

Chapter 6

PEACE OPERATIONS

6.1 Characterization and Legal Basis for Peace Operations

While a strict division between peacekeeping and peace enforcement has often proven to be difficult or even impossible to achieve and maintain in practice, there are clear distinctions in legal concept and in the resulting applicable legal regime between peace enforcement falling short of traditional war-fighting operations on the one hand, and other peace operations which are essentially consensual in nature, on the other.

6.01

1. The UN Charter makes no reference to any kind of military operation other than enforcement operations under Chapter VII, which were dealt with in the previous chapter (see sub-Chapter 5.1). Nevertheless, the concept and practice of UN operations have emerged and developed over the years into one of the major tools the UN possesses and utilizes in the maintenance of international peace and security.¹ UN peacekeeping and what is now referred to as 'peace operations' in UN parlance and within the context of this Handbook are conceptually and legally distinct from enforcement measures under Chapter VII of the Charter, even though it is not always possible to maintain a strict distinction in practice between peace enforcement and certain aspects of peace operations from a practical perspective. Enforcement measures involving the use of force, as set out in the previous chapter, are characterized by lack of the need of consent and by the (possibility of) the use of proactive (offensive) force to carry out the mandate provided by the Security Council and impose the will of the international community, and have their legal basis in Chapter VII of the Charter. As stated previously, they can be conceptually subdivided into 'enforcement operations' involving full-scale and protracted hostilities aimed at defeating the opposing party and imposing a solution and 'peace enforcement operations', which, while not requiring the consent of the parties from a legal perspective and possessing a Chapter VII authorization to employ force beyond self-defence, will normally seek to maintain the maximum consent or at

¹ M. Bothe, 'Peace-keeping' in B. Simma, (ed.). *The Charter of the United Nations: A Commentary* 2nd edn., 2 vols. (Oxford: Oxford University Press, 2002) 648 *et seq.*; N.D. White, *Keeping the Peace: The United Nations and the Maintenance of International Peace and Security* (Manchester, New York: Manchester University Press; 1993), 199–206.

6.01 least acquiescence of the relevant parties as a means of facilitating their operations and will not normally engage in offensive hostilities beyond what is necessary to carry out the mandate.²

2. In contrast, UN peace operations are not conceptually based upon Chapter VII of the Charter and consequently legally require the consent of the Host State in order to be able to deploy and operate on that State's territory and are additionally subject to the principles of impartiality and restricted to the use of force in self-defence.³ In addition to the legal requirement of Host State consent, peace operations are also dependent upon the consent, or at the least acquiescence, of all the parties to the conflict or dispute, in order to function and carry out their mandate, and are not intended or usually organized and equipped to engage in protracted hostilities or impose a solution militarily. Their primary purpose is to act in support of efforts aimed at promoting disengagement of the parties to a particular conflict and of achieving a diplomatic solution.⁴ Traditionally, the role and function of peacekeeping operations during the first decades of UN Peacekeeping, in the 1950s and 1960s, was to act as a buffer between opposing forces after a ceasefire agreement had been reached and oversee and facilitate the carrying out of the terms of such agreements through monitoring, interposition, and persuasion. Since the end of the Cold War, these traditional tasks have been progressively expanded to include in many cases the promotion of a stable environment, the maintenance of public order, the provision of humanitarian assistance in cooperation with civilian governmental and non-governmental agencies, and the protection of civilians from violations of humanitarian and human rights law to the extent possible within the terms of their mandate and their operational capabilities.⁵ This has sometimes resulted in the blurring of the distinction between 'peace enforcement' and 'peacekeeping', to some extent from a practical perspective, but even so, the legal basis and operational capabilities of peace enforcement operations and peacekeeping and other consent-based peace operations are quite distinct and remain highly relevant, notwithstanding the fact that many recent peacekeeping operations operate in unstable environments against the background of often complex intrastate conflicts involving multiple actors and tenuous consent (of some) of the parties to the conflict and sometimes are provided with mandates under Chapter VII of the Charter as an

² See Sections 5.01 and 5.02 with supporting commentary.

