https://www.ipinst.org/2018/12/accountability-system-for-protection-of-civilians> accessed 16 December 2021; Scott Sheeran and others, 'Peacekeeping and Accountability', *International Law Programme Meeting Summary* (Chatham House, 28 May 2014); Bourgeois (n 1136); Aiste Dumbryte, 'Obligations of UN Peacekeeping Operations and Their Members to Protect Civilians in the Host State' <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2303742> accessed 16 December 2021; Kristina Daugirdas, 'How and Why International Law Binds International Organizations' [2016] Harvard International Law Journal 57 No. 2, 325.

Secondly, it appears necessary to delineate the notion of obligation from that of accountability, as they are also often confounded. In a plain word analysis, the term obligation is inter alia understood as 'something that a person feels morally or legally forced to do'.[1139] In a legal context, an obligation circumscribes 'a legal or moral duty to do something'.[1140] This raises the concept from the subjective level of feeling something, to the objective level of legal commitment.

Accountability, on the contrary, refers to 'the fact of being responsible for what you do and able to give a satisfactory reason for it [...]'.[1141] This term is, therefore, much more closely associated with the concept of responsibility than that of obligation. Likewise, Wills locates the question of accountability within the framework of state responsibility.[1142] Accordingly, the term circumscribes the fact of being held responsible for an act or omission and the consequences of non-adherence to this responsibility. The neglect of an obligation can hence trigger accountability in the form of state responsibility.[1143] Concluding, the notions of obligation and accountability are not synonymous and can be clearly distinguished. Only the former will have relevance in the following comparison.

(1) Obligation to Protect – What the Literature Says

Finally, it can now be determined whether an obligation of peacekeepers to protect civilians, as opposed to a mere authorization to do so, can be derived from robust PoC-mandates. This may be determined by way of interpreting the relevant provisions. The first aspect to be considered here is the resolution's wording.[1144] The relevant phrase in this regard concerns the authorization of the use of all necessary means to protect civilians under the threat of physical violence.[1145] While decisive in scope, this regulation also provides considerable discretion. After all, the use of force is only *authorized,* not prescribed. An explicit obligation to protect civilians with forceful measures can thus not be concluded as of yet.

However, the wording alone cannot be decisive. Further guidance may be found in the development and history of peacekeeping missions. As Wills points out, in the early days, UN missions were predominately accoutered with the negative legal obligation to do no harm,[1146] which is reflected in

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[1139] 'obligation' (*Cambridge Dictionary*) <https://dictionary.cambridge.org/de/worterbuch/englisch/obligation> accessed 16 December 2021.

[1140] ibid.

[1141] 'accountability' (*Cambridge Dictionary*) <https://dictionary.cambridge.org/de/worterbuch/englisch/accountability> accessed 16 December 2021.

[1142] Siobhàn Wills, 'International Responsibility for Ensuring the Protection of Civilians' in Haidi Willmot and others (eds), *Protection of Civilians* (Oxford University Press 2016), 247-51.

[1143] A connection that will be of further interest in the following section on R2P.

[1144] *Namibia Advisory Opinion* (n 87) para 114.

[1145] i.e. UNSC Resolution 2459 (n 714) para 7 (a) (i).

[1146] Wills (n 1142) 225.

the ten rules of conduct for blue helmets from 1999.[1147] Likewise were the first peacekeeping missions established to non-forcefully supervise truce-agreements, which did not include any protection tasks - let alone obligations - at all. Such a positive legal obligation can thus, if at all, only have emerged when the mandates became robust.

In favor of that, it can be argued that the robust mandates arose precisely because the previous missions failed due to a lack of capacities and competence. What else should be achieved with the introduction of robust mandates, if not better protection through direct commitment?[1148] However, such an interpretation is also in danger of exceeding the mission's practical possibilities and thus create the unrealistic expectation of overall protection.

In contrast to this, Wills presents an interesting approach, which aims at detaching the obligation to protect civilians from the existence of a PoC-mandate. She asserts: 'If the UN's obligation to protect exists independently of any resolution it adopts, the absence of a mandate authorizing the protection of civilians from violence does not absolve the UN from an obligation to do so'.[1149] She therewith submits that a mandate, if it exists, is unlikely to be the primary source of an obligation to protect anyway.[1150] Instead, she identifies IHRL and IHL as such sources, which oblige states to protect civilians.[1151] While by this, she initially avoids the question of whether and to what extent resolutions can - at least additionally - convey any such commitment, in her conclusion she asserts that '[...] prima facie UN missions cannot stand by and let one or more persons kill or seriously ill-treat civilians if they have the means to stop it, **especially** [emphasis added] if they have a Chapter VII mandate authorizing the mission to protect civilians from violence'.[1152] In the end, nevertheless, she comes to the conclusion that this is not possible, as the use of force is '[…] merely an option authorized under the mandate […]'. Such an option can, in her view, not '[…] be the essence of an obligation, merely one means of fulfilling it [...]'.[1153]

A definite obligation to protect can thus also not be derived according to Wills. It can also hardly be desirable to introduce one such obligation, perhaps even concerning forceful protection, since the feasibility of any peacekeeping instrument can only be based on a case-by-case-analysis, depending on

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[1147] 'Ten Rules: Code of Personal Conduct for Blue Helmets (1999)' (*United Nations Police)* <https://police.un.org/en/ten-rules-code-of-personal-conduct-blue-helmets-1999> accessed 16 December 2021.
[1148] cf. Bourgeois (n 1136).
[1149] Wills (n 1142) 233.
[1150] ibid.
[1151] ibid.
[1152] ibid 253.
[1153] ibid 252.

the necessity and all other surrounding circumstances. Protection can therefore never be carried out according to an absolute obligation.[1154]

Taking Wills' approach as a basis, the debate can be settled as follows: while there is a general obligation on the part of the peacekeepers to fulfill their mandate,[1155] no concrete and individual case related obligation to (forcefully) protect can be derived from this. The general obligation to effectuate the mandate can therefore only be one of conduct, not of result. Beyond that, a concrete obligation to protect civilians can then only stem from other sources, such as IHL and IHRL.

(2) Obligation to Protect – The UN's Position

The UN itself has also, albeit typically not very clearly, taken a stand, which is comparable and compatible with the above findings. In his latest report on the protection of civilians in armed conflict, the Secretary-General only directly refers to 'obligations' in regard to the requirements under international humanitarian law.[1156] This is also where he locates the question of accountability.[1157] Concerning the protection of civilians through peacekeeping, he merely emphasizes that '[…] peacekeeping operations continued to deliver on their mandates to protect civilians.'[1158] Thus, the Secretary-General seems to assume that the parties involved are bound by the ostensible objectives of the resolution (protection of civilians), which do not, however, establish any obligations going beyond this. In addition, the use of force to protect civilians is only deemed '[…] morally […]' compelling.[1159]

This ambiguity is furthermore reflected by other UN organs, such as the United Nations Peacekeeping Department itself. By referring to the High-level Independent Panel on Peace Operations, it states that '[…] protecting civilians is a core obligation of the whole UN […]'.[1160] This High-level Panel does indeed refer to the protection of civilians as a '[…] core obligation […]',[1161] but without reflecting on the specific content of such an obligation and instead subsequently intermingling it with responsibility. This is only one example of how the terms are used inconsistently and not in their precise and contextual legal meaning.

[1154] ibid.
[1155] see also Bourgeois (n 1136).
[1156] UNSC, *Protection of Civilians in Armed Conflict of the Secretary-General* (n 894) paras 76 (a), 45, 53, 67.
[1157] ibid paras 50 ff.
[1158] ibid para 46.
[1159] *Report of the Panel on United Nations Peace Operations* (n 18) para 50.
[1160] 'Protecting Civilians' (*United Nations Peacekeeping*) <https://peacekeeping.un.org/en/protecting-civilians> accessed 16 December 2021.
[1161] UNGA, *Identical Letters Dated 17 June 2015 from the Secretary-General Addressed to the President of the General Assembly and the President of the Security Council,* [17 June 2015] UN Doc A/70/95–S/2015/446 11.

Concluding, while PoC-missions confer binding legal force on all participating states, they can only generate a legal effect in that the peacekeepers are bound to execute their mandate, not in the form of an obligation to protect civilians.

bb) The Binding Legal Force and Effect of R2P

For R2P, the question of binding legal force and effect is both clearer and more complicated to answer than for PoC. It may appear more obvious, as the binding legal force of R2P as a concept has been consistently rejected and - at least at the moment - is no longer at issue.[1162] However, it is also more difficult to resolve, as both issues are much more closely related than under PoC and can hence hardly be assessed separately.

