Closing gaps between promises and outcomes: the argument for and formation of a unified use of force rule for UN missions engaged in armed conflict

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Abstract

Disagreement and conflict is inbuilt in human civilization. Perhaps, the extensive provision made in the Charter of the United Nations for the resolution of disputes of varying gravity reflects an acceptance of this fact. This thesis analyses how the use of force by UN troops, an instrument that has become indispensable to the maintenance of international peace, can be regulated to better accommodate the objectives that they pursue. The discussion herein is limited to uses of force taking place during situations that satisfy the armed conflict threshold and pursues a step by step approach that first contextualises UN deployment, then develops a ‘chain motif’ comprised of the legality and morality of resort to and use of force by the UN before finding the answer to its central research question; clarifying why and how UN uses of force should be regulated.

Chapter 2 sets the setting by discussing the UN troop generation process, its intricacies and the classification of UN missions, and then addresses the pivotal question of conduct attribution. It formulates a framework of attribution that reflects the conceptual bases of legal Responsibility, notes the possibility of dual attribution and limits the ensuing discussion to the regulation of only those courses of conduct that can be completely attributed to the UN. The thesis then moves to the moral sphere in Chapter 3 and discusses the morality of both the resort to and use of force. Through an assessment of UN policy documentation, the chapter identifies crucial distinctions that lie in the objectives in pursuance of which, the UN and States resort to force. It argues that these legal distinctions permeate into the moral sphere and influence how the just war calculation gets operationalised in the case of resort to force by the UN. It then identifies and analyses a number of crucial links that exist between the ad bellum and in bello levels, both in the case of war and of UN uses of force, and concludes that these linkages shape the respective in bello moralities of each activity in distinct ways. The chapter explores these differences through a ‘Pressure Point’ system that is capable of highlighting the specific considerations within the in bello moral calculus on which each activity places its reliance.

The connections so established between the legality and morality of resort to force, and the morality of use of force, create a collective accent. This collective accent dictates that it be accommodated by and reflected in the legal regime by reference to which use of force is regulated. Chapters 4 and 5 address how this could be achieved by identifying the regulatory candidates, the content of the relevant rules and the nature of the conflicts created by the parallel application of the said rules. Chapter 6 analyses how these conflicts could be resolved.
in a way that accommodates the purposes for which UN troops are authorised to use force. This is achieved through what is referred to as the ‘common contact point’ formulation of lex specialis, which allows the objectives of deployment to be infused into the factual matrix to which the candidate rules are applied. The Chapter then examines, with reference to practical examples, how this approach reduces gaps between the promises made and outcomes achieved by the UN in using force.

It is in consequence of this analysis that this thesis develops a ‘uniform use of force rule’ for the UN that explains and clarifies to UN troops, how force should be used in light of why they use it. The sequential approach that is utilised in this endeavour allows the legal and ethical considerations on which the promises end of the spectrum – the resort to force by the UN – are based, to be reflected in its outcomes end – the use of force by the UN. The discussion essentially carries out the ‘behind the scenes’ meta level thinking that precedes UN uses of force on behalf of ground troops, ultimately providing them with a rule set that can be applied with little or no hesitation or doubt.
Statement of originality

This work has not previously been submitted for a degree or diploma in any university. To the best of my knowledge and belief, the thesis contains no material previously published or written by another person except where due reference is made in the thesis itself.

Charuka Ekanayake
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To my family back home, especially my little girl.
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<td>Allied Democratic Forces</td>
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<td>ADHR</td>
<td>American Declaration on the Rights and Duties of Man</td>
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<td>ADL</td>
<td>Armistice Demarcation Line</td>
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<td>AP I</td>
<td>Additional Protocol I</td>
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<td>Additional Protocol II</td>
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<td>C2</td>
<td>Command and Control</td>
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<td>CCF</td>
<td>Continuous Combat Function</td>
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<td>CCPT</td>
<td>Common Contact Point Theory</td>
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<td>CONOPS</td>
<td>Concept of Operations</td>
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<td>DAF</td>
<td>Dissident Armed Forces</td>
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<td>DPH</td>
<td>Direct Participation in Hostilities</td>
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<td>DPKO</td>
<td>Department of Peacekeeping Operations</td>
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<td>DRC</td>
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<tr>
<td>EC</td>
<td>European Community</td>
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<tr>
<td>ECOMOG</td>
<td>Economic Community of West African States Monitoring Group</td>
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<tr>
<td>ECtHR</td>
<td>European Court of Human Rights</td>
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<tr>
<td>EU</td>
<td>European Union</td>
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<td>FARDC</td>
<td>Forces Armées de la République Démocratique du Congo</td>
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<td>FC</td>
<td>Force Commander</td>
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<td>FDLR</td>
<td>Democratic Forces for the Liberation of Rwanda</td>
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<td>FIB</td>
<td>Force Intervention Brigade</td>
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<tr>
<td>GATT</td>
<td>General Agreement on Trade and Tariff</td>
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<td>GC</td>
<td>General Comment</td>
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HoM  Head of Mission
IAC  International Armed Conflict
ICCPR  International Covenant on Civil and Political Rights
ICESCR  International Covenant on Economic, Social and Cultural Rights
ICJ  International Court of Justice
ICRC  International Committee
IDP  Internally Displaced Persons
IED  Improvised Explosive Devises
IIHL  International Institute of Humanitarian Law
IO  International Organization
ISAF  International Security Assistance Force
KFOR  Kosovo Force
LRA  Lord’s Resistance Army
M23  Mouvement du 23 mars
MINUSTAH  United Nations Stabilization Mission in Haiti
MONUC  United Nations Organization Mission in the Democratic Republic of Congo
MONUSCO  Mission De L’ Organisation des Nation Unies Pour La Stabilization En Rd Congo
MSC  Military Staff Committee
NATO  North Atlantic Treaty Organization
NIAC  Non- International Armed Conflict
NPLA  New People’s Liberation Army
OAG  Organized Armed Group
OD  Operations Directive
OFOF  Orders for Opening Fire
ONUC  Opération des Nations Unies au Congo
PCRS  Peacekeeping Capability Readiness System
PERF  Police Executive Research Forum
PIRA  Provisional Irish Republican Army
PoC  Protection of Civilians
POC-CONOPS  Operational Concept on the Protection of Civilians
POW  Prisoner of War
PP  Pressure Point
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<td>PSO</td>
<td>Peace Support Operations</td>
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<tr>
<td>QRF</td>
<td>Quick Reaction Force</td>
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<tr>
<td>R2P</td>
<td>Responsibility to Protect</td>
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<td>ROE</td>
<td>Rules of Engagement</td>
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<tr>
<td>RUF</td>
<td>Revolutionary United Front</td>
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<td>SAF</td>
<td>State Armed Forces</td>
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<td>SHIRBRIG</td>
<td>Standby High Readiness Brigade</td>
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<tr>
<td>SOFA</td>
<td>Status of Forces Agreement</td>
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<tr>
<td>SPLA</td>
<td>Sudan People’s Liberation Army</td>
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<tr>
<td>SPLM</td>
<td>Sudan People’s Liberation Movement</td>
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<td>SRSG</td>
<td>Special Representative of the Secretary-General</td>
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<td>Troop Contributors</td>
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<td>TCA</td>
<td>Troop Contribution Agreement</td>
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<td>TOA</td>
<td>Transfer of Authority</td>
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<td>UNAMIR</td>
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<td>UNAMSIL</td>
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<td>United Nations Emergency Force I</td>
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<td>UNGA</td>
<td>United Nations General Assembly</td>
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<td>UNITAF</td>
<td>United Task Force</td>
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<td>UNMEE</td>
<td>United Nations Mission in Ethiopia and Eritrea</td>
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<td>UNMIBH</td>
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<td>UNSAS</td>
<td>United Nations Standby Agreement System</td>
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<td>UNSC</td>
<td>United Nations Security Council</td>
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<td>UNSCOB</td>
<td>United Nations Special Committee on the Balkans</td>
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<td>UNSG</td>
<td>United Nations Secretary-General</td>
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<td>UNSMIS</td>
<td>United Nations Supervision Mission in Syria</td>
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<td>UNTSO</td>
<td>United Nations Troop Supervisory Organisation</td>
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<td>USA</td>
<td>United States of America</td>
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1. Introduction

1.1 Background

This thesis focuses on regulating an activity, the use of force by UN Peace Support Operations, that has come to signify the line between life and death for increasing numbers of people over the last 30 years. Its core asks how UN uses of force could be regulated so as to best accommodate the relevant objectives of deployment, where such uses take place during armed conflict. The following narratives, all of which did not take place during armed conflict, set the context by reflecting what UN troops encounter, what they do and, sometimes, refuse to do on the battlefield.

The first is the story of Captain Mbaye Diagne and finds its setting in the infamous Rwandan genocide. Captain Diagne was a Senegalese officer, who was functioning as an Observer in the United Nations Mission in Rwanda (UNAMIR). His heroics began at the inception of the genocide, when he rescued the four children of the Rwandan prime minister, who had already been murdered, and transported them through numerous Interahamwe checkpoints to the safety of the now-famous hotel Mille Collines. Diagne would not stop there, however, he would repeat this routine hundreds of times during the genocide, transporting hundreds of innocent civilians to places of safety, always unarmed, having in defence only his guile and charm. Fate would however catch up with Diagne when, on 31 May 1994, a mortar exploded right beside his jeep, killing him instantly. In May 2014, 20 years after his death, the UN created the ‘Captain Mbaye Diagne Medal for Exceptional Courage’ to be awarded to UN personnel who demonstrate exceptional courage on the field.¹

The second of my narratives also comes from this incident. During the genocide, a large number of the would-be victims rushed to churches and schools, where they thought they would receive the greatest protection. One such school, the Don Bosco Ecole Tecnique Officielle, was occupied by about 100 Belgian Peacekeepers and attracted more than 2,000 Tutsi. The Belgian

detachment was later authorised to evacuate from the school without the Internally Displaced Persons (IDP). When the IDPs objected to this by, for instance, attempting to prevent the departure of the Belgians by blocking the gates, the troops fired into the air and forced their way out. According to one Human Rights Watch Report, while the troops exited from one gate, the assailants (who had been camping outside the school) entered from another. More than 2,000 of the IDPs were killed, either at the premises or while attempting to reach other safe areas.

The last narrative is much closer to the present and belongs to the latest phase of the conflict in Eastern Congo. On 28 August 2013, two Ukrainian attack helicopters, operating under the Mission De L’ Organisation des Nation Unies Pour La Stabilization En Rd Congo (MONUSCO), fired on Mouvement du 23 mars (M23) targets in Kibati Heights in the Eastern Congo. This marked the first direct attack on a rebel army in the history of UN peacekeeping. More fighting, in which the MONUSCO’s Force Intervention Brigade (FIB) would be engaged directly as well as in a blocking capacity would ensue, resulting in the neutralisation of the M23 within a matter of months. The FIB has since been engaged in hostilities against numerous other rebel groups.

It is in this context that this thesis asks its central research question i.e. how can uses of force by UN forces be regulated to accommodate better, their deployment objectives. The answer to this question must in fact be phased, first UN personnel must know why they are required to use force and second, UN personnel must know how its regulation can secure greater realisation of deployment objectives. The first is substantially, a question of morality, while the second is one of law. As will be illustrated, the answer to the second depends on the answer to the first.

1.2 Relevance

The foregoing narratives elaborate that what UN forces do, and are required to do, have today become almost incomparable to the status quo that prevailed at the beginning of

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5 Ibid.
6>
peacekeeping. These developments result from numerous causes, including the changing nature of conflict; the altered nature of the threats encountered by civilians, as well as of their catalysts; and the improved capabilities of the groups that threaten peace. There are also relevant conceptual developments, including the formulation of concepts such as the Responsibility to Protect (R2P) and of the extended version of ‘impartiality’. It is in the backdrop of these conceptual and factual developments that the need to provide UN missions with mandates that are appropriate to the ground situations into which they are deployed is encountered.

Even where such correlations are found, the performance of UN missions on the use of force - front leave much to be desired in respect to both the protection of civilians and mission personnel. Some current missions such as MINUSMA feature among the deadliest missions for UN personnel (caused by malicious acts). Such risks understandably dent troop contributors’ willingness to supply troops for UN missions, and lead inter alia to the imposition of numerous caveats in relation to how their contingents may be utilised. The picture regarding use of force to protect civilians is not altogether encouraging either. While failures of the magnitude of Rwanda and Srebrenica, Bosnia and Herzegovina, are not to be found, a damming IOS Report reveals that UN missions failed to use force to protect civilians during the 10 most deadly attacks on civilians that were executed between 2010 and 2013. Further protection failures are underlined in the UN-commissioned study compiled by Holt and Taylor. Also noteworthy are the far-reaching implications these failures have for troop contributing governments; exemplified by the resignation of the Dutch government in the aftermath of the publication of

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7 Although, as will be discussed in Chapter 3, the United Nations Operation in the Congo provides an early example of resort to elevated levels of force by the UN.
10 Ibid [25].
the Srebrenica ‘safe area’ report in 2002. Critical gaps, therefore, exist between what UN missions promise to do and what they actually do in terms of use of force.

This thesis analyses how the regulatory regime relevant to UN uses of force can be utilised to close these gaps. It does this by formulating a Chain Motif that runs through the legal objectives in pursuance of which the UN resorts to force, the relevant ad bellum and in bello moralities, and ends up at the legal framework by reference to which UN uses of force must be regulated. The thesis analyses numerous linkages that exist between the first three components and emphasises the common ‘accent’ they thereby create within the Motif. It argues that this ‘accent’ can potentially transform into a form of ‘normative pressure’ that can, when applied to an appropriate conflict resolution tool, alter the content of the last component - the relevant regulatory framework.

A number of studies have considered the legal and moral aspects of UN peacekeeping. No attempt has however been made to put these elements together in a single analytical matrix. This is exactly what this thesis does, hence its strongest claim to originality.

1.3 Chapter breakdown

The first substantive chapter of this thesis, Chapter 2, analyses the institutional underpinnings of UN missions and delineates the types of missions with which this thesis concerns itself (i.e. UN-authorised and UN-commanded missions). It further refines the scope of the study by utilising the Peace Support Operations (PSO) nomenclature which, in turn, allows the research to assess missions that fall on either side of the Mogadishu line (which demarcates peacekeeping

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from peace enforcement missions), as well as those that traverse back and forth over it. It then analyses the command structure of UN missions, the types of command and control, how control is distributed among different levels of command and, crucially, the TC practice of intruding with UN command chains. The chapter then discusses how UN troop conduct in using force (as well as failing to use force) should be attributed and formulates in this regard the ‘effects - based theory of attribution’. This issue is central to this thesis for two reasons. First, it formulates a legal framework (of attribution) that is able to return outcomes that are consistent with the basic premises of the relevant legal institution (of responsibility). Second, appreciating the possibility of dual attribution contributes to the scoping of the research by limiting its analysis to only those courses of conduct that are completely attributed to the UN. This also limits the discussion on the regulatory framework to only those standards by which the UN is bound. This makes the discussion undertaken herein of Regulation and Attribution focus on a single point of reference, the UN. The research questions discussed in this chapter are:

1. a) How are UN peace missions assembled?
   b) How are they organized?
   c) What are the relevant levels of command?
2. a) How are UN peace operations classified?
   b) What is the difference between peacekeeping and peace enforcement missions?
   c) What are ‘Peace Support Operations’?
3. What is the theoretical basis of the Institution of Legal Responsibility?
4. a) How does international law attribute conduct in the case of International Organisations?
   b) How should UN troop conduct be attributed so as to be consistent with the theoretical basis of Legal Responsibility?

Chapter 3 focuses on the moral aspect, of the resort to and of the use of, force. Its consideration of the morality of resort to force uses as its starting point the just war doctrine, which the chapter submits can also act as a useful framework for debating the morality of resort to force

15 In this regard, refer to Michael Rose, Fighting for Peace: Bosnia 1994 (Harvill Press, 1998) 241, where he argued that peace operations must maintain absolute impartiality at all times to avoid being drawn into the fighting.
by the UN. The Doctrine can however only so function if certain structural (but not substantive) amendments are made. For instance, in its analysis of the policy documentation underlying five UN missions that mark UN peacekeeping milestones, the chapter finds that the objectives for which the UN has been authorised to resort to force are significantly different from those envisaged by traditional warfare. Although these peculiarities find their roots in legal documentation, they influence the relevant moral calculation by dictating the content of the just cause component within the just war calculation. They also impact the content of the ‘goods’ and ‘harms’ that are balanced within the proportionality calculation by, for instance, requiring factors such as the possibility of loss of local support for the peace process and of rehabilitating less culpable elements of the targeted groups to be incorporated into the calculus.

This chapter then analyses how, at the moral level, the resort to and the use of force are linked. I contend in this regard, that certain ad bellum considerations, such as Right Intention, also function at the in bello level and that the ad bellum proportionality calculus must necessarily consider factors that materialise on the other (in bello) side of the divide. What this means in the moral domain, is that all uses of force must materialise within the overarching framework drawn up by the ad bellum calculation that is made in respect of the particular type of activity. The chapter also notes that considerations which are peculiar to UN uses of force, such as impartiality and Protection of Civilians, function on both sides of this divide, thereby further strengthening the aforementioned nexus.

Chapter 3 then considers the in bello morality of UN uses of force. It uses for this analysis, a unique format referred to as the ‘Pressure Point formulation’ that explains how the in bello morality of a given activity obtains its ‘shape’. It perceives the in bello morality of an activity as comprising of various ‘pressure points’ whose relative importance varies on the nature of the relevant activity. For example, the emphasis placed by the in bello morality of UN uses of force on re-integrating soft core elements of OAGs is much greater than that which is placed on the issue in the case of traditional warfare. The chapter also finds that these pressure points can function independently, but that the underlying factual matrix sometimes creates conflicts between them which must then be resolved by reference to conflict resolution rules, such as the principle of Double Effect. These components, the chapter argues, ultimately dictate non legal normative standards of conduct that shape the in bello morality of each type of use of force in a very distinctive way. Chapter 3, through this Chain Motif, draws a line that runs through the legal purposes in pursuance of which the UN resorts to force, the moral calculation underlying
UN resort to force and the morality of UN uses of force. Accordingly, the chapter considers the following research questions:

1. What are the legal objectives pursued in the resort to force by the UN?
2. a) How does the just war framework ascertain the ad bellum morality of resort to force in the case of war?
   b) Can the just war framework be applied to ascertain the ad bellum morality of resort to force by the UN?
   c) If the above question is answered in the affirmative, how does the just war framework ascertain the ad bellum morality of resort to force by the UN?
3. Is there a nexus between the ad bellum and in bello components of the moral calculation? If so, what is its nature?
4. What does the in bello morality of traditional warfare look like?
5. Is the in bello morality of UN uses of force different to that of traditional warfare? If so, why is it different?
6. What are the composite elements of the in bello morality of UN uses of force?

Chapter 4 opens the analysis of the legal matrix with reference to which the legality of UN uses of force may be regulated, by identifying the relevant forms of law (i.e. treaty or customary law) as well as the branches of law (International Humanitarian Law and International Human Rights Law). It identifies the difficulties that are inimical to applying treaty law to non-parties such as the UN and assesses how these could be resolved. It also notes that while customary law can, in principle, be applied to all parties, certain branches of law such as IHRL cannot be understood intelligibly in a customary sense. These peculiarities lead the Chapter to propose a ‘mixed model’, that deduces the relevant IHRL rules from treaty law (namely the International Covenant on Civil and Political Rights (ICCPR)) and the relevant IHL rules from customary law (with substantial reference to the International Committee of the Red Cross (ICRC) customary IHL study).16

It then analyses the applicability thresholds relevant to each of these candidate branches. The discussion of IHRL in this regard focuses on its extraterritorial, in light of how the UN does not physically own a territory. The chapter discusses the two main approaches to extra-

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territoriality – the territorial and the personal models – and explains why the latter is preferable in the case of UN uses of force. The standard utilised by the personal model also complies with that used in the attribution framework chapter 2 develops for UN conduct, thus permitting the respective analyses to complement one another at two levels, the theoretical and the practical. It also notes that the applicability of IHL to UN forces must be deduced by reference to the same considerations that apply to all other actors. While such an approach contravenes inter alia the ‘active engagement’ formulation of applicability, espoused in the Bulletin, it has the merits of being clear, consistent and compliant with the general approach to belligerency taken by IHL.

The chapter concludes in light of this analysis that, in principle, IHRL can also be applied to UN uses of force that take place in circumstances that have satisfied the armed conflict threshold. The research questions considered by this chapter are:

1. What are the types and branches of law by which the regulatory framework analyzed in the thesis is comprised?
2. How does IHRL become applicable to UN uses of force that take place in circumstances that satisfy the conflict threshold?
3. How does IHL become applicable to UN uses of force that take place in circumstances that satisfy the conflict threshold?

Chapter 5 discusses the content of the specific IHRL and IHL rules by reference to which the on-field use of force by the UN can be regulated. The analysis does limit itself, however, to those rules that have potential to return contradictory outcomes when applied in parallel. In reference to IHRL, it analyses restraints such as necessity and proportionality, subject to which the Right to Life can be legally deprived. This discussion draws heavily from law enforcement literature and from a number of ECHR decisions concerning active combat scenarios. The chapter also discusses the context-specific standards that IHRL dictates through its requirement to plan operations in ways that reduce, to the greatest extent, recourse to lethal force.

The discussion of the relevant IHL rules focuses on the principles of Distinction and Proportionality. I analyse Distinction in terms of both human and material targets. As regards the first of these categories, the chapter notes how the lack of a customary definition of Direct

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Participation in Hostilities challenges the intelligible operationalisation of Distinction in International as well as Non-international Armed Conflicts. The issue is further complicated by the absence of a ‘combatant’ status in NIACs which creates disparities in the respective extents to which members of state and non-state armed forces can be targeted. These challenges force the analysis to examine how customary law understands the targetability of these various elements. Also included in this discussion are the targetability of objects and the operationalisation of the principle of proportionality. I identify during the course of this analysis, a number of elements of the IHL regime that make it incompatible with the in bello morality of UN uses of force, and which thereby obstruct the realisation of UN deployment objectives. The chapter concludes in light of these findings that the parallel application of certain IHRL and IHL rules can, and does, return contradicting outcomes in numerous cases, giving rise to ‘conflicts of law’. It considers the following research questions:

1. Under what circumstances can the Right to Life be deprived under Art 06 of the ICCPR?
2. What is the content of the IHL rules by reference to which UN uses of force must be regulated?
3. Do the parallel application of these rules give rise to contradictory outcomes?

The final substantive chapter of this thesis is Chapter 6, which analyses how the conflicts of law that emanate from the parallel application of IHRL and IHL to UN uses of force should be resolved. It analyses the different methods by which conflicts of law materialise and notes that the IHL-IHRL dichotomy (at issue) materialises from the fragmentation of international law. It then analyses how such conflicts are resolved by the lex specialis principle and finds that it achieves this by selecting that rule which regulates the particular issue most efficiently. ‘Efficiency’, in this regard, the chapter argues, is measured by the extent to which the rule accommodates the realisation of the objectives pursued by the particular exercise. This is also the foundational premise of the principle.

Chapter 6 then sets about formulating an operational framework that allows lex specialis to select the most ‘efficient’ rules in the case of UN uses of force. It utilises, for this purpose, what has been referred to as the ‘Common Contact Point Theory’ (CCPT), which deconstructs the factual matrix and then compares the relative ‘fit’ each rule has with each factual element. This allows the objectives pursued by UN uses of force to be infused into the factual composite,
which is then compared against the content of the competing rules. The chapter argues that so operationalising lex specialis in this case contributes ultimately to reducing the ‘gap’ between the objectives, in pursuance of which UN missions are deployed, and the outcomes they secure, and elaborates this with reference to scenario-specific examples. This analysis ultimately results in the formulation of the ‘unified use of force’ rule that this thesis pursues. This final chapter considers the following research questions:

1. What is a conflict of law?
2. How do conflicts of law materialize?
3. a) What is lex specialis?
   b) How does lex specialis operationalise?
4. How does lex specialis resolve the conflicts created by the parallel application of IHRL and IHL to UN uses of force, in a way that brings troop conduct in line with the objectives of UN deployment?

1.4 Method

This thesis adopts a mixed research method that utilises doctrinal and empirical analysis, and proceeds where possible, from first principles. It utilises in this regard numerous primary and secondary sources that are spread across a vast area of academic as well as industry-oriented literature relating to UNPSOs. These sources relate to such areas of study as the use of force, law of international organisations, ethics and conflict of laws, and are authored by a wide array of academics,18 international organisations,19 non-governmental organisations20 and think tanks.21

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18 Including Ian Brownlie, Hand Kelsen, Bruno Simma, Theodore Meron, Judith Gardham, Michael Schmitt, Jean Marie Henckaerts, Louise Doswald-Beck, Trevor Findlay, Allain Pictet, Ray Murphy, Alex Bellamy, Trevor Findlay, Michael Walzer, Jamer Turner Johnson, Thomas Hurka, CAJ Coady, Charles Sampford, Henry Shue, David Luban and David Rodin.
20 Such as the International Committee of the Red Cross, Amnesty International and Human Rights Watch.
21 Such as the Stimson Centre.
While all of the chapters engage in deep conceptual analysis, they do not follow a uniform approach. Chapters 2, 3 and 6, for instance, make three original contributions to this field of study, the effects-based theory of attribution, the pressure point theory of in bello morality, and the deconstructive approach to the operationalisation of lex specialis, in addition to their analyses of the relevant literature. Chapter 3 also contains an analysis of empirical evidence pertaining to five missions that mark milestones in UN peacekeeping history, which it uses to substantiate the Charter-based resort to force objectives that it locates.

1.5 Conclusion

This thesis perceives the regulation of UN uses of force as the final link of a Chain that is comprised of the legal objectives in pursuance of which the UN resorts to force, as dictated by UN policy and international law, the morality of resort to force and the morality of use of force. It argues that UN conduct can achieve deployment objectives only where the relevant regulatory regime is conceptually and doctrinally consistent with the parts of the Chain that precede it. The thesis achieves this synthesis by locating critical connections that exist between these elements, in the case of UN uses of force, that are then operationalised by the CCPT formulation of lex specialis. In doing so the analysis first explains why a regulatory framework comprised exclusively of IHL simply does not allow the realisation of UN deployment objectives and then points to where, when and how IHRL should be infused into the framework to rectify this deficiency.

This thesis engages in an analysis that must take place ‘behind the scenes’ of combat. If done properly (which this thesis argues it does) this analysis returns legal standards of conduct that not only explain how troops should conduct themselves in a given situation, but also describe why such is required. It is in this light that I invite the reader to draw their attention to how the uniform use of force rule that is formulated at the end of this thesis changes how force would have been used during the second and third narratives mentioned earlier.
2. United Nations Peace Support Operations – institutional frameworks, command and control structures, and attribution of conduct

2.1 Introduction

This chapter addresses the foundational elements on which the remainder of this thesis is posited. After a brief consideration of pre-Charter attempts at regulating the use of force, it discusses the institutional underpinnings on which the deployment of UN forces bases itself. The chapter then considers how UN forces can be classified, particularly with reference to the levels of force they use, being mindful of the divergent purposes for which PSOs may be authorised to use force at a given point of time and the different levels of force this reality entails.

Following will be an analysis of how UN forces are formed, their organisational frameworks, and command and control structures. The discussion highlights the practicalities entailed by the lack of a permanent UN force and assesses the complexities created by the current troop contribution framework. It notes, in particular, the ramifications of troop contributor incursions into the UN command chain.

The final section of this chapter analyses how the conduct of UN troops should be attributed. It commences with an examination of the theoretical foundations of the institution of Legal Responsibility. The chapter then seeks to formulate a framework of attribution that, when applied to uses of force by the UN, returns results that are consistently with these theoretical foundations.

2.2 The Charter framework

This part will discuss, after considering the prominent pre-1945 collective security mechanisms, the institutional framework that the UN Charter utilises to uphold international peace and security. The concomitant normative framework will be analysed in Chapter 3.
2.2.1 Pre-Charter mechanisms

The need to curtail (or at least control) the power to wage war had been unmistakeably felt amid the carnage of the First World War. It was against this backdrop that the Paris Conference was convened in the Palace of Versailles in 1919. The parties to the Conference agreed on the League System and sculpted the Covenant of the League of Nations,\(^1\) intent on preventing the outbreak of another such war.\(^2\) Regarding recourse to war, the Covenant required all signatories to submit a ‘dispute likely to lead to a rupture’ to ‘arbitration or to inquiry’ by the Council.\(^3\) Other disputes, which the parties ‘recognise to be suitable for submission for arbitration’, could also be submitted to arbitration\(^4\) and such disputes that were not so submitted were to be channelled to the Council by the members of the League.\(^5\)

According to Art 15 of the Covenant, when a report was unanimously adopted by those members of the Council who were not party to the dispute, the disputants were under an obligation not to resort to war against any party that complied with the report. While Art 13 imposed an identical obligation in relation to arbitral decisions, this did not mean that the Covenant completely eliminated the possibility of war, as all that was imposed thereby was a three-month ‘cooling’ period, restricting the resort to war against a non-complaint party.\(^6\) Moreover, the Covenant contained absolutely no prohibition on recourse to war where the Council could not reach a decision. Also of direct relevance to the issues being discussed in this thesis is the plebiscite system in which the League was involved,\(^7\) which provided for the management of disputed territories through multinational forces.\(^8\)

The other prominent pre-1945 international agreement relevant to the use of force was the Kellogg–Briand Pact,\(^9\) the parties to which condemned the ‘recourse to war for the

\(^1\)Covenant of the League of Nations, 28 June 1919, signed 28 June 1919 (‘Covenant’).
\(^2\) Refer in this regard to Hamilton Foley, *Woodrow Wilson’s Case for the League of Nations* (Oxford University Press, 1923), which documents the explanations given by President Wilson to the American people and its Senate during the setting-up of the League.
\(^3\)Covenant Art 12.
\(^4\)Covenant Art 13.
\(^5\)Covenant Art 15.
\(^6\)Covenant Art 12.
\(^7\)Plebiscites were, however, not the exclusive province of the League. Some were managed by other ad hoc coalitions.
\(^8\) Refer to Norrie McQueen, *Peacekeeping and the International System* (Routledge, 2005) chap 2, for an informative discussion on pre-charter collective security systems.
\(^9\)General Treaty for Renunciation of War as an Instrument of National Policy, signed 28 August 1928, 2137 UNTS 94.
resolution of their international controversies’ and renounced the same ‘as an instrument of national policy’. The Pact, unlike the Covenant, proscribed the resort to war under all circumstances, even though war was still permitted in self-defence. The Pact would also not intervene where wars were waged as a matter of international policy (and not as a matter of national policy). Moreover, Dinstein argues that the national policy formula could also permit wars that were waged in pursuit of religious or ideological objectives. Furthermore, the Pact (which is technically still in place to date) does not define ‘self-defence’ or proscribe ‘measures short of war’ such as surgical strikes. These frailties undoubtedly affect the efficiency and relevance of the Pact as a tool by which the contemporary use of force could be regulated. Hence the prominence and importance of the Charter of the UN.

2.2.2 The institutional framework of the UN Charter

The aforementioned mechanisms could not prevent the outbreak of another ‘great war’. The Second World War that raged from 1939- 1945 resulted in an estimated civil – military death toll of 76,820,000. The need for a collective security mechanism was thus more evident in its aftermath, than at any point preceding it. Thus emerges the UN, which it was hoped would be a

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10 General Treaty for Renunciation of War as an Instrument of National Policy, signed 28 August 1928, 2137 UNTS 94, Art 01.
12 Yoram Dinstein, War, Aggression and Self-Defence (Grotius Publications Limited, 188) 82.
13 Ibid 82.
15 The term ‘collective security’ has been variously defined. In particular, refer to the definition provided in DaneshSarooshi, The United Nations and the Development of Collective Security (Oxford University Press, 2000) 285:

The aim of any collective security system is to preserve and ensure the observance of certain community defined values. The determinationof what are these community values in the case of the United Nations, what constitutes a threat to, or breach of, international peace and security – and what is the appropriate measure to maintain and restore peace has been left to the Security Council under Chapter VII of the Charter.

Refer also to Adam Roberts, 'The United Nations: Variants of collective security' in Ngair Woods (ed), Explaining International Relations since 1945 (Oxford University Press, 1996) 310, according to whom:

the term collective security refers to a system, regional or global, in which each participating state accepts that the security of one is the concern of all, and agrees to join in a collective response to aggression. In this sense, it is distinct from, and more ambitious than, systems of alliance security, in which groups of states ally with each other, principally against possible external threats.
panacea for the scourge of war. This was different from such predecessors as the Kellogg–Briand Pact and the League of Nations, as it provided for an organised and allegedly efficient enforcement mechanism against recalcitrant states – which was the essence of a collective security system. Enforcement would be done through machinery dedicated for the maintenance of international peace and security which the Charter describes as ‘a primary purpose of the UN’.  

The Charter ascribes the responsibility for the maintenance of international peace and security to both the United Nations General Assembly (UNGA) and the United Nations Security Council (UNSC). The UNGA is, for instance, empowered to discuss questions relating to the maintenance of international peace and security, call the attention of the UNSC to situations that are likely to endanger the same, and recommend measures for the peaceful settlement of disputes. The last-mentioned power to recommend measures, however, is subject to Art 12, which prevents the UNGA from recommending measures where the UNSC is exercising the functions assigned to it by the Charter in respect of the same dispute or situation. Nevertheless, the ‘primary responsibility’ for the maintenance of international peace and security so ascribed to the UNSC is not exclusive. For example, the UNGA is obliged to refer matters on which ‘action’ is required to the UNSC. The Certain Expenses judgement elaborates on the breadth of this provision, particularly in its consideration of the distinction between ‘actions’ and ‘measures’. Accordingly, because coercive action can only be required by the UNSC, those are the only types of action that fall to be referred to the UNSC under Art 11 (2). But the Court continued to note that the term measures in Art 14 implied some kind of action and that the UNGA’s functions, therefore, need not be limited to mere discussion, consideration or the making of recommendations. For example, it is the UNGA that could suspend the rights and privileges of members or expel them from the Organization.

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16 *The Charter of the United Nations* Art. 01 (1).
17 ibid Art. 11 (2).
18 ibid Art. 11 (3).
19 ibid Art. 14.
20 ibid Art. 24 (1).
22 ibid 165.
23 ibid 163.
A further power with which the UNGA is vested is that of organising peace operations, as exemplified by the authorisation of United Nations Special Committee on the Balkans (UNSCOB) (1947–1951) in Greece. It must be noted, however, that forces thus organised by the UNGA cannot be deployed into a territory without the consent of the host nation. This is in comparison to UNSC decisions to deploy that are made under Chapter VII, to which member states are obliged to give effect. As will be elaborated, this is one of the key points of distinction between Peacekeeping and Peace Enforcement missions. In addition to the foregoing, the ‘Uniting for Peace’ resolution empowers the UNGA to authorise collective measures, including the use of armed force, where the UNSC, due to its lack of unanimity, fails to exercise its responsibility for the maintenance of international peace and security. Even though the Uniting for Peace procedure was used to authorise missions on multiple occasions, its primary function was to make a political statement and not to usurp the kinds of actions that the Charter intended to be left to the UNSC. Interestingly, however, the Charter does not mention ‘peacekeeping’ anywhere in its text and even the summary study compiled by then United Nations Secretary-General (UNSG), Dag Hammarskjold, on the experience of the United Nations Emergency Force I, uses the term ‘Force’.

2.3 Assembling a peace mission

2.3.1 A brief history

The UN troop generation process was intended to be based on Art 43 of the Charter, which requires member states to contribute troops to the UN. In spite of this, no Art 43

24 Ibid 164.
25 GA Res 109 (II), Threats to the political independence and territorial integrity of Greece (21 October 1947).
27 For example, refer to GA Res 1474 (ES-IV), UN Doc A/4510 (20 September 1960), which requested that ‘all member states, in accordance with articles 25 and 49 of the Charter of the United Nations to accept and carry out the decision of the Security Council and to afford mutual assistance on carrying out measures decided by the Security Council’.
28 GA Res 377 (V) UN Doc A/1775,10 (3 November 1950).
29 Ibid Part A.
31 United Nations Secretary-General, Summary Study of the Experience Derived from the Establishment and Operation of the Force, UN Doc A/3943 (9 October 1958) (‘Summary Study’) 8.
agreements have ever been concluded. This is not to say, however, that standby military capacity was never on the UN agenda. Numerous attempts have been made to this end. For instance, then UNSG Boutros-Ghali, in his 1992 Agenda for Peace, drew attention to Art 43 and suggested the creation of peace enforcement units that would comprise troops contributed by member states and which would be placed ‘on call’ for use by the UN. The Department of Peacekeeping Operations (DPKO) thereafter created the Standby Agreement System (UNSAS), which made provision for the supply of troops and equipment according to a pre-arranged schedule and time frame. Also of note is the Rapid Reaction Force suggested by the Supplement to the Agenda for Peace, the forces comprising which would be stationed in home countries but at a high state of readiness.

Perhaps the closest the UN has come to achieving a standby force was the Standby High Readiness Brigade (SHIRBRIG), which comprised of units from 23 countries. Political control over the Brigade was exercised by an intergovernmental steering committee, which comprised of states that did not hold permanent UNSC membership. It was placed under the operational control of a Force Commander (FC) and included a Planning Element, which provided an important element of continuity. The Brigade took part in a number of operations, most notably in the deployment of the United Nations Mission in Ethiopia and Eritrea, but ceased all activities on 30 June 2009. Other developments in this area include the creation of a Peacekeeping Capability Readiness System, which is designed to manage TC commitments (replacing the UNSAS), and the practice of Inter Mission Cooperation, whereby critical personnel and equipment gaps within missions are filled by other missions, albeit

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32 There have also been attempts by member state governments, such as the 1995 Dutch suggestion for a UN Rapid Deployment Brigade, the 1995 study carried out by the Canadian government on ‘Improving the UN’s Rapid Reaction Capability’, and the 1995 proposals of the Danish-led working group on the establishment of a multinational rapid deployment brigade. This last-mentioned proposal led to the creation of the Standby High Readiness Brigade (SHIRBRIG).

33 United Nations Secretary-General, An Agenda for Peace: Preventive Diplomacy and Related Matters, UN Doc A/RES/47/120B (18 December 1992).

34 An Agenda for Peace, UN Doc A/RES/47/120B [44–45].

Following the High Level Independent Panel on Peace Operations (HIPPO) recommendations on the issue, the DPKO also commenced designing a UN ‘Vanguard Brigade’ that is deployable within 30 – 60 days.\textsuperscript{37}

In spite of these efforts, the UN does not have a standing army as at the time of writing. Moreover, the Military Staff Committee (MSC), envisaged by Arts 46 and 47, which was to provide strategic guidance to UN operations soon became a non-entity. The framework envisaged by the Charter, therefore, did not completely materialise and this resulted in authority for UN operations being exercised at a number of levels, such as the UNSC, the UNSG and the Secretariat, the DPKO, the Special Representative of the Secretary-General (SRSG) and the FC. As will be discussed later in this chapter, being compelled to utilise such a layered approach to authority significantly influences conduct attribution and the consequent location of legal responsibility.

\subsection*{2.3.2 The troop generation process}

When a UN mission has been authorised by the UNSC\textsuperscript{38} (or occasionally by the UNGA), the Secretary-General embarks upon recruiting the required mission personnel from TC through informal requests that are made during consultations.\textsuperscript{39} The offers of contribution so received\textsuperscript{40} are submitted to the UNSC and, where the UNSC consents to the offer, the supply of troops is formalised through an exchange of letters. The conditions under which the troops are to be provided are then agreed upon, whether informally or (as in most cases) formally. While a model

\begin{itemize}
  \item \textsuperscript{36} Examples of IMC include the provision of uniformed personnel by the (UNMIBH) to the start-up of the United Nations Mission in Kosovo (UNMIK); provision of civilian personnel from a number of UN missions to the United Nations Stabilisation Mission in Haiti (MINUSTAH), in the wake of the 2010 earthquake in Haiti; and provision of personnel by a number of Middle Eastern missions to the United Nations Supervision Mission in Syria (UNSMIS), in 2012.
  \item \textsuperscript{38} Note here that a UNSC authorisation only materialises where there are nine votes in favour and where there is no veto by a negative vote from a permanent member.
  \item \textsuperscript{39} This is done after analysing mission assessment plans and technical assessments, which are carried out in the area of operation.
  \item \textsuperscript{40} For a comprehensive analysis of the nature and history of troop contribution until 1990, refer to Robert Siekmann, \textit{National Contingents in United Nations Peacekeeping Forces} (MartinusNijhoff, 1991).
\end{itemize}
Troop Contribution Agreement\textsuperscript{41} (TCA) enumerating these conditions is now available, troop contributors often introduce caveats\textsuperscript{42} to its content which, at times, leads to significant complications.

It is by virtue of this TCA and the Transfer of Authority (which comprises the national element of the transfer process) that these forces are absorbed into the organisational apparatus of the UN. The mechanics of troop contribution, therefore, attempt to place these troops (from a theoretical perspective) between the UN and the TC, allocating, for instance, responsibility for command and control to the UN\textsuperscript{43} and for maintenance of discipline\textsuperscript{44} and training,\textsuperscript{45} and powers of criminal prosecution,\textsuperscript{46} to the TC. In addition to the foregoing, Status of Forces Agreements (SOFA), which are drawn up between the UN and the country within whose territory the troops will operate, also contribute to the placement by, for example, subjecting the troops to the TC’s criminal jurisdiction\textsuperscript{47} and surrendering partial civil jurisdiction over them to local courts.\textsuperscript{48}

This peculiar positioning, therefore, results in a form of ‘incomplete secondment’; the troops remain in their national service, but are considered international personnel for the duration of the operation,\textsuperscript{49} the functions of which are exclusively international in character.\textsuperscript{50}

\textsuperscript{41}For example, refer to \textit{Agreement Between the United Nations and India Concerning the Service with the United Nations Emergency Force of 14 August 1957}, UNTS 1368 (1957); \textit{Agreement Between the United Nations and Denmark Concerning the Service with the United Nations Peacekeeping Force in Cyprus of 21 February 1966}, UNTS 8108 (1966).

\textsuperscript{42}Caveats can take numerous forms; restrictions placed by TCs can relate to such aspects as the types of functions for which or the geographical areas within which, its forces can be utilised. For their far-reaching implications and how they should be dealt with, refer to the High-level Independent Panel on Peace Operations, Comprehensive Review of the Whole Question of Peacekeeping Operations in All Their Respects, attached to UN Secretary-General, 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, UN Doc A/70/95 – S/2015/446 (17 June 2015) 28 and 58.


\textsuperscript{44}Model TCA, UN Doc A/61/19 [8]. While HoM has overall responsibility for discipline, responsibility for specific disciplinary action rests with a national officer designated by the TC.

\textsuperscript{45}Ibid[28].

\textsuperscript{46}Ibid[25].

\textsuperscript{47}Draft Model Status of Forces Agreement between the United Nations and host countries, UN Doc A/45/594 (09 October 1990)[47] (‘Draft SOFA’).

\textsuperscript{48}Ibid[49] (b).

\textsuperscript{49}This approach has been used unchanged since the deployment of UNEF I.

\textsuperscript{50}Model TCA, UN Doc A/61/19 [9].
Such a status is in line with the concomitant international status of the mission, which is considered to be a subsidiary organ of the UN\(^5\) whose personnel are required to conduct themselves with the interests of the UN only in view.\(^5\) This incomplete form of secondment that troops undergo may be compared with the status of the FC, who is individually appointed by the UNSG.\(^5\) The command chains utilised by these missions will be discussed in detail in Parts 2.5.2 and 2.5.3 of this chapter, along with how they impact the issue of attribution.

### 2.4 Classification of UN forces

How missions are classified has traditionally exerted significant influence on the types of functions they exercise and the degrees of force they are permitted to utilise.\(^5\) As will be noted, however, more recent approaches to classification tend to militate the influence of such ‘pigeon holing’. The ensuing analysis examines these issues in detail, but it commences with an exercise in exclusion that identifies the types of missions this thesis does not cover.

There can be, and have been, missions that are authorised by the UN and executed by a regional or other organisation, or by a ‘coalition of the willing’. The North Atlantic Treaty Organization (NATO)–led Kosovo Force (KFOR), which is deployed in Kosovo (since 1999);\(^5\) the European Union (EU)–led operation Artemis;\(^5\) in the Democratic Republic of Congo (DRC) (2003); and operation Unified Proctor in Libya\(^5\) exemplify the former category, while the United Task Force (UNITAF) in Somalia (code-named Operation Restore Hope)\(^5\) and the International Security Assistance Force (ISAF) in Afghanistan fall into the latter category of operations. These missions, while pursuing Charter objectives, are executed through non-UN chains of command,

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\(^5\)Draft SOFA, UN Doc A/45/594 [15].  
\(^5\)Model TCA, UN Doc A/61/19 [9].  

\(^5\)In this regard, refer to Michael Rose, *Fighting for Peace: Bosnia 1994* (Harvill Press, 1998) 241, where he argued that peace operations must maintain absolute impartiality at all times to avoid being drawn into the fighting.

according to non-UN Rules of Engagement (ROE) and thus differ in their operational dynamics to UN-commanded and -executed operations. These distinctions, which are especially relevant to how troop conduct is attributed in these missions, push them beyond the scope of this study. So also are actions undertaken by member states pursuant to the right of self-defence enshrined in Art 51 of the Charter, such as the 2001 US-led war in Afghanistan (Operation Enduring Freedom and Operation Freedom’s Sentinel), and other kinds of operations such as Operation Palliser\(^59\) and the 1990 Economic Community of West African States Monitoring Group (ECOMOG) intervention in Liberia. While Palliser and the ECOMOG action were subsequently welcomed by the UNSC, these last-mentioned missions do not strictly emanate from the Art 39 guidelines that dictate the purposes for which UN uses of force may be authorised. The objectives that these operations seek to achieve, therefore, differ from what their UN-authorised counterparts pursue. This lack of reliance on Art 39 thus places them outside the scope of this research.

UN-authorised and -executed missions, conversely, have been categorised on a multiplicity of bases. While some classifications divide missions on a generational basis,\(^60\) others such as that used in the *Peace keeper’s Handbook*\(^61\) categorise them according to their main function (as internal pacification, buffer force, border petrol or observation missions). Still other classifications have been based on inter alia, their use of force,\(^62\) functions\(^63\) or command and control, while the Blue Helmets\(^64\) classifies them into observer missions, traditional peacekeeping, second generation peacekeeping and enforcement actions, along a spectrum that is dictated by the nature of the operational environment and the level of military effort/force used.\(^65\)

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\(^59\)Carried out by the UK in Sierra Leone in 2000.

\(^60\)In this regard, refer to the division between first to sixth generation peace operations propounded in Ramesh Thakur, ‘Reconfiguring the UN System of Collective Security’ in M Weller (ed), *The Oxford Handbook on the Use of Force in International Law* (Oxford University Press, 2015) 185–187.


\(^63\)Reflected in particular by the notion of ‘wider peacekeeping’ discussed in Alex Bellamy and Paul Williams, *Understanding Peacekeeping* (Polity, 2nd ed., 2012) 193. Refer also, Alex Bellamy and Paul Williams, ‘Trends in peace operations’ in Joachim Koops at al. (eds.) *The Oxford Handbook on United Nations Peacekeeping Operations* (Oxford University Press, 2015) 2–41, for an interesting data set containing UN-led, UN-authorised, UN-recognised, and non-UN peace operations that are analysed among such markers as type, size, location and duration.


\(^65\)Ibid, 19.
But the most pertinent distinction in this regard has traditionally been drawn between peacekeeping and peace-enforcement operations, as echoed in the *United Nations Peacekeeping: Principles and Guidelines* and the *Supplement to the Agenda for Peace*. Peacekeeping operations have been defined accordingly as ‘actions involving the use of military personnel on the basis of the consent of all parties concerned and without resorting to armed force except in self-defence’. Similarly, the 1990 version of the *Blue Helmets* defines peacekeeping missions as missions ‘involving military personnel, but without enforcement powers, undertaken by the United Nations to help maintain or restore international peace and security in areas of conflict.’ Moreover, as per the *Peace keeper’s Handbook*, peacekeeping is:

the prevention, containment, moderation and termination of hostilities between or within states, through the medium of a peaceful third party intervention organised and directed internationally, using multinational forces of soldiers, police and civilians to restore and maintain peace.

Numerous other definitions can be cited but what is common to all of these is the reliance that they place on the pure form of the ‘peacekeeping trinity’ of consent, neutrality/impartiality and the use of force in self-defence. They all emphasise the consensual nature of the deployment

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67 *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, 03.01.1995 [35].
70 International Peace Academy, above n 61, 22.
71 For instance, refer to North Atlantic Treaty Organization, *Allied Joint Doctrine for the Military Contribution to Peace Support: AJP – 3.4.1* (NATO Standardization Office, December 2014) 0118, which defines peacekeeping as: ‘A peace support effort designed to assist the implementation of a ceasefire or peace settlement and to help lay the foundations for sustainable peace. It is conducted with the strategic consent of all major conflicting parties.’
72 Also refer to Paul Diehl and Others, ‘International peacekeeping and conflict resolution: A taxonomic analysis with implications’ (1998) 42 (1) *The Journal of Conflict Resolution* 33, for a comprehensive taxonomy of PSOs as at the date of the publication.
and the fact that peacekeepers are not allowed to alter the political/military balance prevailing in their area of deployment. This attitude places greater emphasis on the principle of impartiality as well as the need to have no apparent interest in seeing the moral vindication or material triumph of either of the disputants.\(^{73}\) It must be noted, however, that impartiality is an operational phrase and only means that there should be equal treatment of the parties in material terms as against the operation’s mandate, and does not completely exclude the use of force.\(^{74}\) Its evolution, pivotal to the larger issue pursued herein, will be further analysed in Chapter 3.

Peace enforcement\(^{75}\) missions, by comparison, are defined as:

- action authorised by the Security Council under Chapter VII to maintain or restore international peace and security, which – while potentially involving combat – will not entail the application of full scale hostilities on a sustained basis against a state, and which fall conceptually and in terms of their objectives and the intensity of the use of force between enforcement operations and traditional peacekeeping.\(^{76}\)

The NATO, which has a long history with peace missions, defines peace enforcement as follows: ‘A peace support effort is designed to end hostilities through the application of a range of coercive measures, including the use of military force. It is likely to be conducted without the strategic consent of some, if not all, of the major conflicting parties.’\(^{77}\) Peace Enforcement missions, therefore, aim at inducing one or more parties to adhere to a peace arrangement or agreement\(^{78}\) and, while not attempting to militarily defeat that party, seeks to alter party conduct or coerce a party to comply with the will of the international community. Not only does

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\(^{75}\) Also refer to Bellamy and Williams, above n 63, 22 for a distinction between ‘Westphalian’ and ‘Post Westphalian’ peace enforcement.


\(^{77}\) North Atlantic Treaty Organization, above n 71, LEX 3.

\(^{78}\) Donald Daniel, ‘Wandering out of the void? Conceptualising practicable peace enforcement’ in Morrison and Others (eds), *Peacekeeping with Muscle: The Use of Force in International Conflict Resolution* (Canadian Peacekeeping Press: 1997) 2. The coercive nature of PEs is also reflected in North Atlantic Treaty Organization, above n 71, LEX 3. Moreover, according to Findlay, above n 62, 6, peace enforcement operations ‘aim to induce one or more parties to adhere to a peace arrangement or agreement previously consented to by using means which include the use or threat of military force’.
this distinguish peacekeeping from peace enforcement, it also functions as a divider between the latter and traditional warfare, whose intent it is to annihilate the enemy with the minimal amount of damage to oneself. But, as Riggs and Plano accurately put it in regard to the distinction between peacekeeping and peace enforcement:

The Charter neatly separates its prescriptions for pacific settlement of disputes (Chapter VI) from enforcement action (Chapter VII), but in the real world the peacekeeping function involves a variety of specific means that cannot readily be compartmentalized.

The conceptual differences that subsist between peacekeeping and peace enforcement nonetheless give rise to a number of important operational and practical distinctions that merit mention at this juncture. First, (as already indicated) peacekeeping inherently requires the consent of the state within which it is deployed and a withdrawal of consent ends the operation. Peace enforcement operations, being deployed under Chapter VII, do not rely on such consent as a matter of law, but most operations do rely on the strategic consent of the host nation. Peace enforcement operations designate a culpable party, whether in specific or general terms who, according to the UNSC, poses a threat to international peace. Peacekeeping operations do not make such designations.

Peace enforcement actions realise their objectives principally through the medium of force, which primarily aims to coerce a party to do or desist from doing something. Moreover, force can be used even in support of a party to the conflict. Peacekeeping forces traditionally use limited degrees of force, in reactive capacities, for a limited set of purposes such as self-
defence and defence of the mandate. The practical manifestation of these conceptual differences will be demonstrated in Chapter 3, in its analysis of the policy documentation underlying five UN missions (in order of chronology: United Nations Emergency Force I (UNEF I), Opération des Nations Unies au Congo (ONUC), United Nations Operation in Somalia II (UNOSOM II), United Nations Mission in Sierra Leone (UNAMSIL) and Mission De L’ Organisation des Nation Unies Pour La Stabilization En Rd Congo (MONUSCO) that have marked watersheds in the history of UN deployment.

Because this study concerns the use of force by the UN, it prefers to utilise the PSO nomenclature to describe its subjects. This approach draws the dividing line between PSOs and traditional warfare, as opposed to drawing the same between peacekeeping and peace-enforcement missions; a distinction that has become increasingly unclear and virtually unworkable. The PSO nomenclature proves particularly useful for this study, due to its ability to accommodate functions that would have traditionally been the remit of distinct types of missions (whether they be peacekeeping or peace enforcement). Most contemporary mission mandates have both of these types of functions built into them, particularly where the use of force is concerned. Moreover, these missions understand and operationalise impartiality with reference to their mandate, as opposed to its traditional form that required a UN force to not take a position or a side. While even this more intrusive version of impartiality requires uses of force to be directed towards a specific breach of the mandate, be linked to a defined outcome, and be conducted discriminately and proportionally, its operationalisation makes UN missions traverse the ‘Mogadishu line’ (used to demarcate between peacekeeping and peace enforcement missions), sometimes frequently. Where the PSO nomenclature draws the line allows it to consider these newer types of missions as part of an organic whole which, in turn, facilitates a uniform approach to their analysis.

Pursuant to extensive doctrinal study, NATO defines PSOs as follows:

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85 In this regard, refer to the discussions in Bellamy and Williams, above n 63, 280–298 and Mark Malam, ‘Action adapted to circumstance’ in David Rodin (ed) The Use of Force in UN Peacekeeping (Routledge, 2018) 36–65.
86 Bellamy and Williams, above n 63, 281.
87 In this regard, refer to Michael Rose, Fighting for Peace: Bosnia 1994 (Harvill Press, 1998) 241, where he argued that peace operations must maintain absolute impartiality at all times to avoid being drawn into the fighting.
PSO are multifunctional operations, conducted impartially, normally in support of an internationally recognised organisation such as the UN or Organisation for Security and Cooperation in Europe (OSCE), involving military forces and diplomatic and humanitarian agencies. PSO are designed to achieve a long term political settlement or other specified conditions. They include Peacekeeping and Peace Enforcement as well as conflict prevention, peace-making, peacebuilding and humanitarian relief.\footnote{North Atlantic Treaty Organization, above n 71, Lex 4.}

The basic difference between PSOs and traditional warfare lies in the end states that each type of activity pursues. While the former only seeks the enforcement of a mandate (through uses of force tailored to this end), the latter is waged against an enemy and designed to achieve military victory. How these end states operationalise within the initial decision to embark upon the activity (i.e. the resort to force or the ad bellum question), and how they influence subsequent decisions relating to the pursuit of the activity (i.e. the use of force or the in bello question), are not discussed here because they will be analysed in depth in Chapter 3. But this part closes with a minor caveat; it is erroneous to conclude that PSOs do not engage in extensive fighting or only in limited fighting. PSOs such as ISAF, MINUSMA and MONUSCO have engaged in extensive combat with local armed groups on multiple occasions. What this chapter will next consider is the command and control structures of these missions, an aspect that is fundamental to the issue of attribution.

\section*{2.5 Organisational frameworks and command and control structures of UN PSOs}

National armies far preceded PSOs in history. They are therefore privy to military concepts that have benefited from the accumulated wisdom of hundreds, if not thousands, of wars. The conceptual framework of UN Command and Control (C2) structures thus drew (and continues to draw) substantial guidance from their domestic counterparts. This part will commence with a brief analysis of how domestic military strategy is formulated and thereafter move to UN C2 structures.
2.5.1 The three levels of war

Contemporary military theory identifies three levels at which decisions regarding war are taken; an approach that was pioneered by the Prussians in the Franco-Prussian war. These are, in order of descending authority: the strategic, operational and tactical levels of war. The boundaries demarcating each of these levels may sometimes be unclear and each level may not always correspond to the relevant level of command, but perceiving war in this way simplifies its understanding.

The strategic level is the highest level at which decisions pertaining to war are taken. It is where nations take decisions on responding to national security threats, which today take a multitude of forms. These decisions also define the overarching military strategy of a nation from which other tiers, such as operational and battlefield strategy, emanate. A decision to resort to force that is taken at this level always succeeds an examination of the relevant moral as well as legal ad bellum calculations. How these calculations operationalise will be discussed in detail in Chapter 3.

The next level of war (nested under the strategic level) is the operational level. It employs the military forces that are deployed so as to achieve an advantage over the enemy, leading to the attainment of the strategic objectives that have already been identified. It thus requires designing campaigns that are appropriate to the situation being dealt with. For this reason, Drew and Snow skilfully identify an operational strategist with a composer, who directs an orchestra in order to create a symphony and avoid a cacophony. It is at the operational level that the strategic objectives of resort to force are translated into operational goals which are thereafter pursued at the tactical level.

The last level of war is the tactical level. The tactical level focuses on achieving military objectives through combat and concerns the use of force in the battlefield. It is where this thesis places its analytical emphasis, analysing the legal regime by reference to which actions pursued therein should be regulated.

In an ideal setting, each of the aforementioned levels execute what is dictated by the level immediately preceding it. This is facilitated by numerous conceptual as well as practical

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89 Fought between the Second French Empire then the Third French Republic and the North German Confederation, from 19 July 1870 to 28 January 1871.
design overlaps that exist between them. But such a complete top-down transcendence does not completely materialise in practice.

### 2.5.2 The UN Command and Control

The UN C2 also utilises this three-tier spectrum (refer to Figure 1 below). The strategic level for UN operations comprises the UNSC, UNSG (and Secretariat) and Head of Mission (HoM). The UNSC, being the apex sub-tier of the scheme, decides on deploying missions and identifies the limitations that apply to their use of force. The Secretary-General and the Secretariat contribute to these decisions through numerous situation assessments, technical assessments and reports.

In addition to his/her functions at the strategic level, the HoM also features in the operational level of UN C2, which is comprised of the mission headquarters’ teams and respective component heads. A UN mission usually consists of a number of components, such as military, civilian and police. The component head relevant to this thesis is the head of the military component, that is, the FC. Regarding the use of force, it is at this operational level that the mission concept of operations is drawn up which, in turn, acts as the source of mission ROEs.

The tactical level of the UN C2 comprises the FC and the military component, which as discussed above, comprises national contingents. The mission area of operations is usually divided into sectors to which one or more contingents are assigned. The FC also draws up a military chain of command, comprising the FC; division, sector and battalion commanders; company commanders; and sub-units. Similar to the case of war, the tactical level is concerned with the physical conduct of tasks (involving the use or threat of force) in order to implement or safeguard the mission mandate. The respective tiers of the UN C2, therefore, contain a number of overlaps, which are created by the multiple-level positioning of individuals. While these overlaps can readily give rise to complications, they also inject a much-needed degree of coherence into an already complicated framework.

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92 Ibid 10.
Figure 1. UN C 2 Structure. Source: UN DPKO, United Nations Peacekeeping Operations: Principles and Guidelines (18 January 2008)
2.5.3 The nature of UN command

As noted in Part 2.3.2 of this chapter, UN missions are manned by national troops who function on a form of ‘incomplete secondment’. But national policies usually forbid full command\(^\text{93}\) of troops being relinquished to the UN, allowing the TC to retain ultimate authority regarding the withdrawal of its own contingents. This gives rise to a lack of clarity regarding the extent of operational command and control that is transferred to the UN and, when coupled with complications\(^\text{94}\) created by inter alia, national incursions into the command chain, makes the issue of conduct attribution extremely complicated.

The type of authority that TCs transfer to the UN is referred to as ‘Operational Authority’ by the relevant policy documentation. This is defined as: ‘The authority transferred by the member states to the United Nations to use the operational capabilities of their national military contingents, units, formed police units and/or military and police personnel to undertake the mandated missions and tasks.’\(^\text{95}\)According to UN policy, such Operational Authority includes:

- the full authority to issue operational directives within the limits of (i) a specific mandate of the Security Council, (ii) an agreed period of time with the stipulation that an earlier withdrawal requires adequate prior notification, and (iii) a specific geographical range (the mission areas as a whole).\(^\text{96}\)

It is from this operational authority that operational control over troops, which is vested in the FC, emanates. ‘Operational Control’ is defined as:

The authority granted to a Military Commander in a United Nations Peacekeeping Operation to direct forces assigned so that the Commander may accomplish specific missions or tasks which are usually limited by function, time or location (or

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\(^{94}\)Refer to \textit{Jean-Marie Guéhenno and Jake Sherman, ‘Command and Control Arrangements in United Nations Peacekeeping Operations’ <http://www.operationspaix.net/DATA/DOKUMENT/4998~v~Command_and_Control_Arrangements_in_United_Nations_Peacekeeping_Operations.pdf> for a useful discussion on the practical difficulties encountered when operationalising the UN command system.}

\(^{95}\)United Nations Department of Peacekeeping, above n 91, 3.

\(^{96}\)Ibid 3.
a combination), to deploy units concerned and/or military personnel, and to retain
or assign separate tasks to sub-units of a contingent, as required by operational
necessities, within the mission area of responsibility.97

The operational control UN command policy confers on the FC is, therefore, not limited
to merely assigning and deploying units. It leaves open the possibility of the FC also retaining a
form of additional control by, assigning separate tasks to sub-units. Where control is so retained,
on field decisions (that result in troop conduct) become potentially liable to three sources of
control, that is, the FC’s control, the CC’s (or subordinate’s) tactical control and, where the TC
has intervened in the command chain, the TC’s tactical control. The division between
operational and tactical control as well as the last-mentioned division between different types
of tactical control, influence how troop conduct should be attributed. This will be analysed in
detail in Part 2.7.