³ *United Nations Peacekeeping Operations: Principles and Guidelines*, DPKO International Publication, UN Secretariat, March 2008, available online at <http://pbpu.unlb.org/pbps/Library/capstone_doctrine_eng.pdf> (hereinafter cited as *Capstone Doctrine*). See for discussion of the basic principles and distinction between enforcement and peacekeeping Chapter 3, at 31 *et seq.* See also T. Findlay, *The Use of Force in UN Peace Operations* (Oxford: Oxford University Press, 2002), 3–7. Recent practice of the UN has seen the blurring of the lines between expanded 'wider' or 'robust' peacekeeping and peace enforcement. For commentary see Findlay in *ibid.*, 5–6.

⁴ *Capstone Doctrine*: Chapter 2, 'The evolving Role of United Nations Peacekeeping Operations', 17–29; Findlay at 4; Simma *et al.*, 681–683.

⁵ *Capstone Doctrine*, 24. See also SC Res. 1674 (2006) on the protection of civilians in armed conflict.

additional means of inducing compliance of the parties and signalling the resolve of the international community.⁶

3. Essentially, despite the existence of undeniable 'grey areas' and a certain degree of overlap between more 'robust' forms of peacekeeping operations on the one hand and peace enforcement operations on the other, the essential difference between the two lies in the elements of consent, impartiality, and the use of coercion. Peace enforcement may strive for the maximum degree of consent feasible under the particular circumstances, but is not legally or operationally dependent upon it. Likewise, impartiality, while sometimes possible, is not required or always feasible or even desirable within the context of peace enforcement. Finally, and as a consequence of the foregoing, peace enforcement operations will be mandated, organized, and equipped to employ coercion and use force to a far greater degree than peacekeeping or other consent-based peace operations would normally be.⁷ By contrast, peacekeeping or other consent-based peace operations, whether conducted by the UN or by a regional organization or arrangement, are governed by and subject to the principles of consent of the parties, impartiality, and restricted to the use of force in self-defence, which in contemporary UN doctrine includes defence of the mandate (see below Chapter 22 'Unit Self-Defence, Extended Self-Defence and Force Protection').⁸ Consequently, while contemporary peace operations are undeniably multifaceted and multidimensional, there are clear distinctions between enforcement measures including peace enforcement operations which are essentially non-consensual and coercive and peacekeeping and other consensual peace operations, which are bound by these core principles and are primarily an instrument in support of a broader political solution to a particular conflict or situation.⁹

Enforcement operations and peace enforcement operations have their legal basis in Chapter VII of the Charter and are not subject to the consent of the Host State where they are deployed, nor to considerations of impartiality in the conduct of their operations. (See sub-Chapters 5.1 and 5.3 above.) By contrast, peace operations other than enforcement and peace enforcement operations are subject to the consent of the Receiving State and are governed by the principles of impartiality and restricted to the use of force in self-defence. These operations will be referred to subsequently as peace operations.

6.02

See commentary to Section 6.01.

Peace operations have their legal basis in the general powers of the Security Council, of the General Assembly, and of regional organizations. The authorization of such operations with the consent of the

6.03

⁶ Ibid. 14. ⁷ Ibid. 18–19; Findlay, 5–6 and 375–381.

⁸ Findlay, 14–19; *Capstone Doctrine*, 34–35.

⁹ See nn. 3–4 and accompanying commentary above. See also Sections 5.01 and 5.02 above.

6.03 Receiving State has emerged in UN practice as a means of support for diplomatic efforts to establish and maintain peace. Notwithstanding the absence of a specific provision in the UN Charter which refers to such operations, they have become an established and generally accepted instrument in the maintenance of peace.