At any rate, before addressing this interplay of challenges, another terminological clarification is needed here as well.

(1) The Quest for Terminological Consistency – Responsibility Versus Obligation?

When considering a possible obligation to protect in the context of R2P, one inevitably first stumbles upon the terminology. The concept of R2P is in itself founded on the notion of responsibility; a term very closely related to that of obligation. If this proximity would amount to synonymity, the attempt to derive an obligation from R2P was rendered aimless. Such a duty to protect would then be inherent in R2P from the outset. The subsequent discussion is thus only worthwhile if it is possible to demarcate the two terms.

An exhaustive linguistic analysis would thereby exceed the scope of this thesis. No attempt is, therefore, made to define the terms conclusively. The aim is rather to point out how the specific application of the terms in international law proves that they cannot - at least generally - be regarded as synonyms.

Firstly, taking recourse to the Cambridge Dictionary once more, responsibility is defined inter alia as 'a duty to deal with'.[1163] Interestingly, this term is, unlike that of obligation,[1164] not further referred to as a specific legal concept. Apparently, the notion of responsibility is thus much more broadly and commonly used than that of obligation.

[1162] see text to n 1052-57.

[1163] 'responsibility' (*Cambridge Dictionary)* <https://dictionary.cambridge.org/de/worterbuch/englisch/responsibility> accessed 16 December 2021.

[1164] see text to n 1139-40.

Apart from that, however, if responsibility is a duty to deal with and an obligation a legal or moral duty to act, the terms could be synonyms. After all, in everyday language, the terms are certainly used interchangeably.

Nevertheless, this ordinary meaning cannot be solely decisive in the realms of international law. Taking into account the precision with which legal terms are accorded with a very specific meaning and then only used in a certain semantic context, the particularities of a term as a legal concept must also be considered.

In light of this, one can rather conclude a hierarchical relationship between the two notions. While an obligation can be both selected and imposed by the obligated party itself, responsibilities are mostly chosen - at least in the first step. This once accepted responsibility might then give rise to an obligation to fulfill it. Obligations are thus possible results of responsibilities; they are both more specific and apply on a secondary level only.

This dissimilarity can also be substantiated specifically with regard to R2P if its roots within the ICISS report from 2001 are taken into account. Stipulating that they wanted to prevent language from becoming '[…] a barrier to dealing with the real issues involved',[1165] it can be assumed that the authors deliberately chose the term responsibility instead of obligation. After all, they attached a very specific meaning to the term obligation and used it in selected contexts only. One example here is the 'Post-Intervention Obligations',[1166] which relate to the responsibility to react. Apart from that, the term is used in regard to distinct treaty provisions only, such as human rights obligations,[1167] as well as obligations arising from the UN-Charter, specifically in regard to the principle of sovereignty.[1168]

It must therefore be concluded that while the notions of responsibility and obligation do feature certain intersections, in the context of R2P they are distinguishable. While states enter into a responsibility from which an obligation may arise, the concept of such responsibility is much broader than a legal obligation that is imposed and legally enforceable. Additionally, not every responsibility must be followed by a corresponding obligation.

(2) R2P Effecting an Obligation to Protect – The Dilemma of Legalization

Thus, does R2P now impose upon states such a legal obligation to protect? Considering the fact that before, R2P has been deemed a legal principle, albeit without exerting a binding effect, as it is neither

[1165] *ICISS Report* (n 900) para 2.4.
[1166] ibid paras 5.1 ff.
[1167] ibid.
[1168] ibid paras 2.8, 2.14, 6.10.

recognized in hard law nor as CIL,[1169] this is difficult to imagine. While binding legal force does not require any specific legal effect, such an effect, i.e., an obligation, does indeed require prior binding legal force. The relevant question in the context of R2P is therefore not whether such an obligation exists as of yet, but rather if it would arise concurrently with legal recognition and what consequences this would entail.

Generally, this controversy is called the legalization dilemma and in recent years, there has been an increasing amount of literature on it. Peters, for example, submits in her essay on the consequences of R2P as an accepted legal concept: 'The endorsement of R2P as a legal principle fully thought through means that it is a legal obligation incumbent both on the UN (acting through the Security Council) and on the states, especially on the P5'.[1170] A similar position is also assumed by Mohamed in her essay on R2P. She differentiates between R2P as a principle (which it is now) and R2P as a binding legal obligation (which it is not yet for lack of recognition).[1171] Together, these authors submit that once the binding legal force of R2P would be established, states accepting it would be obliged to protect the relevant civilians under the R2P regime.

The inherent dilemma is that it is not clear whether this result is at all desirable. While binding legal force is a characteristic that firstly gives meaning to any legal rule, the legalization of R2P could also lead to a backlash in recognition. Peters therein asserts: 'Spelling out the consequences to their very end is apt to deter states from accepting R2P as a hard legal obligation. The prospects of endless chains of legal obligations might in the final analysis turn out to be counter-productive for alleviating the plight of endangered populations'.[1172] Furthermore, many subsequent questions are still entirely open. To name but a few, if R2P was a legal obligation, what would be the consequences of non-adherence? An activation of state responsibility? Additionally, how could non-compliance be defined? It could both encompass the vetoing of a Security Council resolution, as well as include the refusal to deploy troops to missions.[1173]

While the extent of such a debate is hardly foreseeable, the deterrent effect on states that consider recognizing R2P is quite predictable. Also, for the purpose of promoting the concept and its dissemination, it might therefore be more effective not to seek such legalization.

[1169] see text to n 1052-57.
[1170] Peters (n 1055) 319.
[1171] Mohamed (n 983) 70.
[1172] Peters (n 1055) 325.
[1173] cf. ibid 324-25.

cc) In the End – Not All Committal is Alike

To conclude, the deduction of a legal effect in the form of an obligation to protect civilians from either concept is rather difficult and controversial. For PoC-missions, on the one hand, this does usually not take great effect, as the mission's raison d'être is to protect civilians anyhow, in most cases 'by all necessary means'. Establishing a further obligation in that regard would therefore at best enhance accountability for individual failure. For R2P, on the other hand, the discussion on an ensuing obligation is, at least as of yet, a purely academic one. The principle is nowhere close to assuming binding legal force in near future. From the point of view of an R2P advocate, the question is rather to what extent such recognition should be pursued at all.

Committal thus takes on different forms within the framework of PoC and R2P. While PoC-missions do exert a binding legal force, R2P shows more similarity with a directive guideline. What the two concepts do have in common, though, is the fact that a legal obligation to protect civilians cannot be derived from either concept.

e) Results – The Relationship Between R2P and PoC

The systematic comparison has thus illustrated both the closeness, as well as the distinct features of both R2P and PoC. This may provide the basis for a new perspective on the relationship between the two concepts.

To recapitulate briefly, R2P, on the one hand, circumscribes a very specific mechanism, intended to protect civilians from certain, grave crimes through an international responsibility. On a structural level, R2P is therefore often referred to as a 'narrow but deep' concept; narrow in its application and aims and deep in the variety of tools.[1174]

Within robust PoC-missions, on the other hand, peacekeepers can also resort to a wide range of measures and mechanisms in order to pacify the situation.[1175] However, contrary to R2P, PoC is rather meant as a '[…] guide to how to act, not a trigger for whether to act'.[1176]

Thus, it can be argued that R2P and PoC are related but still fundamentally different concepts in the international protection of civilians. Such a point of view is expressed when the two concepts are described as 'cousins, but not sisters'.[1177] In view of the connections shown, however, it is also possible

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[1174] *Responsibility to protect: timely and decisive response: Report of the Secretary-General* (n 1091) para 9; see also Zambakari, Kang and Sanders (n 789) 98.

[1175] *Responsibility to protect: timely and decisive response: Report of the Secretary-General* (n 1091) para 16.

[1176] Carvalho and Sending (n 1090) 61.

[1177] Ed Luck, Special Representative of the UN Secretary-General on R2P, interviewed in 2010, as cited in Vesselin Popovski, 'Siblings, but not twins: POC and R2P' (*United Nations University*, 1 November 2011) <https://unu.edu/publications/articles/siblings-but-not-twins-poc-and-r2p.html> accessed 16 December 2021.

to perceive the two concepts as interrelated and intrinsically connected ideas, which share the same roots but differ in their conceptional design. In this regard, the two concepts can be better described as 'sisters, but not twins'.[1178]

While the similarities do indeed not reach a level on which one could assume that R2P and PoC were twins, it is here put forward that it still exceeds that of mere sisterhood. Rather, the relationship between the two concepts is characterized by a mutual completion that is best captured by the metaphor of a coin with two sides. Inseparably connected, but still, with individual characteristics, R2P and PoC may thus complement each other. Just like two sides of the same coin, they are both autonomous and literally look in different directions; while at the same time, they are closely connected, both in their aims and means. Most profoundly, this is illustrated by the fact that PoC-missions can be categorized as one tool within the second R2P pillar.[1179] This proves that the concepts, despite their different thresholds and varying contextualization of the use of force, are intrinsically linked. This perception does not only fit into the overall structure of international engagement for endangered civilians, but it also furthermore creates room for practically rethinking the interaction of the two concepts.