Next along the spectrum lies the tactical level of UN command, which allows
commanders to ‘assign tasks to forces under their command for the accomplishment of the
mission assigned by higher authority’.98 Tactical control refers to ‘the detailed and local direction
and control of movement, or manoeuvre, necessary to accomplish missions or tasks assigned’.99
It involves the physical conduct of tasks in order to implement or safeguard the mission’s
mandate100 and represents the ground level at which missions are completed. Tactical decisions
are guided by IHL provisions in the case of traditional warfare; this thesis asks how such decisions
ought to be regulated in the case of UN use of force.

2.5.4 TC intrusions into the UN command chain

This discussion would not be complete without mentioning the intrusions that TCs make into
the UN command chain. Such intrusions find their centre of gravity in the head of each national
troop contingent; that is, the CC. The CC represents a crucial link between the FC and the troops,
as well as between the TC and their troops, and connects the operational and tactical levels of
the command chain. While on the one hand, he is responsible for the utilisation of the troops
per any caveats imposed by the TC, he is also the conduit through which the FC’s (and thus the

97 United Nations Department of Peacekeeping, above n 91, 3.
98 Ibid 4.
100 Ibid 10.
UN’s) orders are transmitted to the troops. The fact that Operational control (OPCON) operates at a comparatively higher level in the UN C2 places added importance on the CC, particularly (but not exclusively) as a means of bridging the gap between the FC and the troops. This perceived solution, however, led to unperceived outcomes. First, CCs can technically control which FC orders reach the troops and which do not, although such intrusions are clear violations of the military code of conduct. Second, CCs are often provided significant discretion regarding the means by which a particular mission may be accomplished, a discretion that can be used to alter or amend the initial order. Moreover, and most significantly to the issue of attribution, CCs frequently consult their national authorities before executing mission orders, leading to considerable disparities between what is ordered to be done by the FC and what is actually done.

The extent and significance of TC intrusions is elaborated in numerous incidents. These include the 1994 abandoning of a refugee camp by Belgian troops in Kigali, Rwanda (referred to in the Introduction), the 1995 Dutchbat decision to surrender their arms to the Serb Forces in Potocari, Bosnia - Herzegovina command execution conflicts in Somalia, and disobedience of UNAMSIL FCs orders by Nigerian troops that formed part of the mission. In the Somalia example, the Italian contingent of UNOSOM II was even accused of paying Somali factions not to attack them and of failing to take action when other contingents were attacked.

101 Ray Murphy, UN Peacekeeping in Lebanon, Somalia and Kosovo (Cambridge University Press, 2007) 375.
102 The practice draws mention in the High-Level Independent Panel on Peace Operations, Comprehensive Review of the Whole Question of Peacekeeping Operations in All Their Respects, attached to UN Secretary-General, 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, UN Doc A/70/95 – S/2015/446 (17 June 2015) [220]–[222].
104 As alleged by the Plaintiffs in Stitching Mothers of Srebrenica v The Netherlands and the United Nations, C/09/295247/HA ZA 07 – 2973. Refer to Michael Rose, Fighting for Peace (Time Warner Books UK, 1999) 85, 116, for other such incidents that took place during the deployment of UNPROFOR.
Disobedience of FC orders by UN troops is therefore well documented\(^\text{108}\) and, in extreme cases, has even resulted in UN FC’s losing effective control of their troops, a fact recognised by the Commission of Inquiry appointed to investigate armed attacks on UNOSOM II in the following terms:

The Force Commander of UNOSOM II was not in effective control of several national contingents which, in varying degrees, persisted in seeking orders from their home authorities before executing orders of the Forces Command. Many major operations undertaken under the UN flag and in the context of UNOSOM’s mandate were totally outside the command and control of the United Nations\(^\text{109}\).

This reality may be compared with what UN troops are required to do in paragraph 9 of the TCA, which provides that:

The functions of [the United Nations peacekeeping operation] are exclusively international and the personnel made available by [the Participating State] shall regulate their conduct with the interests of the United Nations only in view. Except on national administrative matters, they shall not seek or accept instructions in respect of the performance of their duties from any authority external to the United Nations, nor shall the Government of [participating state] give such instructions to them\(^\text{110}\) [emphasis added].

The disparity between what is contemplated and what takes place in practice is put in perspective by the official position taken by the UN, regarding the command of these troops: The international Responsibility of the United Nations for combat-related activities of United Nations forces is premised on the assumption that the operation in question is under the exclusive command and control of the United Nations.\(^\text{111}\)

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\(^\text{110}\) Model TCA, UN Doc A/61/19 [9].

The efficiency of any conduct attribution regime, therefore, will depend not only on the formal UN documentary framework, but also on how well it understands and responds to these practical realities. Moving beyond such practicalities, an analysis of conduct attribution must also be cognisant of what is required to perform within the overall conceptual picture. Here, attribution contributes to how the applicable legal Institution, that is, Responsibility manufactures its contact points with the relevant facts.\footnote{v Roeben, ‘Responsibility in International Law’ (2012) 16 Max Planck Yearbook of United Nations Law 99, 105.} Because it essentially functions as a legal Framework, attribution must be formulated in a way that allows it to ensure that the results returned by its application are consistent with the doctrinal basics that underpin the Institution of Responsibility. This is what the remaining portions of this chapter will address; they will first analyse the conceptual premises of the institution of Responsibility in international law, then devise a complementary conduct attribution framework for UN PSOs.

### 2.6 The Institution of Responsibility

Law regulates conduct. It carries out this function by bringing normative rules, which emanate from an ethical baseline, into contact with facts, which are subjective and detached from ethical discourse in their existence. The onus of linking normative rules with facts is placed on legal Institutions such as Responsibility. Like all other Institutions, the Institution of Responsibility is based on certain foundational elements, which must be reflected in the legal rules that emanate there from and are applied to factual realities. What then, is the foundation of Responsibility?

According to the ‘classical theory’, the origin of Responsibility lay in the commission of a wrongful act.\footnote{Dionisio Anzilotti, ‘La Responsabiliteinternationale des Etats a raison des dommagessoufferts par des etrangers’ (1906) 8 ReglesGenerales de Droit International Public 14; Clyde Eagleton, The Responsibility of States in International Law (New York University Press,1928) 213; Theodore Meron, ‘International Responsibility of states for unauthorized acts of their officials’ (1957) 33,British Yearbook of International Law 85.} This theory understands ‘wrongful act’ as an act that deviates from objective international law; that is, resulting from the gap that exists between the impugned conduct and what is prescribed by the applicable rule of law.\footnote{Pierre-Marie Dupuy, ‘Dionisio Anzilotti and the Law of International Responsibility of States’ (1992)3, European Journal of International Law 139, 141.} This wrongful act, when coupled with imputability (i.e. the causal link between the act and the state), gives rise to the notion of Responsibility for classical theorists. For this school of thought, Responsibility is thus
independent of the subjective fault of the actor - it emphasises the difficulty of attributing psychological elements to states, which are not juridical persons.

The classical theory preserves the distinction between primary rules, which prescribe the legal standards of compliance expected of a party, and secondary rules, which describe how non-compliance with primary rules manifests itself and should be treated. The working of the theory can also be clarified with reference to the discourse relating to ‘ultra-hazardous’ activities,115 which sometimes incurs liability for otherwise lawful conduct in a form of strict liability.116 According to Handl, liability in such cases attaches only if the conduct had fallen short of the expected standards.117 But, as explained in the writings of Akehurst,118 the wrongful act in these cases is not constituted by the activity per se, but by state failure to limit their harmful effects. This is a form of due diligence liability, which will be discussed further in Part 2.8. The content of what is prescribed by the primary rule attains central significance at this point, particularly where two rules that prescribe different standards are potentially applicable to a given situation. This is exemplified, for instance, by the case of conduct undertaken during armed conflict to which both IHL and IHRL apply.119

The content of classical theory may be compared with the position maintained by others, such as Ago and Cheng, who argue that there can be no Responsibility without fault.120 This approach is based on the notion of free will being central to the existence of illegality121 and understands fault as a psychological relationship that exists between the injury and its author. This allows the fault of the individual who acts as an organ of the state (or IO) to be imputed to the state, in turn allowing such fault to become a subjective condition of the act being imputed

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119 Legality of the Threat or Use of Nuclear Weapons(Advisory opinion) [1996] ICJ Rep 226 [25]; Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (Advisory opinion), [2004] ICJ Rep 136 [106]. The concurrent applicability of IHRL and IHL will be the subject of Chapter 4.
120 B Cheng, General Principles of Law as Applied by International Courts and Tribunals (Cambridge University Press, 2006).
121 Ibid 219, 223.
to the state.\textsuperscript{122} This approach has a number of variants (propounded in response to concerted criticisms levelled by classical theorists). Chief among these is the theory of ‘normative fault’, which argues that fault, in the relevant, sense does not concern a psychological element but, instead, represents the breach of a norm or a legal rule.\textsuperscript{123} But the argument here becomes circular, because it ultimately inserts fault into the objective aspect of wrongfulness. Yet others, such as Morelli,\textsuperscript{124} focus on the moment at which the issue of fault arises, while Ross attempts to explain why international practice does not recognise subjective fault, by arguing that it is \textit{presumed} by practice.\textsuperscript{125} In spite of all these attempts to modernise it, the theory of psychological fault cannot agree with practice (which does not require a subjective focus) and is unconvincing. Its inaccuracy is perhaps best expressed by Brownlie, who submits that the general rule on Responsibility supports the notion of objective Responsibility and that fault only plays a marginal role in the framework, such as where the state breaches an obligation to prevent the occurrence of a given event.\textsuperscript{126}

It is, however, worth recalling at this juncture that Responsibility is not the same as Illegality, the ascertainment of which is the premise of primary rules, which require subjective elements (such as fault) to be considered. To include fault within the discussion of imputation is, therefore, also to blur the distinction between primary and secondary rules.\textsuperscript{127} This is how a dialogue on the (international) Responsibility of (International) Organizations (IO) is possible, even when the actual physical acts in relation to which Responsibility is discussed are not carried out by the IO, but by individual officers. The (International) Organization is not a natural body and does not have feelings. Considering fault to form part of Responsibility, therefore, theoretically precludes such an actor from being held legally responsible.\textsuperscript{128} This is clearly not

\begin{itemize}
  \item \textsuperscript{123} Gabriele Salvioli, ‘La responsabilite internaintionale’ in \textit{Collected Courses of the Hague Academy of International Law}, Les regles generales de la paix (Nijhoff, Vol 46) 96–130.
  \item \textsuperscript{124} Gaetano Morelli, \textit{Nozioni di dirittointernazionale} (CEDAM, 7th ed., 1967) 345.
  \item \textsuperscript{125} Alf Ross, \textit{A Textbook of International Law: General Part} (Longmans, Green and Co, 1947) 256–258.
  \item \textsuperscript{126} Refer to Ian Brownlie, \textit{System of the Law of Nations: State Responsibility}, Part I (Oxford University Press, 1983) 37–49, according to whom, fault plays a role when international law binds the State to exercise control, according to standards of due diligence, over certain activities of individuals or other persons, in order that they do not cause harm.
  \item \textsuperscript{127} JG Starke, ‘Imputability in international delinquencies’ (1938) 19, \textit{British Yearbook of International Law} 104.
  \item \textsuperscript{128} Jean Combacau, ‘La responsabilite internaintionale’ in Hubert Thierry, Jean Combacau and Others (eds.) \textit{Droit international public} (Editions Mont Chrestien, 3rd ed., 1981) 678–679; Paul Guggenheim,
international law’s contemporary position and submitting that fault features in the notion of Responsibility is thus illusory.\textsuperscript{129} This difficulty can be resolved if ‘fault’ is considered to be forming part of the relevant primary rule, against which the conduct of the individual is compared. The resultant gap if any, forms the ‘wrongful act’, which is then attributed to the IO.

Further theories on Responsibility suggest that it ought to be based on ‘outcome’.\textsuperscript{130} For instance, Grotius submits that, from injury, ‘there arises an obligation by the Law of Nature to make Reparation for the Damage, if any be done’.\textsuperscript{131} Quite apart from connecting rule with fact, however, Responsibility also connects cause and result, the wrongdoer with the wronged, and conduct with outcome. Thus, according to Anzilotti:

The wrongful act, that is to say, generally speaking, the violation of an international obligation, is thus accompanied by the appearance of a new legal relationship between the state to which the act is imputable, which is obliged to make reparation, and the state with respect to which the unfulfilled obligation existed, which can demand reparation.\textsuperscript{132}

This relational aspect is reflected in the text of the Draft Articles on Responsibility of States for Internationally Wrongful Acts (ARSIWA), in the following terms:

\textit{(f) Specifying the content of State Responsibility, i.e. the new legal relations that arise from the commission by a State of an internationally wrongful act, and reparation for any injury done.}\textsuperscript{133}}
The text of the Draft Articles on the Responsibility of International Organizations (ARIO)\(^{134}\) does not indicate that the approach to Responsibility taken therein is any different to that taken by the ARSIWA. Considering ‘outcome’ as the basis of Responsibility thus polarises this relational dimension towards the wronged (i.e. identity of who should lawfully be recompensed). Responsibility, as pointed out earlier, is concerned also with the allocation of fault, that is, identifying who the wrongdoer is. Not only is ‘conduct’ closer to this end of the equation, thus allowing the same to identify with greater accuracy the persons responsible for the wrong, it also precedes and causes the ‘outcome’. Moreover, it is ‘conduct’ that sets in motion this chain of events and dictates the outcome, along with its nature and extent. An approach to Responsibility must always be capable of tracing this causal chain as accurately as possible and of identifying its causal root. Also, a correction of the status quo cannot arise in the absence of identifying who was responsible for the damage, without which the injury as well as the right to be recompensed will only exist in ‘the air’. Recognising ‘outcome’ as the definitive element of Responsibility therefore ignores these realities. While outcome is what Responsibility attempts to rectify,\(^{135}\) conduct is what Responsibility bases itself on,\(^{136}\) being connected to the latter through the conduit of attribution. The ARSIWA therefore identifies ‘internationally wrongful acts’ (which entail the ‘international Responsibility’ of a state)\(^{137}\) with reference to two requirements, that is, that the act be attributable to the state under international law and that it constitute a breach of an international obligation of that state.\(^{138}\) It does not identify injury as a constituent of Responsibility, with the International Law Commission (ILC) noting in its commentary:

If we maintain at all costs that ‘damage’ is an element in any internationally wrongful act, we are forced to the conclusion that any breach of an international obligation towards another State involves some kind of ‘injury’ to that other State.

But this is tantamount to saying that the ‘damage’ which is inherent in any


\(^{137}\) ‘ARSIWA commentary’, above n 133, Art 01.

\(^{138}\) Ibid Art 02.
internationally wrongful act is the damage which is at the same time inherent in any breach of an international obligation.\textsuperscript{139}

The ARIO similarly adopts the classical theory by providing inter alia, that every internationally wrongful act of an International Organization entails the international Responsibility of that Organization,\textsuperscript{140} that there is an internationally wrongful act when the conduct is attributable to the IO in international law and constitutes a breach of an international obligation of that organisation.\textsuperscript{141} In the result, it maintains the distinction between primary and secondary rules, expressly providing that it only deals with the latter.\textsuperscript{142} Both the ARSIWA and ARIO, therefore, also identify conduct as the conceptual basis of Responsibility.

This conceptual basis remains constant, regardless of whose international Responsibility is being discussed. Thus according to Pellet (referring to the Responsibility of states and IOs), ‘the general system of Responsibility is similar in both cases’.\textsuperscript{143} This is, however, not to lose sight of the ‘principle of specialty’ of IOs propounded in the Reparation for Injuries opinion.\textsuperscript{144} Nor does it submit that the legal mechanisms used to locate the Responsibility of states are identical to those used for IOs and can be completely transposed. As will be elaborated, they do differ\textsuperscript{145} and require amendments that accommodate the special nature of IOs. But the aforementioned basis constantly re-directs the exercise to what the rules were designed to protect and achieve in the first place.

The ‘incomplete secondment’ of officers to UN operations, which encompass situations in which both the TC and the receiving organisation (the UN) retain and/or exercise de jure or de facto powers of control over conduct, provides a complicated example of how this materialises in practice. The ultimate conduct in such cases results from levers of control that


\textsuperscript{140} ‘ARIO’, above n 134, Art 03.

\textsuperscript{141} Ibid Art 10.

\textsuperscript{142} Ibid 2.

\textsuperscript{143} Allain Pellet, ‘International organizations are definitely not states’ in Maurizio Ragazzi (ed), Responsibility of International Organizations: Essays in Memory of Sir Ian Brownlie (MartinusNijhoff,2013) 41,44.


\textsuperscript{145} See C Ahlborn, ‘The rules of international organizations and the law of international responsibility’ (2011) 8 (2) International Organizations Law Review, 397,480, for criticisms received by the ILC for allegedly transposing mutatis mutandis, the regime of state Responsibility on to IOs.
are vested in and utilised by two or more entities. Locating Responsibility in such cases not only requires attention to be given to the relative impact had by each lever on the conduct, but also to other factors such as the source of each lever and how one lever affects another. These secondary factors significantly differ in their conceptual as well as practical existence, and cannot realistically be compared with one another.

These realities, therefore, necessitate amendments to the criteria by which Responsibility is attributed in the case of IOs, a need apparently provided for by Art 07 of the ARIO through the concept of ‘effective control’. Reference to ‘control’ is, however, also found within the text of the ARSIWA, more particularly in Art 08 concerning ‘conduct directed or controlled by a state’. The role played by ‘control’ in either context is nevertheless very different, as recognised by the ILC in the following terms:

In the context of placing of an organ or agent at the disposal of an international organization, control plays a different role. It does not concern the issue whether a certain conduct is attributable at all to a state or an international organization, but rather to which entity – the contributing state or organization or the receiving organization – conduct has to be attributed. The sense in which the concept of ‘control’ is used in the attribution of conduct to IOs is thus notionally different to that in which it is used in the case of states. Alain Pellet puts this in wider perspective by stating:

and, just as the ‘legal personality and rights and duties [of an international organization are not] the same as those of a State’, similarly the mechanisms of Responsibility which are applicable to States may not necessarily be transposed wholesale and unmodified to international organizations.

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146 But instances of using ‘effective control’ within the meaning of Art 07 to apportion Responsibility are non-existent. Compare UN practice pertaining to Art 06 cases, which is well established and has existed for well over 50 years. See Exchange of Letters Constituting an Agreement Between the United Nations and Belgium Relating to the Settlement of Claims Filed Against the United Nations in the Congo by Belgian Nationals, 535 UNTS 199, 20 February 1965.

147 ‘ARIO’, above n 134, 21.

A final point needs to be mentioned before concluding this section. As already stated, Responsibility resembles Law’s points of contact with facts and its conceptual bases must find voice in the resultant legal consequences. Interests of fairness and justice thus dictate that these reflect the conceptual bases on which the relevant legal institution (that of Responsibility in this case) and rules were based in the first place. All too often, however, Law fails to take proper cognisance of these needs, creating a deficit between who was factually responsible for the particular conduct and who the law identifies as being responsible. This also affects the efficiency of a legal rule, which can be measured by calculating the degree of consistency it attains between the aforementioned aspects. This consistency is, in turn, dependent on how legal rules are applied, more specifically by the frameworks with reference to which factual situations and legal rules are linked. This is the object of the next section; to provide such a framework for the attribution of conduct of UN PSOs.

2.7 A test for attribution of UN troop conduct?

2.7.1 The contemporary normative framework relating to attribution

This part will analyse the various legal formulations that have been developed in the realm of conduct attribution and how these principles potentially apply to the case of UN forces. It recalls as a preliminary matter, that accountability has to be premised on realistic notions of Responsibility at all times. This means that any regime of attribution that deals with the conduct of UN forces must take notice of the complicated command and control structures it involves, as well as the practical realities of command execution, in proposing a legal threshold that is workable, realistic and capable of returning accurate results. Numerous judgements, authors and the ARIO provide possible starting points to this discussion. The ARIO contains a

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149 Military and Paramilitary Activities in and Against Nicaragua (Nicar. v U.S.) [1986] ICJ Reports 15, (Military and Paramilitary Activities); Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v Serb. & Mont.) [2007] ICJ Reports 143, (Genocide case); Behrami v France and Saramati v France, Germany and Norway (European Court of Human Rights, Grand Chamber, AppNos 71412/01 & 78166/01, 02 May 2007) (‘Behrami and Saramati’); Mukeshimana-Ngulinzi [n 52], The Netherlands v Hasan Nuhanovic (Supreme Court of the Netherlands), 12/03324 LZ/TT, 6 September 2013) (Nuhanovic); Stitching Mothers of Srebrenica v The Netherlands and the United Nations, C/09/295247/ HA ZA 07 – 2973 [n 47].

well-structured division of the different factual circumstances as well as a reasonably complete set (albeit perhaps still incomprehensive) of applicable legal rules. It is where this analysis will begin.

Arts 06 to 08 of the ARIO deal with Responsibility for possible variants of direct perpetration. According to Art 06, the conduct of organs or agents of an IO is to be considered an act of the organisation, irrespective of the position that the organ or agent holds. Notably, however, Art 06 only deals with the conduct of fully seconded organs or agents which, by extension, limits the scope of regulation of Art 08 to the ultra vires conduct of such agents. This has the further effect of disqualifying Art 08 from regulating the attribution of ultra vires conduct of incompletely seconded organs or agents. Even though UN operations are considered organs of the UN, the conduct of troops forming part of these operations does not necessarily have to be governed by Art 06 due to inter alia; the considerable degree of legitimate as well as


As far as provisions affecting Responsibility are concernedfor direct commissions, Arts 3–5 of Chapter 1 deal with General Principles, Arts 6–8 of Chapter II with Responsibility of the IO for its own conduct, Chapter III with breach of international obligations, Arts 14–18 of Chapter IV with Responsibility of IOs for conduct of other states or organizations, and Chapter v with circumstances precluding wrongfulness.

Here, ‘Organ’ or ‘entity’ is used from the perspective of the state and not from that of the IO. But note that ‘ARIO’, above n 134, Art 02 ARIO defines ‘organ’ with reference to the rules of the IO, while defining ‘agent’ with reference to a functional criterion.
illegitimate control exercised by TC’s, as expressly recognised in the ARIO153 as well as the ‘incomplete’ nature of their secondment.

Therefore, as recognised by the ILC:

Art.07 deals with the different situation in which the seconded organ or agent still acts to a certain extent as organ of the Seconding state or as organ or agent of the seconding organization. This occurs for instance in the case of military contingents that a state places at the disposal of the United Nations for a peacekeeping operation154.

Consequently, Art 07 attribution follows the exercise of ‘effective control’, the operation of which to UN troops still remains mooted in spite of having received substantial academic and judicial attention.

One of the earlier judicial considerations of the role of control, generally, is to be found in the decision of the International Court of Justice (ICJ) in the Nicaragua case.155 The Court was there called upon to determine the Responsibility of the United States in relation to actions of the contras, who were waging a guerrilla war against the state of Nicaragua. The general funding, financing and training of the Contras, and even the selection of specific military targets, was held to be insufficient to establish the degree of control necessary to attract international Responsibility to the United States in the following terms:

115. The Court has taken the view (paragraph 110 above) that United States participation, even if preponderant or decisive, in the financing, organizing, training, supplying and equipping of the contras, the selection of its military or paramilitary targets, and the planning of the whole of its operation, is still insufficient in itself, on the basis of the evidence in the possession of the Court, for the purpose of attributing to the United States the acts committed by the contras in the course of their military or paramilitary operations in Nicaragua. All the forms of United States participation mentioned above, and even the general control by the respondent State over a force with a high degree of dependency on it, would not in

154 Ibid 20.
themselves mean, without further evidence, that the United States directed or enforced the perpetration of the acts contrary to Human Rights law and humanitarian law alleged by the applicant state.\footnote{Military and Paramilitary Activities, [1986] ICJ Reports 15, 64.}

A couple of matters merit attention at this juncture. Firstly, general involvement or association in the preparatory stages or actual activities does not, according to the Court, satisfy the threshold of control required for conduct attribution. This echoes the conduct-specific nature of Responsibility referred to earlier (which must necessarily be reflected in the relevant attribution framework) that is also supported by the ARIO.\footnote{ARIO, above n 134, 20.} Secondly, the focus of this judgement is on the conduct of ‘persons and groups of persons’ \emph{in relation to} a state and not on the conduct of ‘organs’ or ‘agents’ \emph{put at the disposal} of a state. What this chapter focuses on is the corollary of the latter situation, that is ‘organs’ or ‘agents’ \emph{put at the disposal} of an IO. This, in turn, informs the role played by ‘control’ in the Nicaragua-type cases, that is, answering ‘whether conduct \emph{could} be attributed’ to an entity and not ‘to which entity conduct \emph{should} be attributed’. These factors, therefore, limit the relevance of the Nicaragua decision to the issue being discussed at present.

The Nicaragua test was revisited by the ICJ in the more recent Bosnian Genocide judgment,\footnote{Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v Serb. & Mont.) [2007] ICJ Reports 143.} where it was stated:

Genocide will be considered as attributable to a State if and to the extent that the physical acts constitutive of genocide that have been committed by organs or persons other than the State’s own agents were carried-out, wholly or in part, on the instructions or directions of the State, or under its effective control.\footnote{Ibid401.}

\footnote{Tom Dannenbaum, ‘Translating the Standard’, above n 150, 154.}

Dannenbaum places emphasis on the comma that is placed by the ICJ between ‘instructions or directions of the State’ and ‘or under its effective control’ to conclude that the former encompasses something more than the latter;\footnote{Ibid 157.} that ‘something more’ being the capacity vested in an entity to prevent the impugned conduct\footnote{\footnotetext{161}{} through discipline, training,
punishment, etc. This preventive focus on control represents a departure from the mainstream approach to attribution and will be analysed shortly.

A number of decisions domestically, as well as by the European Court of Human Rights (ECtHR) also shed light on the application of the attribution threshold. For instance, in Behrami and Saramati,\(^{162}\) the ECtHR was called upon to determine, respectively, liability for an allegedly unlawful detention and for omissions pertaining to mine clearance in Kosovo. The ECtHR noted that the civilian and military presence in Kosovo was deployed under UN auspices,\(^{163}\) and the UN delegated its civil administration and military powers to KFOR and UNMIK,\(^ {164}\) respectively. However, attribution of conduct was held to depend on ‘whether the UN retained ultimate authority and control so that only operational command was delegated’.\(^ {165}\) The Court found that such UN ultimate authority was present on a number of grounds, including the authority to delegate a power, the nature and ambit of the delegation, and the reporting requirements imposed on those to whom the power was delegated.\(^{166}\) It is pertinent to note, however, that none of these considerations point towards the origin or cause of the impugned conduct and cannot, therefore, function as indicators of Responsibility.

The Court, thereafter, proceeded to hold that: ‘KFOR was exercising lawfully delegated Chapter VII powers of the UNSC so that the impugned action was, in principle, attributable to the UN within the meaning of the word outlined in paragraphs 29 and 121 above.’\(^ {167}\) This thesis submits that the Court’s reliance on ‘overall authority’ in this instance is superfluous and unhelpful. As in the Nicaragua case, focusing on ‘overall authority’, which likely continues with the UN in most situations, runs counter to the necessarily conduct-specific character of attribution.\(^ {168}\) For example, individual TC orders can give rise to specific troop conduct, even when UN overall authority is present. Moreover, troops can be ordered by CCs to achieve a particular objective by means different to those prescribed by the FC. Overall, UN authority subsists in both these cases but does not contribute to identifying the cause of the particular

\(^{162}\) *Behrami and Saramati*, App Nos 71412/01 & 78166/01, 02 May 2007.

\(^{163}\) Ibid [3].

\(^{164}\) Ibid [70 and 129].

\(^{165}\) Ibid [133].

\(^{166}\) Ibid [134].

\(^{167}\) *Behrami and Saramati*, App Nos 71412/01 & 78166/01, 02 May 2007) [141].

\(^{168}\) See Larsen, above n 150, 521–522, for a detailed critique of the (lack of) relevance of ‘ultimate authority and control’ to the notion of effective control. See also Marco Milanovic and Tatjana Papic, ‘As bad as it gets: The European Court of Human Rights’s *Behrami and Saramati* decision and general international law’ (2009) 58, *International and Comparative Law Quarterly* 267.
The attribution of conduct also formed an integral part of the Nuhanovic decision, which was delivered by the Supreme Court of the Netherlands in 2013. Action was filed by Hasan Nuhanovic, who had worked as an interpreter at the Dutchbat compound in Potocari during the fall of the ethnic Albanian Srebrenica enclave. He was a ‘local personnel’, who was eligible to seek refuge in the compound and be evacuated. His parents and brother also sought refuge at the compound, but only his father was allowed to remain (for having partaken in the general negotiations that were conducted during this time) while the others were refused. Mr Nuhanovic’s father refused this offer, left with the other family members, and was taken and murdered by Serb forces or paramilitaries. The Dutch Supreme Court, while emphasising the relevance of the actual control exercised over specific conduct to the issue of attribution, applied the effective control test to find attribution to the Dutch government. Similarly in Mukeshimana-Ngulinzira, the evacuation of a refugee camp in Kigali was held to have been carried out under the effective control of the TC and not of the UN.

Further, in Mothers of Srebrenica, action was filed by a group of women against the government of the Netherlands alleging inter alia, that the conduct of the Dutchbat regiment deployed in Potocari, which contributed to the deaths of their relatives, was attributable to the Dutch government. In delivering judgement, the Court noted that even though Dutchbat was subject to UNPROFOR OPCON, effective control had to be determined by analysing who had the ‘actual say’ over specific actions and that, in the case of ultra vires acts, there was no need for the state to give instructions, the powers inter alia to provide training, and to enforce discipline providing the necessary link. This particular formulation indicates that the concept of effective control encompasses matters beyond the issuance of orders along the lines

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169 Nollkaemper and Jacobs, above n 130,389.
170 The Netherlands v Hasan Nuhanovic, 12/03324 LZ/TT.
171 Ibid [3.11.3].
172 Mukeshimana-Ngulinzira.
175 Ibid[4.46].
176 Ibid [4.57].
suggested by Dannenbaum, but what these ancillary matters are must be examined further. The Court’s actual findings on attribution, however, were based on the source of the orders, for instance, the Dutch government’s instructions to avoid unnecessary casualties,\textsuperscript{177} not abandon observation posts immediately\textsuperscript{178} and lay down weapons.\textsuperscript{179}

\textbf{2.7.2 Attributing conduct through effective control: A framework}

The foregoing precedents provide insight on how the effective control standard has been defined and applied to factual situations. But what does ‘effective control’ actually mean in the case of UN troops? A couple of initial points must be made at this juncture.

First, as has already been stated, in the case of IOs’ (and particularly in the case of UN troops) ‘effective control’ needs to decipher which, out of a number of levers governing conduct, actually caused the conduct. It must therefore assess the relative impact created by these candidates on the impugned conduct, as well as on each other, in view of the institutional contexts within which these forces operate; a function it is not called upon to discharge in the case of states. Second, the factual situations to which the concept of effective control requires to be applied (‘Art 07 situations’) are diverse. This requires consistency in how these situations are classified; for instance, whether according to the source of the impugned conduct, the nature of the impugned conduct or the consequences that stem from the impugned conduct. Such an approach allows a consistent treatment of each situation, while avoiding the danger of having to consider the same situation under multiple heads. Third, given the intricacies of the case at hand, the possibility of utilising an approach to effective control that can accommodate combinational criteria (where one criterion may not be applied to the exclusion of others), which allows a comparative assessment of the various control levers as well as of how they impact the conduct, has to be considered seriously. Fourth, a framework of attribution cannot be limited to actions, it also has to take cognisance of allocation of Responsibility for failures to prevent. This last aspect obtains particular pertinence in the case of the conduct of UN troops who, as shall be noted in Chapter 3, are obligated to prevent Human Rights violations by virtue of the protection of civilian components in their very mandates.

\textsuperscript{177}Ibid [4.66].
\textsuperscript{178}Ibid [4.95].
\textsuperscript{179}Ibid [4.98].
As already stated, UN troops are linked to the chain of command by a CC, who ordinarily hails from the same country as that of the contingent, and it is through this CC that the FC’s orders are transmitted to the troops. A FC can word his/her commands in a multitude of ways, which makes it possible for the analysis of attribution to be classified along various lines. As pointed out earlier, the UN command chain allows some control over a mission to be exercised by the FC, in addition to that which is exercised at the tactical level. The degree of tactical control that is granted to a CC in a given situation can thus be deduced from the amount of control that the FC retains. The levels of control retained at each level is, effectively, directly commensurate to the levels of discretion retained or delegated by and to each level. The ‘effects based theory’ of attribution developed hereunder therefore centres around discretion as conditioned by legality. FC orders can, in this sense, be divided into three broad categories, along a trajectory that increases the amount of command discretion granted to the tactical level.

The first category of orders affords minimal command discretion to the CC (such as where the FC retains a degree of tactical command by prescribing a particular form of infantry attack). In these cases, what is ultimately done may or may not be compatible with what was ordered by the FC. The second category grants greater command discretion to the CC by, for instance, by making a choice available to the latter regarding the means to be used in achieving the objective. To not over-complicate this category, the discussion hereunder limits the number of choices involved to two. As will be discussed hereunder, the same control factor (e.g., intervening TC orders or failure to provide training) may function differently in each of these classes; their contribution being either positive or negative when placed in the context of the ultimate result, thus requiring the attribution process to attach different degrees of weight to them. The third category of FC orders operates exclusively at the operational level and grants the widest degree of tactical discretion to the CC.

The framework will also discuss, specifically in the case of Human Rights violations, Responsibility for failing to prevent the abuse (also referred to as the positive effect of Human Rights). What is assessed in this last case is not the Responsibility for a specific act or omission, but Responsibility for failing to prevent an act that has already been attributed to another party.

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180 This framework was originally formulated in Charuka Ekanayake and Susan Harris Rimmer, ‘Applying Effective Control to the Conduct of UN Forces: Connecting Factual Complexities with Legal Responsibility’ (2018) 15 (1) International Organizations Law Review 9.
2.7.2.1 Attributing conduct in cases of minimal command discretion

This first category deals with situations in which the parent order affords minimal command discretion to a subordinate. It creates two sub-categories, that is, where the impugned conduct is inconsistent with a FC order that was legal and where the same is consistent with a FC order that was illegal.

(a) The impugned conduct is inconsistent with a FC order that was legal

This part will deal with illegal conduct that contravenes a legally sound FC order. Such conduct can take numerous forms: it may be per se legal but take place beyond the temporal or geographical limits imposed by the mandate; be illegal but take place within the aforementioned limits; or be illegal and, at the same time, take place beyond the said limits. It is important to note that the illegality discussed here emanates from tactical decisions, which are made in layers of command that include and fall below that of the CC (these include TC intrusions with the command chain). What this also means is that the initial FC order in these cases provided realistic space for the mission to be achieved within legal parameters. The failure of the CC and the troops to act within the FC order may either stem from an individual decision (whether intentional or unintentional), which will be referred to as ‘human error’ henceforth; the failure to provide adequate training; or from an intervening TC order. The initial UN order has little relevance to the attribution issue in these circumstances. Cases in which no intervening TC orders are found will be analysed first.

As discussed above, UN troops are subject to UN OPCON and are required to conduct themselves with the interests of the UN only in view. In these situations, a properly trained CC or officer would be expected (indeed required) to take cognisance of this and act within the initial FC order. In the absence of TC interference with the chain of command, the failure to do so can result only from human error, which is meant to be prevented primarily by the provision of training. This preventive capacity in fact forms the bed-rock of Dannenbaum’s aforementioned theory of attribution, wherein he argues that conduct ought to be attributed to that entity which was best placed to prevent it.181 He identifies training, disciplining and criminal

181 Tom Dannenbaum, ‘Translating the standard’, above n 150, 158–183. See the response to this theory that manifests itself in the form of a debate between Rowe, above n 150, who underlines the difficulties of pursuing Human Rights remedies regarding UN Responsibility and argues that discourse should rather focus on prevention of these beaches, and Paust, above n 150, who submits that any
prosecution as possible preventive mechanisms. In fact, the UN has itself submitted that the retention of these powers enables the TC to exercise a ‘residual control’ over the troops but concludes that such control is irrelevant for the purposes of attribution so long as it does not interfere with UN operational control.182

A couple of matters demand attention at this point. First, the only form of ‘residual control’ referred to by Dannenbaum, which precedes the impugned conduct, is the provision of training. Both disciplining and criminal prosecution succeed the conduct. Thus, by their very nature, while the latter two forms of control may shape future conduct, they cannot prevent the occurrence of the conduct in question. They are mere results of the conduct in question and the fact that they may deter future intransigence is of no relevance to the issue of attribution (which is concerned with the cause of the impugned conduct and not how such conduct is ex post facto dealt with).

The provision of training, however, by virtue of its placement in the sequence of events, has potential to affect the impugned conduct. Unlike in the case of effective control being deduced from an order (which represents positive conduct on the part of the person issuing the order), control through the residual mechanism of training manifests itself through failure, that is, the failure to provide adequate training. It is this failure that Responsibility follows, not the abstract duty to train. In other words, what is relevant for the purposes of attribution in this case is not the abstract duty, but the failure to satisfy that duty. Holding an entity liable exclusively on the basis of this duty (as suggested by Dannenbaum), without investigating if they have satisfied the same, thus violates the very theoretical premises of Responsibility. In such circumstances, the burden shifts to the TC to establish that it had, in fact, provided the necessary training, thereby dispelling the allegation of failure that may otherwise have operated in favour of attribution to the TC.

In addition to this, it must also be noted that the provision of the best training does not completely exclude the possibility of human error. It is, therefore, not correct to assume that training eliminates human error but what can be used is an exercise of exclusion, where possible TC Responsibility for such errors is dispelled on the TC establishing the provision of sufficient attribution scheme should accommodate joint and several Responsibility. See also Natalia Perova, ‘Disentangling “effective control” test for the purpose of attribution of the conduct of UN Peacekeepers to the states and the United Nations’ (2017) 86,Nordic Journal of International Law 30, which supports Dannenbaum’s preventive formulation.

182 UN Doc A/CN.4/637/Add.1, 14 [4].
training. Error in such cases is thus not connected to (the failure to provide) training but would not have manifested had the troops not been on mission at the first place. The UN’s act of placement thus represents the closest institutional link to the error in these circumstances.183 Where the TC establishes the provision of training, conduct falling under the instant category will be attributed to the UN.

There may yet be cases in which the TC fails to establish the provision of adequate training. This theoretically creates three factors that affect the issue of attribution; that is, TC failure to provide training, human error and the act of placement. Human error here is not a free-standing factor. While caused by the lack of training, it also has a secondary line of causation to the act of placement by the UN. Attribution of conduct in these cases is thus determined by the ‘extent of effective control’184 that was exercised by each entity over the impugned conduct, which requires a balance to be drawn between the effect each element had on the conduct.

The relationship between error and (lack of) training is a complicated factual matter, which will have to consider such factors as the gap between the training that is required to be provided and that was administered, the extent to which this shortfall actually contributed to the impugned conduct, and whether there are additional mitigating factors (such as where the impugned conduct, by its nature or gravity, indicates that the same would have taken place even had there been adequate training, such as in cases of malicious conduct). The question must therefore be assessed on a case-by-case basis and it is only where these elements are factored in that the actual weight to be attached to this lever becomes apparent.

Additional considerations similarly inform the weight to be attached to the act of placement. Chief among these is the fact that UN operations are deployed as matters of necessity in the interests of the international community as a whole. As has already been submitted, they represent one of the means by which UN Charter objectives are realised and are not designed to be (and seldom are) reckless forays. Naturally, such operations will not function without the placement of TC troops, something that the UN is obliged to do per the provisions of the Charter and in the absence of a standing UN force. The possibility of misconduct on the part of the troops so placed is thus a necessary risk taken by the UN; the primary form of protection against which is provided by TC training. The significance of the failure to properly

183 Hirsch, above n 53, 94–95. The relevance of the troop transfer to attribution is recognized in Poland’s observations on the ARIO in the Sixth Committee (UN Doc A/C.6/66/SR.20, para.66).
184 See Leck, above n 150, 361, where he mentions this approach as formulated by Giorgio Gaja.
train such troops cannot therefore be underestimated and presumably carries more weight in the extent of effective control equation than the act of placement. These considerations thus result in the dual attribution of conduct in the instant case, a possibility expressly recognised by the ILC. In terms of the degree of attribution, the conduct is likely to be primarily attributed to the TC with possible secondary UN attribution.

In yet other cases, the command chain between the FC and the CC could be interrupted by a TC order. This materialises through a consultation procedure by which CCs seek TC instructions before executing FC orders. The causal effect of the FC order in these cases is almost completely negated and the subsequent TC order, completely or partially, contributes to the illegality (by, for instance, introducing a manoeuvre that violates IHL). Presumably, proper training would have familiarised the CC with the illegality of these actions. Such circumstances thus call on the TC to discharge the burden regarding the provision of adequate training and where this is successfully done, only the act of placement and the intervening TC order remain to be considered for the purposes of attribution. The latter will outweigh the former in such situations, resulting in conduct being attributed to the TC. The result will be exactly the same in cases of failure to provide training, the balance tilting more clearly towards the TC. Assessing the extent to which the intervening order and lack of training contributed to the deviation towards illegality is only of academic significance in this last mentioned instance, because both levers lead to the same actor.

(b) The impugned conduct is consistent with a FC order that was illegal

Attribution of conduct that is consistent with an illegal order of the FC shall be considered next. This category of cases may or may not have an intervening TC order, but the CC and the troops fail to recognise the illegality of the FC order and continue to follow same. The CC (and

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186 ‘Primary’ and ‘secondary’ are not used in this article in a derivative sense. Thus, this article does not treat what is secondary to have been derived from what is primary. It only indicates a matter of degree, primary denoting the higher and secondary, the lower degree of Responsibility.

187 Such as was revealed in Stitching Mothers of Srebrenica v The Netherlands and the United Nations, C/09/295247/ HA ZA 07 – 2973 [n 47] and Mukeshimana–Ngulinzira [n 52].
commanders below him/her) may also take tactical decisions that either contribute to or reduce the illegality of the action ordered by the FC but, in this case, such reductions are insufficient to remove completely, the resultant conduct from the realm of illegality. Similar to what was earlier considered, this failure can be the result of lack of proper training, human error (which is caused by the act of placement where adequate training had been provided) and intervening TC orders, or a combination of these factors.

As was discussed earlier, the exercise in exclusion will here first be applied to a situation that does not have an intervening TC order. If the TC establishes that adequate training was provided, attribution falls to be determined by two factors; that is, the initial FC order and human error that would not have occurred but for the act of placement. Both these factors are caused by the UN and conduct is accordingly attributed to the UN. It is important to note here, though, that the FC order operationalises illegally, the degree of command he/she retains in this case. It therefore acts as the source of the (illegal) tactical decisions that are made at the lower levels, commencing from the CC.

The scheme becomes more complicated where the TC fails to discharge the aforementioned burden. The analysis carried out at 2.7.2.1 (a) into the genesis of human error is equally relevant here; the other contributing factors remaining unchanged. For the reason mentioned in the last paragraph, the weight to be attached to the FC order is greater in this instance when compared to the case of the legal order of the FC. A comparative assessment of the relevant factors results in conduct in such cases likely being attributed primarily to the UN (due to the act of placement as well as the illegality of the FC order) with secondary attribution to the TC. This is because the aforementioned factors likely outweigh the contribution that lack of training makes to tactical decisions (made at and under the level of the CC) that contribute to or maintain the initial illegality in this case.

The myriad becomes further complicated when an intervening TC order is present. In such cases, the TC order does not negatively influence the authority of the illegal FC order; in fact, it maintains or enforces same. This does not, however, reduce the relevance of the fact that what is reinforced by the TC order was already illegal. In cases in which sufficient provision of training is established, the extent of effective control will be determined by the FC order, responsibility for human error deriving from the act of placement and the intervening TC order. In allocating appropriate degrees of weight to the FC and TC orders, note must also here be taken of where these orders are located within the command chain. As was discussed above, the FC order is made at the interface between the operational and tactical levels of command. It therefore sets
an overarching parameter, within which subsequent tactical decisions must be made. Decisions taken by CCs and, indeed, intervening TC orders are located exclusively at the tactical level which, in spite of being taken at a lower level of command, are closer to actual battlefield conduct. The relative weight to be attached to each element, therefore, calls for a difficult analysis to be carried out. However, the presence of a third controlling lever, in the form of the act of placement in the instant case, mitigates this difficulty and points towards Responsibility being primarily attributed to the UN.

The lack of training influences this balance in two respects; that is, by acting as an independent cause as well as being a contributor to human error. This creates three sources that contribute to the ultimate conduct; that is, the FC order, the TC order and human error, created partially by the act of placement and partially by the failure to train. In this case, the relationship between lack of training and error will have to be informed by the relevant sub-tier factors, which were referred to under Part 2.7.2.1 (a). There are, however, further relevant considerations. For example, the fact that the initial (illegal) framework that is set up by the FC order is maintained or enhanced by the TC order, requires an apportioning of weight to be carried out between them. The two sources of error must also be balanced, but the weight attached to lack of training likely outweighs that attached to UN placement in this case. When these elements are balanced, attribution and thus Responsibility, tilts towards the TC, with possible secondary attribution to the UN.

The preceding scenarios cover some of the instances referred to in Dannenbaum’s thesis. The first such category is named ‘Orders that Violate the Lex Specialis – International Humanitarian Law and Peacekeeper’s Duty to Disobey’. As pointed out by Dannenbaum, there exists a positive duty to disobey orders that are manifestly illegal and this position is well established. Dannenbaum’s conclusion of dual attribution is, however, based on preventive

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188 Tom Dannenbaum, ‘Translating the standard’, above n 150, 171.
authority and the means available to the UN and the TC, the former by issuing lawful commands, the latter by providing adequate training. The basis of this formulation is unsound for a couple of reasons. First, UNFCs are, for the purposes of deployment, agents of the UN. They are either UN officers or, at least, individuals that have been fully seconded by their respective states. Their conduct, including the orders they issue, are therefore attributed by the Art 06 criteria (or Art 08 criteria in case of ultra vires conduct) and do not attract the attention of the effective control calculus with which Art 07 is concerned. To follow the preventive theory regarding FC orders is thus to ignore the nature of the relations between the UN and a FC. Second, even though preventive capacity is undoubtedly relevant to the issue of attribution, as discussed above, the same cannot be premised on the abstract duty to train, but rather on a failure to provide training which, in turn, leads to an analysis of human error. The relevance of human error, which dictates conduct in one way or the other, therefore does not find voice in Dannenbaum’s argument.

Conduct considered under the above headings also covers the instances encompassed in Dannenbaum’s fourth category: ‘Orders that Violate Human Rights Law – When UN Orders Lead to Tragic Consequences’. Here, Dannenbaum argues that the absence of an express duty on the part of the troops to disobey orders that, although violating Human Rights, do not direct the commission of war crimes, is tantamount to the TC having no control over conduct in such situations. But it must not be forgotten that the TCs duty to train encompasses educating troops on manifestly illegal orders (which necessitate disobedience) as well as on those that amount to Human Rights and other violations, which may not impose a positive duty of disobedience. The TC therefore attracts Responsibility for failing to provide training that would have enabled the proper identification of orders falling within this latter category as well. Concluding as Dannenbaum does, that TCs lack any control in such situations, is inaccurate.

(c) Attributing failures to act

A complete attribution framework must also encompass failures to act. This is particularly important in light of the due diligence concept which requires those bound to respect Rights to not only desist from engaging in conduct (acts or omissions) that may violate them, but also to prevent or stop violations that will be or are being committed by third parties. The conduct that

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191 Ibid 175.
192 Ibid 176.
directly causes the injury in these cases is attributable to a third party. What the due diligence concept focuses on is the failure to prevent its occurrence and it is this failure that attribution follows. This preventive element is exceedingly relevant to UN missions, due to the Protection of Civilians (PoC) obligations that their mandates confer on them. The substance of the due diligence concept will be discussed in detail in Parts 5.2.3 and 5.2.4 of Chapter 5. The following analysis will, therefore, be limited to how due diligence liability can be attributed within the framework suggested above.

It is worthwhile recalling at this point that an actor’s failure to satisfy expected standards formed part of the preceding discussion as well (in relation to the failure to provide training, for instance). There is a crucial point of divergence, however, between the failures discussed therein and those discussed here. This is that, whereas ‘failure’ was analysed as a component of the secondary rule pertaining to conduct attribution in the former case, the same forms part of the primary rule in the discussion of due diligence. In other words, ‘failure’ is here discussed in terms of an inability to satisfy a behavioural standard that has already been prescribed. As Tzevelekos explains in relation to states,

The state is responsible not for the result towards which it ought to demonstrate due diligence, but for its own negligence. That means negligence is by default attributable to a state, simply because this has an obligation to demonstrate due diligence.

The aforementioned ‘gap’ constituting the ‘wrongful act’ manifests between what is expected, in so far as prevention is concerned on the part of the person potentially liable in due diligence and the baseline of not doing anything or doing something that is insufficient, on which he/she sits. This will be the case, for instance, where a UN force, while being satisfactorily equipped and trained, fails to take measures to prevent or stop the killing of civilians by an armed faction.

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193 Due diligence liability is not concerned with the result, but with the conduct: Genocide Case [n 58] 143,430; Riccardo PisilloMazzeschi ‘Due Diligence’ E responsabilitainternazionale d eglisstiti(Giuffre, 1989) 41–55. Refer also to Velasquez Rodriguez Case (Judgment) (Inter-American Court of Human Rights) (Ser C) No 4 (1988) [172].
194 Tzevelekos, above n150,155.
The effects-based attribution framework discussed above can also be utilised to attribute liability for omissions. While in the case of acts, it follows which out of a number of triggers causes the relevant conduct, in the case of omissions, it adopts the same process to ascertain which trigger/s gave rise to the omission (i.e. the wrongful act). However, unlike in the preceding discussion where the framework followed orders (relevant to the FC, CC and TC levels) and decisions (relevant to the troop level), here, it follows the lack of such orders and decisions. Because troops are technically subject to UN command, the framework commences its analysis from the FC and works its way down the command chain. This makes omissions completely attributable to the UN, where the FC fails to issue an order to take proactive measures where he/she should have. CC and TC orders, and individual troop decisions, become relevant only where they negate a FC order to take proactive measures that was legal (such as in the cases discussed at 2.7.2.1 (a) above). This allows the framework, as with the analysis above, to locate the cause/s of the omission and to allocate appropriate amounts of weight to them.

### 2.7.2.2 Attributing conduct where command discretion existed

This category deals with instances in which the FC grants to the CC, a greater degree of discretion as regards the execution of a command than what was considered above. This can be done by, for instance, prescribing a set of means by which a particular mission is to be accomplished. In spite of the provision of these options, the CC can disregard the choices so provided and choose his/her own means or objectives. The possibility of TC orders contributing to the choices so made could also not be discounted. For purposes of elaboration, I will utilise a hypothetical situation in the following analysis, in which the CC is given two alternatives as regards the means by which a mission could be accomplished.

**(a) Both alternatives being illegal or beyond the geographic or temporal remit of the mandate**

It may be the case that both alternatives provided to a CC are illegal and the latter nonetheless proceeds to follow one of them. Not only is what takes place contained in the initial FC order in these circumstances, same also partially causes the impugned conduct which in turn indicates a degree of control on the part of the UN.

The discussion of Responsibility, however, cannot end here. The CC, as well as the relevant troops, ought to have recognised the illegality of these options. As elaborated earlier, the cause
of this failure may either lie in the TC not properly training the troops or, where this has been done, in human error traceable to the act of placement. The burden of establishing the provision of adequate training shifts to the TC at this point. If adequate training had been provided, conduct is taken to have been caused by the FC order and human error, culminating from the act of placement, conduct thus being attributed to the UN. Failure to discharge this burden attracts dynamics analogous to those informing the case of insufficient training and lack of intervenient TC orders under 2.7.2.1 (b). Attribution is thus informed by the illegal FC order and human error (caused by the lack of training and the act of placement) and will, in turn, lead to dual attribution of conduct. On a balance, conduct will likely be primarily attributed to the UN in such cases, with secondary attribution to the TC.

(b) One alternative being illegal or beyond the geographic and temporal remit of the mandate, and the CC and troops follow that alternative

It may also happen that only one of the FC’s alternatives is illegal, but the CC and the troops follow that alternative. By issuing the initial order, the UN influences the ultimate conduct to an extent, but this is lesser than what was found in the preceding case, due to the availability of the choice between the legal and illegal alternatives. The residual mechanisms of control aspect remain relevant here as well. Where the TC establishes the provision of sufficient training, the ultimate conduct results from the FC order and error emanating from the act of placement, and is attributed to the UN. Cases in which the provision of sufficient training is not established, require error resulting from such failure to be factored into this equation. While conduct will be attributed primarily to the UN with secondary attribution to the TC in this case, the gap between the respective degrees of Responsibility will be lesser than that which existed under the analogous case under 2.7.2.1 (b). This is because the instant FC order contains one legal alternative (thus reducing the impact that the UN has on the conduct), while the CC fails to select the correct alternative (a choice he/she did not have in the analogous case under 2.7.2.1 (b), which increases the impact the TC has on the conduct).

It may also be the case that the troops follow the illegal option in this case, after liaising with the TC. This creates three sources that contribute to the conduct, namely, the FC order, the TC order and human error, resulting partially from the lack of training and partially from the act of placement. The points referred to above, on the levels at which the FC and TC orders are made and their respective proximity to the actual conduct, become relevant to the equation at this point. The presence of the legal option (within the FC order) must also be factored into the
calculus. When this is done, it is likely that more weight would be allocated to the TC order (weight increased due to closer proximity to the conduct, while that of the FC order is decreased due to the presence of the legal option as well as its comparative distance from the conduct). To this must be added the levers, comprising the act of placement and the lack of training, and as discussed above, the latter outweighs the former. Troop conduct in such cases will, therefore, primarily be attributed to the TC with secondary attribution to the UN.

(c) One or both alternatives being illegal or beyond the geographic or temporal remit of the mandate, and the CC follows a course of conduct not falling within either

The course of conduct ultimately followed in this instance is ultra vires the FC order. A chain of command to the FC does not exist, being interrupted by an intervening TC order or human error. The nature of the FC order holds limited or no significance in this case, because its content is completely disregarded. Where there is no TC order, attribution may be informed by (lack of) training and the act of placement. If training had been provided, the conduct will be attributed to the UN, attribution depending exclusively on the act of placement. If the provision of training cannot be established, error resulting from the said failure, as well as the act of placement inform attribution, conduct likely being attributed to the TC. Where intervening orders are found, this balance tilts further towards the TC.

The FC orders concerned in each of the aforementioned cases retained an element of command that could potentially affect the ultimate conduct, the difference was one of degree. But FCs may well issue orders that operate exclusively at the operational level, delegating complete tactical control to the subordinate, that is, the CC. It is the CC and his/her subordinates that take all tactical decisions in such cases, including choosing the specific targets, selecting targeting cycles, and deciding on the means and methods of attack. The fact that the FC order operates in such cases at a pure operational level undoubtedly affects the relative weight it secures in the ‘extent of effective control’ equation. Apart from this distinction, all other factors contributing to troop conduct in these cases remain similar to those discussed at 2.7.2.1 above, thus allowing the same conceptual framework to be utilised.

I will now consider, briefly, the merits of this ‘effects based framework’ of attribution. First, it is capable of taking cognisance of the different levels with which the UN command chain is comprised and the distinct relations by which each actor (such as the FC, TC, CC or a soldier) is linked to the UN. Second, it manages to allocate appropriate degrees of weight to a given
lever, taking note of both its extent as well as the nature of its contribution to the ultimate conduct. It also explains how dual attribution\textsuperscript{195} operationalises in the case of UN conduct. Dual attribution is here first considered as a means of de-bundling Responsibility, which allows Responsibility for a particular course of conduct to be notionally divided and apportioned between two entities according to the relative degrees of control they exercise over the conduct. This results in the direct primary and secondary attribution of the conduct (within the meaning of this chapter) to the respective entities. A distinct advantage of this scheme is its ability to factor into the calculation an actor’s inability to comply with the standards that are expected of him/her, in relation to a control factor (such as, for instance, failure to provide adequate training), effectively operationalising both acts as well as failures to act within one normative matrix.

### 2.9 Conclusion

This chapter commenced with a brief analysis of pre-Charter collective security mechanisms. It then analysed the Charter framework within which UN missions are deployed, noting in particular the prominence that the Charter accords to the maintenance of international peace and security, the Responsibility for the maintenance of which rests with the UNGA and the UNSC. While the former exercises numerous functions in this regard (including the deployment of peace missions with host state consent), exclusive capacity to undertake coercive action rests with the latter.

The chapter thereafter focused on how UN missions are classified. In noting the numerous classifications that have been canvassed, it utilised the PSO nomenclature, which allowed the discussion to take cognisance of the conceptual distinctions between peacekeeping and peace enforcement, while maintaining a unified approach. One such distinction pertains to the levels of force that are used by each type of PSO, peace-enforcement missions being compelled to resort to higher levels in view of how they are required to alter the behaviour of particular parties. The chapter, however, noted that, even where elevated levels of force are

\textsuperscript{195}See Gaja, Second Report, UN Doc A/CN. 4/541 (2 April 2004) 20. See also VassosVassileiou and Others (Nicosia District Court), 13863/2002, 174; M.S.S. v Belgium and Greece App no 30696/09 (ECtHR, 21 January 2011) 223–234, where the concurrent existence of direct attribution of conduct and indirect attribution for failures to prevent was considered by domestic courts and the ECtHR.
used, such uses can and must be distinguished from uses of force in traditional warfare, in light of the objectives being pursued by each type of activity.

This was followed by an analysis of the troop contribution mechanisms of UN missions, and their command and control structures. The lack of a standing military force compels the UN to rely on troop contributions by member states. While theory dictates that these troops be placed at the exclusive disposal of the UN, in practice, this is far from what takes place. TCs continue to influence troop conduct through such mechanisms as caveats and, more importantly, intervening TC orders. This led the chapter to its next issue, that is, how Responsibility for the conduct of UN troops should be attributed, more particularly, how Art 07 ARIO situations should be dealt with. To this end, this chapter analysed the notion of Responsibility, the foundational basis of which, it was argued, was ‘conduct’.

The scheme of attribution proposed by this chapter bases itself on the effect had by a particular trigger on the relevant wrongful act. It recognises that any scheme of attribution has to accommodate, as well as apportion correct degrees of weight, to the numerous factors (whether legitimate or illegitimate) that influence UN troop conduct. These factors cannot be treated the same way by their very nature, some being actions and others omissions. These are the reasons that justify me in arguing that attribution pertaining to Art 07 ARIO situations concerning UN forces should be resolved by a combinational criterion, which operationalises the ‘extent of effective control’ calculus from an ‘effects-based’ perspective. Not only does the compartmentalisation I suggest permit consideration of ‘conduct-triggers’ that vary both in their form as well as impact, it also allows the relative effect had by these triggers to be accurately calculated, while avoiding analytical overlaps. The said scheme ensures that the division of factual power, originally exercised over the impugned act, is reflected in how Responsibility is ultimately located, reducing significantly, the existent deficit between factual and legal culpability in this context. The important role played by due diligence in this context cannot be ignored, and this chapter delineates how and where the same should be posited within the scheme of Responsibility.

It is also useful to remember that this thesis deals only with the conduct of troops partaking in a UN-commanded and UN-executed mission. In this regard, it must further be noted that the thesis limits itself to an analysis of conduct that is attributed exclusively to the UN. Connecting conduct to the responsible actor through attribution is essential to the overall objective of this thesis, because it is only then that the legal standards applicable to that actor
can be deduced. This chapter dealt with identifying the actor. Chapters 3, 4, 5 and 6 analyse what these standards are and what they should be for UN uses of force.
3. The resort to and use of force by the UN: The legal and the moral

3.1 Introduction

Historically, thinking on war has bifurcated between its morality and legality. The legal aspect comprises the legality of the resort to force and the legality of the use of force, while the moral aspect comprises the counterparts of these issues. These two lines of thinking do not agree on all things all the time and what is immoral could, in fact, be legal and vice versa. This has led some\(^1\) to advocate the strict separation between the two components but others, such as Bellamy\(^2\) and Neff,\(^3\) argue that such a separation is artificial – because the premises underlying the current legal regime are themselves based on principles that are fundamental to the moral regime.

The use of force by UN missions can also be discussed in terms of these elements, although the moral aspect has not attracted the attention it deserves. This chapter discusses how these components can be ordered in a way that forms a Chain Motif. It first identifies the legal rules that govern the resort to force by the UN with reference to the charter provisions on which UN deployment is based and will deduce the purposes in pursuance of which the UN resorts to force. The chapter will then assess how these purposes are elaborated upon by other sources, such as enabling resolutions, DPKO and UNSGs reports, and concepts of operation. It then considers the moral arguments on which the resort to force is premised, making reference to the just war theory and its operationalisation. It assesses whether this moral framework can be applied to how the UN resorts to force and, if so, the nature and extent of the amendments such an application will require. These frameworks by reference to which the legality and

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morality of resort to force by the UN is deduced constitute the first and second links of the Chain Motif.

The chapter then moves to the morality of use of force in the case of war and identifies the theoretical premises on which the same is premised. While considering these moral considerations, it also asks whether these ad bellum and in bello elements are linked and, if so, what the nature of this association is. The chapter notes that there are such linkages in the general case of war and that these links are stronger in the case of UN uses of force due to a number of concepts, such as impartiality and the PoC, that function within both the ad bellum and in bello levels. The chapter argues that these linkages require the morality of UN use of force to place added emphasis on certain moral principles and that the in bello morality thus shaped is different to that of traditional warfare. It further submits that this in bello morality of UN use of force, through the consistencies it manufactures with its ad bellum counterpart, becomes a generally accurate reflection of the underlying ad bellum moral principles that have already been influenced by its legal counterparts. The chapter argues, in conclusion, that this Chain Motif opens the door to designing an in bello legal framework, which closes the gap between what UN forces are mandated to do and what they actually do.

3.2 The legality of resort to force by the UN

3.2.1 Legal objectives prescribed by the Charter framework: The first tier

The unprecedented destruction brought about by the Second World War made a case for global cooperation for the maintenance of international peace, which could no longer be denied. This was realised by the formation of the UN, whose constitutive document adopts an extremely cautious approach to when force can be resorted. Whereas the institutional framework underpinning UN use of force was discussed in Chapter 2, this chapter assesses the relevant substantive framework, comprising of Articles 01(1), 02(4), 36, 39, 40–42 and 51.

