CHAPTER 2

PEACEKEEPING AND INTERNATIONAL LAW

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WHEN considering the fact that peacekeeping, an activity largely shaped and operated by the United Nations (UN), has no express legal basis in the UN Charter, it may be surprising to find that international law has played a central role in its development. Writing in 1964, one of the leading legal experts on peacekeeping, Oscar Schachter, made it clear that law performs several important functions within peacekeeping. First, law (in the form of the UN Charter and international law) provides authority for the intervention, in addition to the consent of the host state. Second, law helps to constrain the behavior of the conflict parties by laying down prescribed standards. Third, and more broadly, international law provides a "common frame of reference and the standards of mutual interest that are necessary for collective effort in today's divided world."[1]

This chapter identifies that common frame of reference for peacekeeping, as found in the Charter, international law, and in customary constitutional practice, but also examines how international law applies to peacekeepers in practice, particularly when they use force. The development of explicit civilian protection mandates since 1999, whereby peacekeepers are directed to use force if necessary, does not solve the legal problem of when peacekeepers are permitted to use it. In fact, it makes the issue more complex and may increase the pressure for greater accountability of the UN (and other mandating organizations such as the European Union (EU), the troops contributing countries (TCCs), as well as individual peacekeepers and their commanders.

To this end the chapter first considers the constitutional, institutional, and normative framework that governs peacekeeping before analyzing some of the laws applicable to peacekeeping operations, specifically when peacekeepers use force.

Legal framework: UN Charter and international law

Peacekeeping is a product of the restricting effects of the Cold War. While the vision of centralized UN military enforcement capability found in Chapter VII of the UN Charter was, and remains, unachievable, it was possible to develop a consensual military option for the UN. As such, peacekeeping was not envisaged in the UN Charter, but has proved vital in providing a limited contribution to peace and security in trouble spots around the world. In the late 1940s, this job was performed by small teams of unarmed UN observers dispatched to provide the Security Council with a reliable account of the facts in war-zones in Indonesia, Kashmir, and Palestine. An evolutionary process led, in 1956 in the Sinai, to the first fully fledged, lightly armed, but several-thousand-strong force, deployed to secure the peace by acting as a buffer between formerly hostile nations. Although new in its day, the UN Emergency Force (UNEF, 1956–67) is now regarded as the "traditional" form of peacekeeping, one that reflects "classical" principles of international law, in that it was based on the consent of the host state or states and, even though it appeared to constitute military intervention, its respect for sovereignty was reflected in the neutrality of such forces. The restrictions on the use of force to peacekeepers' self-defense or their equipment meant that the trinity of peacekeeping principles of consent, impartiality, and non-use of force very much reflected fundamental principles of international law—of sovereignty, non-intervention, and non-use of force found in Article 2 of the UN Charter.

At its inception, peacekeeping was a consensual, non-interventionist, non-coercive military activity. However, the UN Charter does not simply embody traditional principles of international law, it empowers the Security Council to take measures which are coercive and interventionist when necessary to confront threats to international peace. Article 2 (specifically paragraph 7) of the Charter prohibits UN intervention in domestic affairs except when the Security Council is taking measures under Chapter VII. Chapter VII (specifically Article 42) also empowers the Security Council to take military action to combat threats to the peace, breaches of the peace and acts of aggression. Thus, the Security Council has exceptional powers to authorize enforcement action, which has led to peacekeeping forces on occasions being given more coercive mandates.

In summary, traditional consensual, inter-positional forces can be said to be constitutionally derived from Chapter VI of the Charter, which is concerned with the Security Council's peaceful settlement of disputes; and Chapter IV, which contains the recommendatory powers of the General Assembly. Moreover, peacekeeping is underpinned by general international legal concepts of sovereignty and non-intervention. Those forces with Chapter VII elements to their mandates are more properly based in Article 40 of Chapter VII, which empowers the Security Council to demand provisional measures such as ceasefires. Coercive peacekeeping constitutes a method of enforcing that demand.

The dialectic between consensual peacekeeping and its more belligerent variant was established as early as the second full peacekeeping force in the Congo

(ONUC, 1960–64), and was repeated, with less success, in the force in Somalia (UNOSOM II, 1993–95). As of 1999, with the operation in Sierra Leone, the issue has come back on the agenda as the UN struggles to implement the "human security"[2] and "protection of civilians"[3] agendas through "protection" mandates given to UN forces. Under these mandates the military component of a peace operation is tasked with protecting civilians under threat of violence within their areas of deployment by the use of force if necessary.

Institutional competence

In 1962, the International Court of Justice, in the "Certain Expenses" opinion, determined that both the Security Council and the General Assembly had competence to mandate consensual peacekeeping forces and, therefore, the expenses of the operations in the Middle East (UNEF) and the Congo (ONUC) were lawfully incurred by the UN. France and the Soviet Union had refused to pay for these forces arguing that their mandating by the General Assembly was *ultra vires* (beyond its powers under the UN Charter), but the Court found that since peacekeeping operations fulfilled the purposes of the UN, and did not violate any express limitation found in the Charter, they could not be considered *ultra vires*.[4]