Currently, this interaction is impaired. Based on the present perception of mutual exclusion, a process is induced in which the impaired effectiveness of R2P in the protection of endangered civilians is compensated by an increased presence and robustness of PoC-missions. Even though this process is not to be criticized in principle, a different approach may foster the recognition of both principles and thus improve the degree of efficiency of the two concepts. For now, it is thus to be concluded that it is indeed possible to specify anew the current relationship between the two concepts based on a systematic comparison. Furthermore, it is stipulated that the hitherto unintended coaction of R2P and PoC can be turned into an advantage. Therefore, a new approach to the practical interconnectedness of R2P and PoC shall be developed that strengthens the individual advantages of the concepts and thus ultimately raises the overall international standard of protection for civilians. This so-far theoretical approach shall thus now finally be translated into practice.

2. The Challenge of Integration – A New Approach to a Two-Track R2P

The directions that both robust PoC-missions and R2P have taken within the last years symbolize a trend in which forceful protection of civilians has moved to the center of attention, while concurrently the willingness of states to ultimately enforce this goal unilaterally has steadily declined. Robust PoC-missions, for one, are the predominant means to express a consensual international responsibility for

[1178] ibid.
[1179] see text to n 1107-12.

civilian protection and have thus become the method of choice in that regard. Consequently, their sphere of action is consistently expanded. Because of this, their mandates are reinforced and filled with both competencies and expectations, up to a level that is bound to exceed the actual capabilities. R2P, for another, degenerates more and more into a mere thought experiment, theoretically convincing but practically entirely insignificant.

One practical implication of robust contemporary PoC-missions is thus an increasing displacement of R2P and a transfer of tasks, which is reinforced by the fact that despite existing similarities and corresponding objectives, the concepts are merely running in parallel. Within the next chapters, however, it is submitted that this is not the only viable path. On the contrary, the existing legal frame leaves room for a redefinition of R2P in relation to robust PoC-missions that can convert the so far parallel existence into substantial coexistence. The last challenge is therewith to transfer the above findings into a concept that legally integrates existing similarities and differences of R2P and robust PoC-missions into the practice. The overall objective is thereby to construct an optimized, legally permissible approach to civilian protection through contemporary peacekeeping missions. Neither R2P nor PoC shall by doing so be conceptionally reconstructed; the aim is rather to present a new approach on how to perceive and implement the existing concepts.

In the following, this approach shall firstly be summarized and introduced. Hereafter, it shall be presented in detail, demonstrating its legal validity and its disposition for integration into the framework of international protection of civilians. Lastly, both the advantages and the potentials of the approach shall be presented, followed by a critical examination of possible shortcomings.

a) Made to Fit – The Integrative Power of Division

Considering their comprehensive practice and wide dissemination, as well as the scope of this work, the hereinafter presented, redesigned approach will focus on contemporary robust PoC-missions and the new dimensions of protection that they can convey. R2P in its current form shall therefore be adapted and then be partly integrated into the practice of PoC, complementing the latter by reinforcing its legal scope and adding new spheres of responsibility while simultaneously building upon existing competencies. Although this does entail a restructured conception of R2P as a concept, no comprehensive redesign of all relevant R2P aspects will be pursued beyond that.

In order to achieve this and thus make robust PoC-missions and R2P a better fit, the elements of R2P that are not compatible with peacekeeping must be filtered out. Based on a reinterpretation of R2P that was brought forward by Thomas H. Lee in 2014, the ensuing approach, therefore, presumes that true integration firstly implies segregation, which subsequently paves the way for recomposing. In order to convey the fundamental idea, the summarized presentation of the approach shall thus be

preceded by a presentation of its doctrinal roots, to be found in Lee's proposal to a revised categorization of forcible R2P.

aa) The Doctrinal Framework – Lee's Approach to a Forcible Two-Track R2P

In 2014, Lee proposed a new categorization of forcible R2P that aimed at strengthening a third, CIL grounds for the use of armed force to protect civilians and thus intended a better integration of R2P in the respective laws. Lee thereby distinguished between what he called r2p, a concept built on the traditional and customary right of every state to protect its own nationals abroad and those of third-country allies, and R2P, as laid down by the ICISS.[1180] Although r2p is deemed to be antique,[1181] Lee nevertheless suggests integrating r2p and R2P into one '[...] unitary concept of customary jus ad bellum to protect civilians [...]'.[1182] For that end, he proposed dividing forcible R2P, that is the third pillar, the responsibility of states to use armed force in order to protect civilians of other states, into two tracks.[1183]

These tracks tie in with the predicate offenses that currently trigger R2P and are based on the finding that not all four of them are actually equal. While war crimes, ethnic cleansing, and non-lethal crimes against humanity short of a massacre (track two) are infamous crimes, according to Lee they do not amount to genocide, massacre crimes against humanity, or lethal use of weapons of mass destruction against civilians (track one) in their disrespect for the uniqueness or singularity of human life.[1184] In that regard, Lee regards the conception of R2P as '[…] overbroad […]'.[1185]

To counter the resulting lack of recognition and thus make R2P practically effective, Lee thereupon suggests that only those interventions that are deployed in reaction to the commission of track-two crimes should require prior Security Council authorization. Therewith, strict scrutiny for the lawful use of armed force against another state would be applied in urgent, albeit not the worst, situations of collective violence. Unilateral interventions, on the contrary, would only be legal in dealing with the commission of track-one offenses, in other words the worst of the worst crimes that states may commit against civilians. As long as they are based on clear and convincing evidence, such interventions would not require prior Security Council authorization,[1186] as the use of such armed force would be legitimized by a third, CIL for lawful war.[1187]

[1180] Lee (n 932) 252–53.
[1181] ibid 253.
[1182] ibid 259.
[1183] ibid 306, 314.
[1184] ibid 314.
[1185] ibid 307.
[1186] ibid 313–14.
[1187] ibid 319.

For Lee, the idea of a two-track forcible R2P was thus only a means to an end, with which he could combine R2P and r2p and therewith derive a CIL grounds for unilateral interventions of states for the purpose of civilian protection. Argued from the R2P perspective, this approach aimed at providing greater practicability and legal certainty. However, also from the perspective of robust PoC-missions, the principal idea can broaden the perspective. Applied to the interaction of R2P and robust PoC-missions, Lee's fundamental idea of a two-track R2P might therefore serve as a base to formulate a new, integrative approach to supplementary coexistence.

bb) A New Perspective – Two-Track R2P Revised?

Incorporating the perspective of robust PoC-missions, Lee's approach to a two-track forcible R2P could be transformed as follows: instead of differentiating between the severity of the atrocity crimes and, correspondingly, the requirement to request Security Council approval, the dividing line could also be drawn between a PoC-incorporated R2P (track one) and an independent, short-term response R2P (track two).

This approach assumes that many - if not most - parts of R2P can nowadays be integrated into robust PoC-missions, whereby certain parts, namely those entailing genuine peace enforcement, must remain autonomous. Foremost, this separation relates to forcible R2P, thus the third pillar commitment. The idea can, however, also be extended to incorporate all three R2P pillars. Overall, this approach does not aim at a new conceptual development of R2P, but rather at a better legal integration and consolidation of current, practical developments. It should thus strengthen the legal framework and therewith enhance the new dimensions of protection, which currently emerge and materialize in the realm of robust PoC-missions and R2P.

In the following, the revised two-track approach shall be presented in more detail by integrating it into the framework of international civilian protection and thus validating it legally.

b) Conception and Integration of the Revised Two-Track R2P Under the Auspices of Legal Permissibility

Subsequently, the revised two-track R2P approach shall be presented in more detail. It is thereby submitted and will thereafter be substantiated that its conception can be validated against the backdrop of legal permissibility and that it integrates into the existing structures of R2P and robust PoC-missions. The following analysis will thereby distinguish between the two stipulated tracks and therein identify the different components of R2P, on which the approach would have an impact.

aa) The PoC-Incorporated Track as an Alternative Implementation of R2P

The PoC-incorporated R2P track is certainly the part that would have the greatest practical effectiveness, as it unites most aspects of contemporary R2P. This R2P can, both in regard to its original conception by the ICISS as well as according to its design by the World Summit, be divided into a narrow R2P, describing the concrete responsibilities to prevent, react and rebuild, as well as a broad R2P, encompassing all three pillars. In both matters, the revised two-track approach can make a decisive difference.