Article 01(1) of the Charter enumerates the purposes of the UN, one of which is to maintain international peace and security, and to take effective collective measures for the prevention and removal of threats to peace. The Charter does not however define what ‘threats’ are or could be, leaving the definition exclusively to the UNSC. In terms of the use of force by

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4 Charter of the United Nations.
states, Art 02(4) lays down the relevant prohibition by requiring members to refrain from inter alia, the threat or use of force against the territorial integrity or political independence of a state, while Art 51 prescribes the corresponding permission by preserving the right of individual and collective self-defence— a right that can only be exercised until the UNSC takes appropriate measures under the Charter.

What must happen when disputes arise as a result of the violation of these provisions is contained in Chapters VI and VII. Chapter VI is titled ‘The Pacific Settlement of Disputes’; it outlines the UN’s role in the negotiation, mediation, conciliation and judicial, as well as other peaceful means of settling international disputes. Art 36 of Chapter VI has sometimes been argued to provide a basis for some non-intrusive UN missions, such as observers. It must be noted, however, that when compared to Chapter VII, which undoubtedly provides a basis for UN deployments, Chapter VI does not contain any policy framework relevant to the management of a deployment. Even former UNSG Hammarskjold, in locating UN peacekeeping in ‘Chapter six and a half’, notes that such missions fall short of Chapter VII, while going beyond the purely diplomatic means described in Chapter VI.

In comparison to Chapter VI, Chapter VII (titled ‘Actions with Respect to Threats to the Peace, Breaches of the Peace and Acts of Aggression’) lays down an order of mechanisms that may be utilised in the resolution of international disputes. As mentioned in the previous chapter, Art 39 of Chapter VII empowers the UNSC to determine the existence of a threat to or breach of the peace and to make recommendations, or decide on which of the Art 41 or 42 measures are to be taken. The alternative phrasing thus adopted by the Article, in relation to threats to and breaches of the peace, provide it with a broad compass. When peaceful methods of resolution

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6 Of course, disputes can arise in relation to numerous other treaty as well as non-treaty obligations.
7 Gareth Evans, Cooperating for Peace: The Global Agenda for the 1990s and Beyond (St Leonards Press, 1993) 23.
9 Refer to Bruno Simma (ed), The Charter of the United Nations: A Commentary (Oxford University Press, 2002) 608–610, who submits that ‘peace’ in Chapter VII refers to the organised use of force between two states. Accordingly, a civil war does not by itself constitute a breach of the peace, but can constitute a threat to international peace.
fail, Art 41 authorises the UNSC to inter alia impose sanctions and blockades, while Art 42 allows the council to take ‘such action by air, sea or land forces as may be necessary to maintain or restore international peace and security’. Threats to or breaches of the peace and acts of aggression are, therefore, the primary vices that UN missions are expected to rectify by using force. The rectification of aggression has usually been undertaken by coalitions of the willing as exemplified by operation Desert Storm (explained in Part 2.4 of Chapter 2), which fall beyond the remit of this thesis.

UN operations are therefore deployed with the sole purpose of maintaining or restoring international peace and security. The centrality of the role played by ‘peace’ within this conceptual context is thus undeniable. ‘Peace’ is today not limited to a merely negative dimension, comprising the absence of war, but as pointed out in the Agenda for Peace, it also encompasses the need to address the causes of conflict, and to identify and support structures needed to consolidate peace. This broader concept of peace pursued by UN missions is sometimes referred to as a ‘liberal peace’ and requires missions to undertake a multiplicity of functions that are tailored to address each of its elements. These can range from assisting in the distribution of aid supplies to protecting civilians to conducting elections.

Because this thesis assesses the use of force by UN PSOs, what this chapter will focus on are those objectives within this overarching purpose that can be realised or affected through uses of force. While an analysis of the objectives for which all UN missions were or are

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10 Other such measures include the total or partial interruption of economic relations (refer to inter alia SC Res 216 UN Doc S/RES/216 (12 November 1965); SC Res 217, UN Doc S/RES/217 (20 November 1965); SC Res 232, UN Doc S/RES/232 (16 December 1966) in the case of Rhodesia), complete economic boycotts (refer to SC Res 661, UN Doc S/RES/661 (6 August 1990)) in the case of Iraq, and arms embargo and complete air blockade (refer to SC Res 748, UN Doc S/RES/748 (31 March 1992) in the case of Libya).
11 Simma, above n 09, 612.
12 United Nations Secretary-General, ‘An Agenda for Peace: Preventive Diplomacy and Related Matters’, UN Doc A/RES/47/120 (18 December 1992) (‘An Agenda for Peace’).
13 Ibid [15].
14 An Agenda for Peace, UN Doc A/RES/47/120 [16].
16 For a comprehensive analysis of the interdependence of these different functions within missions, refer to Paul Diehl and Daniel Druckman, ‘Multiple Peacekeeping Missions: Analysing Interdependence’ (2018) 25 (1) International Peacekeeping 28.
authorised to use force would have been helpful, the same is impracticable at this point. Instead, this chapter will limit its inquiry to the documentation that underpinned five UN missions, which represent milestones in PSO history. They are the UNEF I, ONUC, the United Nations Operation in Somalia II (UNOSOM II), the UNAMSIL, and MONUSCO.

3.2.2 Detailing the first tier through relevant policy documentation – The second tier

The primary objectives in pursuance of which the UN resorts to force are further detailed by mission documentation. These can be divided into two groups. The first of these include enabling resolutions, Concepts of Operation, and the relevant Secretary-General’s and DPKO reports. They add a second tier to this matrix, which further elaborates the purposes in pursuance of which the UN resorts to force and explain how the Charter framework becomes operationalised. These missions (and indeed all missions) also utilise a second set of documents that describe how force should be used in practice. These include Orders for Opening Fire (OFOF) and ROE which, are more akin to administrative orders. They are non-legal normative standards that indicate how troops should conduct themselves, and in concert with actual UN troop conduct, shape the in bello morality of UN uses of force. While both sets of documents are considered together in this section for structural convenience, it is imperative to note that they contribute to different components of the Chain Motif.

As mentioned above, each of the missions that will be considered hereunder marked watersheds in PSO history. UNEF I was the first UN peacekeeping operation properly so-called, distinguishing the same from earlier supervisory missions such as the United Nations Troop Supervisory Organisation (UNTSO). It represents the original, non-intrusive peace operations thinking; elaborates what a strict adherence to peacekeeping principles would look like; and is located at the ‘peacekeeping’ end of the spectrum. ONUC is relevant due to the sheer intensity of the violence it encountered for an early peace operation. It represents how peace operations thinking, still young and leaning towards extreme passivity, addressed the intensely volatile and violent challenges posed by the Congo situation. UNOSOM II represents another juncture in peace operations history, being the first operation to be authorised under Chapter VII of the

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Charter, which permits coercive actions on the part of the UN, regardless of the presence of host state consent (although Somalia, at this time, did not have a functioning government). It is also pertinent for using relatively aggressive ROE which, as will be elaborated, sometimes legitimised pre-emptive actions. UNAMSIL was deployed into a violent civil conflict that involved massive Human Rights abuses, particularly through attacks on civilians. UNAMSIL introduced the ‘Protection of Civilians’ language into UN mandates for the first time and how the mission operationalised the concept is particularly informative in light of the importance the same has attained since. MONUSCO concludes this section of the chapter. The mission marks a first for the UN, in its Intervention Brigade being authorised to use offensive force against identified groups, in favour of a party to the conflict. It represents a drastic shift from the original peacekeeping principles and is conceptually radical, even when compared to later, more intrusive operations such as UNOSOM II and UNAMSIL. It therefore lies at the extreme ‘peace enforcement’ end of the spectrum.

3.2.2.1 UNEF 1

(a) Background

Egypt nationalised the Suez Canal in July 1956 after the United States withdrew funding for the Aswan dam project. The unease caused thereby provoked the immediate issuance of Resolution 118 by the UNSC, which called for the prompt resolution of the issue in agreement with a number of requirements. It is against this backdrop that Israel mounted an attack on Egypt in October of the same year, and an immediate ultimatum was issued by France and Great Britain for the parties to withdraw from the canal. Egypt refused this ultimatum, which resulted in the bombing of Egyptian targets. After two further UNSC resolutions were vetoed, the matter was transferred to the UNGA to be actioned under the ‘Uniting for Peace’ Resolution. This resulted in UNGA Resolution 997, which requested all parties to withdraw behind the Armistice lines and halt military movements.

\[ \text{Note, however, that the United Nations Integrated Stabilisation Mission in Mali also functions under a mandate that authorises resort to extended degrees of force; SC Res 2100, UN Doc S/2100/2013 (25 April 2013)} \]

[19]


[20]


[21]

GA Res 377 [V], UN Doc A/1775 (3 November 1950).
(b) Organisational framework and use of force

In the midst of these developments, the UNSC directed the Secretary-General to submit a report on the setting-up of an emergency force for the purpose of supervising the cessation of hostilities.\(^23\) In his first report,\(^24\) the Secretary-General suggested that a mission with a UN command, manned by troops from non-permanent member states and UNTSO corps, be established; thereafter, he distributed a second report that provided details on the operation of the mission.\(^25\) According to this second report, the mission was not to have any military objectives, and the same (along with the CONOPS) contained therein were adopted by UNSC Resolution 1001.\(^26\) The force was to be a subsidiary organ of the UN,\(^27\) the personnel being international personnel subject only to the authority of the commander.\(^28\)

Details on how the force functioned are provided by the Summary Study,\(^29\) which was carried out after the conclusion of the operation. According to this study, the force interposed between the Anglo-French and Egyptian forces,\(^30\) and undertook some local functions, temporarily.\(^31\) The force was described as having had a dual role in initially securing and supervising the cease fire and the withdrawal of forces form Egypt, and then in maintaining peaceful conditions along the Armistice Demarcation Line (ADL).\(^32\) The study notes that the force could fire in self-defence,\(^33\) particularly in response to attacks with arms and forceful attempts

\(^{26}\) GA Res 1001 (ES-1) (7 November 1956).
\(^{28}\) Ibid Regs 29, 31, 32.
\(^{29}\) United Nations Secretary-General, Summary Study of the Experience Derived from the Establishment and Operation of the Force, UN Doc A/3943 (9 October 1958) (‘Summary Study’).
\(^{30}\) Ibid [53].
\(^{31}\) Summary Study, UN Doc A/3943 [59].
\(^{32}\) Ibid [10].
\(^{33}\) Ibid [70],[79].
to make it withdraw, but could never take the initiative in the resort to force. The mission would also not hold ground by force and was to be neutral, noting that the authority of the UN group could not be exercised in cooperation or competition with the host government. This limited stance regarding the use of force is best reflected in the crowd control instructions issued by the force commander, which required troops to be guided by the principles of necessity, impartiality, minimum force and good faith. The first use of force instructions, Operations Directive (OD) 10, which was to apply in patrolling the ADL, also reflect this by proscribing firing unless forced upon, *then too only for the troops own protection* (emphasis added).

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34 Ibid [179].
35 Ibid [179].
36 Summary Study, UN Doc A/3943 [15].
37 Ibid [149].
38 Ibid [165].
39 Refer to UNEF Headquarters, Gaza, *Instructions for the Guidance of Troops for Protective Duty Tasks*, Ref. 2131/7(OPS), (1 September 1962), which provides for the following principles (emphasis original):

   (a) Principle of necessity
      (i) There must be justification for each separate act;
      (ii) Action must not be taken in one place with the object of creating an effect in another place;
      (iii) No reprisals or unnecessary physical coercion;
      (iv) Action is preventive and not punitive.
   (b) Principle of minimum force
      No more force may be used than is necessary in the circumstances. This refers to the degree of actual force used and not to the number of troops employed.
   (c) Principle of impartiality
      (i) The soldiers must be impartial;
      (ii) Gifts or favours will never be accepted.
   (d) Principle of good faith
      (i) Nothing can be said to have been done or believed to have been done in good faith, which is done WITHOUT due care and attention.

36 Refer to the following guidelines contained in UNEF Headquarters, Operations Instruction No 10, HQ UNEF 1-0 (OPS) (2 March 1957):

1. In general, UNEF Troops shall NOT fire unless fired upon, and then ONLY for their own protection.
2. Warning shots shall NOT be used during daylight.
3. During darkness warning shots may be fired when unknown persons approach a UNEF position or are observed by a UNEF patrol or observation post, and the persons do not halt when called upon to do so.
These principles are considered to have provided the basis of the self-defence norm for PSOs.
3.2.2.2 ONUC

(a) Background

The Republic of Congo (as it was then called) gained independence from Belgium on 30 June 1960. Upon gaining independence, its administrative structure disintegrated, leading to widespread chaos and violence. While the Force Publique mutinied and commenced killing Europeans, the mineral-rich province of Katanga proclaimed independence from the Congo, with the support of Belgian troops that had now been deployed.\(^{41}\) The issue was brought to the attention of the UNSC through the Art.99 procedure as a matter that, in the Secretary-General’s opinion, could threaten international peace and security. The Secretary-General suggested the deployment of a token group of troops as a temporary measure and the same was approved by UNSC Resolution 143.\(^{42}\)

(b) Organisational framework and use of force

The unabated violence that was engulfing the Congo forced its president to make a request for military assistance to the UN. Upon receiving this request, the UNSC directed the Secretary-General to report on possible options. In his report,\(^{43}\) the UNSG proposed that the requested assistance be afforded but that the force should not be authorised to act beyond self-defence or to take action that would make them a party to the conflict.\(^{44}\) Although ONUC was headed by a SRSG to whom the FC reported, basic policy was primarily formulated by a group of officials, referred to as the ‘Congo Club’, who were handpicked by the Secretary-General.\(^{45}\) These proposals were then adopted by Resolution 143,\(^{46}\) which authorised the Secretary-General ‘to take necessary steps […] to provide the government with such military assistance as may be necessary until[…] the national security forces may be able, to meet fully their tasks’.\(^{47}\)

\(^{42}\) SC Res 143, UN Doc S/4387 (14 July 1960) (‘Resolution 143’).
\(^{43}\) UN SCOR 873rd mtg (13th July 1960).
\(^{44}\) Ibid [26]–[28].
\(^{45}\) Connor O’Brien, To Katanga and Back: A UN Case History (Hutchinson, 1962) 50.
\(^{46}\) Resolution 143, UN Doc S/4387.
\(^{47}\) Ibid [2].
regard, the basic document on the use of force by ONUC\(^{48}\) provides that the force could not take the initiative, but can respond to armed attacks and attempts to use force to make it withdraw from legitimately occupied positions.\(^{49}\)

The situation on the ground continued to deteriorate, however, and it was soon apparent that ONUC required wider powers than were initially conferred.\(^{50}\) In this regard, the Secretary-General points out that Katangan troops had opposed UN entry with organised military opposition, which required military initiative on the part of UN forces.\(^{51}\) While initially, this did not amount to any more than an affirmation of the original noninterventionist stance on the part of the UN,\(^{52}\) continued Katangan attacks led to a radical change in the mandate. This was first implemented through Resolution 161,\(^{53}\) which authorised the UN to ‘take immediately, all appropriate measures to prevent the occurrence of civil war […] including[…] the prevention of clashes, and the use of force, if necessary, in the last resort’\(^{54}\) and thereafter by Resolution 169,\(^{55}\) which authorised the Secretary-General to:

> take vigorous actions, including the use of the requisite measure of force if necessary, for the immediate apprehension, detention pending legal action […] of all foreign military and paramilitary personnel […] not under the United Nations command, and mercenaries.

These conceptual expansions, along with the levels of violence on the ground, effectively made ONUC an example of use of extreme force by the UN, which made it indistinguishable from a standard military campaign.\(^{56}\)


\(^{49}\) Ibid [15].


\(^{51}\) UN SCOR 884th mtg (8 August 1960) [12].

\(^{52}\) SC Res 146, UN Doc S/4426 (9 August 1960) [4].


\(^{54}\) Ibid [1].


\(^{56}\) Trevor Findlay, *The Blue Helmets’ First War? Use of Force by the UN in the Congo 1960–1964* (Canadian Peacekeeping Press, 1999), but refer to Scott Sheeran and Stephanie Chase, *The Intervention Brigade: Legal Issues for the UN in the Democratic Republic of the Congo* (International
The heightened levels of force that ONUC was using are reflected in its use of force instructions. For instance, while OD 1 provides that ‘on no account [are] weapons to be used unless in cases of great and sudden emergency and for the purpose of self-defence’, OD 6 (refer Appendix), after emphasising that ONUC could not take the initiative, lists as an instance in which force can be used, an attempt by force to prevent the mission from carrying out its responsibilities as ordered. This latter permission expanded considerably the ambit of instances in which force could be used by the mission. The directives also used the concept of self-defence in flexible (as exemplified by the interpositional strategies that were permitted in dealing with marauders and armed bands) as well as extended (as exemplified by the inclusion within the use of force in self-defence, the power to disarm and detain those preparing to attack) ways. Notwithstanding these expansions, the degree of force that could be used was carefully limited, with emphasis on the minimum necessary force as guided by a number of principles. It is pertinent to note OD 9 (refer Appendix II) at this juncture. It introduced which

Peace Institute, 2004) 7, who note how the UN never acknowledged that its troops were a party to this conflict.

57 Refer to Ralph Bunche, *Directive on the Provision of Internal Security*, dated 2nd August, which contained the initial guidelines on crowd control and listed four principles that were to be followed in maintaining order:

1) exhaust all possible peaceful means of keeping order before any resort to force,
2) it is the responsibility of the civilian police, either Congolese or UN, to maintain civil order,
3) firing, even in self-defence, was to be resorted to only in self-defence and
4) FIRMNESS, TACT AND HUMOUR ARE ESSENTIAL QUALITIES FOR CONTROLLING CROWDS PEACEFULLY [as printed].


60 The other instances so listed in OD 06 are:

a) attempts by force to compel troops to withdraw from a position occupied under order from their commander, or to infiltrate and envelope such positions as are deemed necessary by their commanders to hold;

b) attempts by force to disarm; and

d) (as printed) violation by force of United Nations’ premises and attempts at arrest or abduction of UN personnel, civil or military.


62 Refer to OD 06 cl 8, which requires that the following principles be followed where firing is resorted to:

a) the object throughout is to deter and not to cause loss of life;

b) it follows that firing should be low, and not to cause loss of life;

c) in the case of mob attack, the leaders should be picked out for deterrent action;

d) firing must at all times, be controlled and not indiscriminate;

e) the officer in charge will keep a record of the number of rounds fired; and

f) firing into the air should be avoided as it may be provocative without strengthening respect for the force.
was at the time, a radical element to the use of force in what seems like an early statement of
the concept of Protection of Civilians: ‘Where feasible, every protection was to be afforded to
unarmed groups subjected by an armed party to acts of violence likely to lead to loss of life.
Interpose using armed force if necessary.’

3.2.2.3 UNOSOM II

(a) Background

A discussion of UNOSOM II can only take place against a backdrop that encompasses the
deployment of the United Nations Operation in Somalia I (UNOSOM I) and UNITAF. The regime
of Somali president General Siad Barre was ousted in 1991. The power vacuum created thereby
resulted in hostilities between numerous armed factions, the largest being those supporting the
interim president, Ali Mahdi Mohamed, and General Mohamed Farah Aidid. A UN team arrived
in Somalia amid the fighting in January 1992 to negotiate a cessation of hostilities, pursuant to
which most of the warring parties expressed their agreement to a cease fire. The UNSG
proposed that this ceasefire should be monitored (through observers) by a UN mission and
that this, together with the provision of protection to humanitarian actors, would constitute the
objectives of the mission.

Resolution 751 thus created UNOSOM I with the above purposes and the first observer
units arrived in Somalia in July 1992. This was followed by a larger security contingent. The
security situation in Somalia, however, continued to worsen despite these developments, as a
result of which the Secretary-General called for recommendations on possible courses of action.
These were enumerated in letter dated 29 November 1992 wherein, inter alia, he referred to

63 Force Commander ONUC, Operations Directive No 08 (February 1961) (‘OD 08’).
64 UN Secretary-General, Report of the Secretary-General on the Situation in Somalia, UN Doc S/23693 (11 March 1992) [40].
65 UN Secretary-General, Report of the Secretary-General on the Situation in Somalia, UN Doc S/23829 (21 April 1992) [20].
66 Ibid [22]–[33].
68 Ibid [7].
an offer that had been made by the United States of America (USA) to lead any humanitarian relief operation that was authorised by the UN.\textsuperscript{70}

The UNSC ultimately approved the US proposal by Resolution 794,\textsuperscript{71} which authorised the use of ‘all necessary means to establish a secure environment for humanitarian relief operations in Somalia’.\textsuperscript{72} UNITAF (commonly referred to as operation ‘Restore Hope’) was thus deployed as a ‘coalition of the willing’, led by the USA but also comprising units from other countries. It proceeded to successfully secure the main relief points, while UNOSOM I took charge of the humanitarian assistance efforts. These changes in the ground situation prompted the UN to assess the future of its presence in Somalia. A return to exclusive UN command was suggested by way of a transition in the Secretary-General’s reports of 19 December 1992,\textsuperscript{73} 26 January 1993\textsuperscript{74} and 3 March 1993.\textsuperscript{75} The last of these reports was particularly significant, because it requested certain capabilities for the proposed UN force, including anti-armour fire, indirect fire, close combat capabilities and air power, presumably in view of how rapidly the situation on the ground could aggravate in Somalia.\textsuperscript{76} As a consequence of these recommendations (particularly those contained in the last report), the UNSC adopted Resolution 814,\textsuperscript{77} creating UNOSOM II, the first UN mission to be authorised under Chapter VII of the Charter.

(b) Organisational framework and use of force

UNOSOM II was headed by a SRSG, retired US Admiral Jonathan Howe, to whom FC UNOSOM II would report directly. The SRSG would report to the UNSG, who would, in turn, report to the UNSC. The USA, however, continued to retain significant influence within this command structure. For instance, a US Quick Reaction Force forming part of the mission, was placed under

\textsuperscript{70} Ibid 5.
\textsuperscript{71} SC Res 794, UN Doc S/RES/794 (3 December 1992).
\textsuperscript{72} Ibid [10].
\textsuperscript{74} United Nations Secretary-General, Progress Report of the Secretary-General, UN Doc S/25168/1993 (26 January 1993).
\textsuperscript{75} United Nations Secretary-General, Further Report of the Secretary-General Submitted in Pursuance of Paragraphs 18 and 19 of Resolution 794 (1992), UN Doc S/25354/1993 (3 March 1993) (‘Further Report’).
\textsuperscript{76} Ibid [77],[88].
the command of US CENTCOM, while a company of US Rangers, which was deployed later, operated under a Special Command based in the USA.\(^{78}\)

UNITAF and UNOSOM II used their own ROEs (refer Appendices III and IV respectively), but it has been suggested that the latter was modelled after the former.\(^{79}\) Also, while it has sometimes been claimed that UNITAF ROE amounted to little more than those of a Chapter VI UN operation,\(^{80}\) they differed from standard UN ROE in many aspects. For instance, while UN ROE would permit the use of deadly force only when troops had been fired upon, UNITAF ROE allowed deadly force against ‘the clear demonstration of hostile intent’, defined as the ‘threat of imminent use of force.’\(^{81}\) Moreover, the use of certain machinery, such as ‘crew served vehicles’ were considered a threat ‘whether or not the crew demonstrated hostile intent.’\(^{82}\)

It has also been submitted that UNOSOM II ROE were based on the concepts of ‘perceived threat and proportional response.’\(^{83}\) In this regard, how they define ‘hostile act’ and ‘hostile intent’ attains pertinence. The ROE define ‘hostile act’ as the use of force against UNOSOM personnel or mission-essential property, or against personnel in an area under UNOSOM responsibility, and ‘hostile intent’ as the threat of imminent use of force against UNOSOM forces or other persons in those areas under the control of UNOSOM.\(^{84}\) The mission’s ability to use deadly force to ‘defend themselves, other UN lives, or persons and areas under their protection against hostile acts or hostile intent’ [emphasis added] and to ‘resist attempts by forceful means to prevent the force from discharging its duties’ conferred by Rule 01,\(^{85}\) is clarified by Rule 04.


\(^{81}\) US Department of the Army, Peace Operations, FM 100-23 (Department of the Army, 1994) 90 (Appendix D). Factors to be considered included:

- (a) Weapons—Are they present? What types?;
- (b) Size of the opposing force.
- (c) If weapons are present, the manner in which they are displayed; that is, are they being aimed? Are the weapons part of a firing position?
- (d) How did the opposing force respond to the US forces?
- (e) How does the force act toward unarmed civilians?
- (f) Other aggressive actions?

\(^{82}\) US Department of the Army, above n81, 93.

\(^{83}\) Gary Anderson, ‘UNOSOM II: Not Failure, not Success’ in Donald Daniel and Bradd Hayes, Beyond Traditional Peacekeeping (Macmillan, 1995) 198.

\(^{84}\) US Department of the Army, above n81, Rule 5.

\(^{85}\) Ibid, Rule 1.
This is done first by requiring ‘clear evidence’ of hostile intent when using deadly force; second, by providing that crew served weapons were to be considered a threat to UNOSOM, whether or not the crew demonstrated a hostile intent; and third, by providing that even armed individuals within areas controlled by UNOSOM were to be considered a threat, whether or not a hostile intent was demonstrated, authorising commanders to act as above. These positions were reinforced subsequently, particularly through fragmentary order 39, which provided that ‘organised armed militias, technical and other crew served vehicles are considered a threat to UNOSOM forces and may be engaged without provocation’ and fragmentary order, dated 8 July 1993, which replaced ‘hostile forces’ with ‘enemy forces’.

3.2.2.4 UNAMSIL

(a) Background

The civil war in the Sierra Leone dated back to 1991, when the Revolutionary United Front (RUF) commenced fighting the government. The fighting continued even after the appointment of a new president, Dr Ahmed Tejan Kabbah, who was subsequently deposed by a military coup that was executed jointly by the national army and the RUF, thus leaving the country in the grip of a military junta. Amid regional and international pressure, the junta signed a peace plan to halt hostilities, to which the deposed president also agreed.

The peace accord, however, could not be implemented, largely due to lack of cooperation by the military junta. This resulted in an attack by Economic Community of West African States Monitoring Group (ECOMOG) forces on the capital Freetown, which deposed the junta, driving the rebel alliance into the countryside. Thereafter in June 1998, the UNSC established the United Nations Observer Mission in Sierra Leone (UNOMSIL) to monitor and advise on efforts to disarm the rebels. Fighting between pro-Kabbah forces and the rebels would continue in the meantime, with the rebels approaching the capital by December 1998 and taking it, only to be again driven out by ECOMOG forces. Negotiations between the parties continued against this

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87 United Nations Secretary-General, ‘Note by Secretary-General’, UN doc S/1994/653 (1 June 1994) [152].
backdrop, ultimately leading to the signing of the Lome agreement,\textsuperscript{89} eventually convincing the UNSC to establish UNAMSIL on 7 February 2000.\textsuperscript{90}

(b) Organisational framework and use of force

UNAMSIL was deployed into a situation that had come to be synonymous with massive Human Rights abuses, particularly against civilians. It was authorised by Resolution 1270 to take necessary action to ensure the security and freedom of movement of its personnel, and to provide protection to civilians under imminent threat of physical violence.\textsuperscript{91} In a subsequent report,\textsuperscript{92} the UNSG notes that the Lome agreement required the UN force to be a neutral force\textsuperscript{93} and that, while UNAMSIL was expected to function with the cooperation of the parties, it had to be able to deter attempts to derail the peace process.\textsuperscript{94} These aspects were then incorporated into the mandate by a revision,\textsuperscript{95} with UNAMSIL now being authorised to:

- provide security at key locations and government buildings, important intersections and major air ports, facilitate free flow of people, goods and humanitarian assistance along specified thoroughfares and provide security in and at all sites of the DDR program and within its capabilities and areas of deployment, to afford protection to civilians under imminent threat of physical violence.\textsuperscript{96}

Violence in the Sierra Leone would, however, continue almost unabated with even UN troops consistently being detained and harassed, and UN positions being overrun.\textsuperscript{97} This forced


\textsuperscript{91}SC Res 1270, UN Doc S/RES/1270/1999 (22 October 1999) [14].


\textsuperscript{93}Ibid [26].

\textsuperscript{94}Ibid [28].


\textsuperscript{96}Ibid.

\textsuperscript{97}United Nations Secretary-General, Fourth Report of the Secretary-General on the United Nations Mission in Sierra Leone, UN Doc S/2000/455 (19 May 2000) [57],[59],[60],[68],[89].
the UNSG to call for capability and authorisation to deter attacks, and to respond decisively to hostile action or intent.98 These calls brought about a further revision to the mandate which, while retaining the civilian protection element, authorised UNAMSIL to deter and, where necessary, decisively counter the threat of RUF attack by responding robustly to any hostile actions or threat of imminent and direct use of force,99 and to patrol the main access routes to the capital actively, in order to dominate ground.100 What is noteworthy here is that a source of threat was now clearly identified (the RUF), with UNAMSIL being authorised to ‘decisively’ counter that threat by responding as appropriate. The class of threats that can be responded to, however, are narrowed down by the *imminent and direct use of force* criteria.

UNAMSIL was the first UN mission to be expressly authorised to act to protect civilians, the wording of its PoC element became a blueprint101 for subsequent UN PoC mandates. It is also the first mission to be authorised to act against an identified group. It must, however, be noted that this element of UNAMSIL’s mandate is not expressly linked to the PoC element (even though a major portion of the atrocities against civilians were being committed by the RUF, thus resulting in UNAMSIL actions being directed at the RUF under the PoC element as well) and is general.

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98 Ibid [85].
99 SC Res 1313, UN Doc S/RES/1313 (2000) [3(b)].
100 Ibid [3(d)].

3.2.2.5 MONUSCO

(a) Background

Tensions in one of the most ethnically divided regions of the world erupted with the 1994 Genocide in Rwanda, during the course of which approximately 800,000 Tutsi and moderate Hutu were killed. Following the genocide, more than one million ethnic Hutus and Tutsis exited Rwanda to neighbouring Zaire and remained in its eastern parts of Zaire (giving rise to what has been referred to as the ‘Great Lakes Refugee Crisis’). Elements of these refugees coalesced with local militia into the Alliance of Democratic Forces for Liberation of Congo under Laurent Kabila, to rebel against the corrupt and inept government of President Mobuto Sese Seko. The rebels took the capital of Zaire, Kinshasa, in May 1997 (just over six months from the beginning of the concerted campaign) and renamed the country the Democratic Republic of Congo.

Another rebellion, this time against the Kabila government, started in 1998. The rebel forces took large swathes of land in the east of the country before the Lusaka ceasefire agreement was signed in 1999. The Second Congo War officially concluded with the Sun City Agreement, but violence and atrocities continue even to the time of writing. The United Nations Organization Mission in the Democratic Republic of Congo (MONUC) was established by Resolution 1279 to plan for the observation of the ceasefire and to disengage the forces. Subsequent resolutions would expand this mandate, and the MONUC would ultimately oversee the conduct of a general election in 2006. The mission was transformed into the United Nations Organization Stabilization Mission in the Democratic Republic of the Congo (MONUSCO) in 2010.

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102 The backgrounds to the First and the Second Congo Wars are exceedingly complex, and only a summarised version can be provided here.
(b) Organisational framework and use of force

MONUSCO was established under Chapter VII of the Charter and was authorised by Resolution 1925 to inter alia:

ensure the effective protection of civilians, including humanitarian personnel and human rights defenders, under imminent threat of physical violence, in particular violence emanating from any of the parties engaged in the conflict, ensure protection of UN personnel, facilities and equipment and support efforts of the government to bring the ongoing military operations against the FDLR, the Lord’s Resistance Army (LRA) and other armed groups, to a completion, in compliance with international humanitarian, human rights and refugee law and the need to protect civilians, including through the support of the FARDC in jointly planned operations.  

This marked the beginning of a number of resolutions that expanded the boundaries within which MONUSCO could use force. These ultimately led to the formation of the FIB, which is tasked with neutralising and disarming armed groups. The real watershed however, in terms of the use of force, is contained in Resolution 2147, which authorised the FIB, without creating a precedent or any prejudice to the agreed principles of peacekeeping, to inter alia:

4(a) Protection of civilians

(i) Ensure [...] effective protection of civilians under threat of physical violence, including through active patrolling, paying particular attention to civilians gathered in displaced and refugee camps, humanitarian personnel and human rights defenders, in the context of violence emerging from any of the parties engaged in conflict, and mitigate risk to civilians before, during and after any military operation.

108 Refer to <https://www.africandefence.net/wp-content/uploads/2013/07/FIB-Infographic_1280.png> for a useful infographic on the FIB.
(ii) Ensure the protection of United Nations personnel, facilities, installations and equipment [...] 

(b) Neutralising armed groups through the Intervention Brigade

In support of the authorities of the DRC [...] and taking full account of the need to protect civilians and mitigate risk before, during and after any military operation, carry out targeted offensive operations through the Intervention Brigade, either unilaterally or jointly with the FARDC, in a robust, highly mobile and versatile manner and in strict compliance with international law, including international humanitarian law [...] in cooperation with the whole of MONUSCO, prevent the expansion of all armed groups, neutralise these groups, and disarm them.

A further revision to this mandate was introduced by Resolution 2211111 which, while repeating the wording above on ensuring protection of UN personnel and neutralisation of armed groups, amends the PoC aspect slightly, authorising MONUSCO to ‘ensure [...] effective protection of civilians under threat of physical violence, including by deterring, preventing and stopping armed groups from inflicting violence on the populations’.112

The FIB commenced its mission on an aggressive posture as reflected in the following quote from its mission commander: ‘We are going to protect the civilians, eliminate and neutralise the threats [...] We are not going to wait for the threat to come here against the civilians.’113 Immediately after the FIBs deployment in July 2013, a 48-hour deadline was issued to all armed groups to disarm.114 When this was not complied with, it commenced offensive operations (at times on its own as well as along with the FARDC) and forced the M23 to end its insurgency by November 2013.115 Thereafter, it focused its attention on other rebel groups such as the Allied Democratic Forces (ADF), the Democratic Forces for the Liberation of Rwanda, the Alliance of Patriots for a Free and Sovereign Congo (APCLS) and the Mai Mai, and has since been

112 Ibid, 9(a).
involved in numerous engagements. Its bases have also been targeted in conventional assault-type operations, such as the 2017 Semuliki attack that was carried out by the ADF, killing 15 UN troops and wounding 53. Engagements between the FADRC and the FIB, and the ADF continue at the time of writing. The intensity of the fighting, in which the FIB was involved in these situations, clearly satisfy the armed conflict threshold and it is now accepted that the FIB has become a party to the relevant conflict by virtue of its own activities as well as through the support it renders to the FARDC.

While the FIB was granted significant authorisation to protect civilians, results in this regard have been mixed with the FIB sometimes being criticised for inaction in the face of atrocities, such as a string of attacks carried out by the ADF against civilians in Beni and surrounding areas. The issue is further complicated by alleged FARDC atrocities.

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Even though the full extent of the FIB’s contribution to lasting peace in Eastern Congo is not yet clear, it has at times been hailed as a considerable success. Some have even advocated that it be used as a blueprint for future missions.\footnote{122} What cannot however be denied is its degree of involvement in the conflict, which potentially makes all MOUSCO military personnel and bases ‘military objectives’ per IHL.\footnote{123}

### 3.2.3 Resort to force objectives: A summary

The documentation analysed above\footnote{124} significantly expands the Charter-based primary purposes in pursuance of which the UN resorts to force. These purposes, as expanded by this second tier, can be summarised as follows:

1. Self Defence, defence of mission personnel, and providing security to humanitarian relief operations
2. Deter and neutralise forceful attempts to make the mission withdraw.\footnote{125}
3. Apprehend and detain, pending legal action, military personnel not under the command of the UN.\footnote{126}
4. Detain or disarm those preparing to attack.\footnote{127}
5. Establish a secure environment for humanitarian relief operations.\footnote{128}


\footnote{123}{Refer to United Nations Secretary-General, *Bulletin on the Observance by United Nations Forces of International Humanitarian Law*, UN Doc ST/SGB/1993/13 (6 August 1999) 1.1, for a contrary position, which argues that IHL is applicable to UN forces for so long ‘as they are actively engaged’ as combatants. This is critiqued in the next chapter at 4.1.1.3 and this thesis submits that IHL’s temporary scope of applicability should remain the same for UN forces as for any other force. What this also means is that objects, such as UN compounds etc, continue to be ‘military objectives’ for so long as the UN is a party to the conflict.

\footnote{124}{In addition to the mission-specific documents referred to above, refer to the UN Master List of Numbered Rules of Engagement in United Nations, *Guidelines for the Development of ROE for UNPKO*, UN Doc MD/FGS/0220.0001 (May 2002) regarding the on-filed use of force.

\footnote{125}{Summary Study, UN Doc A/3943, [179].

\footnote{126}{SC Res 169, UN Doc S/5002 [4].

\footnote{127}{Abi-Saab, above n 61.

\footnote{128}{Summary Study, UN Doc A/3943 [179].}
6. Ensure the security and freedom of movement of its personnel and to provide protection to civilians under imminent threat of physical violence.  

7. Deter and decisively counter the threat of attack (by RUF in this case) by responding robustly to any hostile actions or threat of imminent and direct use of force.  

8. Support efforts of a government to bring ongoing military operations against identified groups to an end.  

9. Carry out targeted offensive operations in support of government authorities against all armed groups, to prevent their expansion and to neutralise and disarm them, taking full account of the need to protect civilians.

Some of these objectives are closer, conceptually as well as practically, to certain others. This allows the objectives in pursuance of which the UN resorts to force to be categorised into three object-based groups, namely, using force in self-defence, defence of mission personnel, and providing security to humanitarian relief operations (category 1); to protect civilians from imminent threats emanating from parties to the conflict (category 2); and to support one party in its military operations against other parties (category 3). Even though self-defence has been listed here as an ‘objective’, it must be noted that same materialises because of deployment and is not a reason for deployment. It is therefore not strictly speaking, identical to the other listed objectives. While this distinction technically takes self-defence out of the remit of ad bellum purposes, this thesis argues that it must form part of this analysis. The reason for this resides in how the ‘effect’ of UN uses of force is gauged. This ‘effect’ cannot be analysed on a piecemeal basis per uses of force that are directed at each objective, but rather on a holistic basis. Each kind of use of force must not damage the overall use of force effect achieved/ sought to be achieved by the mission. Moreover while these outcomes constitute the just cause/s on which the ad bellum morality of resort to force by the UN bases itself, they also prescribe the overall parameters within which UN uses of force must materialise and exemplify the critical link that exists between the two aspects (further analysed at the end of Part 3.4.1). They also explain how the ad bellum morality of resort to force by the UN and that of traditional warfare differ from each other, an issue that is further analysed in the next portion.

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3.3 The morality of resort to force

3.3.1 The case of war

The theory that has received most attention regarding the morality of resort to force is the ‘just war’ tradition. It is viewed by some as a synthesis between Christian doctrine and a natural law version of morality, which employs war as a penal proceeding that sets wrongs right. According to this approach, there is no presumption against war; what there is, however, is a presumption against injustice, which consequently makes the theory revolve around the notion of justice. But some theorists suggest that the presumption against war requires being infused into this traditionalist understanding.

Another version of the theory, espoused principally in the writing of Michael Walzer, bases itself on the concept of Rights (both of states as well as of individuals), which exist in a form of a social contract, giving rise to an ‘evaluative collectivism’. As will be discussed shortly, this rights-based approach premises national defence on the defence of individual rights, a premise that has been criticised by some authors, who argue that states are, in fact, the

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136 For instance, refer to Bryan Hehir, ‘In Defense of Justice’ (2000) 127 (5) Commonweal 32–3: Johnson has often stated his view that the presumption against war is detrimental to the intention of just war tradition and cannot be found its classical authors. I think all would concede the last point and contest the first. [...] The substantive reason for placing a presumptive restraint on war as an instrument of politics is, in my view, entirely necessary. Both the instruments of modern war and the devastation of civilian society which has accompanied most contemporary conflicts provide good reasons to pause (analytically) before legitimating force as an instrument of justice.
preeminent threats to individual rights in the contemporary setting. An extension of this line of opposition leads to humanitarian intervention being justified more conveniently.¹³⁹

This research does not allow a comprehensive analysis of the vast literature on just war theory.¹⁴⁰ While the preceding diminutive analysis puts the theory in context, it may be noted that, regardless of which version of just war is followed, the tradition ascertains the justness of resort to force by reference to a number of (relatively established) criteria. While the content of each individual criterion may vary, they successfully hold the theory together. This chapter next analyses how just war understands each of these components.

### 3.3.1.1 Ascertaining the justness of resort to force

The elements by reference to which the just war theory ascertains the justness of resort to force are just cause, right authority, right intention, reasonable hope of success, last resort and proportionality.¹⁴¹ These elements can be divided into two categories, that is, the deontological elements (just cause, right authority, right intention and last resort) and the consequentialist

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ones (reasonable hope of success and proportionality). The justness or otherwise of a particular resort to force depends on how many elements it violates and their relative importance. Wars can thus be just, even where the threat they seek to avert is less than imminent or where they do not have reasonable prospects of success.

\(\text{a) Deontological elements}\)

The paradigm ‘just cause’ in just war thinking is the defence of aggression or self-defence.\(^{142}\) Thus, according to Walzer, the only just wars are wars of defence and the only injustice that wars can right is aggression.\(^{143}\) In propounding an individualistic approach to just cause, he adduces three reasons that justify a state’s right of defence. In exercising this right, Walzer argues, the state first defends the rights of its citizens; it also defends a common cultural life that its citizens developed over time; and it protects a social contract, which is entered into between the state and the citizens, whereby the latter surrender certain rights to the former for the sake of a better outcome.\(^{144}\) This reasoning has been critiqued by inter alia Rodin,\(^{145}\) who argues, in relation to the first reason, that the Rights affected by aggression are often not important enough to justify a resort to force,\(^{146}\) and by Norman,\(^{147}\) who argues that the contract entered into by and between the state and its citizens only confers internal sovereignty, as opposed to external sovereignty that would protect the former from attacks by other states (particularly where the state itself violates the rights of its citizens).

In spite of the breadth of this dialogue, self-defence (that is of the state) is generally accepted as the paradigm just cause for traditional warfare and is reflected also in the contemporary legal position discussed above. This may be compared with the three categories of objectives in pursuance of which the UN resorts to force. All these categories are clearly different to the just cause on which the resort to force by states is posited. This distinction in turn influences other components such as Right Intention and Proportionality that rely on just cause for their operationalisation. These discrepancies in turn make the overall ad bellum

\(^{143}\) Walzer, above n 137, chap 4.
\(^{144}\) Ibid 158.
\(^{145}\) David Rodin, War and Self-Defense (Clarendon Press, 2002) Chap 6. However, refer to Refer Hurka, above n 141, 53–56, for a convincing critique of this argument.
\(^{146}\) Norman, above n 139, 197.
\(^{147}\) Ibid 196.
calculation pertaining to resort to force by the UN differ significantly from that of traditional warfare.

The next consideration that must be satisfied by a resort to force is right authority. The idea is rooted in Paullian theology and identifies the Prince (at the time) as the minister of god, who was empowered with determining what needed to be done in order to right a wrong. \(^{148}\)

While Johnson tries to maintain that this element has retained its significance, others such as Hurka submit that it has lost most of its importance. \(^{149}\) Hurka’s suggestion is well placed, particularly in light of how the Westphalian idea revolutionised the way in which states and communities were approached and understood. But the concept does hold some practical relevance, particularly in relation to the role of the UN in cases of humanitarian intervention.

A resort to force must also be executed with the right intention. Right intention can either be defined in a subjective (absence of harmful motives whose presence will render any war unjust) \(^{150}\) or objective (focusing on the objects that the resort to force is intended to achieve) \(^{151}\) sense. As understood in this latter sense, this is the Right Authority that is encompassed in Barnes’ notion of ameliorative warfare, \(^{152}\) according to which the justice of going to war depends on its anticipated benefits. This objective formulation focuses on the wrongs whose rectification the war seeks, as well as how that rectification must be achieved. In the words of Clarke, therefore, ‘the criterion of right intention is to be understood as a limitation upon the conduct of war even though it is framed as part of the jus ad bellum’. \(^{153}\)

Last resort is the other deontological condition that a resort to force should satisfy. It requires that all other feasible alternatives are exhausted before war is resorted to, which makes war what Coady calls a ‘genuinely reluctant resort to force’. \(^{154}\) It does contain quite significant

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\(^{149}\) Hurka, above n 141, 35.


parallels with the Human Rights concept of necessity and, if interpreted literally, can make the resort to war impossible.155

(b) Consequentialist elements

The other just war conditions – reasonable hope of success and proportionality – deal with the consequential aspects of the use of force. While the first requires that any resort to force should have a reasonable hope of success, it can realistically be incorporated within the proportionality condition. This is because the destruction caused by any war that had only a minimal hope of succeeding, and in fact fails, outweighs the benefits that it confers. The expected harm is thus greater than the expected benefit, leading to the war being disproportionate at the ad bellum level. Lazar, therefore, calls reasonable hope of success a ‘staging post’ on the way to proportionality.156

Just war proportionality has the potential to take account of numerous factors and can be formulated in a multitude of ways. In a simple form, it weighs the expected goods of a resort to force against its expected harms and, where the former outweighs the latter, war becomes proportionate. This may be compared with comparative proportionality which, having carried out this balancing in relation to each option, compares each net outcome against a baseline of doing nothing. Hurka thus suggests that comparative proportionality, in fact, accommodates last resort considerations as well.157

Proportionality does require, however, the goods and harms that are factored into the calculation to be identified correctly. The difficulty here is that none of these goods or harms have materialised when the assessment is being carried out. What the decision-maker is equipped with, therefore, are expected goods and expected harms. A number of approaches to the identification of these expected goods and harms have been proposed. According to an extreme view proposed by Johnson, all goods and all harms of the resort to force must be weighed.158 But this would mean that even goods that materialise because of the resort to force,

157 Hurka, above n 141, 59–61.
158 James T Johnson, Morality and Contemporary Warfare (Yale University Press, 1999) 27, 28; James T Johnson, Can Modern War Be Just? (Yale University Press, 1984) 3; Lazar, above n 156, 44.
but which do not directly emanate from the same, are also counted. Doing so makes the proportionality assessment faulty which, in turn, makes the overall ad bellum calculation defective.

It may be recalled at this juncture that the whole idea of resorting to force depends on the existence of a just cause. The goods that the war are to achieve must therefore have a nexus to its just cause. This is where Hurka’s division of just cause into sufficient (those causes that, by themselves, justify the resort to force) and contributing (those causes that, by themselves, do not give such permission) causes becomes pertinent. Hurka thus suggests, and this thesis agrees, that the goods to be counted in the proportionality equation can reside in both these types of just causes. In the case of UN uses of force, these goods emanate from the three categories of objectives that were listed above.

The other side of the proportionality equation comprises the harms assessment. The focus here lies not so much on the nexus between the harm and the war (as was the case with the goods) but on whether there are intermediate acts of third parties that reduce the weight to be attached to a particular harm. It thus presupposes that all harms are to be counted, but that the weight to be attached to each depends on how responsible one is for it.

This discussion on the justness of war will not be complete without a reference to how this framework compares with the contemporary legal regime governing resort to force. As mentioned above, some just war thinkers, such as Johnson, submit that the present legal regime prevents the use of force for the purpose of upholding justice, thus distorting the just war premise on waging war. He bases this assertion on three premises, chief among which is the ‘Aggressor–Defender’ model allegedly promoted by the Charter, which presumes that all first uses of force are illegal. Such a conclusion, however, is not supported either by the recent practice of nations or the content of the Charter.

The fundamental components of the just war regime, such as just cause and last resort, are, in fact, well engrained in the Charter. The former is reflected in the permissions for the use of force (i.e. self-defence and breach of international peace and security), while the latter is elaborated by UN practice, whereby numerous appeals are made to potential violators to desist.

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159 Hurka, above n 141, 40.
160 Ibid 41–43.
162 Bellamy, above n 2, 234.
from particular types of conduct before force is ultimately used. Thus Bellamy, with whom this part agrees, argues that the essential difference lies between how legality under the Charter and justness under the just war approach take account of justice. While the former relies on a thinner version, the latter relies on a thicker one. As also pointed out by Bellamy, the UN now resorts to force in a wide array of circumstances (which include humanitarian intervention, defeat, or aggression and prevention of genocide), thus reducing the distance between its justifications for use of force and those of just war thinking. The two lines of thinking are interdependent and while ‘natural law provides guidance as to the basic principles that ought to be applied to the decision to wage war (just cause, right intention etc.) positive law is required to interpret how those principles are adduced to particular historic settings.’ When this nexus between the legality and the morality of resort to force is identified, it provides a platform from which the operationalisation of the theory as relevant to the case of the UN can be analysed. It also connects the first two components of the Chain Motif, the legality and the morality of a given resort to force.

3.3.2 The case of uses of force other than war, including use of force by the UN

The just war approach to war has been applied to uses of force other than ‘war’. For instance, Brunstetter and Braun seek to apply these premises to small scale uses of force, such as surgical strikes and drone attacks, which have become exceedingly common in contemporary practice.

The jus ad vim, as it is referred, proceeds along an evaluative framework that is similar to the jus ad bellum in its structure, but takes account of important peculiarities that characterise the measures it evaluates. The aforementioned authors argue, for instance, that just cause for jus ad vim actions may contain a lesser degree of injuria, as opposed to that which would inform the same criteria under the jus ad bellum. They also suggest that the jus ad bellum probability of success criterion must be adapted to the jus ad vim context by insisting on a ‘probability of

163 ibid 237.
164 ibid 237.
165 ibid 243.
166 ibid 241.
escalation’.\textsuperscript{168} This thesis submits, however, that the jus ad vim calculation can also be carried out within the probability of success criterion envisaged in the jus ad bellum, because small scale uses of force are designed to prevent escalation – success in their case is \textit{non-escalation}.

A further example of the just war criterion being applied to cases other than conventional interstate war is provided by Harries, who considers its utility to ascertaining the justness of revolutionary wars and insurgencies.\textsuperscript{169} He also agrees that some modifications need to be made to the original criterion, if accurate assessments are to be secured.

The just war criteria can similarly be applied to the resort to force by the UN.\textsuperscript{170} This is reflected, for instance, in the text of ‘A More Secure World’, which dictates that the seriousness of the threat, proper purpose, last resort, proportional means and balance of consequences must always be addressed by the UNSC in authorising or endorsing the use of force.\textsuperscript{171} Importantly, however, any such attempt to apply the just war framework to UN uses of force must take note of how the objectives sought to be secured thereby (discussed in Part 3.2) differ from those of warfare. It must also take account of other factors, such as impartiality and the Protection of Civilians that are peculiar to UN uses of force.

\textbf{3.3.2.1 Impartiality}

Activities of peace missions are fundamentally influenced by the ‘peacekeeping trilogy’ and its contemporary understandings. The notions of consent and impartiality were first introduced as peacekeeping principles in a 1957 report\textsuperscript{172} by the then Secretary-General Hammarskjold and have, along with the non-use of force except in self-defence or defence of mandate, become the

\textsuperscript{168} Ibid 98–99.
\textsuperscript{170} High Level Panel on Threats, Challenges and Change, \textit{A More Secure World: Our Shared Responsibility, Report of the High Level UN Panel on Threats, Challenges and Change}, UN Doc A/59/565 (December 2004) [207] (‘A More Secure World’). Refer also to Tony Pfaff, \textit{Peacekeeping and the Just War Tradition} (US Army War College, 2000) for an attempted application of the theory to the resort to force by the UN. Substantial portions of the publication, however, focus on the in bello element.
\textsuperscript{171} Ibid [207].
\textsuperscript{172} United Nations, \textit{Report of the Secretary-General in Pursuance of General Assembly Resolution 1123 (XI)}, UN Doc A/3512 (24 January 1957) (‘1957 Report’).
‘bed rock principles of peacekeeping’. While these principles apply to all UN missions, the fluidity associated with UN functions require that their content be reconsidered so as to avoid or limit, to the greatest extent possible, any conflicts with actual practice. The following discussion will focus on the second of these principles, how it is interpreted today and how this contributes to the peacekeeping ethos.

The Oxford dictionary defines impartiality in a number of ways. According to one such meaning, to be impartial is to ‘not favour one party or one side more than the other’. This definition is similar to how impartiality is referred to in an early Secretary-General’s report, which provides that a mission must be impartial ‘in the sense that it does not serve as a means to force settlement, in the interests of one party, of political conflict or legal issues recognised as controversial’. The Summary Study reiterates this idea by stating that a Force should not ‘be used to enforce any specific political solution of pending problems or to influence the political balance decisive to such a solution’.

These early understandings of impartiality were modelled particularly by the contexts into which UN troops were deployed that did not require high degrees of force to be used by the mission. UNEF 1’s primary responsibility was, for instance, to enter Egyptian territory with its consent and to help maintain quiet during and after the withdrawal of the non-Egyptian forces and to secure compliance with the other terms of resolution dated 2 November 1956. Even under these circumstances, uses of force necessarily had to be against a particular party at a given time, which would theoretically alter the balance of power that would have existed prior to the use of force. To argue that even such uses of force preserved equidistance with all parties, in its purest sense, is therefore not completely accurate.

Most contexts into which UN missions were subsequently deployed called for a digression from this position, which required mandates to authorise acts that would, directly or indirectly, negatively affect one party or the other. Impartiality in this latter sense is, in fact, a result of failures such as Srebrenica and Rwanda, which were blamed primarily on UN inaction, owing to an unquestioned adherence to the aforementioned original version of impartiality. Because this

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173 UN Secretary-General, Identical letters Dated 21 August 2000 from the Secretary-General to the President of the General Assembly and the President of the Security Council, UN Doc A/55/305–S/2000/809 (21 August 2000) [48].
175 1957 Report, UN Doc A/3512 [5(b)].
176 Summary Study, UN Doc A/3943 [167].
177 Second and Final Report, UN Doc A/3302, 12.
original version only dictated what not to do, it was practically useless to the UN in situations of excessive violence and Human Rights abuses. In these situations, what impartiality had to guide was what the UN could do.

This new attitude is reflected in a statement made in 1998 by the then UNSG Kofi Annan: ‘In the face of genocide, there can be no standing aside, no looking away, no neutrality – there are perpetrators and there are victims, there is evil and there is evil’s harvest.’ He extended this line in January 1999 by stating: ‘impartiality does not – and must not – mean neutrality in the face of evil. It means strict and unbiased adherence to the principles of the Charter, nothing more, nothing less.’

This novel approach is perhaps best encapsulated in a later announcement, made by Deputy Secretary-General Frechette:

impartiality is not the same as neutrality. Of course United Nations forces must apply impartially the mandate given them by the Security Council. But that is at all not the same as being neutral between parties that obey that mandate and those that resist it.

These changing attitudes in the higher echelons of the UN were also being echoed in its official documents. For instance, the report of the Independent Inquiry on the Rwandan Genocide provides that ‘traditional neutrality cannot be applied’ in the midst of massive killings or genocide and states that ‘in effect there can be no neutrality in the face of genocide, no impartiality in the face of a campaign to exterminate part of a population’. There was now an obvious conceptual shift in how the term was approached; inaction was no longer to be excused.

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182 Ibid, 48.
This trend is picked up on by the Brahimi report, which provides:

Impartiality for such operations must therefore mean adherence to the principles of the Charter and to the objectives of the mandate that is rooted in those Charter principles. Such neutrality is not the same as equal treatment of all parties in all cases for all time, which can amount to a policy of appeasement.\(^\text{184}\)

The move is completed by the high-level *Principles and Guidelines* (Capstone doctrine),\(^\text{185}\) which defines impartiality as ‘without favour or prejudice to any party’ and argues for a need not to ‘condone actions by the parties that violate the undertakings of the peace process or the international norms and principles that a United Nations peacekeeping operation upholds.’\(^\text{186}\)

According to some commentators,\(^\text{187}\) therefore, ‘neutrality has disappeared from the vocabulary of peacekeeping’.\(^\text{188}\)

On the academic front, Donald provides a useful distinction between neutrality and impartiality in the following terms:

An impartial entity is active, its actions independent of the parties to a conflict, based on a judgment of the situation; it is fair and just in its treatment of the parties while not taking sides. A neutral is much more passive; its limited actions are within restrictions imposed by the belligerents, while its abstention from the conflict is based on ‘an absence of decided views’.\(^\text{189}\)

The natural consequence of this is that the neutral can only act so long as the balance of power is maintained and, as soon as the belligerents’ interests clash with the neutral’s status, the latter can only act where and to the extent that the strongest power permits it.\(^\text{190}\) It cannot, at least at a conceptual level, pre-empt, prevent or stop violations. The second of these causes,

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\(^{186}\) *Capstone Doctrine* 33.


\(^{188}\) Ibid 30.

\(^{189}\) Donald, above n 187, 22.

\(^{189}\) Ibid 23.
that is, the absence of decided views, is alluded to by General Cammaert in the following terms: ‘Being neutral means you stand there and you say ‘Well I have nothing to do with it’, while being impartial means that you stand there, you judge the situation as it is and you take charge.’

While the absence of decision-making capacity would not have frustrated earlier, lesser intrusive deployments (such as UNEF I), such capacity formed an integral part of the conceptual apparatus, at least since the failures of the 1990s. Under this contemporary understanding of impartiality, UN missions are required to make judgements on transgressions and thereafter take appropriate corrective measures, but also be mindful of the overarching requirement to build relationships and trust, sometimes with the transgressors themselves. This feature feeds in to what use of force doctrine should look like for today’s forces and will be returned to later in this chapter.

Moreover, in linking impartiality with the Charter and the mandate, the Brahimi report creates an important baseline, by reference to which the concept could be operationalised and action taken. In this interpretation, mandates are considered to reflect the Charter principles as relevant to the particular situation being considered. They reflect the conditions that must be secured by the mission, identify the factors that obstruct the realisation of these conditions, and explain how these factors are to be dealt with. Any party whose conduct would violate or endanger these conditions would thus become liable to being compelled to abide by them, sometimes through the use of elevated levels of force.

The ramifications of this approach become more pronounced when elements such as MONUSCO’s FIB, which would appear to be the diametric opposite of UNEF 1 on the use of force issue, are considered. As discussed above, resolution 1920 mandated the FIB to ensure the effective protection of civilians and to support the Congolese government in its ongoing military operations against identified rebel groups (such as the FDLR and LRA). This stance is further extended in Resolution 2147, which authorises the FIB to carry out targeted offensive operations to prevent the expansion of all armed groups and neutralise them. The FIB’s mandate, therefore, has built into it the realisation that particular groups are ‘total spoilers’ and that the circumstances do not allow their reformation or participation in the process.

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192 SC Res 1925, UN Doc S/RES/1925 (28 May 2010) [12(a)],[12(h)].
193 SC Res 2147, UN Doc S/RES/2014 (28 March 2014) [4(b)].
bound to this mandate in turn allows the mission to resort to appropriate levels of force against these groups.

Regardless of which of these forms of impartiality (original or extended) one refers to, there is a crucial point that must not be ignored. Impartiality is a compound concept, which is comprised of two parts – first, impartiality within the mandate and second, impartiality in mandate implementation. Both of these aspects are related, but they can be readily disaggregated. The first part expresses the broad overlay of the intention with which the mission is deployed, which takes account of the desired end-state and the obstacles to its realisation. It is part of the right intention component of the ad bellum morality calculation which, as pointed out above, functions on both sides of the divide and is influenced by just cause. This aspect of impartiality then seeps into how the mandate should be implemented or how the mission executes its tasks. In this connection, it may dictate that civilians be protected, security conditions be improved or that particular groups be neutralised and, consequently, forms part of the in bello morality of UN use of force. This ability to bifurcate impartiality between the ad bellum and in bello aspects is echoed in the Brahimi report which, as mentioned above, refers both to ‘adherence to the principles of the Charter’ (relating to the ad bellum question) and ‘equal treatment of all parties’ (informing the in bello question).

This disaggregated nature of the principle is also apparent in Levine’s work on peacekeeping morality. In noting that impartiality ‘varies’ along the dimensions of standards and processes, he suggests:

The question of standards is the question of what rules peacekeepers should be even-handedly observing and or imposing. Responding to violations in an even-handed manner requires that there be some standard to which peacekeepers are comparing parties’ actions.

The question of process is the question of how putative violations of rules are to be judged and appropriate response determined.

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197 Ibid, 106.
While the work then tends to push its overview on peacekeeping morality towards the ‘non-intrusive’ end of the peacekeeping project, the moral discussion that underpins the above quotation is both coherent and logical. This proves that, while it may be convenient to perceive impartiality as a mere ad bellum issue, such a perception only amounts to blurring its true nature.

The ability impartiality has to function thus on both sides of the ad bellum–in bello divide confers on it a powerful potential to ensure consistency between the said aspects in the case of UN uses of force. Once this link is understood, and impartiality read in its proper context, it explains how the ad bellum morality influences the in bello morality in the case of the UN (in other words, how the second link of the Chain Motif influences the third).

3.3.2.2 Protection of civilians

One of the most pertinent outcomes of the protection failures mentioned above has been the crystallisation of the PoC concept. While PoC fell within the UN radar at least as far back as ONUC,\textsuperscript{198} it was Rwanda and Srebrenica that catalysed its insertion into mainstream UN policy. Following the release of the reports\textsuperscript{199} of the respective independent inquires that were conducted, the UN embarked upon an extensive program of thematic activity. This ultimately resulted in the PoC ‘blueprint’, which was included in the UNAMSIL mandate. The conceptual significance of this development is well reflected in the following statement, which was made during the debate into adopting the relevant resolution:

> The protection of civilians under Chapter VII (of the Charter) is a pertinent development in the context of the mandate of a peace operation. This draft resolution is significant in that it introduces a new, fundamental political, legal and moral dimension\textsuperscript{200}[emphasis added].

So noting that PoC adds an additional moral dimension proves crucially important to the ad bellum morality of UN uses of force as it allows PoC to function simply as an independent just

\textsuperscript{198}OD 08, above n 63.

\textsuperscript{199} UN Secretary-General, \textit{Report of the Secretary-General Pursuant to General Assembly Resolution 53/35: The Fall of Srebrenica}, UN Doc A/54/549 (15 November 1999) [49]; Rwanda report, UN Doc S/1999/1259 [50]–[52].

\textsuperscript{200}Security Council Meeting Record, UN Doc S/PV.4054 (22 October 1999).
cause within the ad bellum moral calculation. The following passage from the Brahimi report encapsulates the rationale underpinning PoC lucidly:

Whether or not an obligation to protect civilians is explicit in the mandate of a peacekeeping operation, the Rwandan genocide shows that the United Nations must be prepared to respond to the perception and the expectation of protection created by its very presence\(^\text{201}\).