The main objection from the non-paying states was that under the UN Charter only the Security Council was empowered to mandate military forces thereby rendering the creation of UNEF and ONUC unconstitutional in that they both had received mandates, at some point during their existence, from the General Assembly. The Court responded by declaring that the Security Council had primary but not exclusive responsibility for peace and security under Article 24(1) of the UN Charter, and that while only the Security Council could "order coercive action," there was nothing in the Charter to prevent the Assembly recommending the deployment of consensual peacekeeping operations.[5] Although the Assembly had come perilously close to recommending enforcement action in the case of ONUC, the Court confined its interpretation of ONUC's mandate to its consensual nature and not to its use of coercive measures. While legally speaking ONUC did seem to stop short of full-blown enforcement action under Article 42 of the Charter, it did amount, at times, to enforcement of widely drafted provisional measures under Article 40.[6]

The orthodox view in international law is that peacekeeping forces with coercive mandates are compatible with the traditional principles of international law and peacekeeping.[7] Hence these forces do not constitute full-blown enforcement action on a par with the UN-authorized actions in Korea in 1950–53 and the Gulf in 1991 (whose constitutional base is Article 42 of Chapter VII), since they are not directed against the government of a state but against rebel factions, armed groups, mercenaries or "spoilers" (i.e. those non-state actors who seek to undermine the peace). Nevertheless, coercive mandates mean that peacekeepers are increasingly crossing the line to become "combatants"

in the language of international humanitarian law, causing confusion as to the legal status of peacekeepers who are traditionally not seen as legitimate military targets. Indeed, attacks on them are prohibited under the 1994 UN Convention on the Safety of United Nations and Associated Personnel (Articles 7–9). This issue will be revisited when considering the use of force by peacekeepers.

Although both political organs of the UN have competence over peacekeeping, the norm is for a force to be mandated by the Security Council in fulfillment of its primary responsibility for peace and security. The General Assembly has exceptional secondary competence to mandate peacekeeping forces when the Security Council is deadlocked or inactive, enabling the UN to respond to crises even when permanent members are involved (as with the Suez Crisis in 1956). In the Uniting for Peace Resolution (1950), the General Assembly claimed exceptional powers to recommend enforcement action by military forces when the Security Council was paralyzed.[8] The process envisaged in the Uniting for Peace Resolution, of transferring competence from the Security Council to the General Assembly, was used to enable the Assembly to create UNEF in 1956 and to take over the mandating of ONUC in 1960. While the Uniting for Peace Resolution was, and remains, controversial, and despite the use of its procedure for the first two forces, the Resolution is not the legal basis of the Assembly's peacekeeping competence. The Assembly has clear competence under Articles 10 and 14 of the Charter to make recommendations concerning issues of peace and security, including the creation of consensual peacekeeping forces.

Having established that, within the UN, both political organs have competence to establish peacekeeping forces, the Secretary-General's central role also deserves mention. The Secretary-General, acting under Article 98 of the Charter, is entrusted by the Council or Assembly with peacekeeping functions, in terms of coordinating the establishment of a force, reporting to the Security Council on its progress, and exercising command and control over the force. Military command and control is delegated by the Secretary-General to a UN-appointed commander of each force.

Regional organizations with peace and security amongst their purposes and functions clearly have competence to establish peacekeeping forces if they are based on basic principles of international law and respect the terms of Chapter VIII of the UN Charter (Articles 52–4). There is a significant amount of regional peacekeeping practice in this regard and, while some regional forces have received a UN Security Council mandate (for example the EU Forces in the Democratic Republic of Congo and in Chad/Central African Republic),[9] others have acted solely under their own constituent treaties (for example ECOWAS in Liberia).[10]

There is some uncertainty as regards the competence of regional organizations to mandate a coercive version of peacekeeping, given the requirement in the UN Charter that regional enforcement action should be authorized by the UN Security Council (Article 53(1)). Moreover, the only recognized exceptions to the ban on the use of force in the Charter (Article 2(4)), are actions taken in self-defense or under the authority of the Security Council (Articles 42 and 51). Historically, the Organization of American States force in the Dominican Republic (1965–66), the Arab Deterrent Force in Lebanon

(1976–82), and Commonwealth of Independent States peacekeeping force in Georgia (1994–) seem to have operated outside these parameters. In other instances, such regional forces have been mandated by the UN Security Council. Most recently, the African Union Mission in Somalia (AMISOM), a Security Council-authorized regional force, has fought alongside the Somali National Army against factions opposing the Transitional Federal Government, including al-Shabaab.[11]

Thus, while peacekeeping in its traditional non-enforcement guise is within the competence of a range of security actors, the UN has been the leading actor and has established the standards and principles of peacekeeping, which through constant iteration and use have become customary institutional law. When more controversial enforcement action is required, whether through UN-authorized coalitions acting under Article 42 of Chapter VII, or a more belligerent version of peacekeeping with some elements of Chapter VII in its mandate under Article 40, then the UN Security Council has clear competence. Regional organizations may also claim competence to establish regional peacekeeping with some coercive capacity (in order to protect civilians and support the peace in the face of violence by spoilers); but if proactive military enforcement action is proposed either against a government or, to combat insurgents in an armed conflict, then authorization from the Security Council is required by Article 53 of the UN Charter. This was the case with the authorization to the African Union's force in Somalia—AMISOM—which was mandated to engage al-Shabaab as combatants in an armed conflict.