1. As stated previously, the Charter makes no specific reference to peacekeeping or peace operations and the instrument of peacekeeping has emerged in UN practice, starting with the first observer missions in the years immediately following the coming into force of the Charter and continuing up to the present day.¹⁰ They were initially a pragmatic solution to the failure of the UN collective security system to function as it was originally intended due to Cold War tensions and the inability of the Permanent Members of the Council to reach agreement on the employment of enforcement measures and filled a gap left by the political stalemate that characterized international relations over the first four decades of the UN's history. Since the end of the Cold War, they have developed into a multifaceted instrument of UN policy to not only contain traditional interstate conflicts but to assist broader efforts by the UN, by regional organizations, and by other actors, which are directed towards promoting the overall settlement of intrastate conflicts and restoration of stability following breakdowns of authority, preventing large-scale violations of human rights, and assisting in post-conflict efforts aimed at conflict prevention and the (re)establishment of democratic self-governance.¹¹

2. The legal basis for peace operations is to be found in the general powers of the UN Security Council to promote peaceful settlement of disputes and to maintain and restore international peace and security. These find their bases in Article 1 (1) and in Chapters VI and VII of the Charter respectively.¹² Former UN Secretary General Dag Hammarskjöld referred to them as being 'Chapter VI and a half' measures, and prior to the end of the Cold War, all peace operations of a non-enforcement character were undertaken on the basis of a Chapter VI mandate of the Council, or in some cases of the General Assembly.¹³ The involvement of the latter organ was a direct result of the Cold War political situation referred to immediately above and resulted in a major controversy regarding the legality of the General Assembly's role in peace operations and in a crisis within the UN which led to vehement opposition by two Permanent Members of the Council to UN peace operations set up by the General Assembly in the Suez and Congo crises of the 1950s and 1960s and their refusal to pay contributions for the UN Emergency Force (UNEF) and UN Organisation in the

¹⁰ See sources cited in n. 1 above.

¹¹ *Capstone Doctrine*, Chapter 2, 'The Evolving Role of United Nations Peacekeeping Operations', at 17 *et seq.*

¹² Simma *et al.*, 684–694. See also D.W. Bowett, *United Nations Forces*, (1964) 274 *et seq.* and White, 199 *et seq.*

¹³ Simma *et al.* 660 *et seq.*; White 199–206. *Capstone Doctrine* 13–14. It should be pointed out that while peacekeeping has been traditionally associated with Chapter VI, the Council's practice is not to refer to specific provisions of the Charter and no mandate has ever been explicitly based on Chapter VI.

Congo (ONUC) missions.¹⁴ Although the International Court of Justice determined in its 1962 Advisory Opinion on *Certain Expenses* that the General Assembly had the power to make specific recommendations of a non-mandatory character related to international peace and security, including the establishment of missions such as those in Suez and the Congo, and that the expenses involved in the conduct of such operations constituted expenses of the UN organization to which all Member States were required to contribute to financially,¹⁵ this controversy and ensuing crisis, together with shifts in the membership and influence of the various groupings of States within the General Assembly and the political situation in general, has led to the reasserting of the predominant role of the Security Council in conducting peace operations and all such operations since the early 1960s have been exclusively mandated and politically controlled through the Council.¹⁶ Hence, while the General Assembly is theoretically capable of setting up a peace operation through its general powers of recommendation, the practice over the past near half century has been that the Security Council has paramount authority to authorize and conduct peace operations of both an enforcement and a more consensual character and the Assembly's role has been largely ancillary and supportive to that of the Council in this context.¹⁷

3. Under Chapter VIII of the Charter, regional organizations and arrangements have the power to conduct peace operations of a non-enforcement character within the context of the maintenance of regional peace and security and the settlement of regional disputes and conflicts (see Chapter 7 below for further elaboration). The Council has taken a flexible approach to what constitutes a regional organization and has been generally supportive of the efforts of such organizations in the conducting of various types of peace operations, irrespective of whether such organizations technically qualify, or even view themselves as 'regional organizations' within the context of Chapter VIII of the Charter. Such regionally initiated peace support operations are subject to the consent of the Receiving State's government and the consent or acquiescence of other relevant partners in the same way UN-initiated peace support operations are and follow the same basic principles of impartiality and defensive force as their UN counterparts. As such, they do not require UN authorization in order for them to be carried out. In practice, however, the UN Security Council has been generally supportive of such regional efforts and has often provided them with political endorsement and on request a degree of

¹⁴ L. Goodrich, E. Hambro, and A.P. Simons, *Charter of the United Nations* 3rd rev. edn. (New York: Columbia University Press, 1969), 157–165.