Of vital importance to this thesis is how passages such as the following have been considered to confer on the UN an obligation to ensure Rights:\(^\text{202}\) According to the Brahimi report peacekeepers ‘who witness violence against civilians should be presumed to be authorised to stop it, within their means, in support of basic United Nations principles.’\(^\text{203}\) The UN continues to prioritise the protection of civilians in a variety of documents that include resolutions pertaining to specific missions,\(^\text{204}\) as well as in its general thematic activity.\(^\text{205}\) The fact that this stance now forms part of mainstream UN thinking is reflected in the text of the Report of the High-level Independent Panel on Peace Operations (HIPPO Report), which provides that peacekeeping principles ‘should never be used as an excuse for failure to protect civilians.’\(^\text{206}\) Moreover, the fact that the Operational Concept on the Protection of Civilians\(^\text{207}\) (PoC-CONOPS) provides guidance on the operationalisation of the concept proves that its relevance (like that of

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\(^\text{206}\) High-Level Independent Panel on Peace Operations, Comprehensive Review of the Whole Question of Peacekeeping Operations in All Their Respects, attached to UN Secretary-General, 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, UN Doc A/70/95 – S/2015/446 (17 June 2015) [125].

impartiality) transcends the ad bellum–in bello divide.\textsuperscript{208}PoC-CONOPS formulates a three-tier framework for the protection of civilians, which comprises:

- **Tier 1:** Protection through political process;
- **Tier 2:** Providing protection from physical violence; and
- **Tier 3:** Establishing a protective environment.

Tier 2 is, in turn, divided into four phases, out of which Phase 3 deals with Response, and provides in the relevant part:

Deployment of police and/or direct military action should be considered as an option, such as the interposition of peacekeepers between a vulnerable population and hostile elements or the use of force as a last resort when the population is under imminent threat of physical violence.

In concluding the discussion on PoC, this part however notes that the concept entails different meanings to different actors (and, indeed, to different components of the same actor). Protection of civilians can simply mean, for instance, acting within the contours set by IHL or achieving benefits through the use of force, which can then be enjoyed by civilians (such as by neutralising an aggressor).\textsuperscript{209}Equally, it can be interpreted as requiring the aggressive use of force to protect civilians.\textsuperscript{210} Moreover, most humanitarian organisations have their own definitions of the term.\textsuperscript{211} Holt and Taylor, therefore, note that ‘the lack of an operational definition and the confusion over concepts of protection undermine operations at the core level’.\textsuperscript{212}

\textsuperscript{208}Security Council Meeting Record S/PV.6531 (10 May 2011) 11. Refer also to Security Council Meeting Record S/PV.6650 (9 November 2011) 19, where France refers to the daily relevance of PoC to UN missions.


\textsuperscript{210}Ibid, 42.

\textsuperscript{211}Oxfam International, *Protection into Practice* (Oxfam, 2005).

\textsuperscript{212}Holt and Taylor, above n120, 212.
3.3.2.3 The responsibility to protect

The Responsibility to Protect (R2P) consists of three pillars: the recognition that it is the responsibility of all states to protect individuals within their jurisdiction from the crimes of genocide, crimes against humanity, war crimes and ethnic cleansing (‘R2P crimes’); the international community’s commitment to assist states to fulfil this responsibility; and the power of the UNSC to authorise the collective use of force in favour of those (at the risk of) being subjected to the said crimes.\(^{213}\) While the principle has now arguably attained the status of an international norm, even its most ardent proponents base it on morality and not legality.\(^{214}\) It should also be noted that pillar three, which is most relevant to interventions carried out within sovereign states, is reserved for the most extreme circumstances. Action under this pillar will be taken only when peaceful means are inadequate and national authorities are manifestly failing to protect their populations from the four R2P crimes. Missions with PoC mandates necessarily have a R2P element built into them. Not only does this inform why the mission is deployed (the ad bellum question) it also informs how the mission should achieve some of its objectives such as the PoC (the in bello question). This dual role of the R2P also enforces the link between the ad bellum and the in bello moralities of the UN use of force.


3.3.2.4 Operationalising the just war theory in the case of resort to force by the UN

This part analyses how the just war theory gets operationalised in the case of resort to force by the UN, highlighting the crucial deviations it makes from its operationalisation in the case of war. The analysis is influenced centrally by the purposes for which the UN resorts to force, which influence at least three components of the just war framework; namely, just cause, proportionality and right intention.

The just cause for resort to force by the UN is the preservation of international peace and security, which is comprised of the sub-tier objectives that were summarised in Part 3.3. These moral justifications are different to the self-defence justification applicable to the resort to force by states under Art 51. Some of its composites, such as the provision of security to humanitarian personnel and the protection of civilians, do not imperatively require, in contra distinction to the case of traditional warfare, that the targets of UN use of force be completely neutralised. Yet other composites, such as the neutralisation of armed groups, are similar to what is pursued in warfare. These intricacies require UN uses of force to be more selective and calibrated, a reality on which Part 3.4 focuses.

Provided that the last resort element has been satisfied, right authority plays a limited role in the process due to how the international order accepts the legitimacy of the UNSC (or exceptionally, of the UNGA). The resort to force must then satisfy the probability of success criterion which, as mentioned above, can be built into the proportionality calculus. The relevant goods and harms have to be identified at this point. The goods to be factored into the proportionality calculation are context-dependent, but emanate from the same use of force objectives that were deduced above. Not only do these indicate the outcomes that UN uses of force must secure, on their flip side, they are the vices that UN troops must prevent or stop. Allowing these vices to continue, therefore, is included in the harms component of the equation. There are also consequential harms, which comprise eventualities that materialise from the use of force, such as the disenfranchisement of the local population; collateral loss of civilian lives; and the elimination of softcore elements of the targeted groups who could, in fact, have been rehabilitated. Factors such as disenfranchisement of the local population and re-integration of softcore elements either do not, or only minimally feature in the proportionality calculation of traditional warfare. Therefore, while the baseline rule relevant to both proportionality calculations is identical (resort to force being justified where goods outweigh the harms) their respective contents are notably different.
Moreover, the tenure of the right intention criteria intimately relates it to just cause, and to its composite objectives. Similar to the case of proportionality, the operationalisation of right intention in the case of the UN makes provision for additional factors such as the re-integration of softcore fighters and securing the greatest possible support from the local population, which it does not have to accommodate (or accommodates to a much lesser extent) in the case of war.

The operationalisation of the just war theory, in the case of UN uses of force, is further influenced by concepts such as impartiality and PoC which, in addition to right intention, function on both sides of the ad bellum–in bello divide. This latter characteristic is endemic to UN uses of force and provides a strong foundation on which its in bello morality could be shaped to reflect the ad bellum counterpart. It is against this backdrop that the discussion now turns to the morality of use of force.

3.4 The morality of use of force

Wars as well as UN PSOs are serviced by troops. But there are, as was discussed, significant disparities between how the ad bellum calculation operationalises in each case. There are also, as will be discussed, equally pertinent disparities in the respective ethos that underlie each activity and, indeed, between the respective in bello moralities that emanate therefrom. In spite of these points of divergence, the in bello morality of war provides a convenient starting point to the analysis of the in bello morality of UN uses of force because both activities are manned by the same people, albeit in different helmets.

3.4.1 The case of war

Theorists have traditionally attempted, in the case of war, to identify a central premise/s around which its in bello morality revolves as deduced from practice and as substantiated by moral

\[^{215}\text{McMahan, above n 133 ; Michael Walzer, Just and Unjust Wars (Basic Books, 4th ed, 2006) Chap 9; Tamar Meisels, ‘In Defense of the Defenseless: The Morality of the Laws of War’ (2012) 60 Political Studies 919. Refer also to Richard Norman, Ethics, Killing and War(Cambridge University Press 1995) 159–206 (who argues that there is no difference between the moral guilt of soldiers and civilians. However, killing civilians shows disrespect to human lives, which is very serious. The distinction between combatant and non-combatant attempts to reduce, as far as possible, the de-humanisation and de-personalisation that are part of war.); George Mavrodes, ‘Conventions and the Morality of War’ (1975) 4 Philosophy and Public Affairs 17 (who submits that there is no moral basis to claim that civilians are innocent when compared to combatants. The basis for distinction lay in the common}\]

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argument. These accounts sometimes also lead to an examination of the extent to which law, in fact, represents these moral commitments.\textsuperscript{216} This part will consider some of these formulations and their critiques, and will assess how these approaches can assist the deduction of the in bello morality of UN uses of force.

One line of argument, propounded among others by Walzer, identifies the default position as the moral prohibition of murder; he submits that the challenge is ‘to explain what justifies the privileging of certain killings in wartime that would otherwise be murder’.\textsuperscript{217} It therefore submits that soldiers lose their immunity by virtue of the threat they pose (the first principle of the war convention) and that, by joining the military, they convert themselves into ‘dangerous men’.\textsuperscript{218} According to Schmitt, each of these individuals become ‘an adversary who intends to negate his/her opponent’s way of life and therefore must be repulsed or fought in order to preserve one’s own form of existence.’\textsuperscript{219}

Their very existence is therefore, an existential threat to the opponent. Even though combatants on both sides are not liable for the war they wage, they are liable for how they wage it, and the argument disconnects the ad bellum completely from the in belli. Their relationship towards one another, therefore, is completely dictated by the nature of that which subsists between the actors to whom they belong. The ‘moral equality’ that this approach confers on all combatants results in it sometimes being referred to as the ‘symmetry thesis’. In its converse, the argument explains why non-combatants retain their immunity; that is, they are not trained to fight and cannot\textsuperscript{220} (the second principle of the war convention).

The symmetry thesis has been criticised on numerous grounds. For instance, Coady finds particular difficulties in justifying how Walzer defines consent on the part of soldiers, and submits that the approach is based on a narrow and unrealistic understanding of political obedience.\textsuperscript{221} He further submits that individual responsibility for governmental policy cannot

\footnotesize{\textsuperscript{216}Miesels, above n, 215.  
\textsuperscript{217}Ibid, 920. See also Michael Walzer, \textit{Just and Unjust Wars} (Basic Books, 1st ed, 1977) 144.  
\textsuperscript{218}Walzer, above n 215, 145.  
\textsuperscript{220}Walzer, above n 215, 43.  
\textsuperscript{221}CAJ Coady, ‘The Leaders and the Led: Problems of Just War Theory’ (1980) 23 (3) \textit{Inquiry} 275, 278–279.}
be dispensed with as easily as Walzer suggests, particularly where the individual (such as a soldier) is responsible for its prosecution.\textsuperscript{222} Yet, the most radical criticism of this approach was levelled by Jeff McMahan in a series of essays,\textsuperscript{223} wherein he submits that the criterion of liability in war should be moral responsibility for posing an \textit{unjust threat} and not merely posing a \textit{threat}.\textsuperscript{224} Accordingly, while just combatants are justified in killing unjust combatants, the latter cannot ever kill the former, at least legitimately. When extended, the argument permits the killing of \textit{liable non-combatants} of the unjust side, and allows \textit{innocent combatants} on the just side to be protected.\textsuperscript{225}

McMahan’s thesis therefore results in the \textit{moral inequality} of combatants and leads Walzer to point out that what it, in fact, reflects is what individual responsibility in war would be like if war were a peacetime activity.\textsuperscript{226} Moreover, McMahan’s thesis requires combatants to not only ascertain whether their targets pose a threat, but also to determine the justness of that threat. Such high standards cannot be expected of combatants in the heat of battle without making war impossible; the morality of war (and not only its legality) must be sensitive to the intricacies of the belligerent scenario to be action-guiding.\textsuperscript{227} Where it loses this nexus and sensitivity, it also loses its relevance.

This does not mean, however, that McMahan’s moral inequality thesis is unhelpful. While it does make linking in bello morality with legality quite difficult, it sheds much-needed light on a number of realities of warfare. Two such realities are particularly relevant to this thesis. The first emanates from how the inequality approach opens the door to realising that there are different levels of moral liability among individuals who belong to the same general category.\textsuperscript{228} For instance, according to McMahan, politicians and other civilians who encourage an unjust cause attain a degree of moral blame that legitimises their being targeted.\textsuperscript{229} This is reflected in

\begin{footnotesize}
\begin{enumerate}
\item Ibid 279–280.
\item McMahan, above n 133 21.
\item McMahan, above n 224 (\textit{Killing in War}) 203–235.
\item Walzer, above n 215, 43.
\item Miesels, above n, 215, 931.
\item Refer to McMahan, above n 224 (\textit{Killing in War}) 159–173, where he distinguishes between combatants who are ‘culpable’ (those who act with full knowledge of the moral and threatening character of their actions), ‘partially excused’ (those who act under some form of duress) and ‘fully excused’ (those who act under overwhelming duress). The difference between the second and third categories emanate from the nature of the duress to which the combatant is subjected.
\item McMahan, above n 136, 27.
\end{enumerate}
\end{footnotesize}
the real world; numerous types of non-combatants, such as politicians, priests, lecturers and activists, actively engage in inciting war (whether just or unjust). Their contribution to the war, therefore, makes them more liable than the truly ‘innocent’ non-combatants, in turn, creating two categories within non-combatants on the unjust side, that is, those who are and are not completely innocent. Such an approach to responsibility undoubtedly reflects the appropriate degree of moral liability but, in turn, leads to other difficulties. For example, accepting this requires conceding that many combatants are also ineffective in war (through fear or inefficiency) and their loss of right to life will not be an appropriate outcome.\textsuperscript{230}

Lazar goes further in this regard and submits that the moral inequality approach must commence from appreciating that killing non-combatants is worse than killing combatants. If this is so, according to Lazar, killing non-liable unjust combatants is not the worst type of killing\textsuperscript{231} which, in turn, makes it easier to justify the killing of just combatants by unjust combatants. This chapter suggests that the argument must stop here for the case for war (as Lazar does) because extending it further detaches it from the reality of war, making war essentially \textit{impossible}. It does not, however, have to stop here for UN uses of force. The principle reason for this lies in how, as pointed out above, the ad bellum morality of UN uses of force is shaped. If there are non-liable unjust combatants, then there must also be ‘liable unjust combatants’. McMahan in fact notices this point when he distinguishes between different types of combatants: the culpable, the partially excused, the fully excused and the non-culpable.\textsuperscript{232} If, as is accepted,\textsuperscript{233} there must be a fit between conduct and liability, then all these types of combatants cannot be subject to the same fate. What determines moral liability here is not the type of threat (just or unjust) but the degree of that threat, as informed inter alia by combat ability and motive. This point is exceedingly relevant to the in bello morality of UN uses of force and will be elaborated upon in the next sections.

This is also a convenient juncture at which the arguments adduced, regarding the extent to which in bello legal rules reflect the in bello morality of war, can be analysed. To a large extent, this analysis depends on where the theorist takes the core of the in bello morality to be located. For instance, if \textit{unjust threat} were the criterion of moral liability, then legal rules (through providing for inter alia status based targeting) will not represent the correct moral position at

\textsuperscript{230}Lazar, above n 156, 47.
\textsuperscript{231}Lazar, above n 156, 48.
\textsuperscript{232}McMahan, above n 224 (\textit{Killing in War}) 159–173.
\textsuperscript{233}Lazar, above n 156.
all. This disparity would not arise if (along the lines suggested by the symmetry thesis) the
criterion of moral liability was considered to be threat, which is inimical to how the IHL targeting
calculus functions. Even this, however, is insufficient to justify all forms of legalised killing that
takes place in war, as exemplified by how civilian collateral damage is permitted by IHL rules.
For this reason, even the most ardent proponents of the symmetry thesis, such as Walzer,
complement it with the notion of double effect, which enumerates that it is less blameworthy
to kill someone where the consequence is merely foreseen than to kill someone intentionally.
Yet other theorists, such as Miesels, seek to explain the link between the moral and legal aspects
by basing the former on a commitment to protect the defenceless. According to her, such an
approach better explains the moral argument for the liability of combatants, and the immunity
of non-combatants and special groups such as prisoners of war and parachutists.

While all of the aforementioned approaches have their merits, what must be accepted is
that the law of war may never completely reflect the morality of war. This is best explained by
Miesels, who refers to the collective nature of war and concludes that the same can only be
properly regulated by reference to ‘broad category based distinctions’ that are over- and under-
inclusive. Perhaps due to similar realisations, Shue suggests that what must be sought is a law
that takes the greatest account of moral considerations in the circumstances. Such an
approach yields, according to Shue, ‘the morally best law’ and eliminates a search for the in bello
morality of war.

It must not be forgotten, however, that morality occupies an extremely important place
within the paradigm of conduct of hostilities. The non-legal normative standards of behaviour it
contains have tremendous capacity to guide action where laws point towards unsatisfactory
outcomes, and Walzer’s Just and Unjust Wars is replete with real-life examples of such
dilemmas. Identifying the morality of war, therefore, carries immense importance, an

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234 Miesels, above n, 215, 931–932. In this regard, refer to M Wakin, ‘Professional Integrity’, in C Ficarrotta (ed), The Leader’s Imperative (Purdue University Press, 2001) 195–203, which provides the following quote made by General Douglas MacArthur in the order confirming the death sentence of Japanese General Tomoyuki Yamashita for the atrocities committed by Japanese soldiers during the occupation of the Philippines:

The soldier, be he friend or foe, is charged with the protection of the weak and unarmed. It is the very essence and reason of his being. When he violates this sacred trust, he not only profanes his entire cult but threatens the fabric of international society.

235 Miesels, above n, 215, 931.


237 Ibid, 89.
importance that is significant enough to desist from attempting to distort it in improbable ways in a perhaps unrealistic quest for a perfect fit with the relevant legal rules.

What may also be noted in this regard is that the moral framework underlying warfare contains ample space to accommodate multiple points of prominence that can co-exist together. In this thesis, these are referred to as ‘Pressure Points’ (PPs), and the moral liability of a combatant and the immunity of non-combatants provide two examples. The conduct of warfare and the moral framework relevant to it do not by default, prevent these PPs operating independently. For instance, an attack on a group of combatants, which is carried out in circumstances that do not risk non-combatant lives, can readily be read through the moral liability PP. This position is also reflected in the applicable legal rules. The moral framework similarly proscribes direct attacks against civilians, by reference to the disengagement or immunity criteria. This position is again reflected in the relevant legal rules. These cases do not require debates over which of the PPs is the real PP, they can and do operate independently, and their accent is substantially mirrored in the applicable legal rules.

The difficult cases are factually designed in ways that bring one PP into contact with another. Attacks on military objectives that cause civilian casualties exemplify this category best. While moral liability here justifies the combatants being eliminated, the disengagement or the immunity PP requires that non-combatants cannot be harmed in such cases. The PPs are thus in conflict and this requires a choice to be made regarding which PP should be given precedence, as well as the extent of such precedence. Such conflicts, therefore, require a conflict resolution mechanism and the same is also provided for by moral thinking in the form of the double effect doctrine mentioned earlier. The doctrine operationalises on the following conditions (as quoted by Walzer):

1. The act is good in itself or at least in different, which means, for our purposes, that it is a legitimate act of war,

2. The direct effect is morally acceptable – the destruction of military supplies, for example, or the killing of enemy soldiers,

3. The intention of the actor is good, that is, he/she aims only at the acceptable effect, the harm is not one of his/her ends, nor is it a means to his/her ends,

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238This is not the same as the conflict of laws resolution mechanisms discussed in Chapter 5.
4. The good effect is sufficiently good to compensate for allowing the harmful effect, it must be justifiable under Sidgwick’s proportionality rule.\(^{239}\)

This allows an act that is directed at good effects to be morally justified, even where it causes harmful effects. This secondary moral position, which reflects an ancillary class of moral premises that come into effect only where PPs conflict, is then echoed in legal language in the form of the IHL proportionality rule. Note however that, even in the case of war, doubts have been expressed on whether double effect is or should be the correct moral basis of proportionality. These doubts find their source in how civilians retain more extensive rights against being killed than do combatants. In addition to Luban\(^{240}\) on the point, Walzer notes: ‘Civilians have a right for something more. And if saving civilian lives means risking soldiers’ lives, then the risk must be accepted. But there is a limit to the risk we require [...] We can only ask soldiers to minimise the dangers they pose.’\(^{241}\)

While the appeal of this argument is apparent, Walzer himself appears to wonder if what it suggests is practical. He thus concludes that civilians only have a right ‘that due care be taken’.\(^{242}\) Closer to the issue being discussed in this chapter, Tripody submits that peacekeepers must be willing to accept higher degrees of risk when making this calculation, an acceptance that is necessitated by how they fall beyond the ‘warrior ethos’ to which normal combatants

\(^{239}\) Walzer, above n 215, 153.

\(^{240}\) Refer to David Luban, ‘Risk Taking and Force Protection’ in Yitzhak Benbaji and Naomi Sussman (eds) Reading Walzer (Routledge, 2013) 277, who submits that adherence to the principle of proportionality may require troops to expose themselves to greater risks, in order to avoid civilian casualties.


\(^{242}\) Ibid, 156. For a criticism of this line of argument, refer to Sheldon Cohen, Arms and Judgment: Law, Morality and the Conduct of War in the Twentieth Century (Boulder CO, Westview Press, 1989) 33, where it is argued:

Innocents have certain moral rights, and it would be immoral for a rifleman who has an infant in his sights to gun the child down. But the rights of innocents are defeasible. If the indiscriminate shelling or bombing of a town is an attack on innocents, then armies are not under a moral obligation, in assaults, not to attack innocents. The rule is, I suggest, that the attacker may, given the presence of innocents in a combat zone, do anything that it would be permissible to do if there were no innocents there – subject to the restrictions entailed by the principle of proportionality... This rules out discriminate (selective) attacks on innocents but allows the indiscriminate shelling or bombing of defended areas containing innocents [...] The rights of innocents are defeasible when honoring those rights would push the soldiers’ risks beyond what it is reasonable to expect any group to endure.
belong. Such a position finds greater consistency with features such as PoC and R2P, which are infused into the ad bellum calculation that underpins UN uses of force.

The content of these moral considerations (i.e. PPs as well as the conflict resolution rules) and the relative values they secure within the moral framework thus become dependent on the nature of the underlying activity (as informed by the end-state it pursues as well as the practicalities of which it must be cognisant). This is why the liability PP in the case of war does (can) not take account of the degree of the threat posed by the target. It also means that the immunity PP can (does) not be cognisant of possible proactive duties in favour of such victims all the time. Moreover, the double effect doctrine is drafted in loose terms, thus allowing substantial discretion to the decision-maker on where the balance between losses ought to be drawn in the case of war.

The second aspect in which McMahan’s approach contributes to our understanding of war relates to a note that was made when concluding Part 3.3.2.4; that is, the link between the ad bellum and in bello aspects of the morality of war. Coady explains this phenomenon in the following terms: ‘The point is that some understanding of how the war is to be waged is integral to the decision to embark upon it, since how it is to be waged conditions what it is that the ruler is proposing.’ Clausewitz’s provides further insight in his treatise ‘On War’, stating that war is a political instrument that must be regarded as an ‘organic whole’. He further asserts that war, therefore, takes its character from the policy that leads to it. Coates puts this even more lucidly: ‘Since the means are the end in the making, a just end cannot be advanced by unjust means.’

What this means is that, once the ad bellum requirements are favourably satisfied, all subsequent uses of force within war must materialise within the overarching parameter they set. This is what it means to have right intention function on both sides of the divide. All acts undertaken during war must, therefore, contribute towards the realisation of the goods

244 Coady, above n 221, 286. A similar approach is found in one of Walzer’s earlier writings, refer to Michael Walzer, ‘Moral Judgment in Time of War’ in R Wasserstrom (ed) War and Morality (Wadsworth, 1970).
246 Ibid, 403.
considered when assessing ad bellum proportionality. The flip side of this is that they also contribute to the removal of the harms that gave rise to the just cause. Furthermore, all of these acts must, to the greatest extent possible, desist from contributing to the harms that were envisaged to result from the prosecution of the war (such as excessive civilian deaths). If these requirements are not satisfied, then what will be waged becomes different to that in respect of which the ad bellum permission was granted. The in bello morality of war, discussed above, tries to ensure to the greatest extent that these overarching objectives are realised. This is also the end state the in bello morality of UN uses of force must seek to achieve.

The foregoing analysis returned a number of conclusions, which it is beneficial to summarise before proceeding to the next part of this chapter. It first ascertained that the legal position underpinning the deployment of UN troops, in fact, provides crucial indicators on the corresponding moral position. The relevant Charter provisions enumerate the objective/s of the resort to force, which factor into the just cause element of the moral calculus. The outcomes that emanate from these objectives inform and form part of the ad bellum proportionality equation. It is noted, however, that the just cause of, as well as the goods to be secured by UN missions, were radically different to their counterparts in war. Second, the deployment of UN troops implies that both the legal and moral criteria for resort to force are satisfied and that these considerations are incorporated into the authorising resolution.

Third, the authorising resolution has built into it right intention calculations, as reflected by that element of impartiality referred to as *impartiality within the mandate*, which indicates inter alia the end-state to be realised and what obstructs their realisation. The mandate also explains how these objectives ought to be achieved and, in doing so, injects the ad bellum accent of the deployment into its in bello aspect through what is referred to as *impartiality in mandate implementation*. This is strengthened by further factors, such as PoC, that function on both sides of the ad bellum—in bello divide, essentially ensuring that *what is being done* reflects *what was approved to be done*. Their function is better described as contributing to the ‘personalisation’ of the in bello morality of UN uses of force to its ad bellum counterpart. *Why* this ‘personalisation’ is needed was also hinted at by the preceding discussion on in bello morality. The next section of this chapter discusses how this personalisation takes place, with reference to each of the objectives of resort to force identified above. The in bello moral standards deduced in this discussion provide non—legal normative standards of behaviour that extend the Chain Motif developed thus far.
3.4.2 Operationalising the in bello morality of UN uses of force

3.4.2.1 Category 1 – Use of force in self-defence, defence of non-military personnel and the provision of security to humanitarian operations

Uses of force that are relevant to category 1 objectives may materialise in a multitude of instances, including but not limited to, attacks on check points, routine patrols and humanitarian convoys. These attacks can be launched either during times of peace or of war. This thesis considers only those attacks that are carried out during armed conflicts to which UN forces have become a party.\textsuperscript{248}

What is common in all instances of category 1 uses of force is the fact that, at the point of attack, UN troops are not militarily engaged with the attacker. Their actions are reactive, being a response to the attacker’s proactive and offensive actions or posture. The moral liability of a combatant in category 1 cases depends, as discussed earlier, on the threat he/she poses. This is where Lazar’s reference to ‘the worst form of killing’ which, in turn, created the possibility of dividing combatants and non-combatants into sub-categories depending on their relative liability, becomes relevant. Accordingly, in the case of non-combatants, there are completely innocent non-combatants and non-combatants, who had become liable to be attacked due to some form of conduct. This also applies to combatants, but it may be prudent to consider their liability on a scalar basis. This spectrum emanates from the reasons for which individuals become members in Organised Armed Groups (OAGs). These reasons may be numerous and can include inter alia, prospects of monetary gain, coercion and subscription to a radical ideology. One end of this spectrum is occupied by combatants who are extremely liable (such as hardcore cadres and leaders of an armed group), and the other by combatants who are least liable (such as coerced fighters and child soldiers).

‘Threat’ in this case therefore not only comprises the physical element but also the underlying mental element. It is only where both these components are considered together that its degree can be accurately estimated. This estimate, in turn, returns the moral liability of the combatant, with which the UN response must match. This careful attitude to the gradation of force is elaborated in the ODs that were used by ONUC, including Ralph Bunche’s Directive (which required all possible peaceful means of keeping order to be exhausted before any resort

\textsuperscript{248}The legal matrix pertaining to the conflict threshold as well as to the circumstances under which actors become part thereof will be discussed in detail in the next chapter.
to force)\textsuperscript{249} and OD 6 (which required that firing be low, be controlled and that leaders be picked out for deterrent action)\textsuperscript{250} which prescribe non legal normative standards of behaviour.

There are a number of factors that justify this tempered attitude and these, in turn, emanate from the primary objective of UN deployment. First, overuse of force runs counter to the nature of UN deployment; troops are not deployed in most cases to annihilate an enemy. UN forces, therefore, do not relate themselves with the Schmittian position, considering the use of force only as a necessary means to an end, not as an end itself. Indeed, according to Tripodi, the core value of a peacekeeping code should be ‘respect for human life’\textsuperscript{251}. The Schmittian position, by its very nature, permits serious incursions into this value where combatants are concerned. The lack of a Schmittian enmity might be mutual in some of these cases, such as where a coerced combatant attacks UN troops. It might be unilateral in other cases, such as in attacks carried out by voluntarily conscripted combatants or civilians directly participating in hostilities (both categories can endure a Schmittian enmity). But, in all these cases, UN forces do not align themselves with the Schmittian position. They seriously consider, even where they are compelled to use force, the possibility of building relationships with the targets of such use. As pointed out by Levine, UN troops are often required to ‘consider hostile factions as potential members of a cooperative community in which peace sustains’\textsuperscript{252}.

Second, the success of a peace process depends on the degree of support that it can garner from the local community. Instances of ‘overkill’ will likely damage prospective bases of support, particularly where the targets of force hold ethno-religious links to the population. A further aspect of this in bello morality centres on how these ‘threats’ are to be received by UN forces. First, they are threats that are directed at UN personnel in their personal capacity. This is relevant to the ‘force protection’ element of the equation and in this regard, the UN, as the ‘employer’, owes a duty of protection towards UN personnel, the same way that a state at war owes such a duty to its soldiers. Second, these threats also threaten the underlying peace processes. Because UN forces are deployed towards the realisation of peace, they become morally compelled to restore the status quo through taking action that is appropriate to the

\textsuperscript{249}Bunche, above n 57.
\textsuperscript{250}OD 6, above n 60.
\textsuperscript{251}Paolo Tripodi, above n 243, 219.
\textsuperscript{252}Levine, above n 196, 44.
transgression. Such an attitude is also consistent with identifying the peace process, as the reference point by relation to which impartiality is operationalised.\textsuperscript{253}

A further factor that is relevant to this discussion emanates from whether and the extent to which the attitude of the OAG transcends on its fighters. In this regard, a point of reference is provided by groups that have been excluded from the (peace) processes underlying the UN deployment. Such groups are usually referred to as ‘total spoilers’ who, by their attitude and the ensuing conduct, pose immutable threats to the peace process. The corresponding position within war becomes informative at this point and considers the attitude of the party to which a combatant belongs to completely transcend on the combatant. While some authors correctly point out that some combatants contribute almost nothing to the war – which should technically eliminate most of their liability\textsuperscript{254} – this is usually outweighed by other practical considerations subsisting within warfare, which require all combatants to be considered equally liable. UN uses of force, unlike in the case of war, cannot agree to an idea of the moral attitude of the group completely transcending on all its combatants. All of the reasons that were adduced above, in support of the gradation of liability, apply equally against presuming such a complete transcendence. Here, particular mention must be made of coerced fighters and child soldiers, and this relates to how consent (derived from membership) is traditionally considered to act as a waiver of immunity.\textsuperscript{255} Such a waiver will only be valid if the underlying consent is genuine and informed, and this is not so in either of these cases. While the first group’s consent has been coerced, the second cannot consent at all.

It must also be noted that the immunity PP applies in addition to the foregoing where, in category 1 cases, UN troops use force to protect humanitarian workers or convoys. While these workers have accepted a degree of risk (an acceptance that is not justified by a notion of membership but by one of employment), the fact remains that they remain defenceless at the point of attack. Even though, under this category, the immunity PP does not benefit from elements such as expectation and R2P (that are pertinent to category 2 cases), the vulnerability of the targets it concerns makes it relevant to the in bello morality calculation of these cases.

\textsuperscript{253} Refer to Levine, above n 196, Chap 4, particularly 129.
\textsuperscript{254} Lazar, above n 156, 47. Also refer to McMahan’s arguments referred to earlier on this point.
\textsuperscript{255} Lazar, above n 156, 49.
The foregoing discussion attempted to shed light on how particular PPs must be interpreted and how they shape the in bello morality of UN uses of force that are pursued under category 01. These may be summarised as follows:

1. The moral liability PP as informed by such considerations as ‘threat’, transcendence of attitude, the lack of a Schmittian enmity on the part of (at least) the UN forces, and the damage these attacks cause to the underlying (peace) process as relevant to the principle of impartiality;
2. The force protection PP; and
3. Where relevant, the immunity PP.

### 3.4.2.2 Category 2 – Protecting civilians from imminent threats emanating from parties to the conflict

Uses of force that pursue category 02 objectives deal with instances in which civilians are being attacked or threatened with violence. They essentially concern situations in which power is distributed unequally, thus allowing the party that is more powerful to exert itself on another, through threat or violence. There is, therefore, an aggressor and a victim, the former causing the threat and the latter receiving it. The threats with which this category is concerned are not, at least at their inception, directed towards the UN or its troops. How should the in bello morality of UN uses of force be operationalised such circumstances?

A useful starting point to the discussion is provided by Walzer’s rationalisation of immunity from attack in the case of war. Such immunity, according to Walzer, is based on military disengagement, in the targets not being ‘engaged in the business of war’.\(^{256}\) A further, deeper reason for the prohibition on attacking non-combatants is provided by Shue, according to whom there is a ‘primitive moral prohibition on attacks upon the defenceless’.\(^{257}\) But while these arguments explain why non-combatants should not be attacked, neither indicate what a third party ought to do nor what the moral basis of such proactive conduct should be.

\(^{256}\) Walzer, above n 215, 43.

Such measures were exactly what the protection failures of the ‘90s called for, which required the protection of civilians to be considered extensively in the ad bellum considerations underpinning UN deployments. As pointed out above, this was achieved by incorporating PoC considerations into the ad bellum proportionality assessment. Thenceforth, protection of civilians was a ‘good’ pursued by the deployment, which also had an operational element that made it function on both sides of the ad bellum—in bello divide.

The in bello operationalisation of PoC is catered for, to a significant extent, by the immunity PP referred to above. While its roots are to be found in the PoC concept, its content is strengthened by the expectations of security created by deployment. The expectation of protection entertained by local populations provides impetus for the formation of a moral duty to take proactive action. It is further re-enforced by the ‘last opportunity rule’, according to which those who have the last opportunity to avert a danger/wrong is also morally wrong.\textsuperscript{258} How the UN Infantry Battalion Manual defines ‘imminent threat’ is also relevant to this discussion. Accordingly,

A threat of violence against a civilian is considered ‘imminent’ from the time it is defined as a threat, until such a time the mission can determine that the threat no longer exists. Peacekeepers with a PoC mandate are authorised to use force in any circumstance in which they believe that a threat of violence against civilians exists.\textsuperscript{259}

When taken together, this matrix attaches an intensity to the immunity PP, which is far greater than that which attaches to same in the case of war. In consequence, the PP compels its holder not only to desist from harmful conduct, but also to take proactive measures when civilians are endangered.

Moreover, an abject failure to use force in appropriate degrees at appropriate times can readily cause disillusionment among the civilian population. The disillusionment thus caused must be put into perspective in view of the nature of the situations in which UN troops are called upon to act. These situations invariably represent complete or partial state failure, where state apparatus in place to protect civilians is either non-existent or extremely weak. Moreover, OAGs

\textsuperscript{258} Robert Goodin, Protecting the Vulnerable: A Reanalysis of our Social Responsibilities (University of Chicago Press, 1985) 129.

often attack those civilians or communities they suspect of collaborating with the UN or the government.\textsuperscript{260} The use/non-use of force must therefore not negatively affect civilian opinion, their loyalties towards the government/the UN, or damage their willingness to engage in the underlying processes. In actual fact, both the OAGs and the UN are attempting to manipulate civilian opinion in these cases, albeit in divergent ways and by different means.

These consequential considerations further strengthen the argument made above. While, according to Miesels, the moral rules underpinning conduct in war are grounded in the ‘defence of the defenceless’, the same at least provides one of the main PPs, around which the in bello morality of uses of force that pursue category 2 objectives must revolve.

The liability PP also applies to category 2 cases. Attacks on civilians only threaten their targets, and this threat does not usually directly concern a third party such as the UN. But these are, according to Lazar, the ‘most seriously wrongful kind of killing’.\textsuperscript{261} Moreover, the fact that attacks against civilians was considered centrally in the related ad bellum calculation, morally prohibits UN troops from ignoring the liability emanating from a threat directed at a third party. On the contrary, it requires that such threats confer at least some liability to be attacked. The moral culpability of the attacker in these cases is further impacted by the threats that such attacks pose to the underlying processes, which are intended to benefit the very targets of attack. It must, however, again be assessed in light of the physical as well as the mental elements of liability, which were discussed under category 1.

As in category 1 uses, UN forces must also be mindful of the racial, cultural, religious or other dynamics of the conflict, and ensure that force is used in ways that do not disenfranchise those communities to which their targets belong from the process. Factors affecting the in bello moral calculation in category 2 cases can thus be summarised as follows:

\begin{enumerate}
\item The immunity PP, as informed by such factors as expectations of protection;
\item The liability PP as deduced under category 1, but informed additionally by the nature of the conduct and the threat posed to the underlying processes;
\item How uses of force will affect civilian and combatant opinion towards the peace process; and
\end{enumerate}


\textsuperscript{261} Lazar, above n 156, 48.
4. The force protection PP.

3.4.2.3 Category 3 – Use of force in support of one party in its military operations against other parties and in carrying out targeted offensive operations against a particular group, either unilaterally or jointly

This third category lies at the extreme end of uses of force by the UN, bordering on uses of force in traditional warfare. Only one UN mission, MONUSCO, has thus far been authorised to use force in this way and its carrying-out of targeted offensive operations is ‘without creating a precedent or any prejudice to the agreed principles of peacekeeping’.262

Resolution 1925 authorises MONUSCO in this regard to:

(h) Support the efforts of the Government of the Democratic Republic of the Congo to bring the ongoing military operations against the FDLR, the Lord’s Resistance Army (LRA) and other armed groups, to a completion, in compliance with international humanitarian, human rights and refugee law and the need to protect civilians, including through the support of the FARDC in jointly planned operations, as set out in paragraphs 21, 22, 23 and 32 of resolution 1906 (2009).263

The pertinent portions of Resolution 1906, referred to above, provide that the cooperation with the government of Congo be premised on the protection of civilians as a priority264 and then be with a view to disarming armed groups,265 holding ground in order to ensure protection of civilians266 and helping the extension of governmental authority.267

The PPs identified above in relation to uses of force that concern categories 1 and 2 are equally applicable to category 3 actions, but a number of further matters require mention at this point. The first relates the liability PP to where the OAG, as an actor, is located within the peace process. An OAG can either lie at the centre or the fringes of the process, and their location is influenced by such matters as their military strength, the extent to which they attempt to spoil

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262 MINUSMA 2164 13(a)1 – deter threats and take active steps to prevent return of armed groups.
263 SC Res 1925, UN Doc S/RES/1925 (2010) [12(c)].
265 Ibid [21(a)].
266 Ibid [21(b)].
267 Ibid [21(c)].
the process and the demography of their membership. Where an OAG impedes and damages the centre of the process (or its central tenets), it tends to become excluded from the same, being qualified as a total spoiler. The Goma peace negotiations, for instance, issued an *Acte d’Engagement* in 2009, which was signed by armed groups that were active in the Eastern DRC. The FDLR was not a signatory to the *Acte*—they were clearly a threat to the process, a status that had accrued by reason of their conduct as well as the nature of their demands (which included an inter-Rwandan dialogue between the formerly genocidal opposition and the Rwandan government). Because MONUCs mandate was bound to the peace process, the FDLR accordingly became a ‘total spoiler’.

But the discussion on the transcendence of attitude between belligerent and combatant, carried out in relation to category 1 action, remains equally relevant here. This is particularly pertinent in view of how Resolutions 1906 and 2147 confer on the mission a de facto allegiance in favour of the government of the DRC. This de facto allegiance prima facie permits UN troops to completely destroy the total spoilers, which may also be the preference of the government. As discussed above, however, all the fighters belonging to such OAGs do not hold identical degrees of moral liability. UN forces, therefore, have to find means of calibrating the levels of force, even in these category 3 cases.

Identifying *what* is being targeted for elimination is particularly helpful in this regard. The mandate or the processes do not make individual members of the OAG enemies. What is sought to be eliminated is the OAG and not its members. While it may be convenient to conclude that the most efficient way to eliminate the group is to eliminate its membership, such an approach completely ignores the moral liability PP. Thus, who must be eliminated depends on how closely they are related to and how central their contribution is to the OAG. The radical, immutable and damaging ideology that personifies the OAG is usually shared by only the leadership of the OAG or its hardcore cadres. Such a realisation provides moral justification for targeting such types of combatants with elevated levels of force along the lines used on an adversary in war. The enmity here does not strictly subsist between the targets and the UN troops, although this moral reality has limited practical value on the ground. The relationship subsisting between these parties is similar to that which subsists between combatants in warfare. The only difference is that, whereas in warfare, this enmity emanates from that which is retained between political

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communities, in UN uses of force the same emanates from that which the OAG holds towards the peace process.

This does not however mean that fighters who fall beyond this category can never be the subject of elevated levels of force. Indeed, the threat criteria permits the use of such force even on low-ranking members where necessary, the exercise is one of balancing. It is only where these considerations are incorporated to the liability PP, that the same will return an accurate estimate of the morally required use of force. Such an approach also provides further options in regard to dealing with the OAG. The neutralisation of the ‘core’ of the OAG can cause it to splinter into weaker groups that are more amenable to the process. It can similarly create space for a more moderate leadership to take the group over. Both eventualities will ideally entail a lesser number of combatant as well as civilian casualties, and are more compatible with the underlying ad bellum calculus.

The immunity PP continues to function in these cases as discussed above. The ethno-religious lines, along which conflict is divided, attains pertinence at this point due to the tendencies that uses of force create towards disenfranchising portions of populations. Conversely, failing to use force when required can readily lead to the victims (as well as those portions of the population to which they belong) becoming disillusioned. This is a thin tightrope that UN troops are required to walk and uses of force must take account of all of these factors, if they are to contribute to the goods identified in the ad bellum calculation. What the moral calculus does in each of these cases is that it inserts the possible outcomes of use of force against the goods and vices that informed the initial ad bellum proportionality calculation.

Factors affecting the in bello moral calculation in category 3 cases can thus be summarised as follows:

1. The liability PP as deduced in categories 1 and 2, but informed additionally by the (possible) latent threat posed by combatants to the process as well as to the possibility of integrating OAGs within the process;
2. The immunity PP as deduced for category 2 uses of force;
3. How uses of force will affect civilian and combatant opinions towards the peace process; and
4. The force protection PP.
The preceding section deuced particular factors that shape the in bello morality of UN uses of force that relate to each category. It submits that these factors can be viewed either as PPs, elements that contribute to PPs and conflict resolution mechanisms. While each category of use of force permits this general matrix to be drawn up, the emphasis and relative emphasis that each factor retains is situation specific, and can thus differ between two uses of force falling within the same category.

3.5 Conclusion

This chapter commenced by noting how the resort to force, as well as the use of force, could be considered from a moral as well as a legal perspective. It then identified the legal purposes for which the UN may use force by reference to the relevant Charter provisions and thereafter carried out a comprehensive analysis of the policy documentation that underpinned five UN missions that are particularly prominent in UN peacekeeping history which, detailed a second tier of objectives that UN uses of force were required/anticipated to secure.

The chapter then moved to the moral aspect of the resort to force and analysed the composite elements of the just war tradition and how they operationalised. In this regard, it noted that this moral calculus can also be applied to other activities, including the resort to force by the UN. The chapter concludes, however, that certain elements of the just war theory – such as just cause, right intention and proportionality – need to be amended per the purposes and objectives that the UN pursues through recourse to force. A similar analysis was carried out in regard to the in bello moral calculation, but the focus here was on the moral premises on which the same hinged. This section thereafter noted that the in bello morality was better approached through a ‘Pressure Point’ approach, which was complemented by principles such as Double Effect which operationalised where the relevant factual matrix gave rise to collisions between PPs.

The chapter then analysed how certain ad bellum composites, such as proportionality and right intention, transcend into the in bello domain. The discussion noted that there are further elements, such as impartiality and the protection of civilians, which are peculiar to UN uses of force, that function on both sides of this ad bellum–in bello divide. What this means, the chapter argues, is that the ad bellum morality of a given activity ‘shapes’ its in bello counterpart in very distinctive ways by dictating the emphasis and relevant emphasis that is placed on the latter’s constituent’s elements.
The chapter then moved to how this in bello morality of UN use of force gets operationalised in the three object-based categories that were distilled in Part 3.2.3. It achieves this through moral arguments that assess how the aforementioned PPs are moulded in view of the ad bellum justifications for deployment, as well as the practice of the UN, both on and off field. This analysis returned a number of elements that shaped the in bello morality of UN use of force. These elements are:

1. The liability pressure point, as informed by factors such as physical threat, the mental attitude of the combatant, the nature of the relevant conduct, the possibility of re-integration and the latent threat that the combatant poses to the peace process;
2. The immunity pressure point as informed by factors such as the expectations of protection that deployment creates in civilians and the moral duty to take action created, in particular, by the PoC component of the ad bellum calculus;
3. The force protection responsibility imposed on the UN; and
4. The possibility of securing the greatest possible cooperation with or participation in the underlying process, regarding how uses of force impact civilian attitudes along ethno-religious or other lines.

An in bello morality of UN use of force thus shaped provides non-legal normative standards of behaviour that guide action in particular situations. These standards are strategically placed in the relevant conceptual and regulatory matrix, bordering on one side, the relevant ad bellum morality (which in turn reflects the ad bellum legality) and on the other, the applicable in bello legal rules. This reality must be supplemented by an understanding of how legal rules that regulate a given course of conduct shape themselves after the moral tenure underlying such conduct, with a crucial leeway towards the realities of a given situation. As has been referred to earlier, this is the case with the IHL rules that regulate conduct during warfare. It therefore becomes pertinent to ascertain whether IHL agrees with these truisms in the case of UN uses of force and which, if any, amendments need to be made to the regulatory matrix in this respect. These issues will be analysed in Chapters 4, 5 and 6.
4. A normative framework for UN uses of force: The applicability of the candidate regimes

4.1 Introduction

The previous chapter analysed the first three links of the Chain Motif with which this thesis analyses the issue of regulating UN uses of force. These were the legal permissions under which and the legal objectives for which the UN can resort to force, the ad bellum morality of resort to force by the UN, and the in bello morality of the use of force by the UN. The chapter analysed how the first of these links influences the second, and how the second was connected to the third. It concluded that the morality of a particular use of force is shaped after its ad bellum morality, and defined the in bello morality of UN uses of force with reference to the ‘Pressure Point’ system.

This chapter will commence the analysis of the last link of this chain –the legal matrix by reference to which the legality of UN uses of force may be regulated. It will identify the forms of law (i.e. treaty or customary law) as well as the branches of law (IHL and IHRL) that could be utilised in this endeavour. It will then discuss how different rules emanating from the aforementioned branches become applicable to UN uses of force by analysing how best to interpret the respective thresholds of applicability; effective control and the intensity of hostilities. The chapter analyses how thresholds such as effective control relate to other standards that are relevant to this thesis such as the attribution threshold that was discussed in chapter 2. It also pays particular attention to how IHL becomes applicable to UN forces that are engaged as belligerents in light of instruments such as the UN Safety Convention, which echo the traditional noninterventionist stance of UN PSOs. This chapter notes, in conclusion, that IHRL can, in principle, apply to UN uses of force that take place in settings that satisfy the conflict threshold.

4.2 Identifying the regulatory candidates

Art 38 of the Statue of the International Court of Justice lists as sources of international law: international conventions, international customs, the general principles of law recognised by civilised nations, and (as subsidiary means) judicial decisions and teachings of highly qualified
publicists.¹ Almost all branches of law draw their content from each of these sources. This section of the chapter will identify the sources utilised by this thesis, to ascertain the regulatory standards analysed therein. The thesis will focus on Conventions and Custom as the relevant sources; first, due to how each source has enriched the content of the branches of law being considered, and second, due to the peculiar nature of the UN as an International Organization (IO). This chapter next considers how treaty and customary law become applicable to IOs.

4.2.1 Applicability of treaty law to the UN

Initially, the international system was composed exclusively of states. This meant that it accorded international legal personality only to states. This would change rapidly, however, in the aftermath of the Second World War, with IOs such as the UN becoming increasingly active within the system by not only ascribing certain responsibilities to themselves, but also discharging extensive duties. It did not take long for the ICJ to affirm that such organisations were subjects of international law and that they were bound by the ‘general principles of international law.’² However, the ambit of the powers that give rise to this personality is determined by the organisation’s functions. The personality so enjoyed by these Organisations, therefore, is referred to as being ‘functional’ in nature.³ It is also relevant to note, at this juncture, the debate that continues regarding the doctrinal indivisibility of personality, essentially considering whether each organ of an IO also has a distinct personality.

But this ascription of personality did not change the fact that treaties could still be negotiated and entered into only by and between states – as elaborated by their final clauses.⁴ This is in spite of the Vienna Convention on the Law of Treaties between States and IOs or between IOs making provision for IOs to be bound by treaties by expressions of consent.⁵ The

¹ Statute of the International Court of Justice Art 38 (1).
² Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt (Advisory Opinion) [1980] ICJ Rep 73, 89–90 (‘WHO and Egypt’).
Convention has not received the number of ratifications necessary for the same to come into force, however, as at the time of writing.\(^6\)

However, IOs (particularly the UN for present purposes) do not act in a legal vacuum. While exceptions exist, such as the UNMIK’s attempt to qualify the application of IHL and IHRL instruments to the territories it administers,\(^7\) the balance of opinion lies heavily and almost undoubtedly, in favour of applicability.\(^8\) Both treaty IHRL and IHL are, in principle, applicable to the UN. While noting the existence of a number of bases that justify the applicability of treaty law to IOs, this part focuses in particular on the principle of Functional Treaty Succession.

### 4.2.1.1 Functional Treaty Succession

The inability of IOs to ratify treaties technically creates a gap within the international legal regime. The principle of Functional Treaty Succession attempts to plug this gap. It finds its roots in an EU law concept that concluded, in regard to the General Agreement on Trade and Tariff (GATT), that, in so far as the European Community (EC) had assumed the powers previously exercised by member states in the area governed by the agreement, its provisions became binding on the Community. The principle made the EC functionally succeed to the GATT obligations of its member states before it formally became a party to the GATT.\(^9\) Functional Treaty Succession also draws analogies with the theory of State Succession which, makes

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\(^6\) There are, as at 6 April 2019, 44 parties (32 states) to the instrument and 39 signatories. Art 85 of the instrument provides that the same enters into force upon ratification by 35 state parties.


succeeding states subject to the obligations by which their predecessors were last bound. IOs can intelligibly replace the successor state in this dynamic, thereby becoming committed to those obligations by which their participating states were bound.

The principle operationalises by reference to the activity that falls to be regulated and, where this was carried out by an actor that was created by the member states themselves, that actor had to comply with the standards by which those member states would have otherwise been bound. The ability to use force (regardless of its legality) was a power that was traditionally exercised by states and its ad bellum as well as in bello legality were governed by particular rules that were shaped primarily by these same nation states taking account of their peculiar interests. As discussed in the previous chapters, the Charter now vests this power exclusively in the UN (except in cases of self-defence and authorised actions carried out by regional organisations and coalitions of the willing). What in fact takes place therefore is the monopolisation of the power to resort to force, which the UN then exercises on behalf of all member states and in the interests of international peace and security. By doing so, the UN succeeds to the functional capacity in which states did/ do use force. This allows those treaties provisions by which its members are bound to succeed on the UN.

This part notes however that this succession is limited to functionality i.e. the capacity to resort to force. As was discussed in Chapter 3, the purposes for which force may be used by states and by the UN are considerably different. This difference might well justify, as this thesis argues, alterations to the content of those rules by reference to which conduct is regulated.

4.2.1.2 Other premises

A further premise (used in relation to the applicability of IHRL to the UN), referred to as the ‘external conception’, posits that the UN is bound by IHRL in so far as the same has reached customary law status. This is based on the realisation that international organisations cannot invoke their non-party status in respect of treaties that have been drafted by representatives of all states. The legal foundation of being obliged by such treaties lies in their character as a

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10 Although kingdoms and much smaller social groupings such as clans did exercise this power, this discussion limits itself to the use of force by states, because it is in relation to its regulation, that the jus ad bellum was first seriously codified.
11 Schermers, above n3, 835.
general principle of law, which is codified by the particular treaty. As will be noted, however, the extent to which IHRL has not been sufficiently agreed upon.

A further approach, referred to as the ‘internal conception’, avers that the UN is bound by human rights standards, as a result of its internal order tasking it to promote them. Being bound by human rights is thus concomitant to the UN realising its own purpose. This approach has also been used to ground the UN’s liability towards IHL standards.

4.2.2 Formulation of customary IHRL and IHL, and their applicability to the UN

It is often alleged that customary law binds all international actors, including the UN. In this regard, Sands and Klein assert that, because IOs hold international rights and obligations, they should be bound by international law (including customary law) the same way that states are. IOs also have undeniable potential to contribute to the formation of customary law, a capacity expressly recognised by Conclusion 4.2 of the Draft Conclusions on the Identification of Customary International Law returned by the ILC. It has long been recognised that custom at

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the international level emanates from the horizontal dealings that its actors have with each other.\textsuperscript{20} To the extent that IOs maintain horizontal relations at this level (by exercising Rights and undertaking Duties), it is difficult indeed to contend that they can be excluded from the ambit of the relevant customary rules.

The Statue of the ICJ refers to ‘international custom, as evidence of a general practice adopted as law’. The formation of customary law thus follows what is referred to as the ‘two element approach’, which comprises of state practice in the sense of a rule (the objective element)\textsuperscript{21} and such practice being undertaken in the sense of a legal right or obligation(opinio juris or the subjective element).\textsuperscript{22} While this is the dominant theory,\textsuperscript{23} the exact content of its opinio juris component remains mooted, with theories such as the belief theory (according to which opiniojuris is the belief entertained by a state that a given practice is a binding rule of international law),\textsuperscript{24} the acceptance theory (which is the dominant theory and, according to which, a state accepts that all states have a legal right to act per the practice)\textsuperscript{25} and a weaker

\begin{itemize}
  \item Conclusion 4 (‘Text of the Draft Conclusions on Identification of Customary International Law’). Also refer to Conclusion 12, which provides that:
  \begin{enumerate}
    \item A resolution adopted by an international organization or at an intergovernmental conference cannot, of itself, create a rule of customary international law.
    \item A resolution adopted by an international organization or at an intergovernmental conference may provide evidence for determining the existence and content of a rule of customary international law, or contribute to its development.
  \end{enumerate}
\end{itemize}

\textsuperscript{20} Michael Wood, \textit{First Report on Formation and Evidence of Customary International Law}, UN Doc A/CN.4/663 (17 May 2013) [96].


\textsuperscript{24} Shaw, above n 23, 57.

\textsuperscript{25} Schachter, above n 23, 36.
version of the acceptance theory (according to which, a larger number of states approve a practice as customary international law on behalf of all states),

Other theories of formation have also been adduced, such as Kirgis’ sliding-scale idea according to which, the formation of customary international law must be examined on a sliding scale: one end of this scale is represented by opinio juris, and the other by State practice. The formation of a customary rule is thus analysed on a case-by-case basis, depending on the nature of the rule or act. This, for instance, requires the approach to accord more weight to opinio juris than to state practice in the case of moral-oriented rules. Other authors, such as Meron, suggest an opinion-based one element approach, according to which, the existence of customary rule depends on the core values that are accepted by the international community in a given area of law. While this is canvassed as a customary law basis for Human Rights, the weight of authority appears to contradict such an assumption.

The central obstacle to the formulation of a customary version of IHRL lies in how state practice in this area materialises itself. It does not materialise as a matter of interstate relations but, rather, in the relations that subsist between the state and those within its territory or subject to its jurisdiction, a relation that is vertical as opposed to being horizontal in nature. Largely, it is a matter that is internal to states and remains so in spite of international interventions in regard to large-scale rights violations. How a state acts regarding Human Rights, while being part of such a top-down relationship, cannot act as a reliable pointer of individual state will or opinion. This difficulty has been echoed at least as far back as 1994, when Prof. Hankin, in his Sibley lecture, alleged that the ‘sovereignty paradigm’ to which the international system was subject, denied that Human Rights arise through the practice of states. Identifying

29 Theodor Meron, Human Rights and Humanitarian Norms as Customary Law (Clarendon Press, 19) 94.
customary rules in this realm, therefore, requires the tools used in the exercise to be capable of considering the peculiar nature of the subject and of the relations by which it is comprised. It may well be, however, that our present understanding of customary law formation fails to account for such an exigency. The difficulty is compounded by the scarcity of analyses, which have focused on explaining how the UN has functioned in the realm of Human Rights protection; indeed, there exists no comprehensive study on customary human rights law at the time of writing.

A minority of jurists also argue for a customary status for the UDHR, a view buttressed by the ICJ decision in the Tehran Hostages case. This view does not, however, explain how it complies with the two-step approach, which provisions of the UDHR are customary or, indeed, which actors are bound by this customary status. This thesis, therefore, concurs with the view that a (sufficiently) convincing form of customary human rights law does not exist at present.

The difficulties so encountered by IHRL in this realm may be compared with the corresponding position of IHL. As will be elaborated hereunder, the different types of armed conflict are governed by separate sets of treaty rules. In comparison to those treaty rules that govern IACs, those governing NIACs can only be described as ‘sparse’. The provision that arguably applies to all non-international conflicts, Common Article 3 of the Conventions (CA 03), only guarantees the most basic protections, in an incomprehensive manner. This is also (at least partially) true of the provisions contained in AP II, which (while being applicable only to some conflicts) woefully lack detail when compared to AP I. The reason for this limitation lies in how an important group of states opposed the Draft that was developed incrementally at the Diplomatic Conference, which compelled the passage of the current more diluted version. This


did not, however, prevent state practice from recognising the (il)legality of certain forms of conduct during NIACs, which fell beyond what was covered by AP II. The ICRC customary study testifies to this and concludes, after analysing relevant state as well as UN practice,\(^{38}\) that 136 out of its 161 customary rules apply to both forms of conflict.

Also worth noting, at this juncture, is how deduction of custom in highly normative areas such as IHL places a heavy reliance on opinio juris. As noted by the ICTY: ‘on account of the inherent nature of this subject-matter, reliance must primarily be placed on such elements as official pronouncements of States, military manuals and judicial decisions’.\(^{39}\)

By their very nature, non-international armed conflicts involve and concern the conduct of non-state actors. Should the deduction of customary rules applicable to NIACs, therefore, not take account of the conduct of these groups? Sivakumaran\(^{40}\) analyses the issue in detail and identifies numerous sources – such as unilateral declarations, agreements, and internal rules and codes of conduct – that are potentially relevant.\(^{41}\) The extensive potential that most of these sources have to regulate conduct, indeed, makes it very difficult to ignore their relevance to the formation of customary IHL. Although states may well be in denial, the relation that these non-state actors maintain with the states they fight is horizontal in nature, thus mirroring the comparative position of states that engage each other. Yet, the IL Draft Conclusions that were referred to above provides:

Conduct of other actors is not practice that contributes to the formation, or expression, of rules of customary international law, but may be relevant when assessing the practice referred to in paragraphs 1 and 2\(^{42}\) [in reference to the state practice component].

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\(^{38}\)Henckaerts and Doswald-Beck, above n 23, 5.

\(^{39}\)Prosecutor v Tadic (Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction) (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber Case No IT-94-1-AR72, 2 October 1995) [99]. (‘Tadic Appeal’).


\(^{41}\)Ibid Chapter 4.

\(^{42}\)Text of the draft conclusions on identification of customary international law’, above n 19, Conclusion 4.3.
In spite of the turbulent nature of the attitude towards non-state actor conduct, such conduct will be referred to and drawn from by this chapter, where relevant in its consideration of Customary IHL rules.

4.2.3 A mixed approach

In light of how the aforementioned sources of law are shaped, this thesis follows an approach that considers both customary as well as treaty rules. This is required by the following structural and institutional peculiarities, which are inimical to the issue of UN use of force.

In terms of treaty law, there exists a considerable disparity in the extents to which UN member states (who are also its troop contributors) have ratified (potentially) relevant treaty IHRL instruments. This is particularly significant in view of the rationale of the functional succession argument, which posits that UN forces will be bound *rationae personae* by those treaty standards by which its members are bound when executing similar activities. UN members are party to numerous regional IHRL regimes, chief among which are the ECtHR, the American Declaration on the Rights and Duties of Man (ADHR), and the African Charter of Human and People’s Rights (Banjul Charter). Of course, not all members are bound by all three regimes and the respective standards that each impose on the Right to Life (with which this thesis is concerned) are not identical. Moreover, a given UN mission could be comprised of troops from member states that represent all of these regimes. This makes it imprudent to identify the content of any of these regimes as succeeding on the UN. For this reason, this thesis utilises the standards propounded by the ICCPR (ratified and signed by 172 and 6 states, etc.).

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44 *American Declaration of the Rights and Duties of Man* (adopted at the Ninth International Conference of American States, Bogota, Colombia, 2 May 1948).


46 Art 2(1) ICCPR explicitly mentions territory, whereas Art 1 ECtHR and Art 1 Banjul Charter do not. Moreover, ‘war’ does not find mention as a situation allowing for derogation in Art 4(1) ICCPR, whereas such mention is found in Art 15(1) and Art 27 of the ECtHR and the Banjul Charter, respectively. As opposed to the comparatively liberal approach used by the ICCPR and the Banjul Charter in each of their Articles dealing with the Right to Life and Liberty of Person (Arts 6 and 9 ICCPR, and 4 and 7 Banjul Charter), the ECtHR utilises ‘closed lists’ in its Arts 2 and 5.
respectively, no action taken by 19 states)\textsuperscript{47} in relation to the Right to Life – as succeeding on the UN in the conduct of its missions. This is particularly appropriate due to the extensive attention that the content of Art 6 ICCPR has thus far received when compared to the corresponding UDHR provision, that is, Art3. The research does, however, as regards certain elements such as effective control, draw guidance and inspiration from the jurisprudence of the aforementioned regional regimes. The thesis will not utilise customary IHRL in this exercise, due to the concerns that were noted above.

A point that is similar to that made in respect of the regional rights of regimes can be made in respect of the IHL side of the equation. While the Geneva Conventions are universally ratified, their Additional Protocols (which prescribe the bulk of the rules that regulate conduct during armed conflict) have only been ratified by 174 and 168 member states, respectively. This reality prevents a perfect transcendence of AP I and II provisions on to the UN, through the functional succession argument. The difficulty is exacerbated by the fact that most conflicts in which the UN will partake are non-international in nature, the IHL treaty framework applicable to which (as noted above) is thin in content.