The Trinity of Peacekeeping Norms

The UN's Special Committee on Peacekeeping Operations (also known as the C-34) has made it clear that peacekeeping remains based on the classical UNEF norms of consent, impartiality, and defensive use of force,[12] though it will be seen that the shared understanding of these concepts has changed to allow a peacekeeping force to become more active in protecting its mandate. During the Cold War (with the Congo operation in the 1960s as the exception) the three norms were interpreted narrowly, reflecting the wider purpose of such forces to maintain the status quo between disputing states but also between the superpowers. Forces in Cyprus (UNFICYP, 1964–), Lebanon (UNIFIL, 1978–), and on the Golan Heights (UNDOF, 1974–) are good exemplars in this regard.

After the Cold War, consent has been given by host states not only to a military component to oversee a ceasefire, troop withdrawal, and also disarmament, but also to oversee a transition to peace. Peacebuilding has evolved from a rather limited oversight of elections towards more ambitious development and state building, although the Cambodian operation (UNTAC 1992–93) was a forerunner of the more intrusive operations that came later. The legitimacy, as well as constitutional competence under Article 41 of the UN Charter, brought by UN involvement distinguishes modern peace operations from earlier exercises of mandatory and trusteeship powers by individual states under the

Covenant of the League of Nations (Article 22) and under the UN Charter (Article 81). The development of peace operations with peacebuilding functions has necessitated a changed post-Cold War perception of each of the key peacekeeping norms.

Consent

Peacekeeping forces are deployed and emplaced on the basis of having the consent of the host state or states. This is normally reflected in the negotiation and adoption of a Status of Forces Agreement (SOFA) between the UN and the host state, governing such matters as the legal status of the military and police contingents, communications, freedom of movement, use of flags, uniforms and weaponry, disciplinary jurisdiction over peacekeepers (which is with the TCCs), privileges and immunities of the force, and any claims procedures allowing access to justice for the local population. SOFAs are based on the 1990 model UN SOFA, a revision of which is long overdue in order to reflect changes in function and to engender greater accountability.[13]

For an inter-state peacekeeping force to operate on both sides of the border it must have the agreement of both states (for example Israel did not consent to UNEF's presence in 1956), and if the host state withdraws its consent the force must be withdrawn, repositioned or re-mandated (Egypt's withdrawal of consent to UNEF's presence in 1967 led to its withdrawal by order of Secretary-General U Thant).[14] If a force stays once consent has been withdrawn, its legal status changes from consensual peacekeeping to coercive enforcement action, a step that neither the UN nor the TCCs are likely to contemplate given that a consensual peacekeeping force is not supplied, equipped, sufficiently trained, or sizeable enough, to fight a sustained military campaign against state forces. Weak, post-conflict governments, however, may be persuaded that in the interests of peace and security a UN operation should continue to be deployed. An example of this occurred when President Kabila of the DR Congo publicly withdrew consent to MONUC (1999–2010), but agreed to its successor MONUSCO (2010–).

UN Secretary-General Dag Hammarskjöld was instrumental in establishing the legal basis of UN peacekeeping forces, and so his explanation of UNEF is part of UN peacekeeping principles. First, he pointed to the neutrality of the force in the dispute, there being "no intent in the establishment of the Force to influence the military balance in the present conflict and, thereby, the political balance affecting efforts to settle the conflict." Second, he made clear the consensual basis of the force both in terms of TCCs and the host state(s). Third, he distinguished UNEF from the Security Council's recommendation of enforcement action in Korea, which had been terminated three years earlier, by pointing out the "obvious difference between establishing the Force in order to secure the cessation of hostilities, with a withdrawal of forces, and establishing such a Force with a view to enforcing a withdrawal of forces." UNEF was to secure a ceasefire and withdrawal on the basis that the parties had agreed to do so, and agreed to its implementation under the supervision of UNEF. Thus UNEF was not an enforcement action, or an

occupying force.[15] It effectively served the function of an inter-state buffer force between Egypt and Israel until it was withdrawn in 1967 following Egypt's withdrawal of consent.

As Christine Gray points out in the context of the UN's force in Bosnia and Herzegovina (UNPROFOR, 1992–95), peacekeeping in a hostile environment places considerable pressure on its consensual basis.[16] While it is desirable to obtain the agreement of all the parties to the presence of a peacekeeping force in order to successfully oversee a ceasefire and other provisional measures agreed to by the parties, the legal requirement is that only the government of the host state formally needs to agree to the deployment of such a force on its territory. This increases the chances of the force encountering resistance by factions that refuse to cooperate with it, but it helps to ensure that it does not take coercive action against the state. While the Bosnian government agreed to the presence of UNPROFOR in Bosnia and Herzegovina in 1992,[17] the Bosnian Serbs did not, leading to problems in delivering humanitarian aid (despite a Chapter VII mandate being given by the Security Council for this purpose),[18] and then to protecting the safe areas created by the Security Council (again mandated under Chapter VII).[19]

Gray's analysis makes it clear that negotiations with the host state not only cover the presence of the force but also the terms of the mandate and the composition of the force.[20] After agreement is reached on these issues, consent to the detailed rights and duties of the UN and the host state follow and a SOFA is adopted, though this may not occur until after the force has been dispatched (a SOFA was not agreed until May 1993 in the case of Bosnia). In subsequent situations where no SOFA is agreed, the Security Council has increasingly deemed the model UN SOFA of 1990 to be in force until a specific one is agreed.[21] This practice shows that the Security Council treads the line between what is consensual and what is coercive even in the negotiation of the SOFA, by relying on its mandatory decision making powers, where necessary, to ensure that the model SOFA is applicable.