(1) R2P in a Narrow Sense – The Responsibility to Prevent, React and Rebuild

Most notably, the revised two-track R2P approach may reform narrow R2P that mainly refers to forcible reaction, but also to preventive and reconstruction measures.

For a comprehensive understanding thereof, one has to begin with a short recapitulation of how R2P has been originally structured by the ICISS. First of all, they based the approach on two fundamental principles, namely the individual responsibility of each state to protect its nationals and the corresponding responsibility of the state community to intervene in cases of non-adherence. These basic principles were then again divided into three specific responsibilities, namely that of prevention, reaction, and rebuilding.[1188] This may be summarized as narrow R2P. Even though the World Summit has selected a slightly different structure, this basic idea has remained the same. Next to the responsibility of each state to protect its civilians (pillar one) and the corresponding responsibility to assist other states in discharging their primary duty (pillar three), the Outcome document stipulated a preparedness to take collective action and committed itself '[…] to **helping States build capacity** to protect their populations [...] and to **assisting** those which are under stress **before crises and conflicts break out** [emphasis added]' (pillar three).[1189]

On this basis, it is now possible to filter out those parts of narrow, pillar three R2P that can be integrated into PoC-missions. The most significant intersection is thereby to be found within the subcategories of prevention and rebuilding, as they exist identically, or are at least comparable, within PoC as well.[1190] Taking into account the development history of peacekeeping as well as its current focus, those missions are both mandated and equipped to fulfill numerous prevention procedures and

[1188] see *ICISS Report* (n 900) XI.

[1189] World Summit Outcome (n 398) para 139.

[1190] for R2P see *ICISS Report* (n 900) paras 3.2 ff.; for PoC see *The Protection of Civilians in United Nations Peacekeeping* 2019 (n 23) paras 40-41, whereby the Policy speaks of the 'establishment of a protective environment' and 'consolidation' instead of rebuilding, and paras 71 ff; in particular do these objectives refer to the same, general form of conflict prevention and post-conflict rebuilding as within R2P, and not, as one might presume, to distinctive prevention and rebuilding tasks in the realm of civilian protection.

rebuilding tasks as part of their core activities.[1191] From a purely formal perspective, they therewith also fulfill a significant part of R2P.

Strictly speaking, this consolidation does not even require the inclusion of any revised R2P-track, since PoC-missions are vested with the necessary responsibilities and competencies anyhow. What the implementation of the PoC-incorporated track can achieve, however, is an accentuated understanding of R2P as a multi-faceted principle, which is precisely not solely focused on intervention. As part of the PoC-incorporated track, R2P pillar three could thus be further and more sustainably transformed from a mainly interventionist tool into a holistic instrument, whose focus lies equally on prevention, reaction, and rebuilding within one mission. Although this idea has been inherent in the original concept of R2P from the very beginning, it was never put into practice through R2P alone.

The idea behind this incorporation of at least certain R2P parts in robust PoC-missions has thereby already been indirectly acknowledged by some relevant authorities. In his 2019 R2P report, the Secretary-General asserted that in the realm of prevention, '[…] providing protection of civilians through deployment of United Nations peacekeeping operations is among the most direct ways in which the Organization prevents atrocity crimes'.[1192] Also from the perspective of Gareth Evans, one of the founders of R2P, the concept of R2P is primarily about prevention, not reaction.[1193] The possible overlaps with PoC-missions at the level of prevention and rebuilding were thus inherent to R2P right from the start.

However, forcible R2P does also consist of a reactionary part. It is thereby not stipulated that forcible R2P may wholly be covered by PoC-missions, as this would unduly intermingle peacekeeping and peace enforcement. For exactly that reason, the second track of R2P has been deemed the response track. Nevertheless, there still remains a narrow area of application for the PoC-incorporated track. Even though a PoC-mission may not resort to peace enforcement, it is mandated to use force against spoilers in order to protect civilians. If such a mission was thus confronted with an 'R2P-situation', namely circumstances which indicate the commission of core crimes by a state against its people, PoC-missions would be equipped with the necessary authorization and means to respond to that situation in the same way an independent R2P mission would have been. After all, R2P '[…] implies above all else a responsibility to react to situations of compelling need for human protection'.[1194] This implication can be fully accomplished within robust PoC-missions. This would at least substantially fulfill the reaction duty of R2P without leading to an extension of the mandate. As wide as it is, it

[1191] i.e. see text to n 472-74 (three tiers of civilian protection).
[1192] UNGA/UNSC, *Responsibility to protect: lessons learned for prevention: Report of the Secretary-General* 2019 (n 1063) para 23 b.
[1193] Interview with Gareth Evans (n 967).
[1194] *ICISS Report* (n 900) para 4.1.

already authorizes all necessary means in order to afford protection for civilians against any sort of threat. Not least, this corresponds to the changed type of force used within robust PoC-missions. Having restructured the operational and tactical use of force, they have lastly incorporated the strategic use of force as well.[1195]

Lastly, the UN itself has recognized this possibility very early on as well. When the Brahimi Report was filed in 2000, the authors acknowledged the following in regard to the obligation to counter the targeting of civilians in armed conflict: 'If a United Nations peace operation is already on the ground, carrying out those actions may become its responsibility, and it should be prepared'.[1196] While such targeting might not necessarily fall within the scope of R2P, it certainly may. After all, every perpetration of a core crime will amount to the targeting of civilians in the Brahimi Reports' sense.

To conclude in this regard, the supplementation of these three specific R2P components through the PoC-incorporated R2P track would less result in entirely changed conditions on-site, but rather in a different strategy. While robust PoC-missions already now tackle gross human rights violations around the world on a daily basis, the inclusion of R2P aims would strengthen and further justify their pre-existing competencies and counteracts all efforts to remit PoC-missions to their pre-robust status. Their broad- and effectiveness would thus be effectuated. On a substantial level, the PoC-incorporated track can thereby serve as a substitute for a so far missing or misdirected implementation of R2P.

(2) R2P in a Broader Sense – Pillar One and Two as an Expression of Individual Responsibilities

The PoC-incorporated track may in that way serve as a partial substitute for the implementation of narrow, pillar three R2P. However, that is not all. On a broader level, it may also (indirectly) give effect to R2P pillar one and straightforwardly surrogate pillar two.

First of all, the responsibility of each state to protect its own civilians, hence the first pillar, is a duty that exists both within R2P, as well as separate from it. This can be concluded from the fact that other international law instruments, such as the Genocide Convention, IHL in general, and the Rome Statute set equivalent standards as R2P.[1197] Its efficacy is thus not dependent on a valid R2P altogether. Secondly, and apart from that, the idea behind R2P pillar one finds expression in robust PoC-missions anyhow, even though the pillar may not be explicitly included in the revised two-track approach. Indeed, the foundation of all robust PoC enterprises is that it is the primary responsibility of the host state to care for and protect its civilians and to perform the duties that the mission

[1195] see text to n 514-23.
[1196] *Report of the Panel on United Nations Peace Operations* (n 18) para 50.
[1197] see text to n 1048-51.

assumes.[1198] At least indirectly, the PoC-incorporated track does therewith give effect to R2P pillar one by confirming its substance without impeding its validity.

With regard to R2P pillar two, the duty to assist vulnerable states in fulfilling their primary responsibility to protect, the transferability is even more evident. Any superior means to effectuate this duty, then through the deployment of a robust PoC-mission, are hardly conceivable. Such a mission is installed precisely to prevent the perpetration of core crimes and thus help the host state to perform a protection task it is itself not capable of.

The PoC-incorporated track may therewith combine the different threads of international UN engagement for peace and civilian protection in one coherent mission. As stipulated by the UN Peacekeeping Department: 'Conflict prevention, peacemaking, peacekeeping and peace enforcement rarely occur in a linear or sequential way. Experience has shown that they should be seen as mutually reinforcing'.[1199] In a similar vein, Brian Urquhart, one of the founders of UN peacekeeping, already aspired in 1991 to a 'third category of international military operations', placed 'somewhere between peacekeeping and large-scale enforcement'.[1200] These operations were intended to 'put an end to random violence and to provide a reasonable degree of peace and order so that humanitarian relief work could go forward and a conciliation process could commence'.[1201] This vision already begins to materialize within robust, contemporary PoC-missions and could be further advanced by the incorporation of R2P elements. As part of their robust mandate, those missions could set up certain, small-scale troop compartments to take swift and targeted action, also in case of R2P-situations, without this inhibiting the overall peace process.