This difficulty can be resolved by using customary humanitarian law. The fact that the ICRC customary IHL study, after extensive analysis, finds that the content of most AP I provisions also applies to NIACs as customary law, strengthens this argument. It should also be noted that the structural peculiarities of the system that prevented customary IHRL being deduced through traditional mechanisms does not operate in regard to IHL, because the parties whose conduct it seeks to regulate liaise with each other on a horizontal axis.

Note must also be made here of the relation that exists between treaties and customary law. The ILC Draft Conclusions submit that a treaty rule may affect a rule of customary law if it is established that the treaty rule:

\begin{itemize}
  \item[(a)] codified a rule of customary international law existing at the time when the treaty was concluded;
  \item[(b)] has led to the crystallisation of a rule of customary international law that had started to emerge prior to the conclusion of the treaty;
\end{itemize}

(c) has given rise to a general practice that is accepted as law (opinio juris), thus generating a new rule of customary international law.

Because most AP I rules have also attained customary status in IACs, this relation is potentially relevant only to NIACs. As noted earlier, however, the treaty regime applicable to NIACs is itself sparse and the rules that find expression in AP II pertain to those areas of conduct in which custom is well settled. The utility held by this relationship for the issue under discussion is thus limited.

To improve the accuracy of the analysis, however, Chapter 5 will compare the content of the customary rules it draws from the ICRC study with the corresponding AP I (or, where available, AP II) rule, noting also whether the ICRC finds any contrary state practice in each case. The chapter will also consider the content of the relevant IHL rules that the Secretary-General’s Bulletin prescribes to be applicable to UN forces when engaged in armed conflict.

It must also be asked, in mapping this analysis, whether there is anything antithetical in comparing treaty and customary rules in this way. This query emanates from how customs is generally considered to be ‘dispositive’ in nature and, according to Thirlway, ‘It is universally accepted that [...] a treaty as lex specialis is law between the parties to it in derogation of the general customary law’.48

While the accuracy of this position cannot be doubted, it must be remembered that this form of displacement places a heavy reliance on two elements. First, the two rules must apply to and dictate relations between two parties. Second, both rules must emanate from the same branch of law. The IHL–IHRL dichotomy, as applicable to UN uses of force, violate both these requirements. There is, therefore, nothing antithetical in comparing treaty IHRL with customary IHL in considering the regulation of UN uses of force.

This theoretical possibility of applying treaty law and customary law to the conduct of the UN only opens the issue of application. It must now be ascertained whether UN uses of force

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48 Hugh Thirlway, ‘The Law and Procedure of the International Court of Justice’ (1989) 60 British Yearbook of International Law 147. In this regard, refer also to the following passage in Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v United States of America) (Merits) [1986] ICJ Rep 137 [274]:’In general, treaty rules being lex specialis, it would not be appropriate that a state should bring a claim based on a customary-law rule if it has by treaty already provided means for settlement of such a claim.’48
satisfy the particular applicability thresholds prescribed by the relevant branches of law. This is
what the next section of this chapter will consider.

4.3 IHL and IHRL

4.3.1 A background

4.3.1.1 IHL

Rules on the conduct of hostilities date almost as far back as hostilities themselves. They are
found in varying forms and in numerous temporal and geographic contexts, which range from
the Middle Ages\textsuperscript{49} to the ancient practices of the Pacific Islands.\textsuperscript{50} References to rules of war in
codified form are also found in early treaties, such as the Treaty of Amity and Commerce
between the United States and Prussia of 1785,\textsuperscript{51} the Lieber Code of 1863, the Paris Declaration
Respecting Maritime Law of 1856, and the St Petersburg Declaration of 1868. Today’s IHL finds
its content in the Geneva Conventions of 1949 and their Additional Protocols.

The content of IHL emanates from the principle of ‘inter-arma caritas’, which is based on
respect for opposing troops, reciprocity thus being central to its functioning.\textsuperscript{52} IHL rules balance
military necessity and humanity, and are designed not to undermine an army’s ability to win the
war.\textsuperscript{53} The tenure of the majority of these rules follows a common pattern and permits what
they do not expressly prohibit, which confers on them a ‘permissive starting point’.\textsuperscript{54} They are
animated, according to the ICJ, by ‘elementary considerations of humanity’\textsuperscript{55} and are primarily
worded in the language of Duties, a feature that is explained by how, and the conditions under

\textsuperscript{49} M Keen, The Laws of War in the Late Middle Ages (Routledge & Keagan Paul, 1965).
\textsuperscript{50} Helen Durham, ‘The Laws of War and Traditional Cultures: A Case Study of the Pacific Region’ (2008)
inter arma’ (‘for among [times of] arms, the laws fall mute’).
\textsuperscript{51} A Roberts and R Guelf, Documents on the Laws of War (Oxford University Press, 2005).
\textsuperscript{52} Louise Doswald-Beck and Sylvain Vite, ‘International Humanitarian Law and Human Rights Law’
\textsuperscript{53} Anthony E Cassimatis, ‘International Humanitarian Law, International Human Rights Law, and the
\textsuperscript{54} Clause Pillous, Jean Pictet, Yves Sandoz and Christophe Swinarski, Commentary on the Additional
\textsuperscript{55} Case Concerning the Corfu Channel (Merits) [1949] ICJ Rep 4, 22.
which, they were formulated. IHL rules are absolute as opposed to being reciprocal; noncompliance by one party to the conflict thus does not excuse noncompliance by another. 56

4.3.1.2 IHRL

IHRL, conversely, is based on the ‘inherent dignity of the human person’57. It is the result of a long and sometimes uneasy relationship between the State and the individual, and personifies a check on the powers of the State. The idea of Rights dates back to at least the Code of Hammurabi, which included among its judgements matters of criminal justice that, for instance, required offenders to be caught in the act. Other ancient proclamations that are relevant to the subject include the Torah and the Edicts of Asoka. 58 Further, more recent sources include the Magna Carta, the 1776 Declaration of Rights incorporated into the Constitution of Virginia, the Declaration of the Rights of Man and Citizen 1789 and the 1791 French Constitution. The contemporary International Human Rights system draws its basis from the Universal Declaration of Human Rights59 and the nine core Human Rights instruments,60 which include inter alia the ICCPR and the International Covenant on Economic, Social and Cultural Rights (ICESCR).61

IHRL focuses on regulating state power, which can be exercised in a variety of ways, including through the use of force. The ratione materiae scope of IHRL can, crucially, include not only law enforcement operations but also military operations. 62 IHRL recognises, however, that


59UDHR, above n 57.


the realisation of its standards depends on the extent of control exercised by those on whom it confers these obligations. This is expressed in the notion of effective control. The tenure of Human Rights provisions prohibit a state from restricting Rights unless permitted to do so, which confers on them a ‘prohibitive starting point’.

4.4 Application

4.4.1 Applying IHL to UN uses of force

4.4.1.1 Applicability ratione materiae

IHL treaty law differentiates between IACs and NIACs in their regulation. Insofar as treaty IHL is concerned, the four Geneva Conventions, along with Additional Protocol I, govern conduct in IACs and CA 3, along with Additional Protocol II, govern conduct in NIACs. The fact that most treaty rules applicable to IACs are now considered to have attained customary status regarding NIACs provides a single set of customary IHL rules by reference to which UN uses of force can be regulated, without having to make distinctions according to the type of conflict in which they are involved.

(a) International armed conflict

An IAC is considered to exist per Common Art2 of the Geneva Conventions, where there is a resort to armed force between two or more states. Whether there is a conflict at a particular time is a factual determination that does not depend on the views of the parties. It is now

63 Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda) (Judgment) [2005] ICJ Rep168 (‘Armed Activities’). The principle has been applied by the European Court of Human Rights in Al Skeini v The United Kingdom (European Court of Human Rights, Grand Chamber, Application No 55721/07, 7 July 2011) 59; Loizidou v Turkey (European Court of Human Rights, Application No (ECtHR 18 December 1996); Cyprus v Turkey App no 25781/94 (ECtHR 10 May 2001); and by the Inter-American Commission on Human Rights in Coard et Al v United States, Report No 109/99, Case 10.951 (29 September 1999); Alejandro and Others v Cuba, Report No 86/89, Case 11.589 (29 September 1999).

64 Prosecutor v Boskovski (Judgment) (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber II, Case No IT-04-82-T, 10 July 2008) [176] (‘Boskovski’).

65 Prosecutor v Milutinovic (Judgment) (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber, Case No IT-05-87-T, 26 February 2009) [125]; Prosecutor v Akayesu (Judgment) (International
accepted that IOs, in possessing legal personality, can be party to an IAC, thus extending the \textit{rationae personae} scope of IACs.  \textsuperscript{66} While Ferrarro argues for a low-intensity threshold for IACs (so long as belligerent intent is satisfied), \textsuperscript{67} it is widely recognised that hostilities must acquire a certain level of intensity before satisfying the conflict threshold. \textsuperscript{68} A further school of thought also accords IAC status to conflicts in which a state force engages a non-state armed group on the territory of a second state without the consent of the latter. \textsuperscript{69} While this argument premises itself on the lack of consent on the part of the territorial state, it ignores a fundamental requirement IHL prescribes for IACs – that of having state armed forces engaged on \textit{both} sides.

What is also central to the issue is whether the disputants entertain belligerent intent, which can be deduced from ‘hostile action aimed at neutralising the enemy’s military personnel and resources, hampering its military operations, subduing it or inducing it to change its course of action’. \textsuperscript{70} It requires a nexus between the act concerned and the ultimate objective of the party on whose behalf the act is being committed and runs through numerous aspects of the armed conflict paradigm, including combatant and prisoner of war status, and immunity from attack. But such intent does not always have to emanate from the sort of Schmittian enmity that was discussed in the previous chapter. Even uses of force that do not aim at completely destroying the enemy can, nevertheless, be executed with belligerent intent, a recognition that is crucial to deducing the potential involvement of the UN in IACs (and in conflict generally). It is seldom, however, that a UN mission will find itself directly involved in an IAC because most such missions rely on (at least) the strategic consent of host governments for deployment, even when

\textsuperscript{65} Refer to Dapo Akande, ‘Classification of Armed Conflicts: Relevant Legal Concepts’, in Elizabeth Wilmshurst (ed) \textit{International Law and the Classification of Conflicts} (Oxford University Press, 2012) 32–79, where it is argued that a customary rule that extends the \textit{rationae personae} scope of IACs to IOs has already been crystallised.


\textsuperscript{68} Terry Gill and Dieter Fleck, \textit{The Handbook of the International Law of Military Operations} (Oxford University Press, 2nd ed, 2015) 44.

\textsuperscript{69} Ferraro, ‘Applicability and Application’ above n 67, 576.
deployed under Chapter VII mandates. There is thus a much greater possibility of UN forces becoming party to a NIAC.

(b) Non-international armed conflicts

NIACs have attracted an extensive amount of attention since the 1990s. This is primarily due to how conflict has evolved, most contemporary conflicts being intra state in nature, and attract a multitude of actors that pursue a variety of objectives. There are mainly two types of NIACs: the first falling within the ambit of CA 3 to the Conventions, and the second falling within that of Additional Protocol II. As will be elaborated, AP II type conflicts, by their very nature, are a subclass of the CA 3 conflicts.

While CA 3 does not define a NIAC, the Commentary to the Conventions requires that the hostilities satisfy an intensity threshold and lays down a number of indicative criteria for the constitution of a NIAC. These include the possession of an organised military force and a responsible authority by the party in rebellion, the government being obliged to have recourse to its armed forces in response to insurgents who are organised as military and who are in possession of a part of the national territory, the possession by the insurgents of an organisation resembling a state, and the exercise by the insurgents of de facto civil authority over a determinate territory. The commentary itself notes, however, that a NIAC could exist even if none of these criteria were satisfied.

The type of NIACs covered by AP II is narrower than the preceding category. Art 1(1) of AP II provides that the Protocol applies to armed conflicts:

which take place in the territory of a high contracting party between its armed forces and dissident armed forces or other organised armed groups which, under

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71 A theoretical possibility would be where UN forces support host nation forces in their engagements within their territory against a foreign military or against armed groups that are effectively controlled by a foreign state.
72 Refer to Mark Prigg, article appearing in Daily Mail Australia<https://www.dailymail.co.uk/sciencetech/article-4453666/The-world-war-Interactive-map-reveals-conflicts.html> for an interactive map of all active conflicts.
74 Ibid 35–36.
75 Pictet, above n 73, 36.
responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol.\footnote{Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts. Opened for signature on 8 June 1977, 1125 UNTS 609 (entered into force on 7 December 1978) (‘Additional Protocol II’).}

Control of territory is thus a \textit{pre-condition} for the existence of an AP II conflict, whereas the same was only an \textit{indicative} factor for CA 3 NIACs. Moreover, while CA 3 NIACs were obviously to be differentiated from mere civil disturbances, the indicative criteria does not refer to an intensity threshold. This may be compared with the ‘sustained and concerted’ military operations requirement for AP II conflicts, which imposes a higher intensity threshold. By definition, therefore, AP II conflicts fall within the wider class of conflicts to which CA 3 applies. Whether a NIAC falls to be regulated by both instruments is a factual determination, which must be made on a case-by-case basis.

In spite of these divergent threshold requirements, the analysis of all NIACs is centrally informed by two considerations. These are the intensity of hostilities and the involvement of organised armed groups. The ‘intensity’ is influenced by numerous factors, including the number, duration and intensity of individual confrontations; the types of weapons and other military equipment used; the number and calibre of munitions fired; the number of persons and type of forces participating in the fighting; the number of casualties; the extent of material destruction; and whether the fighting is widespread.\footnote{Boskovski (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber II, Case No IT-04-82-T, 10 July 2008) [177-193].} Criteria by which the level of organisation of the armed groups could be deduced include the existence of a command structure on the part of the OAG, the ability to conduct coordinated military operations, evidence of a level of logistics, and the group’s ability to respect and ensure respect for IHL.\footnote{Prosecutor v Tadic (Judgment) (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber, Case No IT-94-1-T, 7 May 1997) [561-568] (‘Tadic Trial’) Boskovski (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber II, Case No IT-04-82-T, 10 July 2008) [194]–[206]; The Prosecutor v Haradinaj et al (Judgment) (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber, Case No IT-04-84-T, 3 April 2008 [49]. As far as the requirement of organization is concerned, the following factors are relevant: the existence of a command structure, and disciplinary rules and mechanisms within the group; the existence of a headquarters; the fact that the group controls a certain territory; the ability of the group to gain access to weapons, other military equipment, recruits and military training; its ability to plan, coordinate and carry out military operations, including troop movements and logistics; its ability to define a unified military strategy.}
ignored, however, is that the existence of a NIAC (as is the case with IACs) is, above all, to be construed from the individual dealings between the parties, which reflect their attitude towards one another, and which are matters of fact.\(^79\) In the case of UN troops, these attitudes are primarily, though not exclusively, reflected in the authorising resolutions.

4.4.1.2 The UN and armed conflict

The preceding chapter distilled three broad types of situations in which UN forces use force: self-defence and defence of other personnel, protection of civilians and supporting military operations that are conducted against a party to the conflict, or itself carrying out such operations. While engagements that fall within the second and third situations can readily satisfy the conflict threshold, a remark is in order regarding the first. While sporadic attacks against UN forces and sporadic responses will, by themselves, not satisfy the conflict threshold, a NIAC will exist where the hostilities acquire sufficient intensity, such as when there is a general

and use military tactics; and its ability to speak with one voice and negotiate and conclude agreements such as a ceasefire or peace accord.


the definition of an armed conflict per se is termed in the abstract, and whether or not a situation can be described as an ‘armed conflict’, meeting the criteria of common Article 3, is to be decided upon on a case-by-case basis. Further, *Prosecutor v Limaj et al (Judgment)* (International Criminal Tribunal for the former Yugoslavia, Case No IT-03–66-T, Trial Chamber II, 30 November 2005) [90]: ‘the determination of the intensity of a conflict and the organisation of the parties are factual matters which need to be decided in light of the particular evidence and on a case-by-case basis’. For relevant ICC jurisprudence, refer to *Prosecutor v Thomas Lubanga Dyilo (Judgment)* (International Criminal Court, Trial Chamber, Case No ICC-01/04-01/06, 14 March 2012) [533 ff]; *Prosecutor v Jean-Pierre Bemba Gombo (Decision Pursuant to Art 61 (7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor)* (International Criminal Court, Pre-Trial Chamber, ICC-01/05-01/08, 15 June 2009) [220 ff].
pattern of attacks and when UN forces also conduct military operations in response to them. The British Military Manual reflects this position by providing that such forces can become party to an armed conflict and be subject to the law of armed conflict ‘where its personnel become involved in hostilities as combatants (whether as a result of their own initiative or because they are attacked by other forces)’[emphasis added]. Each of the three types of engagement, therefore, have the capacity to satisfy the conflict threshold. The type of conflict such actions result in depends on whether they are directed at state or non-state actors. As mentioned earlier, the greater likelihood is for the UN to engage non-state actors in this fashion, thus becoming party to NIACs.

The Secretary-General’s Bulletin provides a useful point of reference at this juncture in view of a temporal limitation that it apparently imposes on the application of IHL to UN forces. According to the Bulletin, the principles of IHL set out therein are applicable to UN forces ‘when in situations of armed conflict they are actively engaged therein as combatants’. While the Bulletin may be an internal guideline, which does not confer external obligations on the UN, the aforementioned limitation has considerable potential to create confusion due to how general IHL understands combatant status.

Combatant status is expressly recognised in IACs and makes combatants liable to attack at any time. While it is accepted that ‘combatants’ do not enjoy any of the concomitant rights (such as the right to engage in hostilities and to POW status) in NIACs, it cannot be denied that they lose their protection from attack for so long as they function as ‘combatants’ therein. This permanent targetability of combatants in both forms of conflict is in line with Walzer’s idea of the naked soldier, discussed in Chapter 3. While the relevant treaty and customary rules will be

81 United Kingdom: Ministry of Defence, above n 68, 378–379.
discussed in Chapter 5, what must be noted here is that troops belonging to a party to a conflict (including the UN) lose protection for the duration of the conflict and not of the engagement.84

This conclusion is consistent with the position adopted by the Convention on the Safety of United Nations and Associated Personnel, which provides that its protections do not apply to:

a United Nations operation authorized by the Security Council as an enforcement action under Chapter VII of the Charter of the United Nations in which any of the personnel are engaged as combatants against organized armed forces and to which the law of international armed conflict applies.85

The Convention withdraws protection based on the activity that is being pursued, that is, active engagement as combatants in a Chapter VII operation. It is thus apparent that the withdrawal is not premised on each episode of engagement (contra the Bulletin), but for the whole duration of the operation. What ‘active engagement’ means has also been widely debated in the academic sphere – an early interpretation requiring involvement ‘in genuine hostilities with another organized force’.86 Noteworthy, in this regard, is the view expressed by Cartledge, who proposes the same conditions for the application of IHL to UN forces as for any other force.87

This approach may be compared with that of Greenwood,88 who suggests that a higher threshold should be adopted to ascertain whether UN and associated forces have become party

84 In this regard, refer to the analysis in Scott Sheeran and Stephanie Chase, The Intervention Brigade: Legal Issues for the UN in the Democratic Republic of the Congo (International Peace Institute, 2004) 6–8. The status of UN troops, as described in the Bulletin, is more akin to that of civilians directly participating in hostilities who lose protection ‘unless and for such time’ as they so participate.
to a conflict\textsuperscript{89} and, with Shraga’s\textsuperscript{90} ‘double key test’, which bases the application of IHL to UN forces on two conditions: (a) the existence of an armed conflict in the area and time of deployment, and (b) the engagement of members of the Force in the conflict as combatants. Both these latter approaches attempt to introduce additional elements into the ratione materiae applicability, that deviate the same from what is generally accepted. The first view, it is submitted with respect, can only hold true if the inherent nature of UN conduct warranted a deviation from the original standard. To accept so would be to allow ad bellum rules on recourse to force to influence the in bello framework on the use of force.\textsuperscript{91} The double key test is also defective, because it would mean that an armed confrontation in which UN forces would be involved, where there was no pre-existing conflict, could never be regulated by IHL. Following a unified threshold for conflicts, regardless of UN involvement as a belligerent, therefore appears to be the prudent course.

Also relevant are situations in which UN forces \textit{support} operations conducted by a party to a pre-existing conflict. UN involvement in such cases does not create a fresh conflict but, in fact, makes them a co-belligerent in a pre-existing conflict. The following conditions need to be satisfied in such cases:

1. There is a pre-existing NIAC ongoing in the territory where the multinational forces intervene;
2. Actions related to the conduct of hostilities are undertaken by multinational forces in the context of that conflict;
3. The multinational forces’ military operations are carried out in support of a party to that conflict;
4. The action in question is undertaken pursuant to an official decision by the TCC or IO in question to support a party involved in that conflict.\textsuperscript{92}

\textsuperscript{89} Ibid 24.
\textsuperscript{91} While Chapter 2 examined by why the ad bellum and the in bello aspects of uses of force must be related, that relationship cannot change the content or applicability of a rule that is as fundamental as that which prescribes the \textit{rationaemateriae} applicability of IHL.
\textsuperscript{92} Ferraro, ‘Applicability and Application’ above n 67, 584.
In light of the foregoing, this chapter concludes that the *ratione materiae* application of IHL to UN forces depends on the same factors that apply to state and non-state armed forces.

### 4.4.2 Applicability *ratione loci*

The geographical scope of application determines the area to which IHL applies. The ICTY Appeals Chamber clarified the issue in *Tadić*, where it propounded that IHL applies to the whole territory of the warring states partaking in an IAC and to the whole territory under the control of a party to a NIAC – whether or not actual combat takes place there. ‘Territory’ here includes the relevant airspace.

This means that, as long as the existence of either type of conflict is accepted, the law of war applies to the whole of the prescribed zones, including relatively peaceful areas. Marco Sassoli exemplifies this through the example of a lone FAARC leader, shopping in a supermarket in government-controlled Bogota. He points out that, according to a literal application of the law, the IHL rules that apply to this situation permit government forces to use lethal force on the target without first pursuing arrest. This example also reveals where questions central to the conduct–regulation aspect of this thesis arise. If UN forces are hypothetically substituted to the position of the Columbian government, *should* they be allowed to use such force? If they should not, *why?* And if they should not, *under what form of legal justification?*

### 4.4.3 Applicability *ratione temporis*

The temporal scope of application of IHL perhaps poses the least difficulties. According to the *Tadić* decision, in the case of IACs, IHL applies beyond the cessation of hostilities until a general conclusion of peace is reached and, in the case of NIACs, the same applies until a peaceful

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93 *Tadić Appeal* (International Criminal Tribunal for the former Yugoslavia, Case No IT-94-1-AR72, 2 October 1995) [70].

94 Ibid *Akayesu* (Case No ICTR-96-4-T, 2 September 1998) [635].


96 *Tadic Appeal* (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber, Case No IT-94-1-AR72, 2 October 1995) [70].

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settlement is achieved.\textsuperscript{97} It may be noted, however, that an objective approach which is dependent on the facts on the ground must be pursued in this regard. Neither the parties’ subjective position nor even the conclusion of a peace agreement are determinative.\textsuperscript{98}

4.5 Applying IHRL to UN uses of force

The applicability of IHRL is, as noted above, premised on the control wielded by the party whose conduct is being scrutinised. The form of control on which the analysis hinges is referred to as ‘effective control’. This chapter will next analyse what this has been taken to mean, particularly in situations that involve the use of considerable degrees of force. This will elucidate whether and, if so, to what extent, IHRL can theoretically be applied during armed conflict.

4.5.1 Effective control

Human Rights law regulates relations between the state and the individual, the latter surrendering to the sovereign in exchange for the promise of protection. Such protection could be provided, however, only where the sovereign was vested with \textit{jurisdiction} as regards the act in question. The state only possesses such jurisdiction where it exercises a certain degree of control over the appurtenant circumstances. This control element does not feature prominently where the discussion pertains to Rights discourse during times of peace, within territorial boundaries. This is because states, under such circumstances, invariably possess the requisite degree of control.

Competence as well as responsibility, however, can also be found where the state exercises control extra-territorially.\textsuperscript{99} This is particularly relevant to the case of actors, such as the UN, who do not claim pre-determined territorial units. The control (if any) they exercise is

\textsuperscript{97} Ibid.
\textsuperscript{98} Gill and Fleck, above n 69, 50. It has been argued, however, that the principle of continued application of IHL applies only to those provisions that are suitable to be applied after the cessation of hostilities. See \textit{Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (Advisory Opinion)} [2004] ICJ Rep 136 [24] (‘Wall’). Note, however, David Kretzmer, ‘The Advisory Opinion: The Light Treatment of International Humanitarian Law’ (2005) 99 (1) \textit{American Journal of International Law} 96.
therefore always extraterritorial.\textsuperscript{100} How ‘control’ is defined thus attains central significance and its discussion herein will commence from Art2(1) ICCPR, which provides that ‘Each state party [...] to all individuals within its territory and subject to its jurisdiction the rights recognised in the present Covenant.’

The debate concerning the application of the ICCPR revolves upon the insertion of the word ‘and’ between the phrases ‘its territory’ and ‘subject to its jurisdiction’ in Art 2(1). According to the US representative who introduced the amendment:

The purpose of the proposed addition was to make it clear that the Draft Covenant would apply only to persons within the territory and subject to the jurisdiction of the contracting states. The United States was afraid that without such an addition the draft Covenant might be construed as obliging the contracting states to enact legislation concerning persons who, although outside its territory, were technically within its jurisdiction for certain purposes.\textsuperscript{101}

This US proposal was accepted into the final text of the Covenant in spite of concerns that were raised by a number of delegations.\textsuperscript{102} A literal interpretation of the phrase, therefore, suggests that the Covenant would be applicable only where the individual was within the territory of a state party and where he/she was subject to its jurisdiction. This is referred to as the ‘conjunctive’ reading and in practice meant that a state would not be bound by the Covenant where it acted extra-territorially. The approach was later rejected by the Human Rights Committee in the following terms:

In line with this, it would be unconscionable to so interpret the responsibility under article 2 of the Covenant as to permit a State party to perpetrate violations of the

\textsuperscript{100} While the UN influences the administration of various territories to different degrees, it has never aspired to, or been endowed with, a territorial unit. Therefore, all control it exercises is ‘extra-territorial’ in nature.


\textsuperscript{102} Ibid 8, 11. Refer also to Commission on Human Rights, \textit{Summary Record of the Hundred and Ninety Third Meeting}, 6th sess, UN Doc E/CN.4/SR 193 (26 May 1950) 21, for a suggestion that the word ‘et’ in the French text should be replaced by the word ‘ou’, but the records do not indicate how the delegations reacted to this. Also refer to Commission on Human Rights, \textit{Summary Record of the Hundred and Ninety Fourth Meeting}, 6th sess, E/CN.4/SR.194, (25 May 1950) 4, for how the other delegations supported the suggestion of the French delegation to replace the word ‘substitute’ with ‘competence’ in the French text.
Covenant on the territory of another State, which violations it could not perpetrate on its own territory.\footnote{Human Rights Committee, Views: Communication No 2/1979, UN Doc CCPR/C/13/D/52/1979 (29 July 1981)\textsuperscript{103}12.1–12.3 (‘Lopez Burgos v Uruguay’) \textsuperscript{103} [12.1]–[12.3]; also Human Rights Committee, Views: Communication No 56/1979, UN Doc CCPR/C/13/D/56/1979 (‘Lilian Celiberti de Casariego v Uruguay’) \textsuperscript{104}[10.1]–[10.3].}

Moreover, according to Commissioner Tomuschat in the same communication: ‘Consequently, despite the wording of article 2(1), the events which took place outside Uruguay come within the purview of the Covenant.’\footnote{Refer to Appendices of Lopez Burgos v Uruguay and Lilian Celiberti de Casariego v Uruguay‘.}


States parties are required by article 2, paragraph 1, to respect and to ensure the Covenant rights to all persons who may be within their territory and to all persons subject to their jurisdiction. This means that a State party must respect and ensure the rights laid down by the Covenant to anyone within the power or effective control of that State Party, even if not situated within the territory of the State Party\footnote{General Comment 31, UN Doc CCPR/C/21/Rev.1/Add.13 [10].}[emphasis added].

Moreover, because ‘jurisdiction’ is usually co-extensive with territory, adopting the conjunctive reading renders the reference to ‘jurisdiction’ in Art 2(1) meaningless. So interpreted, the disjunctive reading makes ‘jurisdiction’ relevant to situations in which the state...
conduits activities beyond its borders. This begs the identification of the conditions under which this ‘extra territorial jurisdiction’ is obtained.

**4.5.2 Establishing extra-territorial jurisdiction**

The issue of extra-territoriality has not been limited to the Rights regime emanating from the ICCPR. It has attracted extensive attention from other Rights regimes, in particular, the ECtHR and ADHR. While some of these regimes have been more liberal in their approach to the issue than others, the jurisprudence of all three regimes follow a common theme; that is, states become liable extra-territorially on a basis of control. It is regarding the degree of control that impose extra-territorial obligations that debate rages and this will be analysed in Parts 5.2.1 and 5.2.2.

It must be noted at the outset, however, that while ‘control’ gives rise to legal consequences, it is clearly considered in this context as a factual concept. This is elaborated in the text of General Comment 31 (GC 31), which identifies ‘power or effective control’ as the criteria on which the obligation to ‘respect and ensure’ is premised. The criteria is indifferent to (the legality of) the ‘circumstances under which such power or effective control was obtained’. This approach was also followed by the ICJ in the Armed Activities Case, and by the ECtHR in Al Skeini.

There are three principle circumstances under which extraterritorial jurisdiction can materialise. These are: where a territory is placed under the effective control of another state, through lawful or unlawful military action (territorial or spatial model); where a state agent brings an individual within the authority on behalf of which he/she acts (personal model); or the case of consulates or embassies. By their nature, only the first two approaches contribute to the substance being considered by this thesis; these will be analysed next.

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108 General Comment 31, UN Doc CCPR/C/21/Rev.1/Add.13 [10].
110 *Al Skeini v The United Kingdom* (European Court of Human Rights, Grand Chamber, Application No 55721/07, 7 July 2011) 59 [138] (‘Al Skeini’).
111 Ibid.
112 Ibid 57, 58 [134].
4.5.2.1 The territorial or spatial model

Territorial control has been accepted as a basis for extension of jurisdiction by a number of Rights regimes, including the ICCPR, E CtHR and ACHR. The territory with which this model is concerned, obviously, is located beyond the borders of the state whose actions are being scrutinised. GC 31 thus provides that:

This principle also applies to those within the power or effective control of the forces of a State Party acting outside its territory, regardless of the circumstances in which such power or effective control was obtained, such as forces constituting a national contingent of a State Party assigned to an international peacekeeping or peace enforcement mission’.  

This stance is further reflected in the Committee’s analysis of country reports, praising Poland’s commitment: ‘to respect the rights recognised in the Covenant for all individuals subject to its jurisdiction in a situation where its troops operate abroad, particularly in the context of peacekeeping or peace enforcement missions.’

The spatial model was also utilised by the ICJ in the Wall opinion and the Armed Activities Case. The Court, in the latter decision, concludes that:

Uganda was an occupying power in Ituri at the relevant time, finds that Uganda’s responsibility is engaged both for any acts of its military that violated its international obligations and for any lack of vigilance in preventing violations of


115 Human Rights Committee, Concluding Observations on the Fifth Report of Poland, UN Doc CCPR/CO/82/POL (2 December 2004) 1 [3]. Refer also to Human Rights Committee, Concluding Observations on the Fifth Report of Poland, UN Doc CCPR/C/ITA/CO/5 (24 April 2006) 1 [3]. In this regard, refer also to Human Rights Committee, General Comment no 29: Article 4: Derogations During a State of Emergency, UN Doc CCPR/C/21/Rev.1/Add.11 (31 August 2001) [3], where the HRC rejected that the ICCPR ceased to apply to areas in which an armed conflict was raging; Theodore Meron, ‘Applicability of Multilateral Conventions to Occupied Territories’ (1978) 72 American Journal of International Law 542.


human rights [...] by other actors present in the occupied territory\textsuperscript{117}[emphasis added].

Uganda was thus subjected not only to an obligation to respect, but also to an obligation to protect. This second obligation is particularly stringent as it imposes on the actor, the additional responsibility of preventing Rights violations that are committed by others. How such omissions must be attributed, in the case of UN uses of force, was discussed in Part 2.8 of Chapter 2. The spatial approach has also been utilised by the ECtHR, best propounded in its decision in Loizidou in the following terms:

the responsibility of a Contracting party may also arise when as a consequence of military action – whether lawful or unlawful – it exercises effective control of an area outside its national territory. The obligation to secure, in such an area, the rights and freedoms set out in the Convention, derives from the fact of such control.\textsuperscript{118}

It is reflected in further ECtHR decisions, such as Cyprus v Turkey,\textsuperscript{119}Illascu\textsuperscript{120} and Pad v Turkey.\textsuperscript{121} The often-discussed Bankovic decision\textsuperscript{122} also considered the approach but set a high threshold of application in stating that extra-territorial jurisdiction has been recognised by the ECtHR on an exceptional basis where a member state, through their exercise of effective control, ‘exercises all or some of the public powers normally to be exercised by that Government.’\textsuperscript{123} This position may be compared with Issa,\textsuperscript{124} wherein the Court pronounced that: ‘it does not exclude the possibility that, as a consequence of this military action, the respondent State could be

\textsuperscript{117}Ibid.
\textsuperscript{118}Loizidou v Turkey (European Court of Human Rights, Application No 15318/89, 18 December 1996) [52] (‘Loizidou’).
\textsuperscript{119}Cyprus v Turkey (European Court of Human Rights, Application No 25781/94, 10 May 2001).
\textsuperscript{120}Illascu and Others v Moldova and Russia (European Court of Human Rights, Application No18787/99, 8 July 2004).
\textsuperscript{121}Pad v Turkey (European Court of Human Rights, Chamber, Application No 60167/00, 28 June 2007). The facts of Pad entail more violent surrounding circumstances than those obtained in Loizidou, Cyprus and Illascu. The Court held that seven Iranians, who were killed during a skirmish with Turkish troops along the Turkish–Iranian border, were within Turkey’s jurisdiction.
\textsuperscript{122}Bankovic v Belgium and Others (European Court of Human Rights, Application No 52207/99, 19 December 2001) (‘Bankovic’).
\textsuperscript{123}Ibid [71].
\textsuperscript{124}Issa and Others v Turkey (European Court of Human Rights, Application No 31821/96, 16 November 2004) (‘Issa’).
considered to have exercised, temporarily, effective overall control of a particular portion of the territory of Northern Iraq’. 125

The Court further concludes in Issa that the number of soldiers on the ground, the size of the area controlled, the degree of control exercised and the duration of the exercise of the control were indicative of whether individuals were within a state’s jurisdiction at a particular time. 126 An informative discussion on the applicability of the ECtHR to particular actions of British armed forces in Basra, Iraq, on the basis of the spatial approach is also to be found in the House of Lords decision in Al Skeini – although the majority concluded that the requisite threshold had not been satisfied. 127 Of particular note is the dissenting opinion of Sedley LJ, wherein (in addition to his comments on the ‘personal model’ that will be discussed shortly) it is re-iterated that what an occupier is required in terms of ‘ensuring’ Rights, must take cognisance of the factual circumstances, thereby placing on him/her only an ‘obligation to do all that it can’. 128 So interpreting the obligation allows it to take much better cognisance of the practicalities of the situation.

In spite of its extensive usage, though, the spatial model leaves a wide margin of discretion with the interpreter. Moreover, as pointed out by Milanovic, even where states do not have control over territory, they retain control over the acts of their own agents, which in turn enable them to interfere with individual rights. 129 A literal application of the spatial model, therefore, effectively leads to permitting states to do beyond their borders, what they cannot within them – the exact criticism that was levelled against a conjunctive interpretation of Art2(1) ICCPR.

125Ibid [74].
126Issa (Application No 31821/96, 16 November 2004) [75].
127R (Al-Skeini and Others) v Secretary of State for Defence [2005] EWCA Civ 1609 (21 December 2005). Refer also to Al Sad noon and Mufdhi v United Kingdom (Judgement) (European Court of Human Rights, App No 61498/08, 3 July 2009 [84]–[85].
128R (Al-Skeini and Others) v Secretary of State for Defence [2005] EWCA Civ 1609 (21 December 2005); Al-Skeini and Others [2005] EWCA Civ 1609, 60 (Lord Justice Sedley). In this regard, refer also to Aroa Mines (Award, British–Venezuelan Commission) [1903] 09 RIAA 402; Sambiaggio (Award, Jackson Ralston) [1903] 10 RIAA 499, which concerned states’ responsibility to prevent attacks that were orchestrated by revolutionary and rebel forces against foreigners within its territory.
4.5.2.2 The personal model

In comparison to the spatial model, the personal model posits extra-territoriality on a state’s ability to interfere with individual rights. It places emphasis on IHRL’s focus on the relationship between the state and the individual, which is expressed by the Human Rights Committee in the following terms (the reference relates to Art1 of the Optional Protocol to the ICCPR, which uses text identical to that of Art2(1) ICCPR in terms of applicability):

The reference in [...] to ‘individuals subject to its jurisdiction does not affect the above conclusion because the reference in that article is not to the place where the violation occurred, but rather to the relationship between the individual and the state in relation to a violation.\textsuperscript{130}

This approach is also utilised by the Committee when analysing country reports\textsuperscript{131} as well as by other treaty bodies, such as the Committee against Torture.\textsuperscript{132}

While the ECtHR takes account of the personal model, its approach is rather inconsistent. For instance, the early jurisprudence of the European Commission suggests a favourable attitude, as evinced by the following dicta in Cyprus v Turkey:

The Commission further observes that [...] and that authorised agents of a state, including diplomatic and consular agents and armed forces, not only remain under its jurisdiction when abroad but bring any other persons or property ‘within the jurisdiction’ of that state, to the extent that they exercise authority over such persons or property.\textsuperscript{133}

Even though the personal model was thereafter rejected in Bankovic,\textsuperscript{134} the Court refers to it in a number of later cases, such as Pad, Isaak, Solomou and Andreou.\textsuperscript{135} The Court holds in

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{130}General Comment 31, UN Doc CCPR/C/21/Rev.1/Add.13 [10].
\item \textsuperscript{131} Human Rights Committee, \textit{Concluding Observations on the United Kingdom}, UN Doc CCPR/C/GBR/CO/6 (18 July 2008) [14].
\item \textsuperscript{132}Committee Against Torture, \textit{General Comment No. 2}, UN Doc CAT/C/GC/2 (24 January 2008) [16].
\item \textsuperscript{133}Cyprus v Turkey (European Commission on Human Rights, Application Nos 6780/74 and 6950/75, 26 May 1975) [8].
\item \textsuperscript{134}Bankovic (Application No 52207/99, 19 December 2001) [78].
\item \textsuperscript{135}Pad (Application No 60167/00, 28 June 2007), Isaak and Others v Turkey (European Court of Human Rights, Application No 44587/98, 28 September 2006), Solomou and Others v Turkey (European Court of Human Rights, Application No 36832/97, 24 June 2008) and Andreou v Turkey (European Court of Human Rights, Application No 45653/99, 3 June 2008).
\end{itemize}
\end{footnotesize}
Pad, for instance, that ‘a State may be held accountable for violations of the convention rights and freedoms of persons [...] but who are found to be under the former State’s authority and control through its agents operating [...] in the latter state.’

All of these last-mentioned cases, which affirm the personal model (with the exception of Pad), deal however with relatively peaceful situations over which substantial degrees of control were exercised by the authorities. This feature changes with the ‘Chechen cases’, particularly the two Isayeva decisions, wherein IHRL nomenclature was used to determine whether the right to life, as propounded in the ECHR, had been violated during an aerial raid carried out on an area over which Russia had lost control and where (as will be discussed) a NIAC clearly existed. The dissenting opinion of Sedley LJ in Al Skeini also reflects the personal model by suggesting that the victims could be brought within the jurisdiction of the United Kingdom, by virtue of the control that the soldiers had over their use of force.

The stance adopted by the Inter-American regime, in relation to the personal model, is rather more relaxed, expressing a willingness to stretch its scope of application to volatile and violent circumstances. For example, the court states with regard to jurisdiction in Coard that:

While this most commonly refers to persons within a state’s territory, it may, under given circumstances, refer to conduct with an extraterritorial locus where the person concerned is present in the territory of one state, but subject to the control of another state – usually through the acts of the latter’s agents abroad.

As with most of the European decisions referred to above, Coard concerned circumstances over which the respondent (the USA) exercised a substantial degree of control (i.e. the conditions of detention under which the Petitioners were held). This is in comparison to Alejandre v Cuba, wherein the Commission held that the victims of an aerial firing incident

136Pad (Application No 60167/00, 28 June 2007) [53],[54].
137Isayeva and Others v Russia (European Court of Human Rights, Application No 57947 -49/00, 24 February 2005) (‘Isayeva I’); Isayeva v Russia (European Court of Human Rights, Application No 57950/00, 24 February 2005) (‘Isayeva II’).
138Isayeva I (Application No 57947 -49/00, 24 February 2005) [178].
139Al-Skeini and Others [2005] EWCA Civ 1609, 56 (Lord Justice Sedley).
141Ibid [37].
were brought within Cuban jurisdiction by the Cuban airplanes that fired on the target. Also relevant is the decision in Salas v United States, where it was held in the context of the US invasion of Panama that the use of military force implicated the guarantees set forth in the (American) Declaration, thereby bringing the subject matter within the competence of the Commission.143

These decisions evince a realisation that was made earlier; states usually have control over their agents (and their actions), regardless of where they operate (except where the agent acts ultra vires, in which event his/her conduct becomes private conduct). The control so exercised effectively renders jurisdiction clauses meaningless in case of negative obligations.144 Milanovic therefore submits that the jurisdiction requirement should be completely done away with in relation to such obligations,145 an approach with which Tzevelekos concurs.146 Milanovic further submits that positive obligations must depend on the exercise of jurisdiction, but on a territorial reading.147 I will return to this issue shortly, after considering the nature of negative and positive obligations.

4.5.2.3 Positive and negative obligations and the duties to Respect and Ensure

The ICCPR regime (and indeed other regimes) confers an umbrella of Protections on eligible individuals. This umbrella confers three types of obligations on states parties, comprising obligations to respect, protect (ensure) and fulfil.148

How this umbrella operationalises can be demonstrated with reference to any given Right. In the case of the Right to Life, for instance, in proscribing the arbitrary deprivation of life, Art 6 of the ICCPR imposes on states parties a negative obligation to respect. This is coupled with the state’s duty to ‘ensure’ (referred to also as the ‘obligation to protect’)149 that the Right to Life is

143Salas v United States (Inter-American Commission on Human Rights, Case 10.573, 1994) [6].
144Milanovic, above n 129, 207, 208.
147Milanovic, above n 129, 216.
149Ibid 13.
not violated by third parties. This duty to ensure is a positive obligation of conduct. The standard against which the particular omission is compared takes account of such matters as the control exercised over the territory, the predictability of the harm and, particularly relevant to PSOs, how well they are equipped, trained and manned. It is this aspect that Sedley LJ identifies as conferring only on a State a duty ‘to do all it can’. The ‘gap’, by virtue of which wrongful conduct, materialises in these cases exists between what the actor does and what was anticipated from an actor who was similarly placed in the circumstances. The standard, therefore, has both subjective (such as the types of units involved, and how well they were actually trained and equipped) and objective (such as how an actor that was similarly placed should have acted). The other obligation that the Right carries is an obligation to fulfil, which is a positive obligation of result. This last obligation covers such duties as the duty to investigate and punish violations committed by state agents, which exist purely in order to make the corresponding negative obligation effective. The divergent viscosities of intensity that attach to each of these obligations make it necessary to assess the types of control that justifies their imposition on an actor, and this is where the aforementioned conclusions by Milanovic and Tzevelekos become pertinent.

4.5.2.4 Which (if any) type of control?

The discussion on the types of control that underpin each of the obligations referred to above must recognise that states always exercise control over their agents in relation to negative obligations. This is simply how states function. What this means (per Milanovic) is that neither type of control is relevant to the nexus between the state and the relevant conduct, a realisation that justifies the deletion of control from the effective control formula (also per Milanovic). But to do so is also peculiar. This is because such a formulation ignores the peculiarities of the factual threshold with which jurisdiction is deduced and that by which conduct is attributed, in the case of IOs.

It may be recalled at this point that this thesis analyses only those acts that are completely attributed to the UN (mindful of the possibility of dual attribution discussed in Chapter 2).

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150 General Comment 31, UN Doc CCPR/C/21/Rev.1/Add.13 [2].
151 Al-Skeini and Others [2005] EWCA Civ 1609, 56 (Lord Justice Sedley).
152 General Comment 19, UN Doc E/C.12/GC/19 (4 February 2008) 14, which provides a further subdivision, i.e. dividing the obligation to fulfil into obligations to facilitate, promote and provide.
153 General Comment 31, UN Doc CCPR/C/21/Rev.1/Add.13 [2].
Chapter 2 discussed in detail the legal framework relevant to attribution of UN conduct and explained how the same differed from the case of states. Attribution in the case of the UN (and any other organisation) is determined by reference to the notion of effective control, as deduced by a number of levers to conduct that are retained by multiple actors. Effective control becomes relevant to the attribution exercise due to the nature of UN troops, whose conduct it is sought to be attributed to the UN. They are not employees of the UN and man these missions in a form of ‘incomplete secondment’. This organisational dynamic (which is peculiar to UN troops and does not feature in the case of state agents or organs) requires ‘effective control’ to be utilised in ascertaining the extent to which the UN is responsible for a given course of conduct. This coalesces the issues of attribution and jurisdiction in such a way that it makes attempting to detach one from the other impractical and illogical. In short, it requires that the same threshold be applied to both issues.

Control over the agent is the only indicia that can accurately point towards both these spectrums. Not only is this form of control central to identifying whether the UN should be responsible for a given course of conduct, it is also inimical to deducing if the UN exercised jurisdiction in the relevant sense (note, however, that jurisdiction is not a part of the substantive right, albeit it relates to the same). To employ different standards in this case has potential lead to unacceptable conclusions. For instance, consider where control over territory and effective control (i.e. control over conduct) were used, respectively, to deduce jurisdiction and attribution. Where, as is likely, the latter exists regardless of the former, the matrix would have no wrongful act but would, at the same time, have satisfied the conditions necessary for the attribution of a wrongful act. Such a conclusion is clearly irrational. Consider next a case in which jurisdiction is deduced automatically (per Milanovic) and attribution is deduced through effective control deduced by reference to the personal model. Where the particular actor does not exert the necessary degree of control over the agent, there would exist a wrongful act that cannot be attributed. These are serious legal loopholes.

The last of these examples is not merely academic. As was discussed in Chapter 2, the conduct of UN troops is often the consequence of multiple competing influences. Where two or more actors exert control over the same conduct, attribution is deduced by the ‘extent of effective control’ formulation. Attribution in such cases is divided along degree, with conduct

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being primarily and secondarily attributed to each actor, which makes them responsible to the respective degrees. The concept of attribution, however, comes into operation only where there is an internationally wrongful act. The latter is a condition precedent for the functioning of the former. In the case of extra-territorial Rights violations, the existence of this wrongful act is dependent on the jurisdiction the actors exercise. This means that jurisdiction and attribution in such cases are co-extensive. Intellectually coherent results can only be achieved, therefore, if the approach by which they are deduced takes notice of this coherence. This approach, it is submitted, must adopt the uniform standard of *control over the agent* in resolving both issues.

Milanovic also submits that states can be liable for extraterritorial failures to ensure respect only where they had control over the relevant territory. It is pertinent to note, at this juncture, what liability follows in the respective cases of negative obligations and these positive obligations of *conduct*. Whereas liability follows the act, in the case of negative obligations, the same follows the omission in the latter class of obligations. It is not erroneous, therefore, to envisage situations concerning such positive obligations in terms of control exercised over the *source* of the omission, which again is the agent. This is, in effect, the lowest and most accurate denominator of control, being mindful of the fact that states exert this form of control even where they do not have control over territory. As pointed out earlier with reference to Sedley LJ’s dicta, however, the content of this latter class of obligations is fluid, depending on the facts inherent to the case. Following such an approach has the benefit of utilising a common standard of *control* in respect of all forms of obligations, but which also has the flexibility that is necessary to cater to those adjustments called for by the nature of the due diligence exercise.

Determining jurisdiction by reference to a personal model that focuses on the control exercised over state agents, therefore, justifies *in principle* the application of IHRL to conduct taking place in situations that have satisfied the conflict threshold. The extent to which it is applied/suspended depends on the circumstances of the particular case, particularly, the nature of the uses of force that constitute the conflict. This latter aspect ought to be considered by the relevant conflict resolution mechanisms, a subject that is addressed in Chapter 6. This realisation, however, creates extensive potential for the concurrent applicability of IHL and IHRL, an issue that will be discussed next.
4.6 Concurrent applicability of IHRL and IHL

Even though IHL is specifically designed to regulate conduct during armed conflict, contemporary international law also envisages a role for IHRL in this endeavour. This is evinced by numerous instruments, including resolutions of international conferences, UNGA resolutions, UNSC resolutions, Secretary-General’s reports, ILC reports, ICRC reports, and judgements of the ICJ and of ECtHR. The relevance of IHRL to times of war was crystallised by the advisory opinion on the Legality of the threat or use of nuclear weapons in the following terms:

In principle, the right not arbitrarily to be deprived of one’s right applies also in hostilities. The test of what is an arbitrary deprivation of life, however, then falls to be determined by the applicable *lex specialis*, namely, the law applicable in armed conflict which is designed to regulate the conduct of hostilities.

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159 ILC Draft Articles on the Effects of Armed Conflict on Treaties, UN Doc A/66/10 [100].
161 Isayeva I (Application No 57947 -49/00, 24 February 2005) [172]–[178].
163 Ibid [25].
This position was confirmed by the ICJ in its advisory opinion on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory\textsuperscript{164} in the following terms:

106. More generally, the Court considers that the protections offered by human rights conventions does not cease in the case of armed conflict save through the effect of provisions for derogation of the kind to be found in Article 4 of the International Covenant on Civil and Political Rights.\textsuperscript{165}

Neither these Opinions, nor the aforementioned sources, provide much guidance as to how the standards prescribed by each branch of law interact – apart from stating generally that some rights will be governed by IHRL, others by IHL and yet others by both branches.\textsuperscript{166} The ICJ decision in the Armed Activities case\textsuperscript{167} is also pertinent in this regard because it examines, in detail, the nature of the fighting between the Ugandan and the Rwandan forces, the extensive civilian casualties caused thereby as well as through concerted attacks on civilians,\textsuperscript{168} and the applicability of various IHRL and IHL instruments.\textsuperscript{169} The Court finds that:

Uganda is internationally responsible for violations of international human rights law and international humanitarian law committed by the UPDF and by its members in the territory of the DRC \textit{and for} failing to comply with its obligations as an occupying power in Ituri in respect of violations of international human rights law and international humanitarian law in the occupied territory\textsuperscript{170} [emphasis added].

A reading of the judgment establishes that the ‘violations’ mentioned in the first portion of the above dicta refer to those that had taken place during the entire conflict, as opposed to the latter class of ‘violations’ that allegedly took place in the areas under occupation. In spite of indicating that the first class of violations can include breaches of IHRL, the Court does not link particular breaches with particular incidents – referring to and relying upon numerous UN and

\textsuperscript{164}Wall [2004] ICJ Rep 136, 177.
\textsuperscript{166}Wall [2004] ICJ Rep 136, 177 [106].
\textsuperscript{167}Armed Activities [2005] ICJ Rep 168.
\textsuperscript{168}Armed Activities [2005] ICJ Rep 168, 239–240 [207]–[208].
\textsuperscript{169}Armed Activities [2005] ICJ Rep 168, 243–244 [217]–[219].
\textsuperscript{170}Armed Activities [2005] ICJ Rep 168, 245 [220].
non-UN reports. The judgement, therefore, does not discuss how individual rules emanating from each of these branches relate to one another in a given application, an analysis that is central to the overall IHL–IHRL dichotomy. Indeed, there are cases in which the results of application of the IHRL rule disagree with those returned when the relevant IHL rule is applied. Recognising this concurrent applicability makes it pertinent to identify the individual rules that become the subjects of application, and this is what Chapter 5 will analyse.

4.7 Conclusion

This chapter opened the discussion on the legal framework by reference to which UN uses of force could be regulated. It dealt with three primary issues in relation to UN uses of force; first, which forms of law are applicable; second, which branches of law are applicable; and third, when and how do these branches become applicable?

The chapter analysed a number of issues within its discussion on the applicable forms of law, such as how treaty and customary law become applicable to non-state actors, such as the UN, and how our current understanding of custom formation, being deduced by reference to the dealings of parties who locate themselves in horizontal relationships, prevents the identification of a ‘customary IHRL’. This, among other reasons, were cited by the chapter in its justification for utilising treaty IHRL for its analysis, the application of which to the UN (which is not a party to any treaty) was justified on the functional treaty succession argument.

It thereafter assessed the content of the relevant IHL frameworks and noted the sparse nature of the treaty regime applicable to NIACs, which is the type of conflict in which UN forces are most likely to be engaged. It further noted that most rules, which are applicable only to IACs as treaty law, are now considered also to apply to NIACs as customary law. The greater coverage that customary IHL so affords, in conjunction with such factors as its applicability to non-state actors, non-state actor contribution to its formation, justified this chapter in selecting the same for analysis by the remainder of this thesis.

This chapter then analysed the IHL and IHRL applicability thresholds. It noted, in this regard, that the *ratione materiae* applicability of IHL to UN forces must be deduced by reference to the same considerations that apply to all other actors. While such an approach contravenes inter alia, the ‘active engagement’ formulation espoused in the Bulletin, it has the merits of
being clear, consistent and compliant with the general approach to belligerency taken by IHL. The chapter also analysed the applicability of IHRL to UN uses of force, but this discussion focused on extra-territorially in light of how the UN cannot be identified as inheriting a territorial unit, in comparison to states. This part then analysed the main approaches to extra-territoriality, the territorial and the personal models, and noted that the former collapses into the latter where the geographic area relevant to an analysis decreases. Furthermore, adopting a personal approach to extraterritoriality allows a single standard to be utilised in analysing the applicability of both negative as well as positive obligations, and in deducing ‘effective control’ for the purposes of conduct attribution.

In light of the analysis conducted therein, the chapter concludes that IHRL can, in principle, apply to UN uses of force that take place in circumstances that have satisfied the conflict threshold. While Chapter 5 will discuss the content of the IHRL and IHL rules relevant to on-field use of force, Chapter 6 will analyse how the conflicts that result from their parallel application can be resolved.
5. Targeting under IHRL and IHL

5.1 Introduction

The previous chapter identified the forms and branches of international law by which the final link of the Chain Motif that is utilised by this thesis is comprised. It justified selecting treaty IHRL and customary IHL for the purpose of regulating UN uses of force, and noted that IHRL can also, in principle, apply to these uses that take place in circumstances that had satisfied the conflict threshold.

This chapter considers the specific IHRL and IHL rules that may be utilised in this endeavour. Its analysis will be limited, however, to those rules that are relevant to the on-field use of force and, within this category, to only those rules that conflict with each other. The chapter will focus on Art 06 of the ICCPR in relation to the IHRL aspect of the equation and will analyse how the Right to Life enumerated therein can be legally deprived, through a discussion of the necessity and proportionality thresholds, as well as of the requirements imposed on planning operations. This analysis will also draw guidance from regional IHRL regimes, where relevant. The IHL component of the equation will consider how customary law understands the principles of distinction and proportionality in reference to both material and non-material targets and identify certain characteristics that are potentially destructive to the overall accent of the Chain Motif that was developed in chapter 3.

The chapter details, in conclusion, a number of specific instances in which IHRL and IHL standards return contradictory results, thereby giving rise to ‘conflicts of law’. A synthesis between the legal objectives of UN deployment and the legal standards by which UN troop conduct is regulated can only be achieved through the careful resolution of these conflicts which is the object of chapter 6.

5.2 IHRL

The tenure and content of IHRL are based on what is referred to as the ‘law enforcement model’. This model is based on the premise of due process wherein prevention is achieved through apprehension and not elimination. Punishing individuals similarly falls beyond its remit, at least
in so far as use of force is concerned. This is reflected in the practice of the Human Rights Committee, which notes in regard to Israel, that its program of targeted killings ‘would appear to be used at least in part as a deterrent or punishment, thus raising issues under Article 6.’\(^1\)

Art 6 of the ICCPR lays down a high threshold for the use of lethal force. It guarantees everyone’s right to life\(^2\) and explains that the same could only be deprived in a non-arbitrary way. The issue of deprivation only becomes relevant where the target poses an imminent threat\(^3\) that relates to death or serious injury, which is directed at the person using force or someone else.\(^4\) However, even where the threat qualifies this criterion, the use of lethal force must be justified on the necessity and proportionality registers, while the operation leading to its employment must accord with the principles relating to precautions.

### 5.2.1 Necessity

The principle of Necessity essentially refers to the lack of viable alternatives. The HRC notes, in this regard, that all measures to arrest a person suspected of being in the process of committing acts of violence must be exhausted before resort is made to lethal force.\(^5\) It has thus been argued

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\(^2\) ICCPR art 6 (1).

\(^3\) Human Rights Committee, *General Comment No 30: Reporting Obligations of States Parties under Article 40 of the Covenant*, UN Doc CCPR/C/21/Rev.2/Add.12, 18 September 2002) [18] (‘General Comment 30’).


[Para 2] Governments and law enforcement agencies should develop a range of means as broad as possible and equip law enforcement officials with various types of weapons and ammunition that would allow for a differentiated use of force and firearms. These should include the development of non-lethal incapacitating weapons for use in appropriate situations, with a view to increasingly restraining the application of means capable of causing death or injury to persons. For the same purpose, it should also be possible for law enforcement officials to be equipped with self-defensive equipment such as shields, helmets, bullet-proof vests and bullet-proof means of transportation, in order to decrease the need to use weapons of any kind.

[Para 4] Law enforcement officials, in carrying out their duty, shall, as far as possible, apply non-violent means before resorting to the use of force and firearms. They may use force and firearms only if other means remain ineffective or without any promise of achieving the intended result.
that force would only be justifiable where attempting to arrest the perpetrator would allow him/her to execute the threat he/she poses\(^6\) or where capture is too risky.\(^7\)

But even where force is necessary, the level of force is limited to the minimum that is *reasonably necessary* in the circumstances.\(^8\) This aspect is exemplified in the views expressed by the Human Rights Committee in Suarez de Geurrero v Columbia, which concerned the deaths of a group of suspected terrorists. According to the Committee:

> The police action was apparently taken without warning to the victims and without giving them any opportunity to surrender to the police patrol or to offer any explanation of their presence or intentions. There is no evidence that the action of the police was necessary in their own defence or that of others.\(^9\)

Thus, according to Nolte,\(^10\) the exceptions to the Right to Life (including under the ICCPR) must be limited to cases in which lethal force is used to prevent an imminent attack. This appears also to be the position of the Inter-American Commission on Human Rights, which mentions in its Report on Terrorism and Human Rights that ‘the state may resort to force only against individuals that threaten the security of all, and therefore the state may not use force against civilians who do not present such a threat.’\(^11\)

Guidance on the threshold is also provided by the Basic Principles on the Use of Force and Firearms by Law Enforcement Officials\(^12\) which, in addition to emphasising the need to provide non-lethal incapacitating weapons, states that:

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\(^6\) Georg Nolte, ‘Preventive Use of Force and Preventive Killings: Moves into a Different Legal Order’ (2004) 5 *Theoretical Inquiries in Law* 111 (‘Nolte’).


\(^8\) Christof Heyns, Special Rapporteur on extrajudicial, summary or arbitrary executions, *1979 Code of Conduct; and Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions*, UN Doc A/HRC/26/36 (1 April 2014) [59] and *Code of Conduct for Law Enforcement Officials* (Adopted by General Assembly resolution 34/169 of 17 December 1979) Commentary (a) to art 3.


\(^11\) *Bukta et al v Hungary* (Europe Court of Human Rights, Second Section, Application No 25691/04, 17 October 2007).

\(^12\) Basic Principles, above n 5, Principles 9 and 10 explain the purposes for which force may be used.
Law enforcement officials in carrying out their duty, shall, as far as possible, apply nonviolent means before resorting to the use of force and firearms. They may use force and firearms only if other means remain ineffective or without any promise of achieving the intended result.\textsuperscript{13}

This approach is referred to as the ‘progressive approach’ and elaborates what necessity in a pure form, should be. It is echoed in the principles of ‘necessity’ and ‘minimum force’ that were contained in UNEF’s troop instructions for Protective Duty Tasks,\textsuperscript{14} Bunche’s Directive to ONUC on the Provision on Internal Security\textsuperscript{15} and ONUC OD 06\textsuperscript{16} that were discussed in Part 3.2.2 of Chapter 3. But recent debate has raged around how mandatory this approach to the use of force is or should be, Special Rapporteur Christof Heyns noting for instance,‘Where non-violent means remain ineffective or without promise of achieving the intended result, necessity requires that the level of force used should be escalated as gradually as possible.’\textsuperscript{17}

Others go further and suggest that the use of force continuum is altogether unsuitable for law enforcement as it inherently makes officers hesitate at crucial moments.\textsuperscript{18} Perhaps more realistically and more accurately, Fridell et al. state that the use of force continuum accords officers a substantial degree of flexibility, erasing a need to ‘climb the stairs one at a time’.\textsuperscript{19} This approach permits officers to resort to higher levels of force where, they consider the graduated use of force to be ineffective or too risky. It places each use of force option on a circular axis, each of which can be resorted to directly where necessary (Refer Diagram 5.1). On a related note, it must also not be forgotten that the literature clearly recognises the need to afford to officers

\textsuperscript{13}Basic Principles, above n 5, Principle 4.
\textsuperscript{14}UNEF Headquarters, Gaza, \textit{Instructions for the guidance of troops for protective duty tasks}, Ref. 2131/7(OPS), (1 September 1962).
\textsuperscript{16}Force Commander ONUC, \textit{Operations Directive No 6}, ‘Security and maintenance of law and order’ (28 October 1960), Cl. 08.
\textsuperscript{17}Christof Heyns, above n 8 [61].
a ‘margin of error’ in light of the nature of the circumstances in which they make these decisions.  