A modified understanding of consent was put forward in the Brahimi Report on peace operations of 2000.[22] The report marked a watershed between traditional peacekeeping and modern peace operations. Brahimi concurred that "consent of the local parties, impartiality and the use of force only in self-defense should remain the bedrock principles of peacekeeping."[23] However, the report also stated that

> Experience shows ... that in the context of modern peace operations dealing with intra-State/transnational conflicts, consent may be manipulated in many ways by the local parties. A party may give its consent to United Nations presence merely to gain time to retool its fighting forces and withdraw consent when the peacekeeping operation no longer serves its interests. A party may seek to limit an operation's freedom of movement, adopt a policy of persistent non-compliance with the provisions of an agreement or withdraw its consent altogether.[24]

The practical problems that lie behind consent are more fully addressed in the latest iteration of peacekeeping Principles and Guidelines developed within the UN's

Department of Peacekeeping Operations in 2008. These recognize that the "consent of the main parties provides a United Nations peacekeeping operation with the necessary freedom of action, both political and physical, to carry out its mandated tasks"; and that, "in the absence of such consent, a United Nations peacekeeping operation risks becoming a party to the conflict; and being drawn towards enforcement action, and away from its intrinsic role of keeping the peace."[25] However, they also recognize that the "absence or breakdown of local consent" and cooperation on the ground may necessitate the use of force "as a last resort" by the peacekeeping operation.[26]

Impartiality

As peacekeeping has become part of a more complex concept of "peace operations" it is difficult for the force to remain completely neutral, and so this norm has been modified so that the force must be impartial in the implementation of its mandate, enabling it to take coercive action against spoilers and others trying to undermine the peace process and the force's wider peacebuilding mandate. This is reflected in the 2008 Principles and Guidelines which distinguish impartiality from neutrality by declaring that UN peacekeepers should be "impartial in their dealings with the parties to the conflict, but not neutral in the execution of their mandate." Further, the document declares that the "need for even-handedness towards the parties should not become an excuse for inaction in the face of behavior that clearly works against the peace process ... or the international norms and principles that a United Nations peacekeeping operation upholds."[27]

Dominick Donald provides a critique of the change in peacekeeping norms from neutrality to impartiality since 1956.[28] In the UNEF-type inter-positionary model of peacekeeping impartiality and neutrality were essentially the same, but once the ONUC-type of force was created in the 1960s within a deteriorating intra-state conflict, strict neutrality could not be maintained in the face of violence by certain parties. In these circumstances, if the peacekeeping force is to fulfill its mandate, it must be active but impartial, meaning that its judgment on decisions to act is based on an unbiased application of its mandate within the wider frameworks of applicable international and UN law, whether that be to keep the country from breaking up as in ONUC's mandate in the 1960s, or to protect civilians as required of UNAMID in Darfur in the twenty-first century.[29] While the mantra may be of impartiality, the reality in a post-war country is that coercion is only used by peacekeepers against non-state actors, not normally against state actors.

Furthermore, while modern peacekeeping principles seem to have accepted this move from neutrality to impartiality, the change does not appear to have been fully matched by actions on the ground or in the understandings of their obligations by TCCs or even the UN Secretariat.[30] While the intention is that peacekeepers should not again stand by in the face of egregious human rights violations, the practical problems of establishing a credible gap between neutrality and impartiality has led to instances of peacekeepers remaining passive in the face of violence against civilians.

Clearly ONUC fought on the side of the government so did not fall fully on the Chapter VII enforcement side of the line where coercive action is taken against a government, but was not a classical peacekeeping force either. The more recent peacekeeping force in the Congo (MONUC), first emplaced in 1999 and renamed MONUSCO in 2010, also repeated the pattern of its predecessor from the 1960s, by fighting on the side of the government when implementing its increasingly widely drawn mandate to protect civilians from attacks by non-state actors.[31]

Defensive use of force

Over the lifetime of peacekeeping operations there has been confusion as to the nature and level of force that peacekeepers are permitted to use. Sitting somewhere between a military combat operation and an armed police operation, this confusion is unsurprising, though the UN has had plenty of practice in which to develop clear norms on the use of force. At its core the limited use of force available to peacekeepers means self-defense, which is normally interpreted narrowly to cover a peacekeeper using force in defense of his own life, his "comrades and any person entrusted in [his] care, as well as defending [his] post, convoy, vehicle or rifle."[32] Beyond this there has been a continuing lack of clarity as to whether the force could also "defend" a force's mandate. As UN Secretary-General Hammarskjöld recognized in 1956, the more widely the right of self-defense is drawn, the more blurred the distinction between peacekeeping and enforcement action under Chapter VII becomes.[33]

While UNEF stuck to a narrow interpretation of self-defense by using light arms to defend itself, by 1960 there was an alternative version of peacekeeping. In the Congo, ONUC used a variety of weapons: mortars, fighter and bomber aircraft, light armored vehicles as well as rifles, light automatic weapons and bayonets, and anti-tank and anti-aircraft weapons.[34] ONUC did initially confine its use of force to self-defense when overseeing the withdrawal of Belgian troops, but that proved inadequate when its task became the elimination of the mercenaries supporting the Katangese secession.[35] In reality, in 1961, ONUC had ceased to act in a defensive way and began to take the initiative and enforce the peace by engaging the forces of non-state actors.[36] This has occurred in more recent operations, for example in DR Congo, where, for example, MONUSCO used attack helicopters against M23 rebels in July 2012, and in the Ivory Coast where UNOCI (2004–) used attack helicopters in April 2011 against the heavy weapons of the forces of former President Laurent Gbagbo.