Closing the loop, this first track does therewith encourage a holistic approach that conveys an idea of robust peacekeeping that strives for an all-encompassing protection standard and is supplemented by a targeted implementation of R2P objectives.

bb) The Short-Term Response Track as an Alternative Implementation of R2P

However, in spite of all these R2P elements that can be incorporated within robust PoC-missions, it must still be borne in mind that there is a fundamental difference between the concepts as well, which cannot be bridged dogmatically. After all, R2P remains at its core a peace enforcement tool, whereas

[1198] i.e. see *The Protection of Civilians in United Nations Peacekeeping* 2019 (n 23) para 29.
[1199] 'Terminology' (n 135).
[1200] Brian Urquhart, 'Who Can Stop Civil Wars?' (*New York Times,* 29 December 1991) <https://www.nytimes.com/1991/12/29/opinion/who-can-stop-civil-wars.html> accessed 16 December 2021.
[1201] ibid.

PoC is a peacekeeping mechanism. In the face of gravest crimes, which do not unfold within reach of a peacekeeping mission, a rapid short-term intervention mechanism is, therefore, still required.

For this purpose, the second R2P-track, the short-term response mechanism, will have to complement the first. It is conceived as a narrow, independent, and strictly termed forcible R2P, which must be deployed on the basis of a Security Council resolution and function in a way that forcible, active R2P is perceived nowadays.

What is clear today is that this R2P is not a practical reality. The urgent need to create greater support in the international community for this form of responsibility thus persists and is not solved by the two-track R2P approach. In this respect, a more in-depth consideration of reforming the decision-making process within the Security Council and the creation of new incentives for states to make such a responsibility a reality remains vitally necessary.

cc) Result

To conclude this introduction of the revised two-track R2P approach, it has been confirmed that its conception is legally permissible and that it is dogmatically compatible with the existing structures of R2P and robust PoC-missions.

To summarize, within this approach, R2P would disintegrate and mainly become one part of a large, comprehensive standard of civilian protection that equally comprises prevention and reaction mechanisms and is embedded in robust PoC-mission. The conventional R2P would, conversely, be reduced to a narrow, solely interventionist instrument that would only be activated in reaction to gravest emergencies.

This approach offers the potential to integrate the non-interventionist parts of R2P, which are not implemented today due to a lack of overall acceptance of the concept, into PoC. The reformation of forcible R2P could thus be continued in a more targeted manner. The approach thus mainly puts an already ongoing process on a legally more secure footing. Applied, it could not only strengthen robust PoC-missions but also bears the potential to promote the implementation of R2P as a focused and targeted mechanism, with a small but exact scope.

c) Potentials, Pitfalls, and Patterns – The Implementation of the Revised Two-Track R2P

Having elaborated on the general conception of the revised two-track R2P approach, the focus shall now further lie on the potentials as well as possible pitfalls of the presented approach in order to substantiate the need for and relevance of this reevaluation.

aa) New Game, New Chances? The Revised Two-Track R2P Approach and its Potential for a Restart

To begin with, the revised two-track R2P approach offers a potential that exceeds its mere legal feasibility. It may not only facilitate a fresh start for R2P as an independent concept but, furthermore, strengthen the perception and implementation of the peacekeeping principles within robust PoC-missions.

(1) R2P Reloaded – A Fresh Perspective for R2P

So far, this analysis has focused on the PoC-incorporated track and the modification of robust peacekeeping missions by means of the revised two-track R2P approach. However, the recontextualization may also benefit R2P as an independent concept, then in the form of track two R2P, as it can strengthen its weakest points: the lack of recognition and the resulting practical insignificance.

While it is impossible to predict how exactly states will react to such a restructured R2P, there are different factors that indicate that the revised two-track approach will provide a fresh perspective for R2P and thus encourage rather than impede effective future implementation. Firstly, and as already indicated, this interpretation of R2P is much more concise and targeted than the current approach. Although the comprehensive protection standard, as which R2P was originally conceived, is very enticing, it has never asserted itself in practice. Reducing the scope and objective while simultaneously confirming the precise triggers, conditions, and framework of action is designed to result in wider understanding and thus approval.

This process is reinforced by the second relevant factor, which is essentially one of transparency. R2P practice has so far often failed due to the widespread fear of disguised motives and regime change ambitions of the proactive states. The revised two-track approach would counteract this by disclosing how R2P goals are already currently expressed in peacekeeping missions without them exceeding their mandates or existing competencies. The remaining part of R2P, the second track, then, would precisely not be introduced 'through the back door' of any mission, hidden and disguised, but openly acknowledged and pursued as the last resort mechanism it is. Thus, downsizing the scope of R2P may potentially lower the hurdles to accepting R2P as an idea.

(2) The Peacekeeping Principles in Renewal

The revised two-track approach may not only be integrated into the existing framework of R2P and PoC-missions, but it also offers the potential to further reunite and enhance the basic peacekeeping

principles. Instead of straining these principles, the approach is actually suited to increase their efficacy.

On a general note, this presupposes that the principles can be evolvingly interpreted and adapted to changed circumstances. Considering that peacekeeping missions themselves have displayed an extraordinary evolution in recent years, it is, however, not far-fetched to assume that also the peacekeeping pillars are subject to an evolving interpretation.[1202] Next-generation missions can thereby function very well with reinterpreted versions of the foundational principles.[1203] The revised two-track R2P approach is thereby an excellent illustration of this process. The three basic principles will be considered in turn below.

Prima facie, the prospect of requesting consent from a host state, after having pointed out that the ensuing mission will not only pursue classic peacekeeping aims but additionally implement R2P objectives, does not appear to be very promising. In order to obtain the necessary approval, it is therefore important to pay close attention to an exact terminology. While it can by no means be the goal to implement R2P through PoC, it is certainly desirable, and this must be communicated, to implement the underlying objectives - at least in part - within one comprehensive and thus effective mission. This is the first and foremost priority of the host state. However, even though open communication is always recommended, there is technically no need to obtain any form of additional consent for the implementation of the presented approach. This is because the objectives can - as explained - already be put into action by means of the existing mandate. With respect to the revised two-track approach, an advancement of the principle of consent would thus not require a factual extension of approval.

In regard to the principle of impartiality, the situation is even more favorable, as both the revised two-track approach may be favorable to the principle as well as vice versa. This is because, for one thing, the implementation of the revised two-track approach would generally strengthen and expand robust PoC-missions and thus confirm the principle of impartiality. For another, the validity of the principle of impartiality is also a major advantage of an R2P implementation within robust PoC-missions. As such an implementation always encompasses an impartial execution of the respective tasks, it not only increases outside confidence in the troops but also significantly facilitates the attribution of offenses and the ensuing liability. Instead of a single state or group of states, the UN would assume this responsibility. Thus, an overall fair-minded standard of civilian protection is generally promoted.

Lastly, an expansion of the non-use of force principle is not to be expected through the first track either, since the added tasks would not be truly new tasks and keep within the set limits. The missions

[1202] see Khalil (n 134) 218.
[1203] Wilson (n 37) 147.

would, on the contrary, better live up to their robust, Chapter VII UNCh mandates and further fill them with life. On a practical note, this would counteract all efforts to put PoC missions on a different legal basis.

Then again, misuses of force could also be much better resolved if attributed to the UN. The use of force within a robust PoC-mission is thus always preferable to one of unilateral state action. The approach can also promote this.

bb) The Full Picture – Inherent Pitfalls and Potential Criticism of the Revised Two-Track R2P Approach

Furthermore, and in order to consider the approach in its entirety, it requires an examination of inherent pitfalls and potential criticism, albeit with a focus on corresponding solution approaches.

Firstly, the strongest point of criticism ties in with the basic conception of the revised two-track R2P approach. With respect thereto, one could argue that it is nothing more than an abolition of the concept of R2P and the reintroduction of humanitarian intervention as a legal basis for unilateral action. After all, R2P was constructed as an alternative draft to humanitarian intervention. While this concept had been solely focused on forceful intervention, R2P was conceived as the holistic counter-project that did encompass preventive and rebuilding measures in order to comprehensively protect civilians and - above all - increase recognition. Separating these supplementary elements from R2P and reintegrating them into PoC, effectively leaving the independent R2P solely with its forcible intervention part, could thus be conceived as retrogression instead of progress.