A discussion on the necessity threshold cannot be concluded without reference to the ECtHR decision in *McCann and Others v The United Kingdom*, which concerned the shooting deaths of three Provisional Irish Republican Army (PIRA) members in Gibraltar, Spain when they were (mistakenly) assumed to be detonating a bomb. After discussing a number of useful British authorities elaborating the concept, the Court holds that the actions of the soldiers did not, in themselves, violate Art 2(2), and states that it considers:

that the use of force by agents of the State in pursuit of one of the aims delineated in paragraph 2 of Article 2 (art. 2-2) of the Convention may be justified under this provision (art. 2-2) where it is based on an honest belief which is perceived, for good reasons, to be valid at the time but which subsequently turns out to be mistaken.

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21 *McCann and Others v The United Kingdom* (European Court of Human Rights, Judgement, Application no 18984/9, 27 September 1995) (‘McCann’).
22 Ibid [135]: ‘the test of whether the use of force is reasonable, whether in self-defence or to prevent crime or effect an arrest, is a strict one. It was described in the following terms in the report of the Royal Commission appointed to consider the law relating to indictable offences ([1879] 36 House of Lords Papers 117, at 167):

We take one great principle of the common law to be, that though it sanctions the defence of a man’s person, liberty and property against illegal violence, and permits the use of force to prevent crimes to preserve the public peace and to bring offenders to justice, yet all this is subject to the restriction that the force used is necessary; that is, that the mischief sought to be prevented could not be prevented by less violent means; and that the mischief done by or which might reasonably be anticipated from the force used is not disproportionate to the injury or mischief, which it is intended to prevent.

Lord Justice McGonigal in Attorney General for Northern Ireland’s Reference ([1976] Northern Ireland Law Reports 169 (Court of Appeal)) stated his understanding of this approach as follows (at p. 187):

it appears to me that, when one is considering whether force used in any particular circumstances was reasonable, the test of reasonableness should be determined in the manner set out in that paragraph. It raises two questions:

(a) Could the mischief sought to be prevented have been prevented by less violent means?
(b) Was the mischief done or which could reasonably be anticipated from the force used disproportionate to the injury or mischief which it was intended to prevent?

These are questions to be determined objectively but based on the actions of reasonable men who act in the circumstances and in the light of the beliefs which the accused honestly believed existed and held. Force is not reasonable if

(a) greater than that necessary, or
(b) if the injury it causes is disproportionately greater than the evil to be prevented.

23 *McCann* (Application no 18984/9, 27 September 1995) [200].
The use of firearms has been justified in numerous other ECTHR decisions, wherein state agents had acted pursuant to a belief of a threat of violence or for the purpose of arresting fugitives.²⁴ Also informative is the decision in Güleç v Turkey,²⁵ wherein an Art2 ECTHR violation was alleged in respect of the Applicant’s son, who was killed by security forces’ fire during a demonstration. The Court, after re-iterating the exceptions contained in Art 2(2), found in favour of the Applicant and stated that:

it goes without saying that a balance must be struck between the aim pursued and the means employed to achieve it. The gendarmes used a very powerful weapon because they apparently did not have truncheons, riot shields, water cannon […] The lack of such equipment is all the more incomprehensible and unacceptable because the province of Sirnak […] is in a region in which a state of emergency had been declared.²⁶

While the ECTHR functions on a standard of ‘absolute necessity’, the Court appears to use the same interchangeably with ‘necessity’.²⁷ It is not however sufficient that a use of force satisfies the necessity threshold; it must also comply with proportionality, which will be discussed next.

### 5.2.2 Proportionality

The condition of Proportionality deals with the amount of force that could be used in respect of a particular objective. According to General Comment 36, this amount of force cannot exceed what is strictly needed to respond to the threat.²⁸ The Court in Isayeva echoes the standard by stating that ‘it goes without saying that a balance must be achieved between the aim pursued and the means employed to achieve it’.²⁹

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²⁴Nachova and Others v Bulgaria (European Court of Human Rights, Application Nos 43577/98 and 43579/98, 26 February 2004) [105] (‘Nachova’).
²⁶Ibid [71].
²⁷Refer to Nachova Application Nos 43577/98 and 43579/98, 26 February 2004) [94],[95], where ‘absolutely necessary’ and ‘necessary’ are used, respectively.
²⁸Human Rights Committee, General Comment No 36 on Article 6 of the International Covenant on Civil and Political Rights, on the Right to Life, UN Doc CCPR/C/GC/36 (30 October 2018) [18].
²⁹Isayeva II (Application No 57950/00, 24 February 2005) [181].
It is not sufficient, therefore, that the means and methods employed by an operation are necessary for the attainment of the objective; they must also be used in an acceptable way. This emphasis on conduct is reflected in the Basic Principles, which require officials to 'act in proportion to the seriousness of the offence and the legitimate objective to be achieved'.\(^{30}\) The Police Executive Research Forum (PERF) provides further guidance in this regard, by providing that:

In assessing whether a response is proportional, officers must ask themselves, 'How would the general public view the action we took? Would they think it was appropriate to the entire situation and to the severity of the threat posed to me or to the public?\(^{31}\)

The principle, therefore, effectively prescribes the maximum level of force that may be used in a given situation and has been applied by the HRC to individual cases\(^{32}\) as well as to patterns of state conduct, such as Israel’s practice of targeted killings.\(^{33}\) Such matters as the number of rounds fired, the trajectory of the rounds, the type of weapon used\(^{34}\) and the location of the incident (whether, for instance, the surroundings were crowded or not)\(^{35}\) will inform this assessment.

In addition to the foregoing, IHRL also requires the pre-execution phases of operations to comply with certain standards it prescribes in terms of precautions. These standards are, however, linked to and influenced by those dictated by the necessity and proportionality conditions.

### 5.2.3 Planning of operations

The necessity and proportionality registers link with the duty imposed on those employing force to plan and control operations so as to minimise, to the greatest extent possible, recourse to

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\(^{30}\) Basic Principles, above n 5, Principle 5(a).


\(^{32}\) Suarez de Guerrero v Colombia, above n 9.

\(^{33}\) Concluding Observations on Israel (2010) UN doc CCPR/C/ISR/CO/3; see also (2003) UN doc CCPR/CO/78/ISR [15].

\(^{34}\) Isayeva I (Application No 57947 -49/00, 24 February 2005) 20 [96].

\(^{35}\) Isayeva I (Application No 57947 -49/00, 24 February 2005) 37–40 [179]–[201].

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lethal force.\textsuperscript{36} The principle of Precaution, as it is sometimes called, thus acts as a precursor to necessity and proportionality. Indeed, it was this aspect of the Duty that gave rise to the violation in McCann – the Court summarising its finding as follows:

In sum, having regard to the decision not to prevent the suspects from travelling into Gibraltar, to the failure of the authorities to make sufficient allowances for the possibility that their intelligence assessments might, in some respects at least, be erroneous and to the automatic recourse to lethal force when the soldiers opened fire, the Court is not persuaded that the killing of the three terrorists constituted the use of force which was no more than absolutely necessary in defence of persons from unlawful violence within the meaning of Article 2 para. 2 (a) (art. 2-2-a) of the Convention.\textsuperscript{37}

The relatively recent Isayeva decisions\textsuperscript{38} provide further insight. The decisions pertain to Russian military actions during and immediately succeeding the siege of Grozny. Numerous sources elaborate that the situation satisfied the conflict threshold with the insurgents, for instance, functioning under responsible command\textsuperscript{39} and being capable of carrying out well-coordinated, sustained and concerted operations.\textsuperscript{40} Isayeva I concerned the aerial bombing of (what turned out to be) a civilian convoy. Isayeva II concerned the aerial bombardment of a village in which Chechen insurgents had been holed up, as well as of civilian vehicles that were exiting that village. Both cases involved civilian casualties.

While acknowledging that the relevant operation had been designed to disarm or destroy a group fighters\textsuperscript{41} in an area over which the Russian government had lost control,\textsuperscript{42} the court holds in Isayeva II that the convention also applied to situations in which it was permitted to use force, which may result ‘as an unintended outcome in the deprivation of life’.\textsuperscript{43} The state obligation in respect of incidental loss of life depends on taking feasible precautions in the choice

\begin{itemize}
\item \textsuperscript{36}Isayeva I (Application No 57947 -49/00, 24 February 2005) 35 [171].
\item \textsuperscript{37}McCann (Application No 18984/9, 27 September 1995) [213].
\item \textsuperscript{38}Isayeva I (Application No 57947 -49/00, 24 February 2005) and Isayeva II (Application No 57950/00, 24 February 2005).
\item \textsuperscript{40}Patrick Cockburn, ‘Chechen Leader Pledges to Retake Grozny’, The Independent (London), 8 February 2000, 15.
\item \textsuperscript{41}Isayeva I (Application No 57947 -49/00, 24 February 2005) [188].
\item \textsuperscript{42}Ibid[180].
\item \textsuperscript{43}Isayeva I (Application No 57947 -49/00, 24 February 2005) [173].
\end{itemize}
of means and methods with a view to ‘avoiding, and in any event, minimising such losses’.\textsuperscript{44} What precautions are ‘feasible’ in a given circumstance is context-dependent. The case law does, however, provide the following insights:

1. The use of missiles with a damage radius of 300 m was disproportionate to the destruction of two insurgent vehicles that were alleged to be part of a civilian convoy;\textsuperscript{45}

2. The use of high-explosion bombs with a damage radius of 1000 m was disproportionate for engaging targets within a village;\textsuperscript{46}

3. The failure to deploy forward air controllers\textsuperscript{47} and the failure to communicate a route of ‘safe passage’ to the relevant elements of the operation;\textsuperscript{48} and

4. The ambush was planned without adequately considering the risk the ensuing fire fight will entail to civilians.\textsuperscript{49}

It is pertinent to note that IHRL utilises this same standard also for regulating the execution phase of the operation. This allows both phases to be regulated with reference to a uniform standard.

\section*{5.3 IHL}

All IHL rules can be traced back to one of its four basic principles – military necessity, humanity, distinction and proportionality. Military necessity and humanity, in particular, form the basis of IHLs targeting rules, but it is important to note that neither principle has risen to the status of a

\textsuperscript{44} Ibid[176].  
\textsuperscript{45} Ibid[195].  
\textsuperscript{46} Ibid[190].  
\textsuperscript{47} Ibid[186].  
\textsuperscript{48} Ibid[186].  
\textsuperscript{49}\textit{Ergi v Turkey} (European Court of Human Rights, Application No 23818/94 (28 July 1998) [80].
positive rule of law and are, therefore, incapable of altering the substantive content of IHL rules. They are only the parameters within which states strike a balance in their use of force.

Military necessity has both a permissive as well as a restrictive function. In the former, it justifies those measures that are necessary for securing the ends of modern warfare and, in the latter, proscribes the use of such kinds and degrees of force that are in excess of what is required to accomplish a legitimate military purpose. The function of humanity is similar to that of the restrictive element of military necessity.

In view of the extensive nature of the relevant literature, this part limits its analysis to those IHL rules that regulate on-field use of force, while potentially contradicting the corresponding IHRL rules. It will essentially concentrate on rules that underpin the operationalisation of Distinction. There are other IHL rules that deal with precautions, whether in relation to target verification, selecting means and methods of warfare, assessing the effects of attacks, or target selection, and yet others that apply to particular targets such as cultural property, works and installations containing dangerous forces (that dictate how these installations enjoy special protection), and the natural environment. These rules will not feature in this discussion. Before drawing conclusions on the customary content of a given rule, this discussion considers the corresponding treaty rule, the relevant formulation suggested by the ICRC customary study, and relevant academic literature.

5.3.1 Distinction – combatants and civilians

The principle of Distinction emanates from one of the most fundamental premises that underlie the use of force. It is expressed in the St Petersburg Declaration in the following terms: ‘the only

50 Nils Melzer, Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law (International Committee of the Red Cross, 2009) 79 (‘ICRC DPH Guidance’).
54 United Kingdom, Ministry of Defence, above n 52, Section 2.4.
legitimate object which states should endeavour to accomplish during war is to weaken the military forces of the enemy’. 55

This ‘weakening’ of enemy forces could be achieved in regard to both human and material resources. The basic rule, therefore, requires parties to a conflict to distinguish between those goals that contribute to this objective and those that do not. Thus, according to AP 1, ‘parties to the conflict must at all times distinguish between the civilian population and combatants and between civilian objects and military objectives’.

The human element of the rule is then elaborated in Art51(2), according to which, ‘The civilian population as such, as well as individual civilians, shall not be the object of attack. ’ This is repeated in verbatim in Art 13 (2) of AP II and, according to the ICRC, the corresponding customary IHL position is as follows:

the parties to the conflict must at all times distinguish between civilians and combatants. Attacks may only be directed against combatants. Attacks must not be directed against civilians. 56

The Bulletin formulates the rule (in relevant part) in terms similar to the proposed customary rule:

The United Nations force shall make a clear distinction at all times between civilians and combatants and between civilian objects and military objectives. Military operations shall be directed only against combatants and military objectives. Attacks on civilians or civilian objects are prohibited. 57

Prof. Dinstein describes distinction as a ‘fundamental and intransgressible principle of customary international law’. 58 There is, however, a minute disparity between the texts of the relevant treaty rules and of the suggested customary rule. Where treaty law provides in relation to attacks, that civilians ‘shall not be the object of attack’, the ICRC provides that ‘Attacks must

not be directed against civilians’. Bothby submits, in this regard, that a customary rule cannot be wider than the treaty rule from which it draws support and suggests, accordingly, that the ICRC formulation does not reflect the correct customary position.59

The application of this argument to Distinction, however, warrants closer attention. The term ‘object of’ in the treaties is used to personify a ‘goal’ or a ‘target’. The idea of an ‘object’, in this sense, requires that it be accompanied by an intention, in this case, an intention to target civilians. Of course, attacks launched by a party may engage civilians by mistake. In this latter case, that party would lack the intention required for a violation of the treaty rule. An analysis of the ICRC wording does not indicate a significant deviation from this position. The requirement that ‘Attacks must not be directed against civilians’, necessitates a similar intention to so direct the attack. An attack that mistakenly engages civilians will lack this mental component and thus not be violative of the rule. It can be concluded, therefore, that the two formulations do not diverge from each other in any significant respect. Moreover, nothing in the Commentaries to the APs or the ICRC study indicate the existence of such a divergence.

Distinction so elaborated applies to both IACs and NIACs,60 and the ICRC cites the following factors in support of its customary content:

1. The prohibition on directing attacks against civilians is included in numerous military manuals used around the world;61
2. The criminalisation of directing attacks against civilians in a number of countries, including those of states that are not, or were not at the time of drafting, party to AP I;62 and
3. The APs have been ratified by a large number of states.

The principle of Distinction can, however, operationalise only where the categories of persons it distinguishes are accurately identified and this is what will be analysed next.

60 Henckaerts and Doswald-Beck, above n 56, 3.
61 Henckaerts and Doswald-Beck, above n 56, 4.
62 Henckaerts and Doswald-Beck, above n 56, 4–5.
5.3.1.1 Definition of civilians

Civilians are defined in both treaty as well as customary law through ‘negative delimitation’. It may be noted at the outset, however, that state reluctance to recognise a ‘combatant status’ in NIACs\(^{63}\) gives rise to differences in how the term is defined in relation to NIACs as opposed to IACs. This section will first analyse the customary position obtaining in IACs.

According to AP I, ‘A civilian is any person who does not belong to one of the categories of persons referred to in Article 4A (1), (2), (3) and (6) of the Third Convention and in Article 43 of this Protocol.’\(^{64}\)

Art 43 AP I then provides:

The armed forces of a party to the conflict consist of all organised armed forces, groups and units which are under a command responsible for that party for the conduct of its subordinates, even if that party is represented by a government or an authority not recognised by an adverse party. Such armed forces shall be subject to an internal disciplinary system which, inter alia, shall enforce compliance with the rules of international law applicable in armed conflict.

Art 43 therefore prescribes two conditions a group etc. must satisfy, in order for the same to form part of the armed forces. These are:

1. Being placed under a command responsible for the party for the conduct of its subordinates; and
2. Being subject to an internal disciplinary system that enforces compliance with the applicable rules.

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\(^{64}\) Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts. Opened for signature on 8 June 1977, 1125 UNTS 3 (entered into force on 7 December 1978) art 50(1) (‘Additional Protocol I’).
The other broad category of individuals that qualify as combatants according to Art 50 (1) AP I are those referred to in Art4A of GC III, which provides:

Prisoners of war are [...] persons belonging to one of the following categories, who have fallen into the power of the enemy:

1) Members of the armed forces of a party to the conflict as well as members of militias or volunteer corps forming part of such armed forces.

2) Members of other militias and members of other volunteer corps, including those of organised resistance movements, belonging to a party to the conflict and operating in or outside their own territory, [...] provided that such militias or volunteer corps, including such organised resistance movements, fulfil the following conditions:

   a) that of being commanded by a person responsible for his subordinates,

   b) that of having a fixed distinctive sign recognisable at a distance,

   c) that of carrying arms openly,

   d) that of conducting their operations in accordance with the laws and customs of war.

3) Members of regular armed forces who profess allegiance to a government or an authority not recognised by the Detaining power.

Even though this provision, stritco sensu, applies to Prisoner of War (POW) status, such status is taken to be concomitant to combatant status in IACs.

The reference that Art 50 thus makes to two provisions when defining ‘armed forces’ requires the relationship subsisting between these provisions to be clarified. The Commentary to the Protocols provides, in this regard, that the respective ambits of Art 4 A and Art 43 completely overlap: ‘Paragraph 1 also refers to Article 43 of the Protocol (Armed Forces), which contains a new definition of armed forces covering the different categories of the above-mentioned Article 4 of the Third Convention.’

65 In light of this overlap, the ICRC study defines

65 Yves Sandoz et al, above n 55 [1916].
armed forces with reference to only the first of the aforementioned Art 43 conditions (i.e. the command condition) as follows: ‘The armed forces of a party to the conflict shall consist of all armed forces, groups and units which are under a command responsible to the party for the conduct of its subordinates.’

This exclusive emphasis that the ICRC places on the first condition warrants further attention. It must be noted, in this regard though, that the requirement imposed by Art 43 regarding the existence of a disciplinary system is largely, if not completely, conditional on the existence of the command structure that is referred to in its first condition. It has also been argued that the failure to enforce compliance with the applicable rules, which is attributable to the group and not to the individual, cannot function as a ground on which individual combatant status should be denied. This greatly limits the extent to which there can be a disparity between the respective ambi of Art 43 and Rule 4.

According to the ICRC, the definition of armed forces contained in its study has attained customary status in IACs and may also apply to NIACs. The ICRC cites numerous military manuals and official statements in support of the customary status of the rule as regards to IACs. Note also that members of armed forces are automatically considered to be a military objective within the meaning of Art 52 AP I, which entails their status-based liability to be targeted at any time.

Because the ambit of ‘armed forces’ envisaged by AP I and Rule 4 are for all intents and purposes, identical, the categories of persons on whom the two instruments confer civilian status in IACs is also identical. In addition to the fact that no reservations were made to the relevant AP I provision defining ‘civilian’ (i.e. Art 50) at adoption, the ICRC notes that numerous military manuals and instances of state practice reflect the said definition. It thus concludes

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66 Henckaerts and Doswald-Beck, above n 56, Rule 4.
68 Henckaerts and Doswald-Beck, above n 56, 14.
69 Henckaerts and Doswald-Beck, above n 56, 14.
70 Henckaerts and Doswald-Beck, above n 56, 14.
71 Yves Sandoz et al, above n 55 [2017].
72 Henckaerts and Doswald-Beck, above n 23, Rule 5 and Additional Protocol I, art 50 (1).
73 These differences pertain to how armed forces are defined in each text as discussed above.
74 Henckaerts and Doswald-Beck, above n 56, 18.
75 Henckaerts and Doswald-Beck, above n 56, 18.
76 Henckaerts and Doswald-Beck, above n 56, 18.
the same to have attained customary status in IACs. The ICRC formulates its rule in the following terms: ‘Civilians are persons who are not members of the armed forces. The civilian population comprises all persons who are civilians.’

The customary position so obtaining in respect of civilian status in IACs may be compared with that relevant to NIACs. CA 3 of the GCs (which has also attained customary status) provides a good starting point to this discussion and extends its scope of protection to ‘Persons not taking an active part in hostilities, including members of armed forces who have laid down their arms and those placed hors de combat’.

Whether the provision provides or withholds protection, therefore, depends on whether an individual is ‘taking an active part in hostilities’. Even though the English texts of the GCs and APs, respectively, use the terms ‘active’ and ‘direct’, the French text of these documents consistently use the term ‘participant directment’. The Commentaries to the Protocols further clarify this uniform nature of the standard by stating that direct participation ‘implies that a sufficient causal relationship between the act of participation and its immediate consequences’ exists. The nature of the participation, by virtue of which CA 3 justifies loss of protection, can thus be described as ‘direct’.

In view of CA 3’s reference to ‘armed forces’, it must next be considered what the phrase means in an NIAC. This query attains further pertinence in view of the division between State Armed Forces (SAF), Dissident Armed Forces (DAF) and OAGs introduced by Art 1 (1) of AP II. It may be recalled, however, that NIACs to which AP II applies are a sub-category of the larger group of conflicts regulated by CA 3. While this categorisation emanates from the higher degree of organisation and intensity demanded by AP II conflicts, it does not detract from the fact that the violence covered thereby also results from the dealings between the same ‘armed forces’ as mentioned in CA 3. This conclusion finds support in the ICRC Interpretive Guidance on Direct Participation in Hostilities (the ‘Guidance’), which provides that the term ‘armed forces’ in CA 3

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77 Henckaerts and Doswald-Beck, above n 56, 18.
78 Henckaerts and Doswald-Beck, above n 56, Rule 5.
79 Henckaerts and Doswald-Beck, above n 56, XXXVI.
81 Yves Sandoz et al, above n 55, [4787].
82 Akayesu (Case No ICTR-96-4-T, 2 September 1998) 157.
includes all categories ‘juxtaposed in Article 1(1) AP II’. At first glance, this would imply that members of OAGs become liable to attack based on their status. But the ICRC customary international law study explains:

While state armed forces may be considered as combatants for purposes of the principle of distinction (see Rule 1), practice is not clear as to the situation of members of armed opposition groups. Practice does indicate, however, that persons do not enjoy the protection against attack accorded to civilians when they take a direct part in hostilities (see Rule 6).

This leaves open whether members of these groups become targetable on the criteria of DPH or whether they are liable to be targeted based on status, a position akin to that enjoyed by members of SAFs. The Bulletin renders no assistance in this regard because it does not define the terms ‘combatant’ or ‘civilian’.

In relation to NIACs, this essentially creates three categories of persons, that is, members of armed forces (whether they be state, dissident or OAG), civilians taking a direct part in hostilities and civilians not taking a direct part in hostilities. The protected status of the last of these groups has attained customary status in both IACs and NIACs. The corollary of this position is that civilians taking a direct part in hostilities lose their protection from attack ‘unless and for such time’ as they do so (also reflecting customary law), although the ambit of direct participation is subject to extensive debate. Insofar as armed forces are concerned, at least members of state armed forces engaged in a NIAC are targetable based on their status, a position that has similarly attained customary status. The ‘grey area’ that exists between these two customary positions must be resolved and it is this that will be analysed next.

83 Nils Melzer, above n 53, 30.
84 Yves Sandoz et al, above n 55, 12.
85 Henckaerts and Doswald-Beck, above n 56, Rule 1.
86 Henckaerts and Doswald-Beck, above n 56, Rule 6. Refer to pages 121 and 127 for affirmations of respective customary positions in IACs and NIACs.
87 Henckaerts and Doswald-Beck, above n 56, 12.
5.3.1.2 The ICRC Interpretive Guidance and Direct Participation in Hostilities

The ICRC Interpretive Guidance was published in 2009 pursuant to input from a 50 member expert group. The significance of the subject matter dealt with therein is evinced by the overwhelming academic attention the Guidance received, which included inter alia, a dedicated volume of the *Journal of International Law and Politics*. This section will consider how the Guidance contributes to the understanding of DPH in customary law.

The discussion on loss of protection contained in the Guidance is divided along the categories into which persons can be grouped during NIACs. Accordingly, members of state armed forces lose protection for the duration of their enlistment, members of OAGs, until such time as they perform a Continuous Combat Function (CCF); and civilians as long as, and for such time as, they take a direct part in hostilities. According to Recommendation II, OAGs ‘constitute the armed forces of a non-state party to the conflict and consist only of individuals whose CCF it is to take a direct part in hostilities.’ The Guidance further provides that, for the purposes of the principle in NIACs, ‘all persons who are not members of SAFs or OAGs of a party to the conflict’ are civilians. But membership in OAGs is defined by the Guidance in terms of CCF and because CCF, in turn, depends on DPH, defining DPH narrowly has the effect of limiting the ambit of that class of persons who are members of an OAG. This, in turn, expands the class of persons that the Guidance identifies as ‘civilians’. This approach, as will be demonstrated, has substantial potential to manufacture practical difficulties that, in turn, give rise to significant and serious disparities between the respective targetability of members of state and non-state forces, thereby creating serious impediments to the IHL principle of equal application.

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89 Nils Melzer, above n 53, 69.

90 This term is introduced by the ‘Guidance’, at 69.

91 Nils Melzer, above n 53, Recommendation 2.

92 Bill Bothby, ‘“And for Such Time As”: The Time Dimension to Direct Participation in Hostilities’ (2010) 42 New York University Journal of International Law and Politics 741, 757.
The Guidance interprets DPH with reference to three cumulative criteria:

a) The threshold of harm – a specific act must be likely to adversely affect the military operations or military capacity of a party to an armed conflict or, alternatively, to inflict death, injury, or destruction on persons or objects protected against attack,

b) direct causation – the existence of a direct causal link between a specific act and the harm likely to result either from that act or from a coordinated military operation of which that act constitutes an integral part, and

c) belligerent nexus – an act must be specifically designed to directly cause the required threshold of harm in support of a party to the conflict and to the detriment of another [emphasis added].

(a) The threshold of harm

The first requirement of the ICRC notion of DPH, as the denomination suggests, concerns threshold. The Guidance indicates that this can either be achieved by adversely affecting the military operations or capacity of the enemy (the ‘first threshold component’) or by harming protected persons or objects (the ‘second threshold component’). There is no need for the relevant harm to materialise and what is relevant is that there be an objective likelihood of the act leading to the harm.\(^{93}\) The Guidance, therefore, requires there to be a clear link between each part of the threshold component and the harm that ensues to the enemy. This is also reflected in general IHL and, according to the Commentary to AP I, ‘Direct participation in hostilities implies a direct causal relationship between the activity engaged in and the harm done to the enemy at the time and the place where the activity takes place.’\(^{94}\)

It is relevant, in this regard, to note how the ICTY Appeals Chamber in Prosecutor v Strugar enumerates the converse of this position, that is, protection from attack:

a Trial Chamber must be satisfied beyond a reasonable doubt that the victim of the alleged offence was not participating in acts of war which by their nature or

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\(^{93}\) Nils Melzer, above n 53, 50 and 51.

\(^{94}\) Henckaerts and Doswald-Beck, above n 56 [1679].
purpose are intended to cause actual harm to the personnel or equipment of the enemy’s armed force.\textsuperscript{95}

This nexus emanates from the overall object of war, which as enumerated in the St. Petersburg Declaration,\textsuperscript{96} is the weakening of the enemy. All harm must therefore, by definition, have a nexus to this ultimate objective. This truism also applies to the second threshold component enumerated in the Guidance. Such acts satisfy the threshold only where targeting a part of the civilian population is an overall goal of the conflict and where they contribute to that overall military strategy.\textsuperscript{97} What this means is that purely personal attacks (which often take place where law and order breaks down) that are not perpetrated in pursuance of such goals, do not qualify as DPH. In 2012, a group of United Nations Operation in Cote d’ Ivoire (UNOCI) troops refused to open fire on an armed mob that was attacking a camp housing Internally Displaced Persons for exactly this same reason.\textsuperscript{98} The individuals perpetrating such violence, paradoxically, enjoy the same immunity that their victims do under IHL.

There is in war, however, a crucial nexus between harm and benefit. Schmitt explains this issue lucidly and submits that, by focusing on harm, the Guidance completely neglects acts such as the manufacture of Improvised Explosive Devises (IED) that can benefit a party without immediately harming another.\textsuperscript{99} A further criticism on the parameters of the threshold, this time by Watkin, correctly alleges that the formulation adopted by the Guidance limits conduct to tactical activities, thereby limiting also the ambit of the CCF.\textsuperscript{100}

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\textsuperscript{95}Prosecutor v Strugar (Judgment) (International Criminal Tribunal for the Former Yugoslavia, Case No IT-0142-A, (July 17, 2008) 176–179.
\textsuperscript{96}Declaration Renouncing the Use, in Time of War, of Explosive Projectiles Under 400 Grammes Weight, Saint Petersburg, 29 November 1868–11 December 1868.
\textsuperscript{98}Inner City News, ‘UN Peacekeepers Inaction on IDP Killings in Cote d’ Ivoire Due to DPKO Rules?’ 22 October 2012.
\textsuperscript{99}Michael N Schmitt, above n 97, 719. Refer also to how benefit affects causation differently to how harm does, as explained in p 720.
\end{flushleft}
(b) Causation

Causation places emphasis on the well-recognised distinction between direct and indirect forms of participation, and requires that the relevant act must be designed to cause the intended harm. The Guidance requires, in this regard, that harm be caused in one causal step. The act need not be indispensable for the infliction of the harm nor should there be a temporal nor geographic nexus between the two. It is also not sufficient that the act be linked to the harm through an uninterrupted chain of events, a requirement that pushes the ‘IED technician’ beyond the ambit of the criteria. But it is pertinent to note that acts which do not translate into harm in one causal step often cause harm to adversaries. An obvious example is the gathering of intelligence, which needs to be processed and analysed before actual harm is inflicted. While there are intermediate steps between the act and the harm, the latter does not materialise but for the initial act. The one causal step criterion is, therefore, inaccurate and it may instead be more beneficial to frame the question in terms of whether the harm would have materialised but for the act in question. This latter formula is closer to what has been suggested by Schmitt who submits that the ‘integral part’ approach, which the Guidance adopts in relation to military operations, should also determine the issue of causation.

(c) Belligerent nexus

The belligerent nexus component of DPH requires that the act be specifically designed to directly cause the required harm in support of a party to the conflict and to the detriment of another. The act need not be intended to have these effects; it is sufficient that it is so designed. This means that even acts carried out by coerced fighters or child soldiers, whose mental state is very different to that of hard-core fighters, also satisfy this third element. This aspect of the rule attains pertinence when it falls to be utilised by UN troops, who’s in bello morality is shaped differently. This dichotomy will be discussed further in the next chapter.

101 Nils Melzer, above n 53, 53.
102 Ibid 53.
103 Ibid 55.
104 Ibid 54.
105 Schmitt, above n 97, 729.
Moreover, belligerent nexus also has the effect of disqualifying purely private acts that are not carried out on behalf of a party to the conflict. Pertinently however, the formulation adopted by the Guidance requires that both outcomes prescribed therein; that is, the act must benefit one party and be detrimental to another to be satisfied. This requirement pushes beyond the remit of belligerent nexus, those acts that benefit a party without being detrimental to another. It is thus submitted that benefit and detriment should be linked in this regard with an ‘or’ and not a ‘and’.

While the Guidance undoubtedly sheds much-needed light on an issue of exceeding complexity, it does create a number of significant difficulties. Some of these were mentioned in the preceding paragraphs but others merit more discussion. For instance, as also pointed out by Watkin,106 in basing the idea of a CCF on DPH, the Guidance creates a significant disparity between the respective targetability of members of SAFs and of OAGs. Those individuals falling within the former category are targetable under IHL, even when they are not ‘directly participating’ within the meaning of the Guidance. Conversely, individuals belonging to OAGs whose function may not involve ‘direct participation’ within the meaning of the Guidance, but who actually engage in beneficial and/or harmful acts on a continuous basis, are not targetable. Moreover, members of SAFs are targetable by virtue of their membership throughout the conflict, while members of OAGs are targetable only for so long as they assume a CCF. This is in spite of the Guidance recognising that OAGs are, in fact, the armed forces of non-state parties to the conflict.

The Guidance also permits a civilian to move back and forth through the ‘revolving door’ of targetability on a ‘persistently recurring basis’. What this means is that the individual cannot be targeted during the intervals between two acts of direct participation.107 But opinion is far from settled in this regard; the Inter-American Commission on Human Rights, for instance, states in regard to direct participation:

It is possible in this connection, however, that once a person qualifies as a combatant, whether regular or irregular, privileged or unprivileged, he or she

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106 Watkin, above n 102, 655.
107 Nils Melzer, above n 53, 70. Refer to Watkin, above n 102, 676, for a criticism of this position.
cannot revert back to civilian status or otherwise alternate between combatant and civilian status.\textsuperscript{108}

Parks goes even further and submits that the inability of a civilian who had crossed this line by committing hostile acts to regain immunity, has now attained customary status.\textsuperscript{109} This position may be compared with the status of those individuals who attain a CCF who are rendered liable to be targeted through the whole duration, for which he/she assumes such a function.\textsuperscript{110} To say that the line between the persistent participant and the holder of a CCF is thin and unclear is, therefore, a gross understatement.

It is also apparent that states approach these issues rather differently. This aspect of engagement is discussed extensively in the Targeted Killings judgement,\textsuperscript{111} which provides that individuals obtain a CCF where they make the organisation their ‘home’ and concludes that the CCF rule has attained customary status.\textsuperscript{112} According to the Israeli Supreme Court, intervals between each engagement in the case of such individuals do not revert the target to his/her original civilian status.\textsuperscript{113}

\textit{5.3.1.3 Defining ‘combatant’ in NIACs?}

This thesis submits that the aforementioned difficulties make it prudent to disregard the concept of CCF in the discussion of targetability in NIACs. It suggests that the discussion must start from CA 3, according to which individuals not taking a direct (active) part in hostilities enjoy immunity from attack. It is accepted that this forms a customary rule and means, in the converse, that persons taking a direct part in hostilities become liable to attack. In NIACs, this latter class of persons comprises two categories, that is, civilians directly participating in hostilities and members of armed forces (this second class of persons was further divided into members of SAFs, DAFs and of OAGs above). While the former class of persons becomes liable to be targeted \textit{for such time as} they directly participate in the hostilities, the latter are targetable for so long as

\textsuperscript{110}Nils Melzer, above n 53, Recommendation 7.
\textsuperscript{111}\textit{The Public Committee against Torture in Israel and another v The Government of Israel and Others} (HCJ 769/02, 11 December 2005) (‘Targeted Killings’).
\textsuperscript{112}Ibid, 27 [39].
\textsuperscript{113}\textit{Targeted Killings}(HCJ 769/02, 11 December 2005) 27 [39].
they remain ‘members’ of the relevant force. Whether or not a customary definition of ‘membership’ exists in NIACs must therefore be considered in further detail. Three approaches to the issue can be suggested and I shall examine each in turn.

According to the first approach, customary law understands membership through the notion of command. Indeed, this is the conclusion at which Rule 4 of the customary study arrives in respect of SAFs in NIACs, albeit in rather uncertain terms. The position is substantiated by Bothe et al., who argue that the armed groups referred to in Art 1(1) AP II inferentially recognize the essential conditions for armed forces as they apply in IACs. As noted earlier, the categories of people covered by Art 1(1) AP II and CA 3 overlap, and the only condition under which armed forces get constituted in IACs is the requirement for a force, group or unit to be under a ‘command responsible to the party for the conduct of its subordinates’. Accordingly, those individuals that satisfy this condition can, at customary law, be considered as members of armed forces (whether state or otherwise).

The second approach attempts to base membership on enlistment of the force. This was, in fact, how the issue was approached at the Diplomatic Conferences before the text was diluted at their conclusion. According to this initial text, a civilian was ‘anyone who is not a member of the armed forces or of an organized armed group’. The participants, therefore, clearly envisaged that OAGs could also adhere to a realistic notion of ‘enlistment’. The ICTY similarly notes that ‘for the purpose of [...] the term “civilian” is defined negatively as anyone who is not a member of the armed forces or of an organised military group belonging to a party to the conflict’.

Moreover, contrary to what the ICRC Guidance suggests, many OAGs around the world, including the New People’s Liberation Army (NPLA) and the Sudan People’s Liberation

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114 Michael Bothe et al, above n 68, 672.
115 Henckaerts and Doswald-Beck, above n 56, Rule 4. Also refer to Watkin, above n 102, 691.
119 Prosecutor v Galić(Judgment and Opinion) (International Criminal Tribunal for the former Yugoslavia, Case No IT-98-29-T, (5 December 2003) [47]; Prosecutor v Kayishema and Ruzindana(Judgment) (International Criminal Tribunal for Rwanda, Case No ICTR-95-1-T, 21 May 1999)[179] and Prosecutor v Rutaganda Judgment and Sentence)(International Criminal Tribunal for Rwanda, Case No ICTR-96-3-T, 6 December 1999) [100].
Movement (SPLM), have published or unpublished rules on membership. Not only do such courses of action strengthen this argument, they also unequivocally indicate the capacity of OAGs to contribute to customary law.

The third approach posits itself on the customary nature of CA 3, basing targetability in NIACs on direct participation in hostilities, which is itself a customary standard. Beyond this threshold guideline, however, the approach does not add much to the discussion. It does not answer where targetability alters from a permanent to a temporary nature and its utility is further reduced by the fluid customary contours of the notion of direct participation.

It is also pertinent to note, at this point, that the International Institute of Humanitarian Law’s (IIHL) manual on NIAC combines the second and third of these approaches when formulating its rule on Distinction. It prescribes that, attacks must be directed only against ‘fighters’, who are defined as ‘members of armed forces or other organized armed groups, or taking an active (direct) in hostilities. While the document does not define the term, it identifies what must be required for an act to qualify as DPH; that is, a sufficient causal relationship between the active participation and its immediate consequences. This is, in fact, the threshold criteria suggested by the Commentary to the Protocols in relation to Art 13(2) AP II. Because the terms ‘direct’ and ‘active’ are interchangeable, it can be argued plausibly that this is what is required also by customary law.

The foregoing discussion suggests, therefore, that enlistment can act as a customary indicator of membership of OAGs. In addition to its customary credence, such an approach is also consistent with the principle of equal application as it sets a uniform targetability threshold for members of state as well as non-state armed groups. A targeting regime that ignores these realities, such as the ICRC approach, becomes discredited and encounters the danger of non-adherence.

The other class of persons that lose immunity from attack comprises individuals who directly participate in hostilities. Within this class is to be found a distinction between those

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118 NDFP, NDFP Human Rights Monitoring Committee Booklet No 6, 85, 90, for ‘Basic Rules of the New People’s Army’, Principle 3 and SPLA ACT 2003, Chapter II.
120 Ibid 2.1.1.
121 IIHL Manual, above n 121, 1.2.2 a.
122 IIHL Manual, above n 121, 4.
individuals who directly participate on an ad hoc basis, and those who do so on a more regular basis. While loss of protection, by virtue of direct participation, has attained customary status in both IACs and NIACs, the content of DPH has not been developed in state practice.\textsuperscript{123} State practice and relevant jurisprudence do, however, follow a familiar pattern; they first prescribe the rule, then provide examples and thereafter mention that the matter must be resolved on a case-by-case basis.\textsuperscript{124} While this does not provide a complete solution to the issue, it must lead to the realisation that there is, in customary law applicable to NIACs, a core group of activities, such as firing weapons,\textsuperscript{125} attacking the adversary’s personnel or facilities,\textsuperscript{126} sabotage\textsuperscript{127} and intelligence gathering,\textsuperscript{128} which automatically qualify as DPH. It must also be noted in this

\textsuperscript{123} Schmitt, above n 97,705.
\textsuperscript{124} For instance, refer to US Navy, The Commander’s Handbook on the Law of Naval Operations (US Marine Corps & US Coast Guard, 2007) Doc NWP 1-14M/MCWP 5-12.1/COMDTBPUB P5600.7A, chap 8.2.2:

Unlawful combatants who are not members of forces or parties declared hostile but who are taking a direct part in hostilities may be attacked while they are taking a direct part in hostilities, unless they are hors de combat. Direct participation in hostilities must be judged on a case-by-case basis. Some examples include taking up arms or otherwise trying to kill, injure, or capture enemy personnel or destroy enemy property. Also civilians serving as lookouts or guards, or intelligence agents for military forces may be considered to be directly participating in hostilities. Combatants in the field must make an honest determination as to whether a particular person is or is not taking a direct part in hostilities based on the person’s behavior, location, attire, and other information available at the time.

United Kingdom, Ministry of Defence, above n 52, chap 5.3.3:

Whether civilians are taking a direct part in hostilities is a question of fact. Civilians manning an antiaircraft gun or engaging in sabotage of military installations are doing so. Civilians working in military vehicle maintenance depots or munitions factories or driving military transport vehicles are not, but they are at risk from attacks on those objectives since military objectives may be attacked whether or not civilians are present.

Targeted Killings (HCJ 769/02, 11 December 2005)\textsuperscript{25} [35]:

[T]he following cases should also be included in the definition of taking a ‘direct part’ in hostilities: a person who collects intelligence on the army, whether on issues regarding the hostilities, or beyond those issues; a person who transports unlawful combatants to or from the place where the hostilities are taking place; a person who operates weapons which unlawful combatants use, or supervises their operation, or provides service to them, be the distance from the battlefield as it may. However, a person who sells food or medicine to an unlawful combatant is not taking a direct part, rather an indirect part in the hostilities. The same is the case regarding a person who distributes propaganda supporting those unlawful combatants.

Refer to Henckaerts and Doswald-Beck, above n 56, 22, for further citations of this approach.
\textsuperscript{125} Prosecutor v Tadić (Opinion and Judgment) (International Criminal Tribunal for the Former Yugoslavia, Case No IT-94-1-T, 7 May 1997) [616].
\textsuperscript{126} IIHL Manual, above n 121, 4.
\textsuperscript{128} IIHL Manual, above n 121, 4; Prosecutor v Strugar (Judgment) (International Criminal Tribunal for the former Yugoslavia, Case No IT-01-42-A, Judgment, 17 July 2008) [177].
connection that the customary emphasis on the relationship between participation and its consequences referred to above can act as a useful indicator when identifying direct forms of participation. Moreover, military practice requires that the issue of direct participation be approached and resolved in good faith with the duty to do everything feasible to verify that targets are military objectives, having now attained customary status in both IACs and NIACs. These individuals accordingly become liable to be targeted for the duration of their direct participation.

The last category under consideration includes individuals who participate directly in hostilities, but who do so beyond a mere sporadic or ad hoc level. The targeted killings judgment decides, in this regard, that such individuals could be targeted at any time, subjecting them to a status akin to that of enlisted members of OAGs (and indeed of state armed forces). It is pertinent to note at this point that, even though such individuals may not satisfy the ‘enlistment’ criteria, they operate at all times under the ‘command’ of the OAG. This is where the command-based approach to the deduction of membership (and thereby, targetability) that was discussed above proves useful. The difference between this class of individuals and civilians directly participating in hostilities is that the former remain constantly subject to the command of the OAG, whereas the civilian DPH are subject thereto only for the duration of the engagement. This section therefore argues that the command criterion should be utilised as a customary standard of targetability of individuals who fall between enlisted members of OAGs and civilians directly participating in hostilities on a mere ad hoc basis. But while conceding the legal tenability and practical relevance of this position, this thesis notes that its use can only be justified where adequate safeguards, which ensure the accuracy of the information it utilises, have already been employed.

5.3.2 Distinction - objects

The responsibility to restrict military operations to targets that hold military value extends to objects as well. The discussion usually revolves around the term ‘military objective’, first defined

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129 Henckaerts and Doswald-Beck, above n 56 [1679].
130 US Navy, above n 124.
131 Henckaerts and Doswald-Beck, above n 56, Rule 16.
132 Targeted Killings (HCJ 769/02, 11 December 2005).
133 Ibid 27 [39].
in the 1923 Hague Rules on Air Warfare to mean ‘an object of which the destruction or injury would constitute a distinct military advantage to the belligerent’.\textsuperscript{134} AP I elaborates on this definition, dictating that:

(1) Civilian objects shall not be the object of attack or reprisals. Civilian objects are all objects which are not military objectives as defined in paragraph 2.

(2) Attacks shall be limited strictly to military objectives. In so far as objects are concerned, military objectives are limited to those objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralisation, in the circumstances ruling at the time, offers a definite military advantage.

The ICRC finds numerous instances of state practice applicable to IACs that reflect the requirement to limit attacks to military objectives, including military manuals,\textsuperscript{135} pieces of domestic legislation\textsuperscript{136} and official statements.\textsuperscript{137} While the final text of AP II does not prescribe that attacks be limited only to military objectives, the ICRC points to numerous documents pertaining to NIACs, such as military manuals,\textsuperscript{138} pieces of domestic legislation\textsuperscript{139} and official statements,\textsuperscript{140} which reflect the rule. It thus asserts that the requirement to limit attacks to military objectives has attained customary status in IACs as well as NIACs.\textsuperscript{141} The baseline customary rule suggested by the ICRC is ‘The parties to the conflict must at all times distinguish between civilian objects and military objectives. Attacks may only be directed against military objectives. Attacks must not be directed against civilian objects.’

The customary study then defines military objectives in terms identical to those contained in AP I\textsuperscript{142} limiting them to objects:

\begin{itemize}
  \item \textsuperscript{134} ‘Hague Rules of Air Warfare’ (1922), reprinted in Dietrich Schindler and Jiri Toman, \textit{The Laws of Armed Conflicts} (MartinusNijhoff, 3rd ed, 1988) 207.
  \item \textsuperscript{135} Henckaerts and Doswald-Beck, above n 56, 26.
  \item \textsuperscript{136} Ibid 26.
  \item \textsuperscript{137} Ibid 26.
  \item \textsuperscript{138} Ibid 28.
  \item \textsuperscript{139} Ibid 28.
  \item \textsuperscript{140} Ibid 28.
  \item \textsuperscript{141} Ibid 25.
  \item \textsuperscript{142} Ibid Rule 8.
\end{itemize}
1. which by their nature, location, purpose or use make an effective contribution to military action; and
2. whose partial or total destruction, capture, or neutralization, in the circumstances ruling at the time, offers a definite military advantage.

The customary status of this definition of military objectives as relevant to IACs is supported by its inclusion in military manuals, official statements that are relevant to IACs, and the large number of states that have ratified Art.52(2) of AP I. The ICRC also finds no state practice that contravenes the aforementioned definition as applicable to NIACs and cites numerous military manuals, pieces of domestic legislation and official statements in support of its customary status. The Bulletin incorporates the duty to direct attacks against military objectives without defining the term.

The meaning of ‘military objective’ has not however, gone unnoticed by academic circles. While some authors, such as Hays Parks, describe the same as being ‘too narrow’ for its ignorance of war-sustaining activities, others, such as Gardam, italicise its broader aspects such as permitting forms of damage that have long-term consequences.

Within this debate, yet others recognise the possibility of redefining the term:

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143 Henckaerts and Doswald-Beck, above n 56, 30.
144 Ibid 30.
145 Ibid 31.
146 Ibid 31.
147 Ibid 31.
149 Bulletin, above n 57, 5.2.
150 Refer for a helpful analysis of the topic, refer to Agnieszka Jachec-Neale, *The Concept of Military Objectives in International Law and Targeting Practice* (Routledge, 2014).
In order to determine whether there is a real subject of concern here, it would be necessary to establish exactly what the effect has been of the damage to the civilian infrastructure brought about by the hostilities. If that points to a need further to refine the law, it is submitted that what is needed is a qualification to the definition of military objectives. Either it should require the likely cumulative effect on the civilian population of attacks against such targets to be taken into account, or the same result might be achieved by requiring that the destruction of the object offer a definite military advantage in the context of the war aim.\textsuperscript{154}

Acknowledging this possibility of amending the content of ‘military objective’ is especially relevant to its utility in relation to uses of force other than war. That such an approach is not only preferable, but also strategically necessary, is reflected in recent NATO practice\textsuperscript{155}, which seeks to limit the ambit of tactical options that are available to NATO forces in areas of activity, such as Close Air Support, Air to Ground Missiles and Indirect Fires, to a level that is well below what is permitted by IHL.

A closer analysis of the constituent elements of the term indicate why such a redefinition may sometimes be called for. That analysis must commence from the cumulative nature of the ‘effective contribution’ and ‘definite military advantage’ requirements imposed by Rule 08,\textsuperscript{156} which also require that the ‘contribution’ made and ‘advantage’ secured be ‘military’ in nature.\textsuperscript{157} This means that objects that do not make an effective contribution to military action or whose destruction does not confer a military advantage (but perhaps a purely humanitarian benefit) do not qualify to be targeted under customary IHL.

\textsuperscript{154}Ibid, 100.
\textsuperscript{155}Refer to (as because unclassified) General Stanley McCrystal, ISAF, \textit{Tactical Directive dated 02 July 2009}\textless https://www.nato.int/isaf/docu/official_texts/Tactical_Directive_090706.pdf\textgreater
\textsuperscript{156}This approach was pursued by the Institute of International Law at least as far back as 1969. The Institute of International Law, \textit{Annuaire de l’Institut de Droit International} (Schmidt Periodicals GMBH, 1969) 376 defines ‘Military Objectives’ as follows:
only those which by their very nature or purpose or use, make an effective contribution to military action, or exhibit a generally recognised military significance, such that their total or partial destruction in actual circumstances gives a substantial, specific and immediate military advantage to those who are in a position to destroy them.
\textsuperscript{157}This nexus is reflected in the Model List of Military Objectives that was drawn up in the Draft Rules for the Limitation of Dangers incurred by the Civilian Population in Time of War 1956 found in Yves Sandoz et al, above n 55, 632. Refer also to Eritrea Ethiopia Claims Commission, \textit{Partial Award on Western Front, Aerial Bombardment and Related Claims}, 19 December 2005 [120].
The ‘effective contribution to military action’ so envisaged by the ICRC rule can emanate from each of the four listed characteristics. ‘Use’ refers to objects that are, by their nature, directly used by forces; that is, present use. These include weapons, fortifications and buildings etc.158 ‘Location’ can include vacant areas, rivers, etc., as well as areas that hold man-made structures such as bridges with tactical or strategic importance. ‘Purpose’ refers to an object’s future use.159

Moreover, the ‘military advantage’ perceived by the rule must be ‘definite’ in nature; that is, be concrete and perceptible rather than being hypothetical and speculative.160 This aspect attains particular pertinence in the case of diversionary attacks which have sometimes been argued to contravene the AP I rule.161 What is also noteworthy is that the ‘definite military advantage’ conferred by destroying the object is linked to the circumstances ruling at the time. Military advantage is therefore time-specific, the same object may or may not satisfy the threshold at different points of time.162

159 Yves Sandoz et al, above n 55, para 2022. Program on Humanitarian Policy and Conflict Research, Harvard Manual on Air and Missile Warfare (Harvard University, 2009) 107 provides, in this regard: [t]he key issue in determining purpose is the enemy’s intent and that whilst sometimes that intent is clear; when it is not ‘it is necessary to avoid sheer speculation and to rely on hard evidence, based perhaps on intelligence gathering’.
Refer also to Eritrea Ethiopia Claims Commission, Partial Award on Western Front, Aerial Bombardment and Related Claims (19 December 2005) [120] where it was held that the Hirgigo Plant, which was under construction when it was bombed, qualified as a Military Objective due to its future intended use.
160 Michael Bothe et al, New Rules for Victims of Armed Conflicts (MartinusNojhoff, 1982) 325, 326.
162 Regarding the meaning of ‘Military Advantage’, refer to the following reservations that were entered by countries: International Committee of the Red Cross, Australia’s Reservation to the Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977, <https://www.icrc.org/applic/ihl/ihl.nsf/Notification.xsp?action=openDocument&documentId=10312B4E9047086EC1256402003FB253> (with Australia insisting that military advantage in art 57 refers to military advantage ‘as a whole’ and that the judgment of military commanders is necessarily ex ante) and International Committee of the Red Cross, United Kingdom of Great Britain and Northern Ireland’s Declaration to the Protocol Additional to the Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977, <https://www.icrc.org/applic/ihl/ihl.nsf/Notification.xsp?action=openDocument&documentId=0A9EO3FOF2EE757CC1256402003FB6D2> (with the United Kingdom expressing the same reservations).
As noted in Chapter 3, the goals pursued by UN uses of force are significantly different to those pursued by traditional warfare. Conduct pursued by either type of activity (whether be warfare or UN uses of force) must contribute towards the realisation of these overarching goals. This links the concept of military advantage to the overall military goals pursued by the activity and, changes what ‘military advantage’ means in each type of activity. The meaning of ‘military objective’, which by definition is linked to ‘military advantage’ therefore also depends on the type of activity being pursued. This potentially gives rise to two issues concerning UN uses of force. First, the securing or destruction of objects that do not qualify as military objectives per the above definition may well be relevant to the objectives in pursuance of which force is resorted. This is particularly true where securing the object does not confer a military advantage but only a humanitarian benefit. The second is the converse of the first; there may be objectives that fall within the definition, whose destruction would not contribute to the achievement of Deployment objectives. This is elaborated in the Pressure Points model that was adopted towards UN in bello morality, in Chapter 3, which requires the UN to adopt a layered approach to how the targets of force can be ‘weakened’. Conversely, note must also be taken of the greatest possible cooperation with the underlying processes sought by the UN. The ‘weakening’ must not be such as to jeopardise this goal and is certainly not tantamount to the neutralisation of all fighters (particularly the soft core elements). How this happens, and makes the IHL definition of military objective inappropriate to UN uses of force, will be elaborated in the scenario-specific discussions in Chapter 6.

5.3.3 Proportionality

The aforementioned fundamental principles that guide the conduct of hostilities also take account of the practicalities of war. The principle of proportionality – albeit a secondary principle of IHL –exemplifies this truism by legitimising a particular degree of collateral damage that may be caused by a given attack. The proportionality rule is, however, one of the most difficult rules to apply in practice. 163

163 According to William Fenrick, ‘Attacking the Enemy Civilian as a Punishable Offence’ (1997) 7 Duke Journal of International & Comparative Law 539, 545, therefore, the issue is not whether the principle exists, ‘but what it means and how it is to be applied’. But refer to Kenneth Watkin, ‘Assessing Proportionality: Moral Complexity and Legal Rules’ (2005) 8 Yearbook of International Humanitarian Law 3, 4, who states that ‘[t]here may be no other term in international humanitarian law which evokes such debate or controversy as “proportionality”’. 213
AP I enumerates the rule as follows:

5) Among others, the following types of attacks are to be considered indiscriminate:
   
b) an attack which may be expected to cause incidental loss of civilian life, injury to
   civilians, damage to civilian objects, or a combination thereof, which would be
   excessive in relation to the concrete and direct military advantage anticipated. 164

The ICRC supports the customary status of the rule as applicable to IACs, with reference
   to numerous pieces of domestic legislation 165 and military manuals. 166

While the text of AP II does not contain a corresponding rule applicable to NIACs, the ICTY
decision in Kupreskic 167 recognises that proportionality has attained customary status in NIACs.
The ICRC finds no contrary state practice in relation to NIACs 168 and notes that violations of the
rule during NIACs have generally been condemned by states. 169 The customary study formulates
the rule 170 in terms identical to the text of Art 51 (5)b. 171 The rule contained in the Bulletin also
utilises identical language.

The customary status of the rule does not however absolve the difficulties that materialise
during its application, which emanate from two sources. First, the values sought to be balanced
by the principle – civilian life, injury to civilians, damage to civilian property military advantage
– are fundamentally different and obtain their comparative importance from different value
systems. Of central significance, again, is the concept of ‘military advantage’. In linking the term
to the overall object of war (i.e. submission of the enemy), Neuman correctly submits that
military advantage is an advantage that helps the commander reach the ‘goal of submission of
the enemy at the earliest possible time with the least possible expenditure of men and

164 Additional Protocol I Art 51 (5)b.
165 Henckaerts and Doswald-Beck, above n 56, 47.
166 Ibid 47. For an interesting discussion on the status of the proposed ICRC rule with relevant
Against Aspirational Laws of War’ (2016) 17(1) Chicago Journal of International Law 244.
167 Prosecutor v Kupreskic (Judgment) (International Criminal Tribunal for the Former Yugoslavia, Trial
Chamber, Case No IT-96-16-T, 14 January 2000) [524].
168 Henckaerts and Doswald-Beck, above n 56, 49.
169 Ibid 49.
170 Ibid Rule 14.
171 Ibid 46.
resources’. But the extent and nature of the ‘military advantage’ that can be anticipated by an attack is dependent on both the methods and capabilities employed by the adversary, as well as the goals it pursues. To this is added the goals pursued by the UN and how they differ from those of traditional warfare (as discussed above).

The second difficulty emanates from the fairly broad terms in which the rule is drafted. An attack would thus be disproportionate only where there is a significant imbalance between the components that are weighed against each other, and this standard is flexible. Whether or not a given degree of harm is excessive thus depends on the value of the objective being pursued. While the destruction of high value targets can permit higher amounts of collateral damage, much lesser amounts of collateral damage may not be permitted when pursuing targets that have less military value.

There are yet further considerations that complicate the application of the rule. One such complication relates to how it requires the balancing to be done during the pre-execution phase of the attack. This requires that all the relevant elements, such as collateral damage and military advantage, are merely ‘anticipated’ or ‘expected’ when the rule is operationalised. The assessment is primarily objective in that the decision-maker is imputed with the knowledge he/she should have possessed had he/she acted reasonably. The analysis is carried out in view of the information available at the time, thus introducing a subjective element.

Debate has also centred on how ‘military advantage’ must be measured; whether in reference to each individual attack (case-by-case approach) or in reference to the overall objective pursued by the campaign. While Neuman, citing inter alia the US Operational Law

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173 Ibid, 861.

174 How broad these terms are is summarised well by Hays Parks, above n 109, 173, who states that the principle would be ‘constitutionally void for vagueness’ by American constitutional law standards.

175 Michaela Schmitt, ‘Targeting in Operational Law’ in Terry Gill and Dieter Fleck, above n 69, 269, 283; Watkin, above n 102, 3,8.

176 Gill and Fleck, above n 69, 284.

Handbook, favours the latter approach,\textsuperscript{178} the weight of authority clearly balances in favour of the former.\textsuperscript{179} This does not mean that temporally or geographically distant advantages are always discounted. Particularly in the case of large-scale attacks, the term refers to ‘the advantage anticipated from the attack as a whole and not from isolated or particular parts’ of it.\textsuperscript{180} Thus, in reference to the ‘concrete and direct’ component of the rule, the Commentary states:

The expression ‘concrete and direct’ was intended to show that the advantage concerned should be substantial and relatively close, and that advantages which are hardly perceptible and those which would only appear in the long-term should be disregarded.\textsuperscript{181}

A further difficulty, in this regard, lies in ascertaining the limit beyond which a military advantage ceases to be a ‘concrete and direct’ advantage. An element of the calculus that sheds light on this issue is the ‘force preservation’ element which asks where along a spectrum does force preservation cease to be concrete and direct? This spectrum lies between two markers. The first posits that force protection can never be considered a military advantage\textsuperscript{182} and, accordingly, the neutralisation of a military objective that does not pose an active threat cannot confer a military advantage for the purposes of proportionality. The other end of the spectrum recognises military advantage in the neutralisation of any military objective on the basis of preventing its future use against the forces.\textsuperscript{183} It is submitted that the latter marker represents the correct position regarding members of armed forces for the duration of the conflict, due to how the law emphasises their constant targetability. The position with regard to individuals who are directly participating in hostilities is obviously time specific; a military advantage subsists in their destruction only so far as they so participate. The position pertaining to military objects is

\textsuperscript{178} Neuman, above n 172, 99.
\textsuperscript{180} Dietrich Schindler and Jiri Toman, above n 134, 717.
\textsuperscript{181} Henckaerts and Doswald-Beck, above n 56,684.
\textsuperscript{182} Asa Kasher and Amos Yadlin, ‘Military Ethics of Fighting Terror: An Israeli Perspective’ (2005) 4 Journal of Military Ethics 3: ‘jeopardizing combatants rather than bystanders during a military act against a terrorist would mean shouldering responsibility for the mixed nature of the vicinity for no reason at all’.
also time specific (but subject to the limitation referred to at the end of Part 5.2.2); the proposed customary rule imposing a temporal limitation on the definition of ‘military objective’ by using the phrase ‘capture or neutralisation, in the circumstances ruling at the time, offers a definite military advantage’ [emphasis added].

These intricacies are further compounded by the fundamental nature of decision-making. For instance, individuals hailing from different backgrounds already have a value system built into them.\(^{184}\) The values they therefore attribute to different components of the rule differ, sometimes considerably. The calculation simply cannot be limited to a mathematical formula.\(^{185}\) This aspect is especially pertinent to UN uses of force because the allocation of values, as well as the balancing, must be carried out by UN commanders in view of how their in bello morality is shaped. This means, and this is applicable to all UN troops, that decisions that an ordinary military commander may justifiably arrive at, may not be justified for a UN commander. This reality is elaborated in the Report of the Committee Established to Review the NATO Bombing Campaign in Yugoslavia.\(^{186}\)

Decisions are also influenced by various types of biases – including confirmation and hindsight bias – that play an integral role in the decision-making process, regardless of who the

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184 Roni Katzir, above n 172, 859. Also in this regard, refer to United Nations Fact-Finding Mission on the Gaza Conflict, *Human Rights in Palestine and Other Occupied Arab Territories: Report of the United Nations Fact-Finding Mission on the Gaza Conflict*, UN Doc A/HRC/12/48 (29 September 2009) 393, which identifies the following as some of the questions to be asked in this regard:

(a) What are the relative values to be assigned to the military advantage gained and the injury to non-combatants and/or the damage to civilian objects?
(b) What do you include or exclude in totalling your sums?
(c) What is the standard of measurement in time or space? and
(d) To what extent is a military commander obligated to expose his own forces to danger in order to limit civilian casualties or damage to civilian objects?

and notes further: ‘The answers to these questions are not simple. It may be necessary to resolve them on a case-by-case basis, and the answers may differ depending on the background and values of the decision maker’.

185 D Kennedy, *Dark Side of Virtue: Reassessing International Humanitarianism* (Princeton University Press 2004) 290–291; R Kolb, *Ius in bello: le droit international des conflits armés* (Helbing Lichtenhahn, 2003) section 2 [289]. This is not to suggest, however, that the rule is useful in dictating conduct, particularly where there are significant imbalances in the relevant metrics, such as of Yugoslavia in 1998. 77. Michael Bothe et al, *New Rules for Victims of Armed Conflicts: Commentary on the Two 1977 Protocols Additional to the Geneva Conventions of 1949* (MartinusNijhoff, 1982) 310.

186 Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia, *Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia* (13 June 2000).
decision-maker is.\textsuperscript{187} Much also depends on how the rule is framed; for instance, would a decision to launch an attack have been taken had different targeting guidelines – that expressed the balancing in different terms – been applied? These issues will draw further attention when candidate situations are considered in the next chapter.