Despite a post-Cold War trend towards allowing more offensive action to be taken by peacekeepers, there is reluctance, especially from TCCs, to move away from self-defense as this makes the force less acceptable to the host state and the parties within it. Thus, narrow self-defense remains the norm for modern peacekeeping, even those peace operations having Chapter VII elements to their mandates, requiring them to protect the peace process and civilians. However, despite this reticence in practice, at the

doctrinal level the UN has expanded the concept of self-defense. The Brahimi Report of 2000 did this by extending the language of self-defense from individual self-defense to defense of the mission.[37] This forms part of the doctrinal development of when legitimate force can be used by peacekeepers through the "gradual expansion of the meaning of self-defense in PKOs, from individual self-defense inherent to military personnel, to freedom of movement and defense of positions, to the defense of the mandate and the protection of third parties."[38]

Katherine Cox argues that self-defense when considered in the context of peacekeeping "differs from its usual legal meaning," evolving over time in response to the changing conditions in which peacekeepers found themselves. "Initially, a narrow approach was taken: force should only be used in defense of the peacekeeping operation itself and strictly in response to an armed attack ('personal self-defense')," which gradually evolved towards "defense of one's mandate."[39] This is reflected in the UN's latest statement of the 2008 Principles and Guidelines document— which, while still distinguishing peacekeeping from enforcement action, states that it is "widely understood that peacekeeping forces may use force at the tactical level, with the authorization of the Security Council, if acting in self-defense and defense of the mandate."[40] However, the reality is that once self-defense is so expanded it is no longer individual self-defense, but is a mandate that permits a certain level of enforcement (of measures of the type envisaged by Article 40 of Chapter VII), though short of full peace-enforcement under Article 42 of Chapter VII.

Increasing pressure is on peacekeepers to use force to protect civilians under attack or under threat of attack; and for them to protect the peace agreement and process from "spoilers" who want to undermine it. With the greater use of weapons that this entails, it becomes a problem as to which legal regime should be applicable to modern peace operations—that applicable in armed conflict law (international humanitarian law), or norms of international human rights law.

Applicable Law: International Humanitarian Law or International Human Rights Law?

Increasingly coercive mandates mean that peacekeepers can potentially cross the line to become "combatants" in the language of the law of armed conflict (international humanitarian law), sometimes causing confusion as to the legal status of peacekeepers who are traditionally not seen as legitimate targets. In 1999, UN Secretary-General Kofi Annan clarified the non-combatant status of peacekeepers even in situations of armed conflict, by declaring that they are to be viewed as civilians under international humanitarian law unless, and until, they actively engage as combatants in an armed conflict.[41] This establishes the default position of a peacekeeper as a non-combatant, only exceptionally will

he or she become a combatant. This should be contrasted with the legal status of US and other soldiers sent to fight against Iraqi forces in Kuwait, under a UN enforcement mandate,[42] who were clearly instructed to engage the enemy,[43] recognizing that they were lawful combatants and also legitimate targets in an armed conflict.

International humanitarian law is applicable during an armed conflict, and thus is primarily applicable to the *in bello* stage rather than the *post bellum* stage (with the exception of the law of occupation). If, however, violence persists or flares up in the post-war phase and reaches the level of an armed conflict of a non-international character (defined by the International Criminal Tribunal for the former Yugoslavia as "protracted armed violence between governmental authorities and organized armed groups within a state"),[44] then international humanitarian law applies to the parties to a conflict, and also to a UN peacekeeping operation if it engages as a party to the conflict. After much debate in the UN, this was finally recognized in a piece of UN internal law in the form of a Bulletin promulgated by the UN Secretary-General in 1999.[45]

Thus, international humanitarian law does not normally play a significant role in a post-war situation, and it is the *jus post bellum*, more accurately those aspects of general international law, human rights law, refugee law, and international criminal law, which together frame the work of a peace operation. It follows that for peacekeepers the most relevant laws will be those governing human rights. The existence of human rights obligations on peacekeepers flows from two sources. The first source for peacekeepers is as state agents and comes from the human rights obligations of their sending states under human rights treaties, which attaches to them even when acting extra-territorially in circumstances where they exercise control over areas or over individuals. This principle was stated by the Human Rights Committee in 2004; namely that parties to the International Covenant on Civil and Political Rights must ensure the human rights of persons "within the power or effective control of the forces of a State Party acting outside its territory ... such as forces constituting a national contingent of a State Party assigned to an international peace-keeping or peace-enforcement operation."[46] The second source applies to peacekeepers as members of a UN force, given the UN's obligations under customary international law that attach to it as an international legal person. The International Law Commission (ILC) Draft Articles on the Responsibility of International Organizations clearly show that it is possible to attribute wrongful acts to the UN,[47] and such responsibility is based on it having duties under customary international law including ones to uphold and protect human rights. As an autonomous entity, having international legal personality, the UN is recognized as having rights and duties under international law.[48] Thus, human rights duties on peacekeepers in the context of peace operations have two potential sources: the treaty and customary obligations of TCCs and the customary obligations of the UN. Although there is debate about when the UN or the TCCs bear responsibility for particular breaches of human rights, both carry primary human rights obligations and attribution is essentially a secondary issue to which we will return.