However, while it is true that the second track R2P does resemble humanitarian intervention more than the whole concept of R2P did before, this track still does not stand for itself. R2P is and remains a holistic concept; solely its implementation is segmented into two separate tracks. The objectives, means, and methods remain the same.

The need for this new conception arises simply from the practical consideration that R2P is currently not at all effective, whereas PoC-missions are continuously expanded and therewith actually already now taking over these tasks. When R2P was originated, the situation was quite different, especially because PoC-missions were not as developed yet. In the end, one must admit that the repackaging of humanitarian intervention into R2P has not brought the desired success and especially not fostered actual recognition. A reconsideration is thus direly needed.

Secondly, and on a different note, one could furthermore bring forward that such a changed perception, although one that would not require great adjustment in practice, could result in a decline of general support for both kinds of missions. This, however, may only hold true if the impression is

created that an expanded, uncoordinated mission is foisted on the host state. When, on the other hand, the objectives and means are communicated openly, clarifying that no backdoor introduction of R2P is intended, any such deterioration is not to be expected. This does not mean that there is no demand for an overall change in attitude. Peacekeeping missions are losing more and more the support they urgently need. However, this is not the place to tackle the general issue of declining support for robust UN missions among the powerful UN members. R2P incorporated PoC-missions do not significantly change that debate, as they would not require any further support than what is needed anyhow to fulfill the present tasks. If robust PoC-missions were to be equipped in a way they could effectively execute their current mandate, they would all the same be rightly equipped to live up to their international responsibility. Following on from this, the proposed approach does also not lead to PoC-mandates being further overloaded with tasks and competencies. In recent years, the ever-widening scope of resolutions has often been criticized, as they would end up resembling a Christmas tree that is - fully laden with decorations - already beginning to bend.[1204] To begin with, it is questionable to what extent a broad mandate actually impedes effective implementation in the first place.[1205] Additionally, one must bear in mind that the here presented approach does precisely not entail any further extension of the mandate, but ties in with existing competencies and tasks. Such a comprehensive and all-encompassing interpretation is ideally suited to promote 'clear, focused, sequenced, prioritized and achievable mandates',[1206] as it brings together different strands of complementary protection.

Thirdly, the approach must also face the accusation of confusing peacekeeping and peace enforcement as two fundamentally different fields of international engagement. In 1995 still, the Secretary-General asserted in his Supplement for an Agenda for Peace: 'Peace-keeping and the use of force (other than in self-defence) should be seen as alternative techniques and not as adjacent points on a continuum, permitting easy transition from one to the other'.[1207] This attitude must, however, be today dismissed as no longer contemporary, regardless of the revised two-track approach. Peacekeeping has changed significantly since the 1990s.[1208] While it is still clearly distinguishable from peace enforcement, the use of force is no longer fundamentally prohibited. So, while a mixture of both concepts, potentially

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[1204] Alex Bellamy and Charles Hunt, 'Benefits of Pairing Down Peacekeeping Mandates Also Come With Risks' (*IPI Global Observatory*, 15 March 2019) <https://theglobalobservatory.org/2019/03/benefits-paring-down-peacekeeping-mandates-come-with-risks/> accessed 16 December 2021, citing Secretary-General Antonio Guterres.

[1205] ibid.

[1206] 'Action for Peacekeeping: Declaration of Shared Commitments on UN Peacekeeping Operations' (n 7) para 5, cited in ibid.

[1207] *Supplement to an Agenda for Peace: Position Paper of the Secretary-General on the Occasion of the Fiftieth Anniversary of the United Nations* (n 348) para 36.

[1208] see text to n 364 ff.

even something like 'R2PoC',[1209] is neither suggested nor desirable, an interaction based on partial practical integration is different from that. The result is a rapprochement without blending that exactly maintains the relevant separation. This pitfall is therefore a hypothetical one at best.

Lastly, the only resounding criticism that can ultimately be formulated is the approach's seeming lack of effectiveness and power to change. Whether forcible R2P or second track R2P, the idea of forceful unilateral intervention for the sake of civilian protection is and will remain a red rag for many states, while civilians all around the world will remain unprotected.

This may be countered twofold. For one, it remains undisputed that there is an enormous need for reform in the realm of international, forcible civilian protection, which can precisely not be compensated for with this approach.[1210]

What must secondly be remembered is that actual and effective comprehensive protection of all endangered civilians around the world has never been the goal of any UN ambition, as this is virtually impossible. The aim, however, must be to establish a comprehensive protection *standard*, which sets the frame for effective protection in the respective spheres of influence. This exactly is targeted by the revised two-track R2P approach. In essence, the approach revolves around the reformulation and hence legalization of existing processes and procedures. Through this, today's shortcomings may be counteracted and the legal framework under which the protection of civilians takes place today can be improved. Nothing more and nothing less is intended here.

d) On the Ground – The Mastered and Remaining Challenges of Integration

It has thus been proven that R2P and PoC can indeed substantially coexist and mutually complement each other in practice, instead of merely being applied side by side. Therefore, a new approach on how to perceive R2P in a manner that assures the best possible implementation has been presented. With this so-called revised two-track R2P, the challenge of legal integration has been mastered in a practically feasible way.

In many of today's missions, the first track R2P implementation is thereby already taking place today, although not explicitly. In that regard, the approach's benefit mainly lies in the legal footing of existing processes within robust peacekeeping. One example of this is, again, UNMISS in South Sudan. Being a comprehensive, contemporary PoC-mission,[1211] it does still incorporate concrete R2P elements. The mission does not only pursue an all-encompassing protection strategy in that it forcefully protects

[1209] see Carvalho and Sending (n 1090) 61.
[1210] i.e. see text to n 479-510 and 878-82.
[1211] see text to n 624-36.

civilians, inter alia from core crimes, but furthermore, it puts a considerable focus on various prevention and rebuilding measures throughout its mandated tasks.[1212]

Darfur and the corresponding missions have an even clearer connection to R2P. When the conflict within this Sudanese province evolved, an R2P situation was identified,[1213] although no state declared itself willing to intervene on that legal ground. Instead, the corresponding international responsibility was addressed by a robust PoC-mission.[1214] However one judges the performance of this mission, it remains a demonstration of how R2P objectives can be practically absorbed by a robust PoC-mandate. It also exemplifies how robust PoC-missions are more likely to succeed, considering that R2P, as so often, had been disregarded due to concerns for 'diplomatic pressure'.[1215]

What is more, R2P-inspired missions have in the past been deployed to support and flatten the ground for a simultaneous peace-operation. Mégret names the examples of the British-led intervention force, which assisted the UN mission to Sierra Leone when they were confronted with the commission of core crimes.[1216] In a similar vein, the European Union's Operation Artemis assisted the MONUC mission to alter into a rather robust mandate in Ituri.[1217] These examples prove that R2P and PoC can go hand in hand and complement each other. The revised two-track approach has given this development the necessary legal framework.

The much greater remaining challenge is, however, that of implementing the second, independent R2P track. In this respect, little progress can be observed in recent years. In the end, one may, after all, resort to the idea of a revolving door. Although highly controversial, at least Mégret stipulated in 2015:

Conversely, a transition is conceivable between a ‘robust peace operation’ whose primary aim is the protection of civilians, and peace enforcement in a situation where the protection of civilians evolves from an incidental goal as part of peace efforts to the central one in a context of atrocity perpetration.[1218]

A suitable solution is here long in coming.

[1212] i.e. see UNSC Resolution 2514 (n 719) paras 8 (iii)-(vii).

[1213] UNGA/Human Rights Council, *Implementation of General Assembly Resolution 60/251 of March 2006 Entitled “Human Rights Council”: Report of the High-Level Mission on the Situation of Human Rights in Darfur Pursuant to Human Rights Council Decision S-4/101* (n 999) para 76; Peters (n 935) 524.

[1214] see text to n 407-39.

[1215] see Bellamy (n 947) 18.

[1216] Mégret (n 243) 18.

[1217] ibid.

[1218] ibid.

3. Having Come a Long Way – From Competition to Correlation of Concepts

To conclude the preceding chapters, it is possible to specify the current relationship between R2P and robust PoC as that of two sides of the same coin, intrinsically connected but with a different impact direction. Without a new translation into practice, however, this currently leads to a situation in which the lacking potency of R2P in the protection of endangered civilians is merely compensated through reinforced PoC-missions. In the long run, this impedes an effective and comprehensive system of civilian safety. In order to initiate a new dimension of protection, a different approach to practical interaction has therefore been presented, called the revised two-track R2P.