\textbf{5.4 Potential conflicts}

Undoubtedly, the accent placed on protection by both IHL and IHRL brings them together. According to the ICTY, the regimes ‘share a common “core” of fundamental standards which are applicable at all times, in all circumstances and to all parties’.\textsuperscript{188} But these points of overlap are accompanied by points of significant divergence. This is exemplified inter alia by how IHRL cannot conceptually accommodate a notion of \textit{military necessity}, which cannot feature in the law enforcement paradigm within which it is designed to operate.\textsuperscript{189} Such difficulties, in turn, ground numerous voices that oppose a closer association of the two regimes.\textsuperscript{190}

This does not mean, however, that all IHRL rules are completely incapable of being reconciled with the applicable IHL rule and vice versa. There are a number of ways in which the relevant rules can interact. For instance, while some IHL concepts such as DPH do not find a counterpart in the IHRL regime,\textsuperscript{191} other IHRL rules have the potential to revise a corresponding

\textsuperscript{187} Refer to Ben Clarke, ‘Contemporary Research on Proportionality in Armed Conflicts: A Select Review’ (2012) 3 \textit{International Humanitarian Legal Studies} 391, 393, referring in this regard to Asley Deeks’ work, titled, ‘Cognitive Biases and Proportionality Decisions: A First Look’, which could not be located.

\textsuperscript{188} Nils Melzer, above n 53, 34.

\textsuperscript{189} Refer to Cordula Droege, ‘The Interplay between International Humanitarian Law and International Human Rights Law in Situations of Armed Conflict’ (2007) 40 \textit{Israel Law Review} 310, 336, for other points at which the two regimes diverge.


\textsuperscript{191} This is perhaps explained by the nature of the context within which IHRL is designed to operate, i.e. times of peace wherein active hostilities are unlikely to take place.
IHL rule. This is the case as regards Art118 of GC II, dealing with the repatriation of prisoners of war, which does not require the prisoner’s willingness to be so repatriated to be considered. But the prisoner’s will is central to the parallel IHRL concept of non-refoulement,¹⁹² which is now accepted as jus cogens, and the latter rule should, presumably, prevail over the former.

Moreover, an IHRL rule can also specify the content of a corresponding IHL rule, such as where prosecutions are conducted by occupying powers regarding participation in a NIAC, the CA 03 rule requiring the process to afford ‘all judicial guarantees which are recognised as indispensable by civilised peoples’. What these guarantees are, exactly, can thereafter be deduced from the relevant IHRL rules. Such conflicts are referred to as ‘apparent conflicts’.

Yet there are other cases in which the results of application of the IHL rule will be incompatible with those returned by the application of the applicable IHRL rule. The conduct- and status-based targeting approaches under IHL and IHRL, which are elaborated above, exemplify this point best. A considerable portion of cases in which status-based targeting justifies resort to lethal force will fall foul of the relevant conduct-based IHRL rules, thus giving rise to a ‘genuine conflict’.

Moreover, the protection dimension of IHRL obligations envisages a clear preventive element, which requires states to take adequate preventive measures in order to protect individuals against being killed or murdered by inter alia [...] armed or terrorist groups.¹⁹³ Such preventive measures can include the use of force, including lethal force. Chapter 4 explained how gaps between what is so expected and what is actually done gives rise to the due diligence liability. Targeting under IHL does not impose such a proactive duty to employ force in order to prevent others being harmed. The next chapter will consider the issue of ‘conflict’ in detail, and examine how such conflicts can be resolved in the specific case of UN uses of force.

¹⁹² Elihu Lauterpacht and Daniel Bethlehem, ‘The Scope and Content of the Principle of Non-Refoulement: Opinion’ in Erika Feller et al (eds), Refugee Protection in International Law: UNHCR’s Global consultations on International Protection (Cambridge University Press, 2003) 87, 89: ‘Non-refoulement is a concept which prohibits States from returning a refugee or asylum-seeker to territories where there is a risk that his or her life or freedom would be threatened on account of race, religion, nationality, membership of a particular social group or political opinion.’

¹⁹³ General Comment 36, UN Doc CCPR/C/GC/36 [25].
5.5 Conclusion

This chapter discussed the content of specific IHRL and IHL rules by reference to which the on-field use of force by the UN can be regulated. In reference to IHRL, it noted that the Right to Life can only be deprived subject to the necessity, proportionality and planning thresholds. While in a pure form, the principle of necessity requires that all alternatives be exhausted prior to resorting to lethal force, the chapter noted that recourse to such force does not have to satisfy this approach where non-lethal alternatives may be ineffective. The principle of proportionality requires that the intensity of force used in a particular case be calibrated to the seriousness of the threat that is posed. While necessity relates to ‘whether’ force should be used, proportionality relates to ‘how’ such force can be used. Both these elements are also informed by how IHRL requires operations to be planned so as to reduce, to the greatest extent, recourse to lethal force.

The discussion of the relevant IHL rules focused on the principles of distinction and proportionality. The chapter analysed Distinction in terms of both human and material targets. In terms of the first of these categories, the chapter noted how the lack of a customary law definition of Direct Participation in Hostilities challenges the intelligible operationalisation of Distinction in both types of conflict. The issue is further complicated by the lack of a ‘combatant’ status in NIACs. In regard to NIACs, the analysis concluded that there are three types of individuals who can legally be targeted, with varying temporal limits of targetability. These are members of state or non-state armed forces (status ascertained at the customary level through the standard of enlistment), individuals directly participating in hostilities beyond a mere ad hoc or sporadic basis (status ascertained at the customary level through the standard of command), and individuals directly participating in hostilities on a mere ad hoc or sporadic basis (status ascertained at the customary level on a case-by-case basis). While the first two categories could be targeted at any time, until either delisting or permanent withdrawal from the command chain, the third can only be targeted for the duration of the participation.

The chapter also noted that, although identifying military objectives with reference to the ‘effective military contribution’ and ‘definite military advantage’ criteria has attained customary status, debate continues regarding the specific ambit of these terms. It analysed how the nature of the activity being pursued influences the meaning of ‘military advantage’ in a given context. The chapter argues that this nexus in turn makes the definition of ‘military objective’ dependent on the nature of the activity, a truism that must be taken note of when this term is applied to UN uses of force. Similar observations were made in relation to the principle of proportionality.
This chapter then revealed that intricacies in-built to the content of these IHRL and IHL rules make them return contradicting outcomes when applied to the same facts. What is prohibited by one regime may well be permitted by another thus giving rise to ‘conflicts of law. The final section of this Chapter detailed a number of such conflicts and it is to their resolution, in the specific case of UN uses of force, that this thesis now turns.
6. Resolving conflicts, identifying regulatory standards and closing gaps between promises and results

6.1 Introduction

The preceding Chapters analysed the composite elements of the Chain Motif by which this thesis attempts to reduce the gap between the promises and outcomes of UN uses of force within conflict situations. They analysed the legal parameters by reference to which UN uses of force are authorised, how these parameters seep into the ad bellum moral calculation, and the linkages that exist between the ad bellum and in bello moral calculations, which shape the latter after the former. Cumulatively, these components illustrate why UN forces resort to and use force, as distinct from other uses such as during traditional warfare. Chapter 4 opened the discussion on the final link of this chain – the legal framework applicable to the regulation of UN uses of force – by identifying the relevant sources and branches of law, while Chapter 5 discussed the content of the relevant rules and noted how their simultaneous application gives rise to ‘conflicts of law’.

This chapter will focus on how these ‘conflicts’ can be resolved through a conflict resolution mechanism which ultimately returns standards of regulation that are appropriate to nature of UN uses of force. It will commence by acknowledging the dispersed nature of the international legal environment, noting its peculiarities and how these contribute to its fragmentation. Thereafter, it discusses how this fragmented regime accommodates divergent branches of law, which garner in them regulatory standards that contradict other standards emanating from other branches – the phenomenon referred to as ‘conflicts of law’.

The Chapter then analyses how these conflicts could be resolved, utilising for this endeavour the lex specialis principle. After assessing its foundational premises and operational dynamics, the chapter applies the relevant IHL and IHRL standards applicable to UN uses of force to a distinct application of lex specialis, referred to as the ‘common contact point formulation’. How lex specialis operationalises in the specific case of UN uses of force and contributes to reducing the gaps between promises and outcomes will be elaborated thereafter, and explained by reference to a number of practical scenarios. The chapter argues that lex specialis so operationalised better acknowledges why UN forces use force as reflected in in bello morality. Where these regulatory standards so accommodate the in bello morality of UN uses of force,
they become the final link in an unbroken chain, which extends up to the legal objectives in pursuance of which the UN resorts to force.

6.2 The international legal system

The peculiarities of the international system commence with how its subjects legislate. As noted in chapter 4, the international treaty system disallows non-state actors from partaking in rule-making. While non-state actors can, and do, contribute to the development of customary law, they are still not ‘legislators’ in the true sense of the term. In comparison to domestic systems, therefore, the primary international legislators (i.e. states) are also its primary subjects. From this is derived the ‘reciprocal’ and ‘consensual’ nature of the system, whose substantive content comprises numerous supra-national, multilateral, regional and bilateral instruments; customary rules; and of course, jus cogens norms. While Art 103 of the Charter and jus cogens appear to have a hierarchical superiority within the system, neither can be equated to the status of domestic constitutions nor of the Kelsinian Grund Norm.

The consensual nature of the international system also allows parties to ‘contract out’ of general law and develop special legal rules that govern their bilateral, multilateral or even regional relations. This is one form of fragmentation to which the system is subjected. There is also a second form of fragmentation, which derives from the ever-increasing ‘functional specialisation’ to which the system is exposed. This trend was echoed by Jenks, when he submitted in the mid-20th century that:

law-making treaties are tending to develop in a number of historical, functional and regional groups which are separate from each other and whose mutual relationships are in some respects analogous to those of separate systems of municipal law.¹

The rules that develop within these areas of specialisation do so autonomously and in relative ignorance of other rules. They each function in their own practical and normative spheres, attempting to adhere to innate principles and sustain an individualised ethos. They often also have their own adjudicative mechanisms, which are usually designed to solve norm

conflicts that arise between different rules within that particular system, but not conflicts that arise between rules belonging to different systems. These mechanisms are also indifferent and (at times) hostile to rules emanating from neighbouring regimes. This is exemplified, for instance, in the WTO Appellate Body decision in the Beef Hormones case, where it was held that the ‘precautionary principle’ as understood in international environmental law was not binding on the WTO. Whether such fragmentation poses a threat to the international legal system is debated. What are not doubted, however, are its implications, which have received substantial academic attention, including in the form of a study of the ILC. It is this second form of fragmentation that will be considered in detail by this chapter.

6.2.1 Self-contained regimes

The fragmentation of international law has, at times, been considered to give rise to what are called ‘self-contained regimes’. The ILC study on the Fragmentation of International Law identifies three forms of such regimes, that is, regimes containing only secondary rules of law (as exemplified by the Tehran Hostages decision, which held that the regime of consequences contained in the Vienna Convention on Diplomatic Relations prevailed over those prescribed by customary international law of state responsibility); regimes containing primary rules of law (as...
exemplified by the *SS Wimbledon* decision, which assessed whether the provisions of the Treaty of Versailles that related generally to German waterways applied also to the Kiel Canal; and regimes containing both special rules and techniques of interpretation and administration, such as trade law.\(^\text{11}\)

Regardless of which of these forms that a self-contained regime takes, each regime depends on and interacts with general international law in a multitude of ways.\(^\text{12}\) Indeed, they can only receive their legal force from other rules and principles that are outside the regime.\(^\text{13}\) Even well-established regimes, such as the EU\(^\text{14}\) and the WTO, accept this reality; the Appellate body of the latter, stating in relation to the GATT, that the agreement is ‘not to be read in clinical isolation from public international law’.\(^\text{15}\)

The ‘fracturing’ of the international legal system, therefore, takes place on a number of not entirely disconnected levels. This creates the possibility of the system being divided into normative silos, whose rules prescribe divergent standards of conduct in relation to the same issue. These diverging standards, in turn, give rise to the ‘apparent’ and ‘genuine’ conflicts that were mentioned at the conclusion of the last chapter. The next sections of this chapter will analyse this phenomenon in greater detail but, before that, mention (if only a brief one) must be made of the principle of harmonisation.

### 6.2.2 The principle of Harmonisation

In spite of its potential to harbour conflicting rules, international law generally rests on a strong presumption of harmonisation. While this was initially relevant to conflicts that arose between parties’ conflicting treaty obligations, it also applies to those conflicts arising between rules that emanate from different normative silos. The presumption in its original form is recognised in Art

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\(^{10}\) *SS Wimbledon (United Kingdom v Japan)* [1932] PCIJ (ser A) No 1, 23.
\(^{13}\) *ILC Report*, UN Doc A/59/10 (2004) [318].
\(^{14}\) *Opinion 1/91* [1999] ECR I-6079 [39],[40].
31 of the VCLT which requires note to be taken of ‘Any relevant rules of international law applicable in the relations between the Parties’\textsuperscript{16} when interpreting treaties. This presumption is also echoed by the ICJ in its decision in the Rights of Passage case\textsuperscript{17} and its applicability to rules emanating from different regimes is recognised by the ILC in the following terms: ‘It is a generally accepted principle that when several norms bear on a single issue they should, to the extent possible, be interpreted so as to give rise to a single set of compatible obligations.’\textsuperscript{18} It must be noted, however, that harmonization has its limitations and it can only guide the resolution of ‘apparent conflicts’.

\subsection*{6.3 Conflict of norms}

Put simply, conflict arises when different rules apply to the same subject matter, between the same parties, leading to inconsistent results.\textsuperscript{19} The ILC Commentary to the ARSIWA puts this succinctly (albeit in reference to lex specialis) by stating that, for the ‘Principle to apply it is not enough that the same subject matter is dealt with by two provisions, there must be some actual inconstancy between them, or else a discernible intention that one provision is to exclude the other.’\textsuperscript{20}

The conflict issue can, according to the ILC, be approached from two perspectives; that is, those of parties and subject matter.\textsuperscript{21} The first of these perspectives emanates from the nature of international law, referred to above, in how it allows states to contract out of general international law and create special sets of rules. These special rules (usually contained in treaties) often contradict with rules of general international law and give rise to conflicts of law.

\textsuperscript{17}Case Concerning the Right of Passage over Indian Territory (Preliminary Objections) (Portugal v India) [1957] ICJ. Rep 142.
\textsuperscript{18}ILC Report, UN Doc A/59/10 (2004) [408].
\textsuperscript{21}ILC Final Report, UN Doc A/CN.4/L.682 [21].
The ICJ decisions in the North Sea continental shelf cases\(^{22}\) and the Tehran Hostages case\(^{23}\) exemplify this phenomenon.

The dynamics of the second of these perspectives, of subject matter, create a number of conceptual as well as practical difficulties and emanates from the functional specialisation of international law that was discussed above. The ILC study exemplifies one of these difficulties through the example of the maritime carriage of chemical materials, which can relate to and be regulated by a number of areas of law.\(^{24}\) This, according to the ILC, leads to the arbitrary classification of the issue, depending on the interest that each interpreter considers as being ‘relevant’.\(^{25}\) Resorting to such an approach, however, leads to a ‘reductio ad absurdum’, the criterion of ‘same subject matter’ having been satisfied as soon as different rules are invoked regarding the same facts\(^{26}\) which, in turn, reduces the utility of the subject matter approach to the resolution of conflicts.

The relevance of the subject matter perspective is further circumscribed by the fact that a rule may only apply to certain aspects of the ‘subject matter’ and not to others. Lindroos demonstrates this by referring to the case of a vessel sailing into the Exclusive Economic Zone of a country. Such a scenario may be governed by International Maritime Organization rules directed at protecting the environment, as well as by those contained in an environmental law treaty.\(^{27}\) She points out that the two norms deal with the same subject matter but from different premises, and argues that such conflicts are especially difficult to resolve because the relevant rules lack any form of systemic relations between them.

But subject matter plays a much larger role in the identification and resolution of conflicts than is suggested by the above sources. This potential can however be realised only if ‘subject matter’ is approached differently. This thesis therefore suggests that, instead of approaching ‘subject matter’ holistically, attention should focus on breaking the same down to its constituent

\(^{22}\)North Sea Continental Shelf cases, [1969] ICJ Rep 42 [72] where the court states: ‘[i]t is well understood that, in practice, rules of international law can, by agreement, be derogated from in particular cases or as between particular parties’.


\(^{24}\)ILC Final Report, UN Doc A/CN.4/L.682 [21].

\(^{25}\)Ibid [22].

\(^{26}\)Ibid[23].

elements. Where this is done, not only does ‘subject matter’ desist from contributing to the mere ‘pigeonholing’ of the issue as mentioned by the ILC,\(^{28}\) it also addresses Lindroos’ concern. By breaking down the factual matrix, one avoids the need to weigh the factual elements that each regime may consider as being ‘more important’. This deconstruction allows the interpreter to notice better the constituent parts of the matrix, which provide reference points against which what each rule allows and disallows can be measured. Because Lindroos does not provide us with the content of her conflicting rules, this argument cannot be further developed at this point. What may be noted, however, is that most (if not all) rules of international law prescribe behavioural standards. It is these standards that will ultimately have to ‘fit’ with the corresponding factual composite; point that will be returned to in greater detail in this chapter’s consideration of the operationalisation of lex specialis.

**6.3.1 Apparent and genuine conflicts**

Conflict between rules can take two forms –‘apparent’ and ‘genuine’,\(^{29}\)– depending on the content of the conflicting rules. Both these forms can emanate from each of the perspectives to conflict referred to above (i.e. parties or subject matter).

Apparent conflicts arise when the content of one rule is prima facie inconsistent with that of a second but, in fact, acts as an *application* of the latter. What this actually means is that the consequences that result from the application of the narrower rule can be accommodated within the ambit of the consequences returned by an application of the broader one. The former set of consequences is, in effect, a sub-category of the latter. According to the ILC, therefore:

many provisions in the 1987 Montreal Protocol on Substances that Deplete the Ozone layer are special law in relation to the 1985 Vienna Convention on the Protection of the Ozone Layer. When states apply the emission reduction schedule in article 2 of the Montreal Protocol, they give concrete meaning to the general principles in the Vienna Convention. Though it may be said that in such cases they apply both the Protocol and the Convention, there is a sense in which the Protocol has now set aside the Convention. In case of a dispute of what the relevant

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\(^{28}\)ILC Final Report, UN Doc A/CN.4/L.682 [22].

\(^{29}\)ILC Report, UN Doc A/59/10 (2004) [308].
obligations are, the starting point and focus of interpretation will now be the wording of the Protocol, and no longer of the Convention.\textsuperscript{30}

A further example is provided by Lindroos, who cites the case of a general law intended to protect wetlands in general and a special law intended to protect particularly vulnerable wetlands.\textsuperscript{31} Both the rules participating in each of these examples approach the relevant issue from the same standpoint and follow the same approach in how they dictate the standards. This is also exemplified by the content of the rules relevant to the aforementioned Ozone example, which approach the issue from the protectionist standpoint. They also follow a unified approach to their content by expressly prescribing what is not permitted (akin to the prohibitive starting point of IHRL discussed in Chapter 4). The difference in each case pertains to the ambit of each obligation, one being broader than the other. Only the narrower of these obligations can, therefore, really be said to ‘apply’ to the given set of facts, the broader being relegated to the background. This happens by virtue of the nature of the factual matrix, which determines which of the rules it attracts.

These dynamics may be compared with those of ‘genuine’ conflicts, in which one rule necessarily has to set aside another. The respective results cannot be reconciled, because those returned by the application of one rule will be unacceptable under the other. A classic application of this phenomenon is found in the Nuclear Weapons Opinion: ‘The test of what is an arbitrary deprivation of life, however, then falls to be determined by the applicable \textit{lex specialis}', namely, the law applicable in armed conflict which is designed to regulate the conduct of hostilities.\textsuperscript{32}

Thus IHRL proscribes arbitrary violations of life,\textsuperscript{33} and recognises self-defence and the defence of others from an immediate threat as the only purposes for which someone could be deprived of his/her life. Even if this purposive element is satisfied, a deprivation will still be arbitrary and, therefore, illegal if the same violates the principles of necessity\textsuperscript{34} and proportionality\textsuperscript{35} that were analysed in Chapter 5. The level of force that can be legally used

\textsuperscript{30}\textit{ILC Final Report}, UN Doc A/CN.4/L.682 [99].
\textsuperscript{31}Lindroos, above n 27, 46.
\textsuperscript{34}Refer to discussion in Part 5.2.1 of Chapter 5.
\textsuperscript{35}Refer to discussion in Part 5.2.2 of Chapter 5.
under IHRL, therefore, depends on the seriousness of the threat posed by the potential target. IHL regulates the same issue in a very different way. As discussed in Chapter 5, those qualifying as combatants or civilians, directly participating in hostilities during both IACs and NIACs, can be targeted with lethal force at any time (provided that the means used comply with the superfluous injury rule). The approach that IHL adopts does not accommodate the necessity and proportionality requirements envisaged by IHRL, and is exemplified by the case of the ‘naked soldier’ who, as discussed in Chapter 3, can be targeted with lethal force even during his/her bath. Likewise, the untrained civilian guarding a military object can be targeted with lethal force under IHL; no alternative means need to be exhausted or proportionality of force respected. As was established in Chapter 4, however, IHRL also applies (at least in principle) to armed conflict. If targeting in the aforementioned cases were viewed from a pure IHRL lens, both courses of conduct will be illegal.

The rules partaking in genuine conflicts can also be analysed per the standpoint from which they approach the relevant issue, as well as how they dictate their relevant standards. While IHRL approaches the issue from a Rights standpoint, IHL does so from a Duty perspective. What each regime identifies as ‘relevant factors’ are also different (the balance between military necessity and humanity for IHL, and the advancement of Rights for IHRL). More importantly, IHRL (mostly) adopts a prohibitive tenure to its rules, while IHL (mostly) adopts a permissive one. This gives rise to a mismatch between what two rules, emanating from either regime and applicable to the same facts, permit. Hence, what is permitted by IHL can be proscribed by IHRL, giving rise to a genuine conflict in which one rule necessarily has to give way. The next section of this chapter will assess how lex specialis can be applied to resolve these conflicts.

6.4 Lex specialis

6.4.1 Historical origins

The lex specialis principle is founded on the idea of the specific prevailing over the general. This finds voice in such early texts as the Corpus Iuris Civilis, according to which ‘in toto iuregeneri per speciem derogatur et illud potissimum habetur, quod ad specium direktumest’ (in the

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36 This is also true of the sum total of the activities that are permitted by each branch of law. The accumulated spheres of permission and prohibition entertained by each branch are also therefore different.

37 Fitzmaurice, above n 19, 236.
entirety of law, the special takes precedence over genus, and anything that relates to species is regarded as most important. Grotius explains why special law should so prevail, by famously observing: ‘Among agreements which are equal... that should be given preference which is most specific and approaches most nearly to the subject in hand, for special provisions are ordinarily more effective than those that are general’.[emphasis added]. A similar justification for the principle is proffered by Vettel, who posits ‘Above those treaties, which, in the above named respects, are equal, the preference is given to such as are more particular, and approach nearer to the point in question.’

In spite of its notable historical acceptance, however, lex specialis does not find expression in Art 30 of the Vienna Convention, dealing with treaty conflicts.[40] Moreover, its relationship with other conflict resolution rules (such as lex posterior, lex prior and legislative intent) is unclear at best.[41]

How lex specialis operates and what its substantive content is or should be, has also received limited attention. It has even been referred to at times as a ‘mere common sense’ rule and a principle of juristic logic.[42] As Koskenniemi asserts, ‘there is no specific legislative intention of the lex specialis maxim, highlighting its role as an informal part of legal reasoning, that is of the pragmatic process through which lawyers go about interpreting and applying the law.’[43]

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39 Emer de Vattel, Les droit des gens ouprincipes de la loi naturelle, J Chitty (trans) (1883) Liv II, Ch XVII, 316:

Of two laws or two conventions, we ought (all other circumstances being equal) to prefer the one which is less general, and which approaches nearer to the point in question: because special matter admits of fewer exceptions than that which is general; it is enjoined with greater precision, and appears to have been more pointedly intended.

allegedly difficult to characterise the same as a maxim with a particular content and, according to Lowe, in such cases ‘The choice is made by the judge not on the basis of the internal logic of the primary norms, but on the basis of extraneous factors.’

None of these propositions are completely inaccurate but the principle is, and has been, applied by numerous tribunals on a continuous basis in the resolution of disputes with potentially far-reaching implications. To conclude that it is a ‘common sense’ rule therefore imputes to it a degree of discretion that is, at best, misleading and, at worst, dangerous, given the importance of the functions it has discharged. Both its foundational premises and operationalisation, therefore, merit much closer scrutiny.

6.4.2 Approach to conflicts

Lex specialis’ approach to conflicts must commence with an understanding of how (similar to the two perspectives to conflict discussed above) speciality can also function on the party and subject matter registers. This is not a mere coincidence; the resolution of norm conflicts must, by necessity, be directed towards their sources.

It must be noted, however, that the party register is not helpful in all cases. For instance (at a very basic level), it applies only to situations in which there is an agreement between two or more parties. It is only then that the contracting out can have any intelligible meaning. The party register cannot assist when conflicts arise between different obligations undertaken by the same party – such as those pertaining to the use of force by the UN. Second, this register is based on the fiction of a unified state intention, which proposes that states cannot undertake two

above n 27, 44, refers to lex specialis as a juridical assumption and not a substantive rule that can identify one rule as special to another.

44 Georg Schwarzenberger, International Law, Vol 1 (Stevens and Sons Ltd, 1957) 473.


competing treaty obligations at the same time. But, as pointed out by Simma,\textsuperscript{47} there is no such unified will in contemporary international relations, what takes place are ‘bargains’ and ‘package deals’.

Lex specialis can also (potentially) identify speciality by reference to the subject matter of the problem. But, as discussed above, here subject matter does not function to pigeonhole the issue. Instead, it acts, although in a deconstructed form, as the canvass to which each competing rule attaches. How lex specialis operationalises in each of these cases thus merits further analysis and this will be done after identifying the foundational premise/s of the principle.

\textbf{6.4.3 Foundational premises}

The working of any Principle or Institution of law, including lex specialis, can only be analysed after its foundational tenets are identified. As regards the foundational premises of lex specialis, all the aforementioned authorities suggest that the principle is based on some form of ‘proximity’. For instance, the Iuris Civilis refers to the notion of ‘the special taking precedence over genus’; Vettel uses the phrase ‘nearer to the point’; and Sassoli summarises by stating, ‘The reasons for preferring the more special rule are that it is closer to the particular subject matter and takes better account of the uniqueness of the context’.\textsuperscript{48}

Of particular note, in this context, is the reference that Grotius makes to efficiency, which immediately asks how it is to be ascertained — there must be a point of reference or guideline against which efficiency could be measured. This thesis submits that this guideline depends on the type of conflict being analysed. It is what the parties willed\textsuperscript{49} in conflicts that arise as a result of the contracting out of parties, lex specialis selecting what the parties choose to regulate their relations with (such as a bilateral or multilateral treaty) in derogation of the general law.


But what of that other category of conflicts, which are perceived by reference to subject matter (to which the conflicts being considered by this thesis in fact fall)? The ILC submits that, in these cases, the special rule is better able to take account of the *particular circumstances* of the dispute,\(^{50}\) which allows it to regulate the issue more effectively than the general rule.\(^{51}\) Sassoli, in the above quote, echoes this idea in terms of an ability to take ‘better account of the uniqueness of the context’.\(^{52}\) The *particular circumstances* (or context) relevant to this analysis this thesis submits, are composed inter alia of the objectives that are being pursued by the activity that is sought to be regulated, and the nature of the context within which that activity takes place. In other words, it is that rule which permits the better achievement of the relevant objectives in light of the subsisting circumstances.

### 6.4.3 Operationalization

The effective functioning of *lex specialis* is conditional upon linking the aforementioned foundational premise to the subject matter or the (deconstructed) factual matrix. This thesis utilises, for this purpose, a theory suggested by Mary Walker,\(^{53}\) who submits that, between two rules, the one having the larger ‘common contact surface area’ with the situation prevails\(^{54}\) as *lex specialis* (this is referred to as the ‘Common Contact Point Theory’ or ‘CCPT’). What the CCPT essentially impresses on is the divergent abilities of different rules to ‘fit’ differently with the deconstructed factual matrix. This is a consequence that emanates first from how, as discussed above, each regime or branch of law instils in its rules their respective principles and ethos. This is then supplemented by the nature of each factual matrix that is informed by its own individual factual dynamic which yield with different rules to different extents. This is why *lex specialis*

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\(^{50}\) *ILC Final Report*, UN Doc A/CN.4/L.682, 60.


\(^{52}\) Sassoli, above n 48.


\(^{54}\) For instance, according to Larenz, priority falls on the rule with a more precisely delimited scope of application – the description of the scope of application in one rule containing an additional quality that is not singled out in the other.
resolves conflicts on a case-by-case basis. In the case of UN uses of force, the CCPT selects as the lex specialis that rule which better permits the attainment of the objectives of deployment within the particular context, efficiency here being measured by the extent to which each rule permits the realisation of these objectives. As was elaborated in chapter 03, these objectives also reflect why UN troops resort to force.

The utility of the CCPT is not limited to the resolution of genuine conflicts, where the lex specialis carries out a displacement function. Equally, it can be used in the case of apparent conflicts, where the particular situation to be regulated falls within a larger, more general issue. This would be the case, for instance, in the aforementioned wetlands example – the more specific provision ‘fitting’ better with regulating the more vulnerable wetlands. The factual matrix (i.e. the specially vulnerable wetlands) has within it a particular element (such as a geographical or botanical indicator) with which only the special rule can ‘fit’. When interpreted in this light, lex specialis has the potential to resolve the IHL–IHRL dichotomy as applicable to the use of force by the UN, and the remainder of this chapter further considers how this is achieved.

6.5 Lex specialis and the use of force by the UN

6.5.1. Selecting the lex specialis

As discussed earlier, both IHL and IHRL apply during situations of conflict, and are applicable to uses of force by UN missions that materialise during such conflicts. The factual matrix of such uses of force – central to the CCPT – is comprised of a number of components. These include the time and place of the incident (dictating the degree of control), the party using force (the UN) and the person/s being affected by the use of force (civilians/combatants). Which, between the IHL and IHRL rules, acts as the lex specialis in this case therefore depends on the relative ‘fit’ that each rule secures with these composite elements, in light of how the particular situation has moulded them.

The first\textsuperscript{56} element of this factual matrix comprises the persons whose conduct it is sought to be regulated. This is particularly relevant to this exercise because it is the component to which the prescriptive rules (whether commencing from a prohibitive or permissive starting point) being considered by this thesis attach. However, the CCPT correctly identifies the lex specialis only where this part of the matrix is accurately \textit{moulded}, by being infused with the specific in bello morality of the actor (which includes \textit{why} he has resorted to force) representing this contact point. This is where the four core moral considerations, by reference to which Chapter 3 formulated the in bello morality of UN uses of force, become relevant. These considerations were:

1. The liability pressure point as informed by factors such as physical threat, the mental attitude of the attacker, the nature of the relevant conduct, the possibility of reintegration and the latent threat the attacker poses to the peace process;
2. The immunity pressure point as informed by factors such as the expectations of protection deployment creates in civilians and the moral duty to act created, in particular, by the R2P;
3. The force protection responsibility imposed on the UN; and
4. The possibility of securing the greatest possible cooperation with or participation in the underlying process, with regard to how uses of force impact civilian attitude along ethno-religious or other lines.

When these moral considerations are infused into the relevant factual component, they \textit{mould} UN troops in a way that has built into them those core objectives in pursuance of which the UN (and its troops) resorts to force. This transcendence is achieved through the Chain Motif that was developed in Chapter 3, which linked the legal and moral aspects of the resort to force by the UN with its in bello morality. The legal purposes for which states resort to force, and the respective ad bellum and in bello moralities, can similarly be infused by this Chain Motif to a soldier who fights on behalf of his/her country. Chapter 3 noted a number of significant disparities between the UN and a State in these respects. The cumulative effect of these

\textsuperscript{56}The reference to ‘first’ is here not indicative of priority.
disparities results in UN troops and national troops engaged in traditional warfare being moulded very differently to each other.

The second element of this matrix is comprised of the time and place of the incident, which cumulatively dictate the extent of control that UN forces have over a given situation (‘control over the situation’). The relevance of this component to the factual matrix permeates the nature of the particular use of force (e.g. whether it be in self-defence or protection of civilians). But ‘control’ is not being discussed here in terms of the applicability of IHRL. That issue was analysed in Chapter 4, wherein it was concluded that IHRL is, in principle, applicable so long as (any)control over the agents’ use of force is retained. What is being addressed at present is where, along the spectrum of control over the situation, the strictures of IHRL targetability give way to the more relaxed approach adopted by IHL. It is also pertinent to note here that ‘control over the situation’ is not identical to ‘control over territory’ or the territorial approach. ‘Control over the situation’ falls somewhere in between the personal and territorial approaches to control, and the degree of control envisaged thereby is more than the former but less than the latter.

It must also be noted that the direction of this transfer (i.e. from IHRL to IHL) is supported by other components of the factual matrix. This is caused by the interconnected nature of these factual components, which permits each element to support the transfers called for by other components. For instance, control over the situation decreases with increasing levels of violence, which is the sum total of the threats (which comprise the physical as well as mental elements discussed in Chapter 3) levelled by each of the attackers, who represent the targets of the UN’s use of force. The greater the intensity of these threats, the closer those posing them generally are to the status of a Schmittian enemy, and the lesser the chances of reintegration. This change morally justifies a shift from conduct-to status-based targeting (i.e. from IHRL-to IHL-based), which permits the direct use of lethal force, at least in the case of hard-core fighters. This transfer, as was mentioned in the preceding paragraph, is also justified by the practicalities of the situation, as reflected in the receding amounts of control that are retained over the situation. How this transfer materialises is further explained by the scenario-specific examples discussed in Part 6.5.2 below.
6.5.2 Operationalising lex specialis in the case of UN uses of force

This chapter henceforth explains how the conceptual operationalisation of lex specialis discussed thus far converts itself to practical utility by contributing to the deduction of regulatory standards that accommodate better the realisation of UN deployment objectives. This will be done with reference to scenario specific examples – each analysis explains how lex specialis permits the better realisation of deployment objectives which reflect why the UN resorts to force.

Scenario 1 – UN forces are attacked in circumstances that satisfy the conflict threshold. They are compelled to respond with force.

In this situation, the in bello morality of UN troops requires them to take note of a number of factors when executing a response. The first of these is the moral liability of the attacker, which is comprised of both a physical as well as a mental element. The physical element is reflected by the attacker’s ability to cause harm to the UN (i.e. threat level posed) and this will depend on, for instance, the type of attack, the type of weapons used and how well the attacker is trained. The mental element reflects how intent the attacker is at harming the UN, and this is particularly relevant in relation to the divide between those fighters who hold such an intent and those who do not, the latter category including within it coerced combatants. This distinction attains added importance where these fighters belong to a total spoiler. The moral liability of the leaders or hard-core members of these groups was equated to that of a Schmittian enemy by Chapter 3. What this means is that, where such individuals partake in an attack, UN forces have a greater moral licence to have direct resort to elevated degrees of force (including lethal force) against them.

The UN must also take account of the damage that action/inaction can cause to the peace process and this is related to another relevant consideration; that is, the need to ensure the widest possible participation in the peace process. The dynamics of contemporary conflict – in primarily being intra state and being waged by and between factions, which are divided along ethno-religious or other lines – attains central significance at this point. The fact that portions of the civilian community may sympathise with, or swear allegiance to, a given faction creates the possibility of UN uses of force against such factions (particularly where excessive levels of force are used), creating a negative image within the civilian population. This is equally applicable to the opinion of those fighters, such as those who were coerced, who may not completely believe
in the cause for which they fight. Such negative imaging undoubtedly affects the degree to which the peace process can attract its potential partners. These factors must be considered in light of the force protection element of this portion of the matrix.

Thus moulded, UN troops represent a crucial piece of a factual matrix, which is also comprised of the nature of the general environment in which the attack takes place (i.e. the control element). How this element is approached by this part was discussed above, but this analysis recalls that ‘control over the situation’ is also a reflection of other factors such as the moral liability of the targets. When taken together, these components shape the factual matrix in a distinct way, which ‘fits’ with each candidate rule to different extents. The next step involves applying the relevant IHL and IHRL rules to this factual matrix, in order to ascertain this relative ‘fit’.

Chapter 5 discussed, in detail, how IHL and IHRL rules regulate targeting. IHRL rules generally dictate that the application of force commences from the lowest level – allowing its intensity to be increased through the principle of proportionality. Alternatives to recourse to force must be explored when the circumstances permit, and no more force than absolutely necessary can be employed. IHRL does not, however, completely proscribe direct resort to force when circumstances so dictate. In comparison, the IHL targeting regime does not prescribe such a starting point. It permits any type of force (including lethal force) to be used on combatants and civilians directly participating in hostilities, as long as the superfluous injury and unnecessary suffering rule (which is effectively the ceiling) is not violated. IHL, with its status-based targeting rules, thus allows lethal force to be used, regardless of the threat level posed by the target or the mental attitude entertained by him/her. All individuals who qualify to be targeted thereunder are ‘military objectives’, whose complete neutralisation it permits. Crucially, the IHL targeting mechanism lacks a tool by which the level of force used can be calibrated to the corresponding moral liability.

Many forms of force that are permitted by IHL can, and do, comfortably satisfy its superfluous injury and unnecessary suffering ceiling. In spite of being legal, their usage can easily result in ‘overkill’. If and when pursued, they have substantial potential to inflame negative opinion within the civilian population, as well as within softcore elements of OAGs towards UN

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\[57\]Refer to discussion in Part 5.3.1 of Chapter 5.
troops and the peace process they represent. Where this happens, UN actions, in fact, hinder the very process that they were required to safeguard and promote. Moreover, to use lethal force at the first instance is also to completely negate the possibility of reintegrating (at least some of) the targets with the underlying processes – a possibility that itself results from the level of moral liability entertained by the target. These limitations thus relate to matters that are crucial to how UN troops are moulded and limit IHL’s ability to take cognisance of the peculiarities of the situation. The only aspect of the matrix that IHL fits better with is its force protection element – the IHL focus on target elimination translating into reduced present as well as future risk for the troops. But, even here, lethal force at first instance need not be the only option.

Comparing the matrix with the relevant IHRL standards indicates a number of respects in which a better ‘fit’ may be secured. First, the emphasis that IHRL places on recourse to alternatives and force graduation allow the UN response to be comparable with the target’s moral liability. Second, graduated use of force also provides a higher possibility of reintegration, simply because it does not emphasise neutralising the target at the first instance. It must also be noted that, while higher amounts of force may be preferable from a force protection perspective, the same will not always leave the best impression on the civilian psyche, in terms of the overall peace process. Restricting force through graduation guards against these dangers and allows a greater margin for error – affording much greater safeguards against such negative imaging. It also better conveys the attitude of the troops to the populace – a tempered one whose default option is restraint and not resort to force.

The better fit that IHRL has with this factual composite, however, must be weighed against how the respective regimes comply with the control element. This is where the above analysis into the control element becomes relevant; it is assessed here in the realisation that greater control over the situation translates into greater control over use of force and vice versa. The greater control so available over use of force allows the UN to comply with the more stringent requirements that IHRL prescribes. IHRL, therefore, secures a better ‘fit’ with the control element of the matrix where the UN exercises sufficient degrees of control (which may or may not be equivalent effective control, as envisaged by the spatial approach). Attacks launched against the UN in areas firmly under the control of the UN (where an armed conflict is taking
place in other areas), or during low-intensity NIACs, are thus placed towards this end of the spectrum. IHRL, therefore, becomes the lex specialis for these cases.

Control reduces, however, where the situation becomes more hostile. Such reduced (or lack of) control indicates a higher intensity of hostilities, which is caused by the sum total of all the hostile acts in which the fighters are engaged. The individual threat levels posed by each attacker within this matrix can still differ, which creates two categories of targets in these scenarios, those that do and those that do not pose a serious threat (threat here being comprised of the physical and mental aspects). IHRL can, however, still in principle ‘fit’ with some portions of this factual matrix, for instance, by allowing the degree of force to be calibrated to the threat levels posed by each fighter. But increasing levels of hostilities, as discussed above, alter the shape of this matrix in a way that prevents IHRL from fitting with its other elements, including components such as force protection. The exact moment at which this transformation takes place is a factual determination, which must be made on a case-by-case basis. The types of weapons used in the engagement, the number of causalities, the number and type of cadres utilised in the attack, and the duration of the engagement can assist in making this determination. From and beyond this point, IHL maintains a better ‘fit’ with the matrix and acts as the lex specialis.

Scenario 2 – UN forces are engaged in an offensive operation that targets a group of fighters belonging to an OAG.

In this situation, the way in which UN forces are moulded is substantially similar to how they were moulded in Scenario 1. Given the offensive posture of the activity which bases itself on the ‘total spoiler’ status of the group, however, there is likely to be greater moral permission regarding the direct resort to lethal degrees of force in the case of hard-core elements of the target (spoiler) group, when compared to Scenario 2.

Scenario 3 – Civilians are under attack (or an imminent threat of attack) by an armed group. The attack takes place in circumstances that satisfy the conflict threshold.

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58 These are actually more akin to law enforcement operations that are usually dictated by IHRL.
Most of the considerations discussed above apply to Scenario 3–type situations, but with subtle variations in how they operationalise. For instance, while the moral liability of the attacker/s in this scenario is again informed by the physical and mental elements discussed above, the threat that informs this calculation is directed at a third party and not the UN. The fact that this threat is directed at individuals who enjoy immunity arguably increases the moral liability of the attacker. The direction of this threat becomes even more significant when considered in light of the expectations created by the very fact of deployment.

Similar to Scenario 1, the decisions that UN troops take in these situations must be sensitive to the ethno-religious or other grounds along which modern conflicts are fought. Where conflict is so divided, the possibility of actions estranging particular portions of the civilian population (such as those to which the targeted armed group belongs) from the peace process becomes very real. This fine balance, therefore, moulds UN troops in an extremely distinctive way. The force protection element is also relevant to this situation – here being concerned with the risk that UN troops will undertake in the execution of the particular operation.

As discussed in Chapter 5, IHL targeting rules are premised on the concept of military advantage, which is presumed either in the neutralisation, destruction or acquisition (as appropriate) of combatants and objects that qualify as military objectives.\(^59\) Chapter 5 also discussed how individual targets are divided into combatants and civilians directly participating in hostilities. The former are targetable by virtue of status (whether accruing via the membership, or being subject to a command chain in the case of non-state armed groups) either (as appropriate) for the duration of the conflict, until delistment or complete withdrawal from the command chain. The latter are targetable by virtue of a status acquired through direct participation. Crucially in the latter case, an individual only becomes targetable where his/her conduct relates to an overall objective that is being pursued by the OAG to which he/she belongs. Where this link is established, neutralising such civilians becomes tantamount to neutralising the adversary’s objectives\(^60\) which, in turn, confers a military advantage. In short, purely personal attacks on other civilians do not satisfy this harm threshold; the attacker engaging therein does not participate directly in hostilities and remains a civilian, continuing to

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\(^59\) Refer to discussion in parts 5.3.1 and 5.3.2 of Chapter 5.

\(^60\) Here, ‘objective’ is used to connote an aim or purpose, not targetability.
be protected by IHL.\textsuperscript{61} This is exactly how the inaction of the UNOCI troops that was referred to in the last chapter was explained.

I shall ascertain first the respective extents to which the regulatory candidates fit with attacks, which are carried out either by combatants or civilians directly participating in hostilities. IHL permits such attackers to be targeted for the durations referred to in the preceding paragraph. However, nowhere does it impose a proactive duty to act, it does not attribute a higher priority to this objective and only prescribes the relevant permission (i.e. targetability). Any actions that are taken in this regard will constitute ‘just another’ objective within the list of objectives from which the commander deduces priority. This creates a misfit between IHL targeting rules and the immunity pressure point that moulds UN troops.

Moreover, the lack of an emphasis on the minimum levels of force in the relevant IHL rules gives rise to the incompatibilities referred to under Scenario 1 in relation to the need to have softcore members of the targeted groups participate in the process. This lacuna can also damage the opinion of those portions of the population who are either ethnically or otherwise connected to the targets of force—particularly where amounts of force that are excessive but falling within the limits prescribed by IHL are used. Failure to use force may have similar effects on the opinion of those groups of civilians who are being targeted. These discrepancies limit IHL’s ability to take account of the peculiarities of the situation, thus impacting how it ‘fits’ with the factual matrix.

This position may be compared with that of the applicable IHRL rules, particularly the duty to ensure that imposes an obligation to take proactive measures to prevent arbitrary deprivations that are carried out by terrorist or armed groups.\textsuperscript{62} This proactive obligation has the effect of satisfying the expectations of those being targeted and the immunity pressure point, both elements being central to how UN troops are moulded. The above discussion into the conduct-based nature of IHRL targeting also continues to be relevant here. The moral liability of the targets in this case, however, is informed by the relative threat they pose to civilians, as well as to the peace process. The graduated approach that IHRL adopts towards use of force permits a reasonable balance to be drawn between this moral liability and the level of force employed. This provides greater potential to secure the trust of those portions of the population who are sympathetic to the targets, as well as of the softcore elements within the targeted

\textsuperscript{61} Refer to discussion in part 5.3.1.2(a) of Chapter 5.

\textsuperscript{62} General Comment 36, UN Doc CCPR/C/GC/36 [25].
groups. As with Scenario 1, following such an approach to force communicates to these elements that actions taken by the UN in such cases are pursued as a last resort. IHRL is thus able to take better account of the peculiarities relevant to this component and secures a better ‘fit’ with it.

The other class of attacks relevant to Scenario 3 are perpetrated by civilians who are not directly participating in hostilities. Situations in which law and order have broken down provide ample space for the perpetration of such attacks, generally as a means of personal score-settling. These opportunities are, unfortunately, often exploited to the fullest by individuals and groups. As noted above, where these attacks are not linked to the overall military objectives pursued by a party to the conflict, they remain purely personal acts of violence. Targeting these individuals is strictly proscribed under IHL. This approach obviously ignores all of the elements (except that pertaining to force protection) by which UN troops are moulded. This may be compared with how IHRL approaches the issue. Because the proactive duties that IHRL prescribes in such circumstances do not vary, according to the category of persons to which the perpetrators belong, the analysis undertaken above in relation to combatants and civilians directly participating in hostilities becomes equally relevant to the current discussion and, again, allows IHRL to secure the better ‘fit’.

As with Scenario 1 cases, however, the extent to which each rule ‘fits’ with the overall matrix can only be ascertained where the element of control is also factored into this calculus. Similar to Scenario 1, exceeding amounts of violence will ultimately make ‘IHL’ fit better with the matrix.

Scenario 4 – A decision has to be made regarding the use of artillery on a weapon that an armed group uses to cause damage to UN forces. The target is also placed within such proximity to a group of civilians that collateral damage is unavoidable (but the amount of collateral damage in this case satisfies the IHL proportionality rule). The weapon can also be neutralised through an infantry assault, which will inflict casualties on the UN force.

The list of factors that comprise the factual matrix in this case are numerous and varied. The above discussion pertaining to the liability pressure point of those using the weapon applies with equal force to this case, culpability being elevated by the armed group placing the weapon in proximity to the civilians or vice versa.
Also relevant is the force protection element—here, the lives of UN soldiers are being valued both against those of the adversary as well as those civilian lives that will be lost as collateral. As stated above, by the mere fact of being deployed as that branch of the UN that enforces policy, troops innately accept a degree of risk. The difficult question, however, is whether the effect and force of this acceptance is such that they should tolerate being targeted at any cost to them, in order to save civilian lives that may be lost as collateral—an issue that has in the case of war—attracted considerable attention. The discussion relevant to war, however, differentiates between the lives of civilians that belong to the same state/social groups to which the forces belong and those who do not (i.e. the civilian/their civilian dichotomy). This is a distinction that becomes irrelevant in the case of UN uses of force, because the UN and, by extension the UN force, accords equal value to the lives of all civilians. The fact that UN troops have accepted a particular degree of risk, when coupled with the immunity from attack to which civilians are entitled, requires each civilian life to be valued more than that of a UN troop in this case. A similar conclusion is sometimes arrived at within the moral argument for war, although its legal counterpart does not require forces to assume an increased risk to save civilians.

There are further relevant issues that emanate from the civilian collateral causalities aspect of the attack. The first is a corollary of what was discussed above and asks what, if any, amount of damage to troops justifies a violation of the immunity to which civilians are entitled. The second concerns the opinion held by others, belonging to the group of civilians that will perish as collateral, towards the UN and the peace process. Where the group that perishes belongs to the same group to which those operating the weapon belongs, the opinions held by the softcore cadres within the armed group will also be relevant.

What will next be considered is the extent to which the relevant IHL and IHRL rules fit with this matrix. While IHL regulates the planning phase of the operation, with reference to the proportionality rule contained in Rule 14 of the ICRC study, IHRL regulates the same with reference to the duty to plan and conduct operations in such a way as to avoid or minimise, to the greatest extent possible, harm to civilians.

63 Refer to discussion in part 3.4.1 of Chapter 3 for the moral aspect of the rule, and the discussion in part 5.3.3 of Chapter 5 for its legal aspect.
64 Refer to discussion regarding the principle of Double Effect in part 3.4.1 of Chapter 3.
66 Refer to discussion in part 5.2.3 of Chapter 5.
While both standards, therefore, focus on the damage that the attack will cause to civilians, each uses this point of reference differently. The IHL proportionality rule balances the collateral damage element with the notion of military advantage – the latter being deduced in the case of human targets by reference to their status and, in the case of material targets, by reference to the concreteness and effectiveness criteria. This ‘balancing’ approach makes the degree of tolerable collateral damage dependent on the value of the target. Thus much larger degrees of collateral damage can be permitted under the rule where the objective is a high-value target, while lesser degrees of collateral damage will not be permitted where the objective is of lesser military value. The moral basis of this rule, as discussed in Chapter 3, lies in the doctrine of double effect, which permits harmful outcomes so long as they are not intended and so long as the good pursued sufficiently compensates for the same. The IHRL rule, by comparison, utilises consequences very differently. It does not justify collateral damage with reference to military advantage, but requires such damage to be avoided, or minimised to the greatest extent possible. Where alternative courses of action are available (such as an infantry assault), which would cause less harm to civilians, pursuing another course of action that causes greater collateral damage simply becomes illegal.

I will now turn to how each rule ‘fits’ with this matrix. The IHL rule fits well with the force protection element of the matrix by permitting the artillery strike (which neutralises the threat without exposing the troops to any risk in securing the objective). The rule also potentially complies with the moral liability pressure point of those using the weapon, but it must be noted here that the course of action it permits cannot differentiate between the respective levels of liability each fighter will hold in a given circumstance. By its very nature, however, in permitting collateral damage, the IHL rule contributes to the negative imaging of UN troops (within the civilian population as well as the softcore elements of the OAG) as well as of the peace process. By permitting neutralisation, it also makes it impossible for softcore elements (if any) that operate the weapon to partake in the process. It therefore contradicts that part of the in bello morality, which requires ensuring the widest possible cooperation with the peace process.

The IHRL rule, on the other hand, by proscribing the artillery strike, arguably fits with all of the components with which the IHL rule does not fit. It can also fit better with the moral liability PP due to how the course of action it requires (i.e. infantry attack) can, at least, better calibrate levels of force with the levels of liability entertained by individual targets. It may not comply with the force protection element of the matrix as well as the IHL rule does, because the course of action it requires is perceived to inflict casualties among the troops. The expectations
of protection created by UN deployment must also be considered at this juncture. To inflict collateral damage is tantamount to damaging these expectations. To quote Walzer, in relation to soldiers being engaged in warfare: ‘civilians have a right that “due care “be taken’. If this is not accurate in the case of war, it must be true at least in the case of UN uses of force.

The relative ‘fit’ that each rule secures with the matrix will only be complete where its control element is also subjected to this assessment. The conclusions that were drawn in relation to Scenarios 1, 2 and 3 are equally relevant here. This thesis submits in this regard that, at least where the number of UN casualties envisaged in securing the objective (by an infantry assault) are not excessive, IHRL must function as the lex specialis. The artillery strike remains proscribed for so long as IHRL so functions. IHL becomes the lex specialis where the number of UN casualties envisaged in securing the objective (by an infantry assault) is high and where the continued use of the weapon inflicts high numbers of casualties on the UN. How UN forces are shaped within this matrix, however, limits the factors that can influence this transfer from IHRL to IHL. This limitation is prescribed in respect of the nature of the harm the UN seeks to avoid or stop by using force and I submit that such harm must fall within one of the following categories (in the order of decreasing significance):

1. Security of civilians who may be harmed if no action is taken;
2. Security of other protected personnel;
3. Security of the UN force (can include two types of casualties: first, casualties sustained in being subject to a particular type of attack; and/or second, casualties that will be sustained in securing the objective through a means that is compliant with IHRL); and
4. Objects the destruction of which is likely to cause serious hardship or ill feeling towards the peace process or the UN.

Scenario 5 – Members of an OAG are preparing to blow up a dam which, if blown, will submerge an area that is occupied by civilians, killing large numbers. The dam does not qualify as a ‘military objective’ under IHL.
The conduct in which the OAG engages here violates IHL which proscribes attacks on civilian objects.\textsuperscript{67} This possibility is not merely academic, however, recent history demonstrates that OAGs are capable of such atrocities.\textsuperscript{68} As was discussed under Scenario 3, while IHL considers the individuals engaged in this activity as military objectives, it does not accord any degree of added priority to their neutralisation. This position is supplemented by how the object with which this scenario is concerned does not qualify as a ‘military objective’, which proscribes an attack being launched for the exclusive purpose of securing it.\textsuperscript{69} Whatever priority these objectives attain, therefore, depends not on legal principle (due to lack of proactive IHL duties) but on command discretion. This lacuna runs counter to the levels of protection that the civilian community anticipates from the UN.

This may be compared with an application of the relevant IHRL rule, which through its duty to ensure Rights, requires that proactive measures be taken. The discussion under Scenario 3, regarding the removal of the threats posed by the attackers considered therein, applies equally to this situation.

\textbf{6.6 The unified use of force rule}

The preceding analysis elaborates that IHRL could, and should, play a much larger role in regulating UN uses of force. Where this is realised and justifiably applied to UN troop conduct, it permits such conduct to better reflect the in bello morality of UN uses of force. This, in turn, by virtue of the Chain Motif that was formulated in Chapters 3, 4 and 5, significantly aligns UN conduct with its deployment objectives. The outcome of this whole analysis can be reduced to a unified use of force rule that can be utilised (in Toto or in part) to guide UN troop conduct. Which parts of the rule are actually utilised (for instance whether hostile intent is defined per rule 1(i)b or, per 1(i) a and b) by a given mission will depend on the extent of force it has been authorised to use. I formulate its content as follows:

\begin{itemize}
\item \textsuperscript{68} The Liberation Tigers of Tamil Eelam (LTTE) blew up a reservoir in Northern Province of Sri Lanka in January 2009, flooding a number of villages <https://www.aljazeera.com/news/asia/2009/01/200912524210205547.html>.
\item \textsuperscript{69} Refer to discussion in Part 5.3.2 of Chapter 5.
\end{itemize}
1. Definitions

   (i) Hostile intent: An intention to imminently engage in actions that are likely to result in death or serious bodily harm to civilians, humanitarian or other personnel, or UN troops, or damage or destruction of objects, which is likely to cause the above results. Hostile intent is to be ascertained by the following standards-

   a) hard core members of total spoiler groups – presumed*

   b) all other members of OAGs – reasonable belief

   (ii) Military objective: Those objects which, by their nature, location, purpose or use, make an effective contribution to military action, and whose total or partial destruction, capture or neutralisation, in the circumstances ruling at the time, offers a definite military advantage or which need to be secured in order to avoid, in the relevant circumstances, the materialization of serious risks to civilians.

2. All individuals demonstrating hostile intent can be targeted.

   Targeting of individuals should be conduct-based and must generally follow a graduated approach to force escalation. But this can be ignored, and lethal options utilised directly, where a graduated use of force is clearly insufficient and/or inappropriate.

   This rule is subject to the following caveats:

   2.1 Where the target is a hardcore member of a (total) spoiler group, there is no necessity to resort to non-lethal measures prior to using deadly force, unless the target can be detained without an unreasonable risk to UN forces.

   2.2 In all other cases, a graduated approach to force must be followed, unless not doing so seriously impedes the security of civilians, humanitarian or other mission personnel, or UN forces.

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3. Proactive uses of force should be employed in defence of civilians who are being attacked, or who are under an imminent threat of attack. Approach to escalation should be as mentioned in Rule 1. Imminence of threat to be deduced inter alia by capability and preparedness, available evidence and past conduct of the OAG.

4. Attacks that cause collateral damage:

4.1 An attack must, by default, be planned so as to avoid or minimise, to the greatest extent possible, harm to civilians, OR

4.2 An attack may be planned in a way that the collateral damage caused thereby does not exceed the concrete and direct military advantage anticipated.

4.3 The rule under 4.2 may be utilised only where a combination of the following factors prevents the utilisation of the default position:

4.3.1 The security of civilians who may be harmed if no action is taken;

4.3.2 The security of other protected personnel;

4.3.3 The security of the UN force (can include two types of casualties: first, casualties sustained in being subject to a particular type of attack; and/or second, casualties that will be sustained in securing the objective through a means that is compliant with Ihl); and

4.3.4 Objects the destruction of which is likely to cause serious hardship or ill feeling towards the peace process or the UN.

*only applicable to total spoiler groups

6.7 Conclusion

This chapter contained the final section of the analysis of the regulatory standards by reference to which UN uses of force should be regulated. It commenced by analysing how the international
legal system has become increasingly fragmented, whether through party will or specialisation. Thereafter, it assessed how this fragmentation gives rise to the ‘conflicts of law’ that were hinted at in Chapter 4, differentiating between ‘apparent’ and ‘genuine’ conflicts. It also noted that ‘subject matter’ has the potential to play a central role in the identification and resolution of these conflicts, but that this potential can only be realised where these issues are approached with a deconstructed factual matrix.

The chapter next focused on how these conflicts could be resolved, in particular on the utility of lex specialis as a conflict resolution principle. After analysing its origins and rationale, the discussion noted that the principle functions with reference to a baseline of ‘efficiency’ which, it was argued, meant either the ability of a rule to take cognisance of party will or of the particular circumstances of the case. The type of conflict with which this chapter was concerned required ‘efficiency’ to be ascertained with reference to this latter formulation, and to identify that rule which better permits the realisation of the objectives pursued by UN uses of force. The analysis then moved to the functioning of lex specialis and utilised, for this purpose, the ‘Common Contact Point Theory’, which explains the operationalisation of the principle by reference to the relative ‘fit’ each candidate rule secures with the deconstructed factual matrix. It further remarked that the contact point formulation yielded accurate results only where each element of the factual matrix was properly moulded, by infusing it with those characteristics that are distinctive to the case. In the case of UN uses of force, these peculiarities could be drawn from the considerations that shaped the in bello morality of UN forces.

The next section of the chapter demonstrated how a regulatory regime that is based on this formulation allows UN uses of force to better achieve deployment objectives, first through explanation and thereafter, by reference to scenario-specific examples. Each of these examples was first deconstructed before the relations that subsist between the different components of the factual matrix were analysed. The applicable IHL and IHRL rules were thereafter superimposed individually over this matrix, with a view to assessing how each rule ‘fitted’ with the same. This analysis revealed that IHRL can, and should, function as lex specialis in numerous situations, the ‘fit’ shifting towards the relevant IHL rule with increasing levels of hostilities. The findings that were arrived at in this regard enabled the chapter to formulate a ‘unified use of force rule’.
7. Conclusion

This thesis commenced with three narratives: one of valour, one of failure and one of forced aggression. They put in context the dilemma that this thesis attempts to resolve, that of reducing the gaps between the promises made by the United Nations to civilians when it deploys troops and what these troops actually achieve on the ground. I limited the scope of this question to those promises and objectives that can be influenced by or achieved through the use of force, and focused on why and how the legal regulatory framework should be altered in this endeavour. This was achieved through a Chain Motif, which brought together the legal and moral components of both the resort to and use of force by the UN.

Chapter 2 analysed a number of issues on which the remainder of the thesis was based. The institutional framework that underpins UN deployments divides the responsibility for the maintenance of international peace and security between the UNGA and UNSC. While the UNGA can discuss questions that may endanger international peace and security, and draw attention to them, it is the UNSC that is vested with 'primary' responsibility in this realm. This includes the power to authorise missions, including those with coercive Chapter VII mandates that fall outside the province of the UNGA.

The lack of a standing military force compels the UN to draw its missions from voluntary troop contributions that are made by member states. While, theoretically, these troops remain under exclusive UN authority, Troop Contributors often impose express and implied caveats when contributing troops, and continue to influence troop conduct during deployment through intervening TC orders. This is a result of national policies that prohibit full command over their troops being transferred to third parties and contributes significantly to the frequent command complications that materialise during UN deployment. This is in spite of the numerous design overlaps that sustain within the strategic, operational and tactical levels of the UN command chain, which are intended to secure compliance with Force Commander orders. Of special note, in this regard, is the role played by Contingent Commanders, who link their contingents with the UN command chain in practice. Effectively, they act as a vent that either transmits, varies or completely blocks the down flow of Force Commander orders.

This thesis limited its analysis to UN-commanded and UN-executed missions. While these missions have been classified along numerous lines, the point of reference most relevant to this discussion remains the nature and extent of force that is authorised for, and utilised by, a
particular mission. The Peace Support Operations nomenclature, which has been suggested by Bellamy and Williams, obtains particular relevance in this regard for how it allows missions that fall on both sides of the Mogadishu line (which distinguishes between the non-coercive and coercive employment of force) to be included within a single discussion. But even where Peace Support Operations resort to elevated levels of force, such uses must be directed towards a specific breach of the mandate, be linked to a defined outcome, and be conducted using the principles of discrimination and proportionality. Such an approach is called for due to the fact that UN uses of force do not pursue the complete annihilation of a party, in comparison to traditional warfare.

It is in light of this institutional and conceptual backdrop that the discussion moved to the issue of responsibility, more particularly, how responsibility for the conduct of UN troops should be attributed. Attribution is centrally relevant to the issues dealt with by this thesis, due to the voluntary approach that international law utilises when ascribing legal obligations. This makes the content of the obligations to which an actor is subjected dependent on his/her identity. The legality of a particular course of conduct can, therefore, only be assessed after the actor who is responsible for the same has been identified. It is in this realisation that Art 07 ARIO situations, which deal with the conduct of organs that are placed at the disposal of IOs (such as national troops manning UN missions), should be approached.