Having established that human rights law is applicable to peacekeepers, I will take the example of the right to life, following from the discussion of when peacekeepers can use force.[49] Peacekeepers carry weapons and their use may cause deaths. When, if at all,

is the taking of life by peacekeepers justified? Major human rights treaties make it clear that the right to life, though fundamental, is not absolute. The basic principle is that life cannot be taken arbitrarily.[50] Louise Doswald-Beck suggests that in order to understand when life is not taken arbitrarily a good starting place is Article 2(2) of the European Convention on Human Rights, which details when lethal force is permitted. Essentially, during peacetime and situations short of armed conflict, lethal force can be used when absolutely necessary for self-defense (including defense of third parties), to effect an arrest or prevent escape of a detainee, or in action taken to quell a riot or insurrection; while during an armed conflict international humanitarian law applies to those engaged in it as combatants when the right to life is further qualified, although civilians and those *hors de combat* remain protected. This provides a relatively clear legal framework within which peacekeepers should operate.

A more detailed examination of UN policy and guidelines on when peacekeepers can use force, including lethal force, shows that the UN largely acts within this legal framework, indeed, that the UN frames its policies and directives within the parameters of international human rights law, rather than international humanitarian law. The Department of Peacekeeping Operations' *Handbook on United Nations Multidimensional Peacekeeping Operations* (2003) links the limitation on the use of force to self-defense with the consensual nature of peacekeeping. It provides that self-defense includes the "right to protect oneself, other UN personnel, UN property and other persons under UN protection," though it does recognize that the Security Council can, exceptionally, authorize an operation to use armed force in situations other than self-defense. Beyond that the *Handbook* leaves it to the mission-specific rules of engagement to "clarify the different levels of the use of force that can be used in various circumstances, how each level of force should be used and any authorizations that may need to be obtained from commanders."[51] The 2008 Principles and Guidelines document expands somewhat on when potentially lethal force may be used, stating that peacekeeping operations may "use force at the tactical level, with the authorization of the Security Council, if acting in self-defense and defense of the mandate." "All necessary means," which would include lethal force where necessary, may be used against "militias, criminal gangs, and other spoilers who may actively seek to undermine the peace process or pose a threat to the civilian population," in order to "deter forceful attempts to disrupt the political process, protect civilians under imminent threat of physical attack, and/or assist the national authorities in maintaining law and order."[52]

These UN documents containing the rules on when peacekeepers can use force seem compatible with human rights principles on when lethal force can be used. This is particularly the case if the provision recognizing that potentially lethal force may be used when absolutely necessary in tackling riots and insurrections is applied to include these and analogous situations faced by peacekeepers when force is necessary to tackle militia, criminal gangs, and other spoilers who undermine the peace or threaten civilians. There remains the problem found in UN documents of peacekeepers using deadly force to protect UN property, which is generally difficult to reconcile with human rights law, though it is permissible in some circumstances under international humanitarian law.

Accountability and Access to Justice

When the UN is in effective control of peacekeepers (and it normally accepts that it is in such control in UN-commanded and controlled peacekeeping operations),[53] legal responsibility for human rights violations lies with the organization, while normally in the case of coalitions authorized by the Security Council under Chapter VII, responsibility lies with the TCCs.[54] The somewhat stricter test proposed in the ILC's Draft Articles on the Responsibility of International Organizations 2011, namely that the organization must have been in "effective control of the conduct" of state organs placed at its disposal (such as soldiers or police officers) for responsibility to fall on the organization,[55] seems to have added a degree of uncertainty over what had been established practice. Even though there is UN command and control of peace operations, the fact that military discipline remains with the TCC, and the fact that governments of TCCs may well veto any controversial order given by the UN commander, both signify that establishing that the UN is in effective control of specific conduct is difficult.

In terms of access to justice for victims there are a number of UN laws and practices providing remedies, though they are not generally specifically human rights focused, and the reality is that many abuses will go unpunished, and victims will remain without redress. The 1946 Convention on the Privileges and Immunities of the United Nations, which grants the UN and its agents legal immunities, still requires that the UN "shall make provisions for appropriate modes of settlement" for contractual disputes or disputes of a private law character to which the UN is a party (in Article VIII, section 29). The 1990 model UN SOFA provides for the establishment of a standing claims commission for disputes or claims of a private law character,[56] though, in practice, such commissions have not been created and claims have been settled through internal claims review boards.[57] The UN General Assembly's 1985 Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power provides that "mechanisms should be established" by states "where necessary to enable victims to obtain redress through formal or informal procedures that are expeditious, fair, inexpensive and accessible."[58] This should be applied by the UN as well as TCCs. Furthermore, there has been considerable practice by the UN dating back to the first forces in 1956 and 1960 in which the UN has paid compensation to injured third parties.[59]

More on point is the Declaration on "Third Party Liability" adopted by the General Assembly in 1998, which establishes a regime for dealing with claims brought by individuals covering, inter alia, personal injury, illness or death "resulting from or attributable to the activities of members of peacekeeping operations in the performance of their official duties"; but not accepting liability for claims arising from "operational necessity."[60] The latter exemption covers damage resulting "from necessary actions taken by a peacekeeping force in the course of carrying out its operations in pursuance of its mandate."[61] Nor does the resolution cover off-duty acts of a peacekeeper, which the UN Office of Legal Affairs has explained as being when the peacekeeper was "acting in a

non-official/non-operational capacity when the incident occurred and whether he/she was in military or civilian attire at the time of the incident or whether the incident occurred inside or outside the area of operations."[62] The 1998 Declaration also indicates that successful claims for personal injury, illness, or death will be compensated to cover economic loss such as loss of earnings, loss of financial support, and medical expenses, but not for non-economic loss, such as pain and suffering.[63]