With this approach, the current prevailing dichotomy between the concepts, which indeed manifests itself in a competition, has been transformed into a more constructive form of interaction. This interaction can be deemed an effective correlation, instead of a disruptive competition of concepts. Within that correlation, the opposing ambits of both concepts remain independent, while simultaneously those segments that pursue similar aims through similar means are brought together. In the end, this fosters a concurrent allegiance in those realms of civilian protection, where mutual complementation increases capability.

III. Conclusion – Practical Implications of Contemporary PoC-Missions on R2P

Bringing the different strands together, contemporary robust peacekeeping has many different practical implications; in the realm of international responsibility, they take shape in a fundamentally changed definition of relationship and interdependence. The most important result of such a redefined relationship is that despite the existing contrasts and individual areas of application, R2P and PoC can form a unified system of international responsibility for the protection of civilians. Within that system, the revised two-track R2P approach is one manifestation of a revived interdependence and does therewith represent one new dimension of protection in the continuing search for civilian safety. As only one viable path, this in no way excludes other manifestations and options.[1219]

However, the new dimension presented here will not become a reality by itself. Even though it has been pointed out repeatedly that the revised two-track R2P approach could be implemented without fundamental conceptual changes, this does not mean that there is not a considerable need for reform anyhow. For robust PoC-missions, this need mainly ties in with the efficacy of the equipment and resources at hand, as well as with the lack of ambition amongst the stronger UN members. For R2P, it

[1219] such as for example something like 'peacemaking' missions, i.e. see Breau (n 244) 430.

requires a renewed commitment and the political will to fill the principle with life. In the end, this could also necessitate a fundamental restructuring of competencies within the Security Council.

E. Final Remarks – Emerging Realms of Civilian Protection and the Continuous Search for Safety

The search for civilian safety - it is no exaggeration to regard this task as the UN's central undertaking within the last decades. While means and methods have changed, different approaches, concepts, and labels have been tried and revoked, the overall goal has remained the same: the protection and preservation of human lives. It is thereby not to be assumed that the developments in that regard have already come to a halt. On the contrary, the effective protection of civilians in a constantly changing conflict environment will be one of the UN's major challenges in the future. Adaptation in that regard is and will remain key.

To bring this thesis to a close, the considerations and the results found shall be briefly summarized and placed in the current conflict context in South Sudan. For it is precisely here that a new realm of civilian protection opens up, which is characteristic of the continuous search for civilian safety.

I. The Development and Current Status of Civilian Protection by Virtue of UN Peacekeeping – A Review

The present research centered around the most popular and long-lasting instrument for the international protection of civilians, UN peacekeeping. Having been strongly influenced by various adaptation processes, this mechanism was presented in its different developmental stages and was placed in the respective historical contexts. The main focus was thereby put on its current and most controversial appearance, that of robust PoC-missions. These missions are not only intriguing in their evolution, but they also pose different challenges in practical and legal terms, which this thesis allocated and assessed. In the end, this resulted in the elaboration of a new protection standard that follows a comprehensive standard and heralds a new dimension altogether in the search for civilian safety.

Symbolic of this new dimension in robust peacekeeping is one concrete phenomenon, which formed the core of the chapter that followed. This instrument, deemed passive protection, has emerged, and assumed a key role within the UNMISS mission in South Sudan. As such, it is an expression of one of the transformation processes robust PoC-missions are currently encountering and specifically of the emerging all-encompassing protection approach. That such a new protection approach does not only offer unique opportunities but also brings many new challenges and risks was presented next. The UNMISS mission was thereby not only the setting for this specific phenomenon, but it also served as the thesis' case study of a robust PoC-mission that symbolizes the complex transformation processes.

Thirdly and lastly, robust contemporary PoC-missions were put into the larger context of international responsibility for the protection of civilians in the form of R2P. To this end, R2P was first presented as a concept, both in its development and current perception. As a result, it could be compared with robust PoC-missions based on different factors, which allowed for a renewed identification of similarities and differences between the two approaches. As a first conclusion, a redefined relationship between the two concepts could then be deduced. Subsequently, this reevaluation paved the way for a different understanding of how robust PoC-missions and R2P are nowadays intertwined. The aim was to put actual developments on a secure legal basis. The final result was there, with a new, integrative, and comprehensive approach to civilian protection in the context of 21st-century peacekeeping. If fully endorsed, this new conception could herald an advanced, fifth generation of peacekeeping.

II. The Lasting Quest – Contemporary Civilian Protection Between Sustained Challenges and New Perspectives

Taken together, these considerations result in a comprehensive, all-encompassing protection concept that endorses different forms of active and passive protection and incorporates a first track R2P according to the revised two-tack approach. In the continuing quest for civilian safety, this may be one component, one dimension, and one piece of the puzzle. In a very specific way, however, the approach focuses on the legal bases and feasibility and may only be one attempt of many to guide peacekeeping through current, troubled waters. Under no circumstances may it be mistaken for a universal remedy for the predominant lines of conflicts. Before a final evaluation can thus be made on the practical feasibility of the ideas presented, a concise and exemplary presentation of current challenges to robust UN peacekeeping is needed, again using the example of South Sudan.

1. In Search of Safety – Hurdles and Obstacles

The search for safety is neither an easy one nor will it probably ever come to an end. As long as there are violent conflicts, civilians will seek and need protection from them. Even with an all-encompassing protection approach, robust peacekeeping faces major challenges today that are still far from solved. UNMISS is best suited to illustrate that. Though unique, the presented obstacles can be transferred and are comparable to those of many other missions. Different issues that were only touched upon in the previous chapters or were discussed under different premises will thus now be presented in a summarized form. This will not only serve to realistically set the scene for the presented ideas but also to introduce the following prospects and perspectives.

The most prominent hurdles robust peacekeeping missions face nowadays can be roughly divided into those coming from the outside and those inherent to the missions themselves, although they are intrinsically linked and interdependent.

To begin with the outside perspective, one of the greatest obstacles UNMISS has to deal with is the situation of being under constant threat. Frequent attacks occur, and they are mostly the result of a mission-host-state relationship that is more than strained. From a conceptional point of view, this strongly calls the principle of consent into question. In the case of South Sudan, the mutual distrust is deeply rooted. UNMIS's relations with the Sudanese government were already very difficult, and they did not allow for a mission continuation after South Sudan had become independent.[1220] Consequently, hopes were high that with the inauguration of UNMISS, a new chapter would be marked. But this mission as well was soon perceived as acting in too biased a manner and with its own agenda. In 2018, South Sudan's deputy permanent representative to the U.N., Ambassador Moum Majak Ngor Malok, welcomed the latest mandate renewal but lamented that the Council had chosen to politicize a peacekeeping resolution. 'There is a need to bridge the discrepancy between the primary responsibility of the state and the complementary support of the international community,' he said.[1221] Further on, he insisted on the fact that the conflict was '[…] political, not ethnic, in nature'.[1222] This is certainly arguable in essence, but it does reveal the accusation on which the call for a neutral mandate exercise is based. The dilemma lies in the fact that a truly impartial exercise of the mandate will inevitably trigger the displeasure of the government so that in turn, it will invoke a politicized mandate exercise.

These outside conflicts are intensified by internal organization of the mission and especially leadership that is often ambiguous. In the case of UNMISS, the failures in command and control have been emphasized more than once, and they are blamed for many wrong decisions and perceived failures. As Zambakari points out, different authors have found different reasons for the inability of the UNMISS leadership to provide effective protection in South Sudan. Some propose that the 'experiments of state-building from above' caused the deficiency.[1223] Others stipulate that by focusing solely on the ruling elite, the UN leadership might have misjudged the true root causes of the conflict.[1224] What's

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[1220] Wolf-Christian Paes, 'Die Vereinten Nationen in den sudanesischen Staaten – ein zahnloser Tiger?' in Torsten Konopka (ed), *Wegweiser zur Geschichte: Sudan und Südsudan* (Ferdinand Schöningh 2018) 172.

[1221] 'Adopting Resolution 2406 (2018), Security Council Renews South Sudan Mission Mandate, Signalling Intention to Consider New Arms Embargo' (*UN Meetings Coverage and Press Releases*, 15 March 2018) <https://www.un.org/press/en/2018/sc13249.doc.htm> accessed 16 December 2021.

[1222] ibid.

[1223] Zambakari, Kang and Sanders (n 789) 115; referencing to Mahmood Mamdani, 'Who's to Blame in South Sudan?' (*Boston Review*, June 27, 2016) <https://bostonreview.net/articles/mahmood-mamdani-south-sudan-failed-transition/> accessed 16 December 2021.