I argue that attribution pertaining to Art 07 ARIO situations concerning UN forces should be resolved by a combinational criterion, which operationalises the ‘extent of effective control’ calculus from an ‘effects-based’ perspective. Not only does this framework permit consideration of ‘conduct-triggers’ such as Force Commander, Troop Contributor and Contingent Commander orders, and individual troop decisions, that vary in their form, legitimacy and impact, it also allows the relative effect of these triggers to be calculated accurately while avoiding analytical overlaps. The said scheme ensures that the division of factual power originally exercised over the impugned conduct is reflected in how responsibility is ultimately located. This allows the attribution exercise to effectively link with ‘conduct’, which is the theoretical basis of Responsibility.

The discussion does not ignore the important role played by due diligence in this context either. The ‘effects-based’ attribution framework can be utilised equally in attributing omissions, subject to one caveat. This is, where the framework traced orders when attributing acts, it traces the lack of such orders when attributing omissions. This requires the framework to commence its analysis from the FC and work its way down the command chain. The existence of a FC order
is, therefore, a condition precedent to the materialisation of non-UN Responsibility in these cases. Attribution so formulated reduces the existent deficit between factual and legal culpability significantly. While both actions and omissions can be subjected to dual attribution, this thesis limits its discussion to instances in which an act or omission is completely attributed to the UN.

Chapter 3 commenced the analysis of the Chain Motif that forms the axis of this thesis. The provisions of the UN Charter prescribe when the UN may resort to force; that is, to prevent or rectify threats to, or breaches of, international peace and security. While numerous actions have been considered to satisfy this threshold, I focused primarily on how large-scale human rights violations have been utilised to justify UN uses of force. A comprehensive analysis of the policy documentation that underpinned five UN missions, which marked watersheds in UN peacekeeping history, demonstrates that these first-tier legal objectives were operationalised into a second tier, namely, self-defence, defence of mission and humanitarian personnel, protection of civilians, and the neutralisation of identified armed groups. UN uses of force can be directed at either one or more of these objectives, which collectively answer the ‘why question’.

The resort to force by the UN also entails a moral calculation. This was analysed by reference to the Just War theory. The operationalisation of the theory, in the case of resort to force by the UN, reveals a number of peculiarities that emanated from the distinct legal objectives it pursues. The first of these pertains to ‘just cause’ that, in the case of the UN, can mean one or more of the three objectives referred to above. These may be compared with the just cause for traditional warfare, which almost exclusively means the defeat of aggression. The discrepancy that so obtains regarding just cause centrally impacts other just war components. For instance, the ‘goods’ component of the proportionality calculation is influenced directly by the objectives pursued by the just cause and take their content from the latter. Whereas the primary ‘good pursued in traditional warfare is the neutralisation of the threat posed by the opponent through annihilation, that pursued by UN uses of force is limited to altering the behaviour of Organised Armed Groups, subject to extreme cases that pursue the destruction of a ‘total spoiler’. This is also true of the ‘harms’ component of proportionality. Similarly, ‘harm’ in traditional warfare is not sensitive to such matters as the opinion of civilians belonging to the opposing side and the ability to ensure their participation in processes that are promoted by the party using force. These elements are central to the ‘harms’ side of proportionality in the case of resort to force by the UN. The different causes pursued by each activity also impact the
respective Right Intention components; whereas Right Intention for warfare is the annihilation of the opponent (subject to in bello restrictions), Right Intention even for extreme UN uses of force is altering or coercing the behaviour of the OAG in a way that complies with the peace process. The just war theory can return accurate outcomes only where these components are amended accordingly and this makes the overarching moral accent that it ascribes to each activity vary significantly.

Certain components of the just war calculation also transcend into the in bello domain. Proportionality, for instance, inimically concerns itself with how the use of force can be shaped to contribute to the ‘goods’ being pursued while steering it away from, or from contributing to, the relevant ‘harms’. This is also the case with Right Intention that transforms why force is being resorted to into how force must be used on the ground. This transcendence is even stronger in the case of resort to force by the UN, which contains further elements that function on both sides of the ad bellum–in bello divide. One such element is impartiality, which is currently deduced with reference to the mission mandate, thus allowing transgressions and potential transgressions to be dealt with appropriately, including through the use of force. This function can only be realised where impartiality is considered as a compound concept, which is comprised of impartiality within the mandate (that functions at the ad bellum level) and impartiality in mandate implementation (that functions at the in bello level). Where this reality is accepted, impartiality forces the in bello morality of UN uses of force to comply with the overarching parameters that are set by its ad bellum counterpart. Similar functions are executed by the Protection of Civilians concept, which both justifies the resort to force and provides guidance on the operationalisation of the use of force. Ignoring these realities gives rise to the danger of UN troops engaging in and desisting from courses of conduct that are inconsistent with what they have been authorised to do.

It is in this context that the content of the in bello morality of use of force falls to be analysed. This thesis approaches in bello morality through a ‘Pressure Point’ system. These include the moral liability of the opponent, immunity from attack, defence of the defenceless and force protection. I argue that the ad bellum accent relevant to each activity shapes each of these Pressure Points in distinct ways and affords to them distinct degrees of relative importance. These are complemented by further principles such as Double Effect, which is operationalised where the relevant factual matrix gives rise to tensions between Pressure Points, as exemplified by attacks that cause collateral damage. These moral conflict resolution
principles also take their shape from the ad bellum morality of the particular activity, changing for instance the degree of allowable collateral damage

How these Pressure Points are shaped in the case of UN uses of force was thereafter analysed by superimposing them onto the three objectives in pursuance of which the UN resorts to force. This revealed that the in bello morality of UN uses of force was shaped as follows:

1. The liability pressure point, as informed by factors such as physical threat, the mental attitude of the combatant, the nature of the relevant conduct, the possibility of reintegration and the latent threat that the combatant poses to the peace process;
2. The immunity pressure point, as informed by factors such as the expectations of protection deployment creates in civilians and the moral duty to act created, in particular, by the PoC component of the ad bellum calculus;
3. The force protection responsibility imposed on the UN; and
4. The possibility of securing the greatest possible cooperation with, or participation in, the underlying process with due regard paid to how uses of force impact civilian attitudes along ethno-religious or other lines.

The distinct nature of this in bello morality is exemplified by a number of its composite elements. These include for instance, how the moral liability PP of UN uses of force does not always require the annihilation of fighters and how their immunity PP imposes on them a proactive duty of engagement. An in bello morality of UN use of force thus shaped is imperative to reducing the deficit between what UN missions are mandated to do and what they actually do. This is due to how it is placed in the relevant conceptual and regulatory matrix, bordering on one side, the relevant ad bellum morality that explains why UN forces resort to force (which in turn is centrally influenced by the ad bellum legality) and, on the other, the applicable in bello legal rules.

The discussion next moved onto the last link of the Chain Motif, the legal framework by reference to which UN uses of force could be regulated. Its analysis comprised three components: the applicability of the candidate rules, their normative content, and how ‘conflicts of law’ that are occasioned by their simultaneous application to UN uses of force must be resolved.
The applicability issue is comprised of a number of sub-issues. The first among these relates to the sources of law that can be utilised in the analysis. Unique characteristics that are inimical to both the UN as well as to some relevant branches of law, such as treaty law, compel this thesis to use for its analysis a mixed model that comprises both customary and treaty law.

The final clauses of international treaties prevent International Organizations such as the UN ratifying them. Legal thinking has taken cognisance of this difficulty and proceeded to formulate a number of tools that justify the imposition of treaty obligations on International Organizations. One such tool is referred to as the ‘principle of functional treaty succession’, that imposes on an International Organization the treaty obligations by which its member states are bound. Under this formulation, the International Organization is substituted essentially to the position of member states where it exercises functions that would otherwise have been exercised by its members. An application of functional treaty succession must appreciate, however, that the obligations being imposed on the International Organization originate from those of the member states, which in turn depends on how widely the relevant obligations have been ratified by these members. In light of this, this thesis chose the ICCPR for the IHRL component of this exercise, which has been ratified and signed by 172 and 6 states, respectively. How we understand custom formation at present, that is through the dealings of parties who locate themselves in horizontal relationships prevents the identification of a ‘customary IHRL’, which further justifies this selection.

The IHL side of the equation brings its own complications. For instance, IHL utilises different regimes to regulate conduct during armed conflict. While the IHL framework applicable to International Armed Conflicts is contained in the four Geneva Conventions and Additional Protocol I, the framework relevant to Non International Armed Conflicts is contained in Common Article 03 to the Conventions and Additional Protocol II. Even though these instruments have been widely ratified, the IHL treaty framework regulating Non International Armed Conflicts is extremely sparse in content. This is particularly relevant to this thesis because Non International Armed Conflicts are the type of conflict in which UN troops are most likely to become engaged. Moreover, most rules that are applicable only to International Armed Conflicts as treaty law are now also considered to apply to Non International Armed Conflicts as customary law. The greater coverage customary IHL so affords, in conjunction with such factors as its applicability to non-state actors to its formation, justifies its utilisation in this thesis.

The identification of these sources only answers part of the question. The analysis next requires how IHRL and IHL become applicable to any given situation to be analysed. The
applicability of IHL to UN forces can be discussed in a number of respects; applicability *ratione materiae*, *ratione temporis* and *ratione loci*. While some sources suggest that the *ratione materiae* applicability of IHL to UN forces must be deduced by reference to special considerations, I argue that this must be deduced by reference to the same considerations that apply to all other actors. Such an approach has the merits of being clear, consistent and compliant with the general approach to belligerency taken by IHL, which relies on the individual dealings between the parties as informed by such matters as intensity of hostilities and (in the case of NIACs) the level of organisation of the parties. To argue, as the Bulletin does, that IHL applies to UN forces only where they are actively engaged as combatants, therefore runs counter to the revered IHL principle of equality of parties. The approach followed by the Bulletin also allows UN troops and, particularly their bases, to move in and out of targetability, a possibility that is certain to give rise to confusion. It is equally imprudent to argue that IHL applies to UN forces at a higher level of intensity. Such a position allows the reasons for which force is resorted, to influence how force is used. While this thesis does advocate numerous interactions between these two components, none of them posit themselves at such a basic level. IHL usually applies to the whole of the territories of the states engaged in an IAC and to those under the control of the respective parties engaged in a NIAC (*applicability ratione loci*) until a general conclusion of hostilities has been reached (*applicability ratione temporis*).

The applicability of the ICCPR, which constitutes the IHRL component of this analysis, was initially shrouded by the fog created by the conjunctive approach that was used regarding the phrases ‘within its territory’ and ‘subject to its jurisdiction’. This approach dictated that the ICCPR applied only where both elements were satisfied, which essentially made it possible for states to engage, beyond their borders, in conduct that would be prohibited within them. It thereby challenged the universal nature of Rights, and was criticised and discarded in favour of the ‘disjunctive’ approach, that considers each condition to be capable of conferring obligations. IHRL can therefore apply both within and beyond the territorial boundaries of a given actor. While applicability is deduced in the former case by reference to jurisdiction (being concomitant to territorial control), extraterritorial applicability is deduced by reference to the notion of ‘effective control’. Effective control is especially pertinent to the case of the UN, which does not claim any territory as its own, and which therefore always acts extra-territorially.

The meaning of ‘effective control’ is deduced either in reference to control over territory (territorial model) or control over persons (personal model). A comprehensive analysis of these models reveals that the territorial model collapses where the geographical area in relation to
which the analysis takes place decreases. This is exemplified by a case in which an individual is being detained by agents of state ‘A’ in a part of a compound that is located in state ‘B’. The agents, in this case, do not have control over the whole compound, even though their acts clearly impact the Rights of the detainee. Following the territorial model in such cases, in fact, accommodates what the ‘conjunctive’ approach permitted. Furthermore, adopting a personal approach to extraterritoriality allows a single standard to be utilised in analysing the applicability of both negative and positive obligations. It also complements the notion of control that is utilised for the attribution exercise, a feature that is central to the intelligible and consistent functioning of the law in this area. ‘Effective control’ is, therefore, nothing more than control over the person as noted in chapter 4.

Chapter 5 then considered the specific IHRL and IHL rules by reference to which the on-field use of force by the UN can be regulated. This analysis was limited, however, first, to those rules that were relevant to the on-field use of force, and second, to such of these rules that returned contradicting outcomes when applied to the same situation.

The IHRL component of this analysis centres around the Right to Life, which can only be deprived subject to the necessity, proportionality and planning thresholds. While, in a pure form, the principle of necessity requires that all alternatives be exhausted prior to resorting to lethal force, recourse to such force does not have to satisfy this approach where non-lethal alternatives may be ineffective. This allows a circular model of force graduation to be utilised in place of a linear one. The principle of proportionality requires that the degree of force used in a particular case be calibrated to the seriousness of the threat that is posed. Both these elements are also informed by how IHRL requires operations to be planned so as to reduce, to the greatest extent, recourse to lethal force. Whether or not this planning threshold is satisfied, however, depends on the facts of each case.

The IHL rules that are relevant to this exercise emanate from the principle of Distinction that requires parties to distinguish between civilians and combatants, and between military objectives and civilian objects. Distinction can be discussed, therefore, in terms of both material and non-material targets, in relation to both IACs and NIACs. The customary rule applicable to IACs dictates that attacks may be launched only against the ‘armed forces’ of a party to the conflict, which consists of forces, groups and units that are under a command responsible to that party. However, civilians cease to be protected from attack for such time as they participate directly in hostilities. There is however, no generally accepted customary definition of direct participation in hostilities. The corresponding position regarding NIACs is further complicated,
by state reluctance to recognise a ‘combatant status’ therein. NIACs therefore entail three types of individuals that can legally be targeted, with varying temporal limits of targetability. These are members of state or non-state armed forces (status ascertained at the customary level through the standard of enlistment), individuals directly participating in hostilities beyond a mere ad hoc or sporadic basis (status ascertained at the customary level through the standard of command), and individuals directly participating in hostilities on a mere ad hoc or sporadic basis (status ascertained at the customary level on a case-by-case basis). Customary IHL prescribes that, in the first two categories, individuals could be targeted at any time until either delistment or permanent withdrawal from the command chain, and in the third, for the duration of the participation. Whether an individual directly participates in hostilities (in either type of conflict) must however be ascertained on a case-by-case basis. Most importantly, an individual is transformed into a ‘military objective’ the moment he/she satisfies the targetability threshold. This transformation removes most restrictions on the degree of legal force (subject to the generally irrelevant limitation prescribed by the superfluous injury rule) that can be used on the targets.

IHL defines the targetability of objects with reference to the ‘effective military contribution’ and ‘definite military advantage’ criteria. Crucially however, the meaning of ‘military advantage’ ‘varies according to the nature of the activity being pursued. What confers a ‘military advantage’ for warfare may therefore well not do so for UN uses of force. This also makes the meaning of ‘military objective’, which by definition is linked to ‘military advantage’, fluid and dependent on the nature of the activity. This is particularly evident, for instance, in how the annihilation of the whole membership of an OAG does not confer an advantage in the sense envisaged by UN uses of force. It is also relevant where OAGs attempt to damage objects which contain dangerous forces, that fall outside the definition of an IHL ‘military objective’. Such practices can require that priority be accorded to actions by which these objects are secured, a priority IHL does not prescribe at present (even though it allows the relevant fighters to be targeted by virtue of their status).

Similar remarks can be made regarding the IHL proportionality calculation, which functions by reference to a balance that is drawn between the value of the relevant military objective and the extent of collateral damage. Another factor that is central to this balance is force protection, deduced by reference to the risk to which forces will be subject if this or that course of action is followed. It is also influenced by the value ascribed to civilian lives which, in the case of warfare, distinguished between ‘our’ civilian and ‘their’ civilians, a distinction to
which UN forces do not. The chapter concludes with a note on how the parallel application of IHRL and IHL rules return contravening outcomes, giving rise to ‘conflicts of law’.

Chapter 6, the last substantive chapter of this thesis, analysed the content of the ‘unified use of force rule’ - the final component of the regulatory framework. The international legal system has become increasingly fragmented over the years, due to the operationalisation of two phenomena: party will and specialisation. This fragmentation gives rise to ‘conflicts of law’, in which the application of different rules to the same facts returns contradicting outcomes. This is exemplified by how IHL rules permit resort to lethal force against all individuals who qualify to be targeted, and by how IHRL restricts resort to such force only where the target poses an imminent threat, subject to necessity and proportionality requirements. Most uses of lethal force that are permitted by IHL are, therefore, likely to fall foul of the relevant IHRL rules.

Conflicts of law take two forms: ‘apparent conflicts’, wherein the outcomes returned by the application of one rule fall within a larger category of outcomes returned by the application of the other; and ‘genuine conflicts’, wherein the outcomes returned by either rule are inimically inconsistent and cannot be reconciled. While the former category of conflicts generally take place between two rules that approach the subject matter from the same conceptual vantage point (e.g. rights v rights), the latter category involves rules that approach the subject matter from different vantage points (e.g. rights v duties). This thesis concerns itself with genuine conflicts that arise between IHRL and IHL rules which apply to UN uses of force.

The chapter then asks how these genuine conflicts should be resolved? It utilised, for this purpose, the lex specialis principle, which is argued to function with reference to a baseline of ‘efficiency’. What ‘efficiency’ means, however, differs according to the source from which the relevant conflict emanates. In those conflicts that arise due to the contracting out of parties from general law, it refers to the ability of a rule to take cognisance of party will; in those conflicts that arise due to the fragmentation of international law, however, ‘efficiency’ refers to the ability of a rule to take account of the particular circumstances of the issue. The type of conflict with which this thesis is concerned requires ‘efficiency’ to be ascertained with reference to this latter formulation. Given the nature of the underlying activity, this translates into the ability of each rule to permit the realisation of the objectives pursued, under given circumstances.

The analysis then moved to the functioning of lex specialis and utilised, for this purpose, the CCPT, which explains the operationalisation of the principle by reference to the relative ‘fit’ each candidate rule secures with the factual matrix. But the CCPT can only be utilised where the
underlying factual matrix has been deconstructed and where each of its constitutive elements has been properly moulded by infusing it with those characteristics that are distinctive to the case. In the case of UN uses of force, these peculiarities are drawn from the considerations that shape the in bello morality of UN forces which contains the answers to the ‘why question’ The control element of the factual matrix also plays a vital role in this exercise. ‘Control’ is not perceived in terms of an applicability threshold at this point, however, because this analysis only applies to instances in which ‘effective control’ exists, as deduced through the personal model. What the phrase here connotes is where along a spectrum of receding amounts of ‘control over the situation’, the transfer from regulation through IHRL to regulation through IHL is justified. While this point exists somewhere in between the personal and the territorial models of control, it is a fact-specific calculation.

How this model applies and how such application reduces the gaps between promises and outcomes was then exemplified in reference to scenario-specific examples that fell within each object-based category of use of force deduced in chapter 3. Not only did this reveal the instances in which IHL could not, by design, accommodate the realisation of UN deployment objective; it also justified why IHRL should have a much larger role to play in this endeavour. My findings enabled me to formulate the ‘unified use of force rule’ in the following terms:

1. Definitions

Hostile intent: An intention to imminently engage in actions that are likely to result in death or serious bodily harm to civilians, humanitarian or other personnel, or UN troops, or damage or destruction of objects, which is likely to cause the above results. Hostile intent is to be ascertained by the following standards-

a) hard core members of total spoiler groups – presumed*

b) all other members of OAGs – reasonable belief

Military objective: Those objects which, by their nature, location, purpose or use, make an effective contribution to military action, and whose total or partial destruction, capture or neutralisation, in the circumstances ruling at the time, offers a definite military advantage or which need to be secured in order to avoid, in the relevant circumstances, the materialisation of serious risks to civilians.
2. All individuals demonstrating hostile intent can be targeted.

Targeting of individuals should be conduct-based and must generally follow a graduated approach to force escalation. But this can be ignored, and lethal options utilised directly, where a graduated use of force is clearly insufficient and/or inappropriate.

This rule is subject to the following caveats:

2.1 Where the target is a hardcore member of a (total) spoiler group, there is no necessity to resort to non-lethal measures prior to using deadly force, unless the target can be detained without an unreasonable risk to UN forces.

2.2 In all other cases, a graduated approach to force must be followed, unless not doing so seriously impedes the security of civilians, humanitarian or other mission personnel, or UN forces.

3. Proactive uses of force should be employed in defence of civilians who are being attacked, or who are under an imminent threat of attack. Approach to escalation should be as mentioned in Rule 1. Imminence of threat to be deduced inter alia by capability and preparedness, available evidence and past conduct of the OAG.

4. Attacks that cause collateral damage:

4.1 An attack must, by default, be planned so as to avoid or minimise, to the greatest extent possible, harm to civilians, OR

4.2 An attack may be planned in a way that the collateral damage caused thereby does not exceed the concrete and direct military advantage anticipated.

4.3 The rule under 3.2 may be utilised only where a combination of the following factors prevents the utilisation of the default position:

4.3.1 The security of civilians who may be harmed if no action is taken;

4.3.2 The security of other protected personnel;
4.3.3 The security of the UN force (can include two types of casualties: first, casualties sustained in being subject to a particular type of attack; and/or second, casualties that will be sustained in securing the objective through a means that is compliant with IHL); and

4.3.4 Objects the destruction of which is likely to cause serious hardship or ill feeling towards the peace process or the UN.

*only applicable to total spoiler groups

This thesis analyzed why the UN resorts to force to clarify why a regulatory framework that is comprised exclusively of IHL rules cannot synthesize UN troop conduct with it deployment objectives. Such a regulatory framework, simply comprises of the wrong legal rules. It also explains how this framework should be amended in order to secure this synthesis. The unified use of force rule it formulates has immense potential to make a telling difference in this regard, whether it is itself used as a ROE or as a platform for formulating stricter ROEs.

This is where I return to the narratives with which this journey commenced. In terms of the assumption of risk, the unified use of force rule tells UN troops that they are not ‘just another combatant’. As difficult as it sounds, the helmet they wear requires them to accept higher levels of risk, particularly where such risk can contribute to saving civilians. This is exactly what Captain Diagne did in narrative 1. This is also what the Dutch peacekeepers with whom narrative 2 was concerned, did not do. UN PSOs must also be cognizant of how uses of force affect the overall process they represent. Unnecessary degrees of force can, as explained in this thesis, easily disenfranchise local populations from these processes. This is particularly relevant to those missions such as MONUSCO, with which narrative 3 was concerned.

‘Promises are always better kept than broken’.

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Appendices
Appendix 2. Rules of engagement

1. Selected ONUC operations directives

Operations Directive no. 2
ONUC policy relating to questions of arrests

17 August 1960

1. The function of the UN Force is to assist in maintaining law and order. In the exercise of this function, the United Nations is not contesting the right of the Government of the Congo to take police or judiciary measures which it considers necessary for the security of the State. In particular, the United Nations Force is not challenging the principle of the right for the Government to proceed to personal arrest.

2. Wherever there may appear, however, to be wrongful, excessive or arbitrary exercise of police authority in any locality, or a special reason for the UN to step into the situation—in particular in relation to its own operations—the UN Command in the locality should employ its good offices toward the end of ensuring just treatment for all. This should be done tactfully and should be approached on the basis of ethics rather than any legal right on our part.

When and where actual disorder occurs or threatens to occur through acts of arbitrary arrest, the UN Force is entitled to intervene directly, by means of establishing a presence at the particular locality, acting as a buffer between disputing parties, seeking to persuade the authorities concerned to place the person or persons arrested under UN safekeeping, trying to disperse unruly crowds, and any other peaceful actions that the Command may find appropriate.

3. Members of the Staff of ONUC, that is of the UN and the Specialized Agencies, and the officers and men of the UN Force in the Congo, have an international status entitling them to special consideration. They can be identified by the UN identity cards which they carry (blue for the military and pink for the civilian). Unless such a person is clearly guilty of some serious breach of the law, every peaceful effort must be exerted to prevent the arrest or to effect his release, on the grounds both of immunity for international officials and non-interference in the work of ONUC.

Iyassu Mengasha, Brigadier General
Chief of Staff, ONUC

Operations Directive no. 3
ONUC policy with regard to inter-tribal conflict

17 August 1960. Confidential

The following are instructions to be followed by all commanding officers with regard to intervention of the UN Force in inter-tribal conflict situations.

1. Inter-tribal conflict is an internal matter with heavy political connotations. But it also often becomes a source of grave public disorder, which ONUC cannot ignore.

2. Responsible officials in the Government of the Republic of the Congo, including the Prime Minister, the President of the Senate, the Minister of the Interior, the Commander of the ANC [Armée Nationale Congolaise] and various other officials, have recently expressed their desire that the UN Force in the Congo should concern itself with the control of inter-tribal conflict, which is particularly troublesome at present in the provinces of Kasai and Equateur.

3. Elements of the UN Force, when confronted with inter-tribal conflict, should pursue the following course

(a) Every effort should be made to induce local authorities, political, police and military, to take all possible measures to control the conflict, to the full extent of their authority and resources.

(b) If elements of the Armée Nationale are in the area and are sufficiently organized, officered and disciplined to be reasonably effective, they should be induced to intervene to the extent of their capability.

(c) UN good offices should be employed with tribal leaders and local authorities toward establishing at least an understanding precluding further resort to violence.
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(d) The UN Force, at the discretion of the local commander when he considers such action to be called for, and in the light of the manpower available to him, may intervene more directly through the undertaking of patrols, guards and other preventive or protective actions. In this regard, it must be kept in mind that arms are to be fired only in self-defence, when all other measures have failed.

Iyassu Mengasha, Brigadier General
Chief of Staff, ONUC

Appendix I

Operations Directive no. 6
Security and the maintenance of law and order
28 October 1960, Confidential

Applicability

1. This Directive replaces all previous instructions to commanding officers regarding their responsibilities in ensuring security and the maintenance of law and order in the areas under their command and is in amplification of the various directives on the subject so far issued.

General

2. The UN Force in the Congo serves as a temporary security force at the request of the Government of the Republic of the Congo. It acts under the mandate of the resolutions of the Security Council of 14 and 22 July and 9 August, and resolution 1474 of the Fourth Emergency Special Session of the General Assembly. Its purpose is to assist the Government in the restoration and maintenance of law and order and particularly to take all possible measures for the protection of life throughout the territory of the Republic of the Congo, with the ultimate purpose of safeguarding international peace and security.

3. The UN Force in the Congo is a peace force. It carries arms in order to lend weight to its authority and as a deterrent, but these arms may be used only in self-defence, as explained in the Directive. The UN force is in no sense an occupying force. It seeks only to help achieve security in which government and administration can function effectively. Thus, its main purpose is to assist the government in creating conditions of peace in which Congolese people may themselves be able to develop their political freedom and economic prosperity. The UN force therefore must respect the sovereignty, independence and national integrity of the Republic of the Congo.

Responsibilities of the Congolese authorities

4. The UN Force shall not repeat not be a party to or in any way intervene in or influence the outcome of any internal conflict, constitutional or otherwise. This, of course, does not mean that the UN cannot take humanitarian measures to prevent bloodshed, such as serving as a buffer in inter-tribal conflict, lending its good offices to local disputants, and arranging cease fires. Where more than one authority claims to exercise the powers of government, at whatever level, the UN can take no position as to which authority should be recognized. The UN Force, in pursuance of its efforts to maintain law and order, may take necessary contacts for this purpose with those officials on the spot who may be exercising authority, without, however, thereby implying any attitude or position with regard to the legal status of such officials.

5. The responsibility for the maintenance of law and order is primarily that of the Congolese authorities. The aim of the UN Force is to assist these authorities in carrying out their responsibilities. Therefore, in the event of a disturbance, actual or potential, UN commanders wherever possible, will in the instance rely on the appropriate competent Congolese authorities, administrative, policy or military, to take the necessary lawful measures, or if necessary, try to induce them to do so, and may give them assistance towards that end.

6. Should the Congolese authorities be unable to deal with the situation adequately, or when it is apparent that they intend to apply or when they do apply harsh and repressive measures not sanctioned by law and in violation of humanitarian principles, then and only then will the UN Force take further appropriate steps to fulfil its responsibilities in the protection of life, law and order.

7. As a peace force the UN Force may not take the initiative in the use of armed force. It is however, entitled to use force in self-defence, but only as a last resort after other means viz., negotiation or persuasion, have failed. In the following types of cases UN troops are entitled to respond with force to an armed attack upon them:
(a) attempts by force to compel them to withdraw from a position which they occupy under orders from their commanders, or to infiltrate and envelop such positions as are deemed necessary by their commanders for them to hold, thus jeopardising their safety;
(b) attempts by force to disarm them;
(c) attempts by force to prevent them from carrying out their responsibilities, as ordered by their commanders;
(d) violation by force of United Nations’ premises and attempts at arrest or abduction of UN personnel, civil or military.

The minimum force necessary will be used in all such cases in order to prevent as far as possible the loss of human life or serious injury to person[s].

8. In the event of firing being resorted to for purposes of self-defence, the following principles shall apply:
(a) the object throughout is to deter and not to cause loss of life;
(b) it follows that firing should be low and not aimed at vital parts;
(c) in the case of mob attack, the leaders should be picked out for deterrent action;
(d) firing must at all times be controlled and not indiscriminate;
(e) the officer in charge will keep a record of the number of rounds fired;
(f) firing into the air should be avoided as it may be provocative without strengthening respect for the force.

Protection against marauders or armed bands

9. (a) Whenever a threat of attack develops towards a particular area either by marauders or armed bands, UN commanders will endeavour to pacify the area through the Congolese authorities as described in para. 5 above, or failing that, where possible, by direct approach to the attackers. Mobile patrols should immediately be organized to manifest the presence of UN in the threatened or disturbed area, in whatever strength is available. Loudspeaker vans and other appropriate means may be used to calm and restrain public excitement.
(b) If all attempts at peaceful settlement fail, UN commanders may recommend to the Supreme Commander that such threatened areas be declared as under UN protection by means of the deployment of UN troops. In the event of their receiving specific instructions to that effect, the UN commanders will announce that the entry into such area of marauders or armed bands, as the case may be, will be opposed by force, if necessary in the interests of law and order.

(c) If, notwithstanding these warnings, attempts are made to attack, envelop or infiltrate the UN positions thus jeopardising the safety of UN troops, they will defend themselves and their positions by resisting and driving off the attackers with such minimum use of force including firing, as may be necessary.

10. It follows from para. 9 that if UN units arrive at the scene of an actual conflict between marauders and civilians or between opposing armed bands, they will, in the interests of law and order, immediately call on the participants to break off the conflict. If the participants fail to comply, UN commanders will immediately take appropriate steps to separate the combatants and to prevent further lawlessness, bloodshed, pillaging or looting. If the UN troops are then attacked, they may use such degree of force as may be necessary for the exercise of their right of self-defence, including firing.

11. Persons observed to be engaged in looting, but not fighting, on the scene of such conflicts will be called upon by UN troops to desist and surrender. If they desist from looting and flee, firing should not be resorted to in order to apprehend them. On the other hand, if they refuse to desist from looting, force may be employed to stop them, and, if they attack, the principle of self-defence applies and resort may be had to the minimum firing necessary.

Disruption of agencies of public order

12. The obligation of the UN Force to assist in the maintenance of law and order is in no way diminished where it happens that elements of Congolese forces may themselves be engaged in general lawlessness. Where soldiers, gendarmes or police have broken away from their command and are no longer under the control of the authorities, or where they engage in the unlawful killing of unarmed civilians or the pillaging and burning of towns and villages or in any flagrant violation of elementary human rights, they constitute a danger to public order and society and an immediate report on the situation should be sent to the Supreme Commander. If such units appear to be operating under any form of leadership, UN commanders will use their good offices to stop all such activities, by direct consultation with
that leadership or by reference to the nearest authorities of the civil government, the ANC [Armée Nationale Congolaise] or the gendarmerie. If these endeavours fail, every effort should be made to disarm or neutralise the lawless elements and to confine them to barracks. Any further action should be taken only on receipt of specific instructions from the Supreme Commander.

**UN property and existing installations**

13. UN troops are responsible for the protection of UN property. In addition, essential public utilities such as electricity works, waterworks etc., should be given such protection as may be necessary when they are threatened by public disorder, and where any damage or destruction to them would cause hindrance to the UN operation or acute hardship to the civilian population.

14. (a) Protection of UN or other essential installations may be provided by means of mobile patrols or static guards, as appropriate.

(b) Physical force may be used, if necessary, to protect such installations.

(c) Such force may extend to the minimum degree of firing necessary, as a last resort.

**Conclusions**

15. In carrying their responsibilities for assisting in the maintenance of law and order in the Congo, the UN troops are expected to act with tact and moderation at all times. The very presence of armed and disciplined troops, skilfully deployed, can act as a powerful deterrent to the forces of disorder and violence. When force has to be used it should be kept to the minimum required for the attainment of the objective. It is expected that the action of the UN troops will always be inspired by the aims and purposes of the United Nations in Congo.

(Carl Carlson Van Horn) Gen.
Sup Comdr.

**Amendment no. 1**

Page 1, para 1, line 1
Delete word ‘replaces’ and substitute ‘is in amplification of’. Insert after the word ‘instructions’ as follows ‘so far issued’. In lines 3, 4 and 5 delete ‘and is in amplification . . . so far issued’.

LtCol S. N. Mitra, Chief Operations Officer
No. 1001/11/OPS

**Operations Directive no. 8**

*Outgoing code cable*

**OPS 277**

*Untitled, [February 1961]*

Para 1. Within the framework of Operational Directive no. 6, all units will continue to try to prevent armed conflict by every means at their disposal other than the use of armed force. If these efforts fail and actual conflict occurs between any two armed factions of the Congolese, UN troops will not participate and will withdraw from the area of fighting.

Para 2. Where feasible, every protection will be afforded to unarmed groups who may be subjected by any armed party to acts of violence likely to lead to loss of life. In such cases, UN troops will interpose themselves, using armed force if necessary, to prevent such loss of life.

Para 3. Refugees, irrespective of nationality, will be afforded the maximum protection by UN troops. If necessary, armed force will be resorted to in affording this protection.

Para 4. Political leaders seeking UN protection will be afforded that protection.

Para 5. Every possible step will be taken to ensure the personal safety of any person or persons held as hostages.

Para 6. In the event of an attempt being made by any outside force (including the use of paratroops) to intervene in the Congo, such attempt will be immediately countered by UN troops, resorting to armed force if necessary. This action will be taken even if it is claimed by the aggressors that their intervention is for the purpose of evacuating their own or other nationals.

Para 7. Operational Directive no 6 remains fully valid, insofar as it is not inconsistent with the present instructions.

**Appendix II**

**Operations Directive no. 9**

*Use of force in self defence*

*4 March 1961, Confidential*

(This directive is in amplification of the general principles given at paragraphs 7 and 8 of Operation Directive no. 6)

1. The instances of UN military personnel giving up their arms to the Congolese Army are on the increase. Such incidents are most undesirable and have a detrimental effect on
the morale of the troops. I direct that commanders at all levels take immediate steps to stop any recurrence of such incidents.

2. Military personnel are authorized to open fire in self defence. The use of force to prevent being disarmed falls under self defence as directed in para 7(b) of Operation directive No 6. Special measures as outlined in succeeding paragraphs will be taken by all units/sub units of ONUC.

3. In the event of the actual outbreak of an armed clash

In the event of the actual outbreak of an armed clash despite the steps stated in paragraph 2 above, efforts for a cease-fire should continue. Meanwhile, any United Nations troops interposed or deployed in any other way to prevent a clash may defend themselves from any attack on their position in accordance with existing directives on self-defence. The right of self-defence thus applies to action in support of the measures already taken for the prevention of a clash. If, however, United Nations troops have not been able successfully to interpose themselves, they should at the earliest opportunity attempt either to interpose themselves between the parties or otherwise deploy themselves to stop or limit the clash; in so doing, they continue to have the right to defend themselves by force, if necessary, subject to the reservations in paragraph 4 below.

4. When an armed clash has taken place and the hostilities threaten to envelop UN forces

The United Nations commander should attempt to retain his position without getting involved in the fire-fight and maintain contact with both parties so as to be able to negotiate a cease-fire at the first possible opportunity. However if there is a clear risk of United Nations troops becoming a party to the armed clash, or if the United Nations commander considers that the safety of his men will be unduly jeopardized, United Nations troops may be withdrawn. In no case should United Nations troops join with one section against another.

Lieut. General Commander UN Force in the Congo (S. Mac Eoin)  
No. 1001/11 (OPS)

Source: UN Archives DAG13/1.6.5.0.0, Ops Directives Aug. 1960–Jan. 1964, Box 3.
2. Use-of-force instructions for UNEF II

HQ UNEF, Cairo, undated

Aim

1. To specify the circumstances under which force may be used by UNEF troops.

Definitions

2. FORCE—the general term describing the use of physical means to impose the will of UNEF.
   Examples—obstacle, use of bayonet, opening fire.
   For the purposes of this instruction FORCE will be divided into two parts:
   (a) UNARMED FORCE
   (b) ARMED FORCE
   The use of military weapons.

Principles

3. (a) One of the main principles on which UNEF operations are based is that incidents must be prevented and, if necessary, stopped by negotiations and persuasion rather than by the use of force. It therefore follows that force will only be used when all peaceful means of persuasion have failed.
   (b) The use of force is authorised ONLY in self-defense and as a last resort in the carrying out of the task given to UNEF troops. Only the minimum force to achieve the mission is to be used in order to prevent, as far as possible, the loss of human life or serious injury to persons.
   (c) The only circumstances in which fire may be opened are:
      (i) Self-defence, including defence against attempts by force to disarm UNEF personnel, but only as a last resort.
      (ii) In the defense of UNEF posts, premises and vehicles under armed attack.
      (iii) In support of other troops of UNEF under armed attack.

4. Circumstances in which force may be used

(a) By careful planning and foresight commanders at all levels should seek to foresee dangerous situations well in advance and should ask to obtain detailed direction which would include clearance to use force should it be necessary.
   (b) The decision as to when force may be used rests with the commander on the spot whose main concern will be to distinguish between an incident which merits the use of armed force as opposed to the use of unarmed force.
   (c) In circumstances where time does not permit reference to higher authority the commander on the spot will use that amount of force which he considers to be required.
   (d) It is not possible to define all circumstances in which force may be used. However, for the guidance of commanders, the following are given as examples of situations in which troops may be authorized to use force:
      (i) When they are compelled to act in self-defence.
      (ii) When the safety of the Force or members of it are in jeopardy.
      (iii) When attempts by force are made to compel them to withdraw from a position which they occupy under orders from their commanders, or to infiltrate and envelop such positions as are deemed necessary by their commanders for them to hold, thus jeopardizing their safety.
      (iv) When attempts by force are made to disarm them.
      (v) When attempts by force are made to prevent them from carrying out their responsibilities as ordered by their commanders.
      (vi) When violation by force is made of UN premises.
      (vii) When attempts are made to arrest or abduct UN Personnel, civil or military.
      (viii) When specific arrangements accepted by both communities have been, or in the opinion of the commander on the spot, are about to be violated.

5. Degree of force to be used

(a) The principle of minimum force will always be applied. All appropriate means of warning will be used whenever possible before fire is opened.
   (b) Should it become necessary to open fire, two warning shots should be fired before resorting to aimed fire. While aimed fire will be for effect, it should be directed low, at the legs of the attackers, whenever possible.
(c) Automatic fire is NOT to be used except in extreme emergency.
(d) In all cases fire will continue only as long as is necessary to achieve its immediate aim.

6. Protection against individual or armed attack

(a) Whenever a threat of attack develops towards a particular area, commanders will endeavour to pacify the area with the cooperation of the local authorities. Mobile patrols should immediately be organized to manifest the presence of UNEF in the threatened or disturbed areas in whatever strength is available.
(b) If all attempts at peaceful settlement fail, unit commanders may recommend to their senior commander that such threatened areas be declared under UNEF protection by means of the deployment of UNEF troops.
(c) If, despite these warnings, attempts are made to attack, envelop or infiltrate UNEF positions, thus jeopardizing the safety of troops in the area, they will defend themselves and their positions by resisting and driving off the attacks with minimum force, including the use of fire if necessary.
(d) The procedure in defending a locality will approximate the following:
   (i) A tape or strand of barbed wire will be laid across the various [axes] of approach.
   (ii) Signs will be used to announce to all approaching the tape or barbed wire that if they cross over it they will be shot.
   (iii) Should an individual or a group of individuals approach the barrier they will be warned to stop. If they try to advance beyond the tape or strand of barbed wire, fire will be opened and aimed shots will be directed low and towards the apparent ring-leaders.
(e) If soldiers of either party are passing a UNEF position without danger to the lives of the occupants, UN will NOT use force to STOP such passing, but will remain in their posts until the situation is resolved by negotiations.

7. Principles of self-defence

(a) In the event of fire being used for purposes of self-defence, the following principles will be observed:

(i) The aim is to deter and NOT to cause loss of life.
(ii) It follows that aimed fire will be low. This does NOT mean that the point of aim will be the ground in front of the attacker. Firing low means aiming at the legs of the attacker.
(iii) Firing must at all times be controlled and not indiscriminate.
(iv) If a soldier opens fire, he will continue to act independently only until an officer or NCO [non-commissioned officer] arrives on the scene. He will then only act under the orders of the officer or NCO.
(v) The commander on the spot will keep a record of the number of rounds fired.

8. Action after firing

(a) Any wounded will be given medical aid.
(b) An endeavour will be made to collect and count empty cartridge cases after each incident.
(c) A report will be made out and despatched to HQ UNEF on forms as attached.

9. Orders

(a) Unit Commanders will prepare orders for their respective units on the use of firearms, these orders are to be based on the principles set out in this directive.
(b) Unit Commanders will ensure that all ranks under their command are fully aware of the principles governing the use of force by UNEF personnel.

\[\text{Source: UN Archives DAG13/0.3.14.1.0.0.0}\]
\[\#8 \text{ [undated] (UN restricted).}\]

3. 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

General

1. The conduct of military operations is controlled by the provisions of international and national law. Within this legal framework, the
United Nations (UN) establishes the parameters within which the UN Forces can operate. Rules of Engagement (ROE) are the means by which the UN can provide direction and guidance to commanders at all levels governing the use of force. They are approved by the UN and may only be changed with their authority.

2. The UN has stated, in the Report of the Secretary-General pursuant to Security Council Resolution 721 (1991) dated 11 December 1991, Annex III, para 4: ‘Those personnel who were armed would have standing instructions to use force to the minimum extent necessary and normally only in self-defence’. The UNPROFOR is equipped with weapons for defensive purpose only. The use of weapons is authorized normally only in self-defence. Retaliation is forbidden. Self-defence includes resistance to attempts by forceful means to prevent the Force from discharging its duties under the mandate for the UNPROFOR. In applying these rules the principle of minimum force is to be strictly adhered to. The definitions provided at Annex A should be understood and used.

3. The ROE stated in this document apply to all nations contributing to the UNPROFOR. The ROE are written in form of prohibitions or permissions, Annexes B and C refer. Issued as prohibitions, they are orders not to take specific actions. Issues as permissions, they will be guidance to commanders that certain specific actions may be taken if they are judged necessary to achieving the aim of the mission.

4. Changes to these rules will be issued to suit each operational situation as it occurs or to implement changes in the political policy. The classification of these rules is UN RESTRICTED.

**Authority**

5. UNPROFOR personnel may use their weapons:

(a) to defend themselves, other UN personnel, or persons and areas under their protection against direct attack, acting always under the order of the senior officer/soldier at the scene;

(b) to resist attempts by forceful means to prevent the Force from discharging its duties;

(c) to resist deliberate military or paramilitary incursions into the United Nations Protected Areas (UNPAs) or Safe Areas.

**Rules of Engagement**

6. **Rule No. 01: Authority to carry arms**

   Option A: No authority
   
   Option B: Authority granted to carry weapons.

7. **Rule No. 02: Status of weapons**

   Option A: Weapons will be carried with loaded magazines.
   
   Option B: Weapons will be carried charged and made safe.

8. **Rule No. 03: Response to hostile intent (without use of fire)**

   Option A: Observe and report, withdraw in order to preserve own Force.
   
   Option B: Observe and report, stay in place. Make contact and establish liaison with opposing Force(s) and/or local authorities concerned.
   
   Option C: Observe and report, stay in place. Warn aggressor of intent to use force and demonstrate resolve by appropriate means without opening fire (i.e.: cock weapons, deploy troops, etc.).

9. **Rule No. 04: Response to hostile act (with use of fire)**

   Option A: take immediate protection measures, observe and report. Warn the aggressor of intent to use force and demonstrate resolve by appropriate means. Warning shots are authorized (See paragraph 15 and Annex A). Report action taken. If the hostile act does not cease and life is threatened, Option B can be ordered by the troop commander.
   
   Option B: On order, Open Fire (See paragraph 16 and Annex A). Report action taken.
   
   Note: In both Option A and Option B the following manoeuvres are authorized (Depending on the situation, orders and reports given by the troop commander):
   
   (1) Withdraw in order to preserve own Force,
   
   (2) Stay in place and defend, or
   
   (3) Move through to escape and preserve own force.
10. Rule No. 05: Response to hostile act (self-defence)

Anytime, in self-defence situations, take immediate protection measures and/or return fire without challenging (See paragraphs 16, 17 and Annex A). Report action taken.

11. Rule No. 06: Disarmament of paramilitary, civilian and soldiers

Option A: No authorization granted.

Option B: Authorization is granted if failure to do so prevents the UNPROFOR from carrying out its task. In doing so use minimum necessary and proportional force up to and including use of fire, if hostile intent so warrants, or a hostile act is committed. Hand over to appropriate authorities at the earliest opportunity.

12. Rule No. 07: Control of weapon systems

Option A: Manning, in preparation, movement and firing of weapons in the presence of the forces in conflict is prohibited.

Option B: Designated activity (See Note) in the presence of the forces in conflict is prohibited.

Note: Designated activities in this rule will be signalled from the following list, using the numbered prefix:

(1) Overt manning of weapons.
(2) Movement of weapons.
(3) Firing of weapons.
(4) Others (to be specified).

13. In the normal, daily situation the following ROE status applies:

Rule No. 01, OPTION B
Rule No. 02, OPTION A
Rule No. 03, OPTION B
Rule No. 04, OPTION A
Rule No. 05, PERMANENT
Rule No. 06, OPTION A
Rule No. 07, OPTION A

14. Changes in normal status of ROE as described in para 13 for the Force as a whole will be ordered by the Force Commander. Sector Commanders are authorized to change ROE within their sectors and to delegate the authority to battalion commanders if time does not permit sector Commanders’ authorization.

Challenging procedures

15. The following challenging procedure is to be followed in all cases except as outlined in para 17 unless the requirement to fire immediately in self-defence dictates otherwise:

(a) Warn the aggressor to stop.
(b) Repeat the warnings as many times as possible to ensure that the aggressor has understood the situation.
(c) Charge weapons if not already authorized.
(d) Fire warning shots in the air.
(e) If the warnings are ignored, on order open fire.

(See Annex A).

Principles of opening fire

16. When it becomes necessary to open fire (Rules 04 and 05), the following principles apply:

(a) Action which may reasonably be expected to cause collateral damage is prohibited.
(b) Fire is to be used only until the aggressor has stopped firing.
(c) Retaliation is forbidden.
(d) Minimum force is to be used at all times.

Opening fire without challenging

17. The only circumstances in which it is permissible to open fire without challenging in Self-Defence. When an attack by an aggressor comes so unexpectedly that even a moment’s delay could:

(a) lead to death or serious injury to the UN personnel;
(b) lead to death or serious injury to persons whom it is the UNPROFOR duty to protect; or;
(c) the property which UNPROFOR has been ordered to guard with firearms is actually under attack.

Cordon and search operations

18. Cordon and Search Operations are a military responsibility but, in general, the military will establish the Cordon, and the police will conduct the Search. Searches of buildings are not to be conducted at random. They will only be carried out in response to specific evidence that indicates the probable violation of the Vance Plan or the UN Security

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Council Resolution. The military have overall responsibility for initiating, and for the command and control of all Cordon and Search Operations. Searches should be carried out by local police. In the event they refuse to cooperate, UNCFVPOL will carry out the Search with a security element (the minimum necessary) from the military inside the building. Cordon and Search Operations will be conducted using the principles outlined at Annex D.

Jean Cot, General, Force Commander

Annex A: Definitions

Self Defence: Action to protect oneself or one’s unit, when faced with an instant and overwhelming need, leaving no choice of means and no time for deliberation.

Hostile Intent: Hostile intent is an action(s) which appears to be preparatory to an aggressive action against personnel or equipment of Peacekeeping Forces and/or personnel or property placed under their responsibility.

Hostile Act: A hostile act is any aggressive action against personnel or equipment of Peacekeeping Forces and/or personnel or property placed under their responsibility. When deciding on appropriate reaction by Peacekeeping Forces, it has to be kept in mind that the use of armed force is only permitted in the presence of an attack or imminent attack.

Minimum Force: The minimum authorized degree of force which is necessary, reasonable and lawful in the circumstances.

Collateral Damage: Damage to persons or property adjacent to, but not part of an authorized target.

Positive Identification: Assured identification by a specific means can be achieved by any of the following methods: visual, electronic support measures, track behavior, flight correlation, thermal imaging, passive acoustic analysis, or IFF [identification, friend or foe] procedures.

Armed Force: The use of firearms including warning shots.

Unarmed Force: The use of physical force short of firearms, such as stones, batons, shields, CS-gas (when not delivered by firearms). This directive will not discuss further unarmed force.

Warning Shots: A warning shot is used in the challenging procedure (See paragraph 15). It is limited to single shots in the air (and not aimed shots above the target).

Open Fire (See paragraph 16): Open Fire initially with single armed shots until the protection task is complete. The use of automatic fire is a last resort.

Annex B: Rules of engagement guidelines

For issue to all personnel authorized to carry arms and ammunition in UNPROFOR

General rules

1. You have the right to use force in self-defence.
2. In all situations you are to use minimum force necessary. FIRE ARMS MUST ONLY BE USED AS A LAST RESORT.

Challenging

3. A challenge must be given before opening fire unless:
   (a) to do so would increase the risk of death or grave injury to you or any other person;
   (b) you or others in the immediate vicinity are under armed attack.
4. You are to challenge in English by shouting: ‘UN! STOP OR I FIRE!’ or in Serbo-Croat by shouting: ‘UJEDINJENE NACIJE! STAN ILI PUCAM!’ (uyedinyene natsiye! stan ili putsam).

Opening fire

5. You may only open fire against a person if he/she is committing or about to commit an act LIKELY TO ENDANGER LIFE, AND THERE IS NO OTHER WAY TO STOP THE HOSTILE ACT. Dependent always on the circumstances, the following are some examples of such acts:
   (a) Firing or being about to fire a weapon.
   (b) Planting, detonating or throwing an explosive device (including a petrol bomb).
   (c) Deliberately driving a vehicle at a person, where there is no other way of stopping him/her.
6. You may open fire against a person even though the conditions of paragraph 5 are not met if:
(a) He/she attempts to take possession of property or installations you are guarding, or to damage or destroy it; and,
(b) THERE IS NO OTHER WAY OF PREVENTING THIS.

Annex C: Instructions to military personnel

To: 
From: (Note 1)

You are not authorized to bear arms

As of ______ you are ordered by

to bear arms (Note 2)

Your weapon will not be charged

As of ______ you are ordered by

to warn by fire

As of ______ you are ordered by

to defend your mission by fire

Notes:
1. Normally issued by a Company to a Platoon Commander or detached Section or patrol.
2. Authorization may refer to radio call-sign or other appointments title.
3. Bayonets may be fixed or unfixed at any stage in escalation or de-escalation.
Challenging and opening fire procedures

1. Warn the aggressor to STOP.
2. REPEAT the warnings; ensure UNDERSTANDING.
3. CHARGE or COCK the weapons.
4. Fire WARNING SHOT.
5. If warning shots are ignored, ON ORDER, FIRE SINGLE AIMED ROUNDS until task is accomplished. Automatic fire is a last resort.

Search procedures

1. Searchers are not to humiliate nor to embarrass.
2. The object of the search must be clearly stated in orders.
3. Females will be searched by scanners or other females if available.
4. Searchers must be neither overly friendly nor overbearing.
5. A searcher will always be ‘covered’ by a comrade(s).
6. Searches will be reported promptly and fully.

Annex D: Cordon and search operations

Principles

1. Principles of cordon and search operations are as follows:
   
   (a) A Cordon and Search must be justified by a clear violation of the Vance Plan or the UN Security Council Resolution. Justification must not be sought through illegal procedures which violate the human rights of citizens in the UNPAs or Safe Areas;
   
   (b) Cordons will only be conducted if the situation warrants isolation of that area. This should be the exception. In most cases, only a search should be required;
   
   (c) Military will not conduct searches inside buildings;
   
   (d) Searches should be done by local police but, in the event they do not respond, UNCIVPOL will conduct the search;
   
   (e) The military will provide the appropriate security force to support . . . UNCIVPOL searches. The requirement for a preliminary search for mines/booby traps etc., is the responsibility of the OC [Officer in Charge] in consultation with UNCIVPOL/local police.

(Engineers may be used in the recce [reconnaissance] party if judged appropriate);  
(f) The military officer commanding the operation should accompany the search team;

(g) The search should be conducted in such a manner so as to cause the minimum disruption to the occupants. Damage to property is to be kept to the absolute minimum. Any property damages are to be recorded immediately and signed by the OC of the operation. A copy is to be given to the occupant and the original is to be processed for reimbursement as soon as possible; and,

(h) Every effort will be made to explain, through interpreters, the reason(s) for the search. Those involved, especially inside private houses, must be cognizant of the fact that it is private property. Although security is a priority, it is not an excuse for belligerence or the adoption of a confrontational attitude. All involved should display a highly professional, fair firm, but friendly attitude.


Appendix III

Rules of engagement for UNITAF: ROE card for Operation Restore Hope

Rules of Engagement, Joint Task Force for Somalia Relief Operations, Ground Forces

Reproduced December 1994

Nothing in these rules of engagement limits your right to take appropriate action to defend yourself and your unit.

1. You have the right to use force to defend yourself against attacks or threats of attack.
2. Hostile fire may be returned effectively and promptly to stop a hostile act.
3. When US forces are attacked by unarmed hostile elements, mobs, and/or rioters, US forces should used the minimum force necessary under the circumstances and proportional to the threat.
4. You may not seize the property of others to accomplish your mission.
5. Detention of civilians is authorized for security reasons or in self-defense. Remember
   - The United States is not at war.
   - Treat all persons with dignity and respect.
   - Use minimum force to carry out the mission.
   - Always be prepared to act in self-defense.


Appendix IV
UNOSOM II
May 1993

1. UNOSOM personnel may use deadly force:
   (a) To defend themselves, other UN lives, or persons and areas under their protection against hostile acts or hostile intent.
   (b) To resist attempts by forceful means to prevent the Force from discharging its duties.

2. Challenging
   (a) Whenever practicable, a challenge should be given before using deadly force.
   (b) Challenging is done by:
      (i) Shouting in English: ‘UN, STOP OR I FIRE’ or
      (ii) Shouting in Somali ‘UN, KA HANAGA JOOGO AMA WAA GUBAN’
      (iii) Firing warning shots in the air.

3. Principles for use of force
   When it becomes necessary to use force, the following principles may apply:
   (a) Action may be reasonably be expected to cause excessive collateral damage is prohibited.
   (b) Reprisals [are] forbidden.
   (c) Minimum force is to be used at all times.

4. Specific rules
   (a) UNOSOM Forces may use deadly force in response to a hostile act or when there is clear evidence of hostile intent.
   (b) Crew-served weapons are considered a threat to UNOSOM Forces and the relief effort whether or not the crew demonstrates hostile intent. Commanders are authorized to use all necessary force to confiscate and demilitarize crew-served weapons in their area of operations.
   (c) Within those areas under the control of UNOSOM Forces armed individuals may be considered a threat to UNOSOM and the relief effort whether or not the individual demonstrates hostile intent. Commanders are authorized to use all necessary force to disarm and demilitarize groups or individuals in those areas under the control of UNOSOM. Absent a hostile or criminal act, individuals and associated vehicles will be released after any weapons are removed/demilitarized.
   (d) If UNOSOM Forces are attacked or threatened by unarmed hostile elements, mobs and/or rioters, UNOSOM Forces are authorized to employ reasonable force to repel the attacks or threats. UNOSOM Forces may also employ the following procedures: verbal warnings to demonstrators, shows of force including use of riot control formations, and warning shots.
   (e) UNATTENDED MEANS OF FORCE. Unattended means of force, including bobby [sic] traps, mines, and trip guns, are not authorized.
   (f) DETENTION OF PERSONNEL. Personnel who interfere with the accomplishment of the mission or who otherwise use or threaten deadly force against UNOSOM, UN or relief material, distribution sites, or convoys may be detained. Persons who commit criminal acts in areas under the control of UN Forces may likewise be detained. Detained persons will be evacuated to a designated location for turn/over [sic] to military/police.

5. Definitions
The following definitions are used:
   (a) SELF DEFENCE
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   Action to protect oneself or one’s unit against a hostile act or hostile intent.
   (b) HOSTILE ACT
   The use of force against UNOSOM personnel or mission-essential property, or against personnel in an area under UNOSOM responsibility.
   (c) HOSTILE INTENT
   The threat of imminent use of force against UNOSOM Forces or other persons in those areas under the control of UNOSOM.
   (d) MINIMUM FORCE
   The minimum authorized degree of force which is necessary, reasonable and lawful in the circumstances.

6. Only the Force Commander, UNOSOM, may approve changes to these ROE.

Appendix 3. The UN master list of numbered rules of engagement

UN master list of numbered rules of engagement

Provisional, May 2002

1. The following ROE, when authorised, permit United Nations armed military personnel to use force in the circumstances specified below. However, the principle of minimum necessary force is to be observed at all times.

2. The United Nations Master List contains five sets of rules: Use of Force (Rule 1), Use of Weapon Systems (Rule 2), Authority to carry Weapons (Rule 3), Authority to Detain, Search and Disarm (Rule 4) and Reaction to Civil Action/Unrest (Rule 5). The list provides various options from which a selection will be made under each of the five rules, to suit a specific UNPKO (see example contained in Annex A of Attachment 2).

Rule 1. Use of force

Rule No. 1.1
Use of force, up to, and including deadly force, to defend oneself and other UN personnel against a hostile act or a hostile intent is authorised.

Rule No. 1.2
Use of force, up to, and including deadly force, to defend other international personnel against a hostile act or a hostile intent is authorised.

Rule No. 1.3
Use of force, up to, and including deadly force, to resist attempts to abduct or detain oneself and other UN personnel is authorised.

Rule No. 1.4
Use of force, up to, and including deadly force, to resist attempts to abduct or detain other international personnel is authorised.

Rule No. 1.5
Use of force, up to, and including deadly force, to protect United Nations’ installations, areas or goods, designated by the Head of the Mission in consultation with the Force Commander, against a hostile act is authorised.

Rule No. 1.6
Use of force, up to and including deadly force, to protect key installations, areas or goods designated by the Head of the Mission in consultation with the Force Commander, against a hostile act is authorised.

OR:

Rule No. 1.7
Use of force, excluding deadly force, to protect key installations, areas or goods, designated by the Head of the Mission in consultation with the Force Commander, against a hostile act is authorised.

Rule No. 1.8
Use of force, up to, and including deadly force, to defend any civilian person who is in need of protection against a hostile act or hostile intent, when competent local authorities are not in a position to render immediate assistance, is authorised. When and where possible, permission to use force should be sought from the immediate superior commander.

1 This Rule can only be included in addition to Rule 1.1 if consistent with the mandate of the UNPKO.

2 This Rule can only be included in addition to Rule 1.3 if consistent with the mandate of the UNPKO.

3 This Rule can only be included in addition to Rule 1.5 if consistent with the mandate of the UNPKO.
Rule No. 1.9
Use of force, excluding deadly force, to prevent the escape of any detained person, pending hand-over to appropriate civilian authorities, is authorised.

Rule No. 1.10
Use of force, up to, and including deadly force, against any person and/or group that limits or intends to limit freedom of movement is authorised. When and where possible, permission to use force should be sought from the immediate superior commander.

Rule 2. Use of weapon systems

Rule No. 2.1
Use of explosives in order to destroy weapons/ammunition, mines and unexploded ordnance, in the course of the disarmament exercise, is authorised.

Rule No. 2.2
Indiscriminate pointing of weapons in the direction of any person is prohibited.

Rule No. 2.3
Firing of all weapons other than for organised training and as authorised in these ROE, is prohibited.

Rule No. 2.4
Firing of warning shots is authorised.

Rule No. 2.5
Use of riot control equipment is authorised.

Rule No. 2.6
Use of lasers for survey, range-finding and targeting is authorised.

Rule 3. Authority to carry weapons

Rule No. 3.1
Carriage of weapons is not authorised.

Rule No. 3.2
Carriage of unloaded personal weapons, whilst on duty, is authorised.

Rule No. 3.3
Carriage of unloaded personal weapons, both on duty and as designated by the Force Commander, is authorised.

Rule No. 3.4
Carriage of loaded personal weapons is authorised.

Rule No. 3.5
Hand-held support weapons, such as machine guns, light mortars and hand-held anti-tank weapons, may be carried in UN vehicles, but must be obscured from the public’s view.

Rule No. 3.6
Overt carriage by individuals of hand-held support weapons, such as machine guns, light mortars and hand-held anti-tank weapons, is authorised.

Rule 4. Authority to detain, search and disarm

Rule No. 4.1
Detention of individuals or groups who commit a hostile act or demonstrate a hostile intent against oneself, one’s unit or United Nations personnel is authorised.

Rule No. 4.2
Detention of individuals or groups who commit a hostile act or demonstrate a hostile intent against other international personnel is authorised.

Rule No. 4.3
Detention of individuals or groups who commit a hostile act or demonstrate hostile intent against installations and areas or goods designated by the Head of the Mission in consultation with the Force Commander, is authorised.

Rule No. 4.4
Searching, including of detained person(s), for weapons, ammunition and explosives is authorised.

Rule No. 4.5
Disarming individuals, when so directed by the Force Commander, is authorised.

4 This Rule can only be included in addition to Rule 4.3 if consistent with the mandate of the UNPKO.

5 Idem.
**Rule 5. Reaction to civil action/unrest**

**Rule No. 5.1**
Action to counter civil unrest is not authorised.

**Rule No. 5.2**
When competent local authorities are not in a position to render immediate assistance, detention of any person who creates or threatens to create civil unrest with likely serious consequences for life and property is authorised.

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