Furthermore, the UN Secretary-General has accepted the responsibility of the UN to compensate individuals "who have suffered damages for which the Organization was legally liable."[64] The Office of Legal Affairs has added that "an act of a peacekeeping force is, in principle, imputable to the Organization, and if committed in violation of an international obligation entails the international responsibility of the Organization and its liability in compensation."[65] As has been discussed, the UN only accepts liability when wrongful acts are attributable to it and not to TCCs, but this has normally been accepted by the UN in peacekeeping operations where it has command and control.[66]

Thus, although there is UN law on access to justice and remedies, it requires not only consolidation but also greater clarification, especially to include recognition that human rights violations by UN peacekeepers are a legitimate basis for a claim. Furthermore, the principles of providing remedies and access to justice for human rights violations should lead the UN and other mandating organizations to establish regularized mechanisms of accountability that are human rights compliant. Following evidence of significant levels of sexual abuse being committed by the UN operation in the Congo (MONUC) in 2004, several reports ensued,[67] resulting in a 2006 Draft Convention on the Criminal Accountability of United Nations Officials and Experts on Mission.[68] This Convention has not yet been adopted and, in any case, would not apply to the military component of peace operations (where TCCs retain criminal jurisdiction), thereby reducing its potential impact.[69]

Conclusion

To return to Schachter's observation that international law not only frames and shapes peacekeeping, it also provides standards against which to measure the conduct of peacekeepers when performing their functions. This chapter has established that both aspects have been developed by a combination of practice and doctrine. Furthermore, both aspects have developed to reflect changes that have been necessary to maintain the relevance and effectiveness of peacekeeping. As regards the constitutional framework, changes have been wrought to the trinity of norms—consent, impartiality, and self-defense—to allow peacekeepers to function in semi-hostile environments. As regards the applicable law, although international human rights law provides the standards that are normally applicable to peacekeepers, such laws permit peacekeepers to use potentially lethal force, not only to defend themselves but also civilians under existential

threat, as well as against non-state actors who use violence to undermine the peace. Furthermore, if, exceptionally peacekeepers become engaged as combatants in an armed conflict, they have greater discretion to use force in pursuit of their mandate subject to the provisions of international humanitarian law. Although there is a need for the further clarification and refinement of the constitutional and institutional frameworks (for example as regards the competence and role of regional organizations), and applicable standards (for example as regards the use of potentially lethal force for the protection of UN property), the greatest attention should be given to developing clearer and fairer access to justice for victims of human rights violations at the hands of peacekeepers.

The function of peacekeepers is a direct application of the primary purpose of the UN, namely that of maintaining peace and security. Laws should not unduly impede the fulfillment of this function, but neither should peace and security be achieved at the expense of basic protections for both states and individuals.

Notes

1. Oscar Schachter, "The Uses of Law in International Peace-Keeping," *Virginia Law Review* 50 (1964), 1096.
2. World Summit Outcome Document GA Res 60/1 (2005), para. 143.
3. Security Council Resolution S/RES/1265 (1999), para. 3.
4. International Court of Justice, *Certain Expenses of the United Nations* (1962), 151.
5. *Certain Expenses*, 163–164.
6. Rosalyn Higgins, *United Nations Peacekeeping: Documents and Commentary, Vol. 3: Africa* (Oxford University Press, 1980), 54; Dereck W. Bowett, *United Nations Forces* (London: Stevens, 1964), 176.
7. *Certain Expenses*, 163–164.
8. UN General Assembly Resolution 377 (1950).
9. UN Security Council Resolution S/RES/1778 (2007).
10. Although there was retrospective recognition in UN Security Council Resolution S/RES/788 (1992).
11. UN Security Council Resolution S/RES/1744 (2007).
12. Special Committee on Peacekeeping Operations, "Comprehensive Review of the Whole Question of Peacekeeping Operations in all their Aspects," Report, UN Doc A/56/767 (2003), para. 46.
13. UN Doc A/45/594 (1990).
14. Report of the UNSG on withdrawal of UNEF, UN Doc A/6730 (1967).
15. UN Secretary-General Second and Final Report on UNEF, UN Doc A/3302 (1956).
16. Christine Gray, "Host State Consent and United Nations Peacekeeping in Yugoslavia," *Duke Journal of International Law and Policy* 7 (1996), 241–270.
17. UN Security Council Resolution S/RES/758 (1992).
18. UN Security Council Resolution S/RES/776 (1992).
19. First to NATO in UN Security Council Resolution S/RES/816 (1993); and then to UNPROFOR in Resolution S/RES/836 (1993).
20. Gray, "Host State Consent," 249.