[1224] Christopher Zambakari and Tarnjeet K Kang, 'Negotiating peace in South Sudan: Democracy, politics and armed movements' (*African Arguments*, 14 January 2014)

more, building a state that is not backed by a united civil society does not seem to be very effective.[1225] Lastly, might the lack of commitment with regard to social cohesion be the core failure of the UNMISS' leadership.[1226]

The sometimes-inconclusive leadership of the mission does not only potentially aggravate conflicts with the government, but it also influences the peacekeepers' behavior in concrete threat situations. While a united and strong leadership makes it easy to act in a unified way, uncertain, and inconclusive guidance will discourage the troops and further prevent them from using force to protect civilians. Various factors have therefore in the past led to UNMISS troops remaining inactive. While sometimes, instructions and information were not or incorrectly communicated,[1227] in other instances were UNMISS PoC-Sites dependent on local security personnel, which intermingled the protector and the protected.[1228]

Lastly, all of these challenges are overshadowed by a lurking and severe resource problem. This issue is neither new nor uniquely connected to passive protection or PoC, but in this context, it becomes all the more revealing that it has not been solved after such a long time. When the UN time and again voices concern about too few troop-contributing countries, too little equipment, and in general insufficient financial support, those who are responsible repeat themselves. In fact, however, it is an expression of long-lasting frustration. In the end, any multilateral organization can only be as strong as the sum of its members. Without their commitment, the UN is nothing more than an empty shell and with it any peacekeeping commitment. All in all, of course, the UN is not entirely without fault for this situation. Not in all instances have they reacted with offensive campaigning to such a lack of resources, but far too often with an attitude shaped by '[…] complacency and avoidance'.[1229] In the case of UNMISS, again, one may furthermore challenge the decision to allow so many IDPs into the camps in the first place, considering the already then existing, blatant lack of resources. Some of the failures that followed were thus already pre-programmed. Ironically, in that regard, one must give the mission the benefit of another failure. As the massive intake of civilians had neither been foreseen nor planned for, the admission was a pure emergency measure that cannot be reproached with. However, why

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<https://africanarguments.org/2014/01/14/negotiating-peace-in-south-sudan-democracy-politics-and-armed-movements-by-christopher-zambakari-tarnjeet-k-kang/> accessed 16 December 2021; cited in Zambakari, Kang and Sanders (n 789) 116.

[1225] Zambakari, Kang and Sanders (n 789) 116.

[1226] Christopher Zambakari, 'South Sudan's Preventable Crisis' (*The Fletcher Forum of World Affairs*, 8 July 2014) <http://www.fletcherforum.org/home/2016/8/15/south-sudans-preventable-crisis> accessed 16 December 2021; cited in Zambakari, Kang and Sanders (n 789) 116.

[1227] Zambakari, Kang and Sanders (n 789) 117.

[1228] see 'Note to Correspondents -- Board of Inquiry Report on Malakal' (*United Nations Secretary-General,* 5 August 2016) para 23 <https://www.un.org/sg/en/content/sg/note-correspondents/2016-08-05/note-correspondents-board-inquiry-report-malakal> accessed 16 December 2021; as cited in Zambakari, Kang and Sanders (n 789) 117.

[1229] Zambakari, Kang and Sanders (n 789) 119.

those responsible had not taken exactly such precautions, with regard to such a foreseeable development, is a different kettle of fish. At the end of the day, of course, this was again - and here we come full circle - a question of resources.

Neither of these hurdles and obstacles is thereby one that belongs to the past. On the contrary, just as IDPs in South Sudan will continue to seek protection in PoC-Sites, so the individual search for safety in all crisis regions will continue. The current COVID-19 crisis is thereby only one factor that is prone to intensify the conflicts and magnify the overall threat situation.

Meanwhile, it is not foreseeable that civilians will not seek protection in PoC-Sites in the future. On the contrary, as long as the conflict continues, the numbers will at least remain stable. Each new outbreak, on the other hand, may result in a new, sharp increase.

2. New Dimensions of Civilian Protection – Perspectives and Possibilities

Despite the numerous hurdles and obstacles that robust PoC-missions face today, the outlined new dimensions of civilian protection that are inherent in those missions also offer fresh perspectives and opportunities. The most compelling of these is the actual possibility to protect hundreds of thousands of civilians' lives on a daily basis by means of passive protection.

However, also apart from that, the presented all-encompassing protection approach does - in all its aspects - offer both legal as well as practical advantages. All things considered, it may not be suited to make civilian protection any easier, but both foster its legal validity as well as its practical effectiveness. No further, delusive hopes are thereby created, since the range of applications or tasks is not expanded, but only shifted. That is to say, all-encompassing is not to be misunderstood as a protection standard that encompasses all individuals at all times, but one that encompasses those individuals within reach and capabilities comprehensively. It is a holistic concept of safety within the mission's realms of possibility. Within this amended, all-encompassing civilian protection approach, the passive protection mechanism is one means of physical protection. Another instrument of protection is the revised-two track R2P concept. Within this concept, R2P itself has not been transformed but separated into its constituents on the application level alone. Therewith, an integration process between robust PoC-missions and R2P that is already underway now has been consolidated and legally confirmed.

Reflecting these two, new dimensions of civilian protection on the practice one last time, again returning to UNMISS in South Sudan, the implications of passive protection are clearly visible today and have been demonstrated above. For the revised two-track approach, the verdict is far more difficult to pass, as it is so far solely a theoretical construct. However, the approach is only the legal

reinforcement of manifesting changes and thus a legal construct, not a factual reorientation. The consequences of recognition - rather than implementation - of this concept can thus be outlined quite clearly. In South Sudan, acknowledging the revised two-track approach would allow for a separation of certain high-risk protection operations, whose trigger would be an R2P situation. If Ambassador Moum Majak Ngor Malok can be taken at his word, and the conflict is at its core ethical and not solely political, it is not far-fetched to imagine a situation when specific ethnic groups are subjected to a targeted attack. Such a separation would require an additional, track two R2P mission with a corresponding mandate, as these troops would assume peace-enforcement tasks, not to mention additional resources. Under these circumstances, however, the actual PoC-mission would be disburdened and could fully focus on its physical protection tasks, be they active, passive, or preventive in accordance with R2P track one.

Ideally, such a separation would also prevent the PoC-mission from further losing its reputation within the South Sudanese government, as it would outsource the most controversial tasks to a second mission. Realistically, however, the decision would rather be perceived as legal sophistry only, and precisely not lead to a separation of interests and thus relaxation of either relationship. The revised two-track approach does therewith not exonerate the mission leadership from investing in the host state relations, as well as it does not effectively solve the problem of lacking resources. A revised two-track approach or not, there is hence no denying that the whole mission is in dire need of further support and resources.

Consistently pursued, these new dimensions, embedded within an all-encompassing protection approach, still have the potential to not only place current developments on a secure legal basis but also to raise the standard of protection in practice. The main weakness of UNMISS on the ground, and this is again transferrable to other missions, is the conviction of its own weakness, which does (still) effectively '[…] rule[d] out the use of force as a realistic option'.[1230] By means of the all-encompassing protection approach, this weakness can at least partly be turned into a strength. This is to say, realizing and accepting that it is currently not possible to deploy troops in every relevant part of the country and protect the affected civilians there, the mission could legitimately focus on protection hotspots in the form of their PoC-Sites. Therein, a comprehensive protection standard with the inclusion of all preventive R2P aims could be realized. In return for such an extension of physical protection methods and to avoid a mandate overload in the end, however, other parts of the mandate must be outsourced. This does not only apply to the second track R2P, but also to post-conflict peacebuilding measures, which should be clearly separated from the immediate protection mission.

[1230] *Evaluation of the Implementation and results of protection of civilians mandates in United Nations Operations* (n 479) para 45.

In the end, the presented approach does not bring the ideal of de facto comprehensive civilian protection closer to realization. However, it does transform the actual capabilities into the best possible result. As such, it can contribute to the ongoing reformation process that currently takes shape in the Action for Peacekeeping Initiative of 2018[1231], as well as the Future of Peacekeeping project of 2020[1232]. In concert with other transformational efforts on all relevant levels, this contemporary and yet intermediate result may thus be one paving stone on the continuous route to civilian safety.

[1231] see 'Action for Peacekeeping: Declaration of Shared Commitments on UN Peacekeeping Operations' (n 7).
[1232] see 'Future Of Peacekeeping' (n 7).

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