21. See for example UN Security Council Resolutions S/RES/1159 (1998), para. 19 (MINURCA); S/RES/1320 (2000), para. 6 (UNMEE); S/RES/1528 (2004), para. 9 (ONUCI); S/RES/1590 (2005), para. 16 (UNMIS).
22. Report of the Panel on United Nations Peace Operations (Brahimi Report) UN Doc A/55/305, S/2000/809 (2000).
23. Brahimi Report, para. 48.
24. Brahimi Report, para. 48.
25. United Nations Peacekeeping Operations: Principles and Guidelines, 31 available at http://pbpu.unlb.org/pbps/Library/Capstone_Doctrine_ENG.pdf (accessed 19 October 2012).
26. United Nations Peacekeeping Operations: Principles and Guidelines, 33.
27. United Nations Peacekeeping Operations: Principles and Guidelines, 33.
28. Dominick Donald, "Neutrality, Impartiality and UN Peacekeeping at the Beginning of the 21st Century," *International Peacekeeping* 9, no. 4 (2002), 21–38.
29. UN Security Council Resolution S/RES/1769 (2007).
30. Donald, "Neutrality," 23–25, 31–33.
31. UN Security Council Resolution S/RES/1925 (2010).
32. "General Guidelines for Peace-Keeping Operations," UN Doc UN/210/TC/CG95 (1995).
33. "Report of the Secretary-General on UNEF I," UN Doc A/3943 (1956), para. 179.
34. Gerald I. A. D. Draper, "The Legal Limitations Upon the Employment of Weapons by the United Nations Force in the Congo," *International and Comparative Law Quarterly* 12 (1963), 396.
35. UN Security Council Resolution S/RES/169 (1961).
36. UN Security Council Resolution S/RES/161 (1961).
37. Brahimi Report, paras. 48–51.
38. Nicholas Tsagourias, "Consent, Neutrality/Impartiality and the Use of Force in Peacekeeping Operations: Their Constitutional Dimension," *Journal of Conflict and Security Law* 11 (2006), 465 at 473.
39. Katherine E. Cox, "Beyond Self-Defense: United Nations Peacekeeping Operations & the Use of Force," *Denver Journal of International Law and Policy* 27 (1998–99), 250.
40. United Nations: Principles and Guidelines, 31.
41. UN Secretary-General's Bulletin, "Observance by United Nations Forces of International Humanitarian Law," UN Doc ST/SGB/1999/13 (1999), section 1.2.
42. UN Security Council Resolution S/RES/678 (1990).
43. See Pocket Card in Adam Roberts and Richard Guelff (eds.), *Documents on the Laws of War* (Oxford University Press, 2000), 561.
44. "Prosecutor v. Tadić," 105, *International Law Reports* (1996), 488.
45. UN Secretary-General's Bulletin, section 1.
46. Human Rights Committee, General Comment 31, "Nature of the General Legal Obligation on States Parties to the Covenant," UN Doc CCPR/C/21/Rev.1/Add.13 (2004), para. 10.
47. ILC, Draft Articles on the Responsibility of International Organizations, Articles 3–7, UN Doc A/66/10 (2011).
48. *Reparation for Injuries Suffered in the Service of the United Nations, ICJ Reports* (1949), 174–178; *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt, ICJ Reports* (1980), 73; 89–90.
49. See further Nigel D. White, "Use of Weapons in Peace Operations," in Stuart Casey-Maslen (ed.), *Weapons under International Human Rights Law* (Cambridge University Press,

2013); Dale Stephens, "The Lawful Use of Force by Peacekeeping Forces: The Tactical Imperative," *International Peacekeeping* 12, no. 2 (2005), 163.

50. Louise Doswald-Beck, *Human Rights in Times of Conflict and Terrorism* (Oxford University Press, 2011), 161.
51. DPKO, "Handbook on United Nations Multidimensional Peacekeeping Operations" (UN, New York, 2003), 57.
52. United Nations: Principles and Guidelines, 34–35.
53. Iain Scobbie, "International Organizations and International Relations," in Rene J. Dupuy (ed.), *A Handbook on International Organizations* (2nd ed. Martinus Nijhoff, 1998), 891.
54. Also see European Court of Human Rights, *Behrami and Saramati vs. France, Germany and Norway*, Judgment (App. Nos. 71412/01 and 78166/01), 2007.
55. ILC, Draft Articles on the Responsibility of International Organizations, Article 7, UN Doc A/66/10 (2011).
56. UN General Assembly Resolution 45/594, Annex (1990), para. 51.
57. Bruce Oswald, Helen Durham, and Adrian Bates (eds.), *Documents on the Law of UN Peace Operations* (Oxford University Press, 2010), 324.
58. UN General Assembly Resolution 40/34 (1985).
59. Oswald, Durham, and Bates, *Documents*, 323.
60. UN General Assembly Resolution 52/247, "Third Party Liability: Temporal and Financial Limitations" (1998).
61. UNSG Report, "Administrative and budgetary aspects of the financing of the United Nations peacekeeping operations," UN Doc A/51/389 (1996).
62. OLA, *UN Juridical Yearbook* (1986), 300–301.
63. UN General Assembly Resolution 52/247 (1998).
64. UN Doc S/6597 (1956).
65. OLA, *UN Juridical Yearbook 2004*, 352–356.
66. OLA, *UN Juridical Yearbook 2004*, 352–355.
67. Report of the Secretary General, "A Comprehensive Strategy to Eliminate Future Sexual Exploitation and Abuse in United Nations Peacekeeping Operations," UN Doc A/59/710 (2005) (Zeid Report).
68. Report of the Group of Legal Experts, "Ensuring the Accountability of United Nations Staff and Experts on Mission with Respect to Criminal Acts Committed in Peacekeeping Operations," UN Doc A/60/980 (2006) Annex III. See also Secretary General's Bulletin, "Special measures for protection from sexual exploitation and abuse," UN Doc ST/SGB/2003/13.
69. On the possibility of the International Criminal Court asserting jurisdiction over peacekeepers see Oswald, Durham, and Bates, *Documents*, 330–332.