¹⁵ The 'Uniting for Peace Resolution', GA Res. 377(v) 3-11-1950 was originally intended by the then predominant Western States within the General Assembly to serve as a basis for enforcement action. Although this was largely abortive, it did play a role in the establishment of several early peace-keeping operations, notably, those in Suez (UNEF I) and the Congo (ONUC), leading to the above-mentioned constitutional and financial crisis and commented upon in the sources cited in the previous note. The ICJ's Advisory Opinion on *Certain Expenses* (ICJ Reports 1962, 155 *et seq.*) determined that both the Suez and Congo operations were not enforcement operations and were not 'unconstitutional'. However, the solution was found in the political compromise referred to above whereby the Security Council reasserted its predominant role. See also Simma *et al.* 661–662.

¹⁶ *Ibid.* See also White, 127–135.

¹⁷ See sources cited in nn. 13–16 above.

logistical and material support.¹⁸ These should not be confused with peace enforcement operations undertaken by regional organizations which do require Security Council authorization under Article 53 (1) of the Charter.¹⁹

6.04 Political control, exercised by the Security Council, by regional organizations, and by States is the predominant factor for the regulation of such operations, alongside any conditions posed by the Receiving State which have been accepted by the Security Council or other authorizing entity such as a regional organization. This regulation is further subject to the abovementioned principles of consent, impartiality, and the restriction of force to self-defence. These existing legal restraints are worked out into multinational and national rules of engagement (ROE) which often contain additional restraints of an operational or policy nature.

1. The political control by the Security Council or by the appropriate organ of a regional organization through the provision and supervision of the execution of the mandate provides the overall parameters and legal basis for any peace support operation alongside the consent of and any conditions imposed by the Receiving State. These are further governed by the abovementioned basic principles of impartiality and the restriction of force to self-defence and mission accomplishment.

2. The operational planning and regulation of a peace operation will be worked out in an Operations Plan (OPLAN) and rules of engagement (ROE) within the overall framework of the mandate and subject to the political control of the Security Council or other mandating authority. The drawing up of the OPLAN and ROE for the particular mission will normally be entrusted to the relevant designated body or authority within the organization charged with the administrative and operational direction and supervision of such operations. Within the UN, this is the Department of Peacekeeping Operations (DPKO), which forms part of the UN Secretariat under overall direction of the UN Secretary General and which is under the direction of the Under-Secretary General for Peacekeeping Affairs. Within DPKO, the Office of Operations and the Office of Military Affairs would be primarily responsible for the formation of the relevant OPLAN and the drawing up of mission-specific ROE, based upon the UN model ROE and taking into account the restrictions imposed by individual Troop Contributing Countries (TCCs) upon specific types of operations (these are often referred to as 'national caveats').²⁰ While

¹⁸ For example, the DPKO has worked, and still works closely with, *inter alia*, the African Union, the European Union, NATO, the Organization for Security and Cooperation in Europe (OSCE), and the Organization of American States in a variety of missions and has been instrumental in helping to set up the African Standby Force and works closely with the AU in Sudan. For facts and figures see <<http://www.un.org/Depts/dpko/dpko/faq/q13.htm>>.

¹⁹ See e.g. Simma (ed.) *et al.* 863–866 and Goodrich, Hambro, and Simons, 364–367.

²⁰ *Capstone Doctrine*, Part II: Planning United Nations Peacekeeping Operations, 47 *et seq.* See also Sections 6.4 and 6.5 below in this Handbook, relating to ROE and the Application of Force and Authority. Command and Control in UN Peace Operations.

it is the policy of the UN to discourage the imposition of such caveats, it is nevertheless a common practice that TCCs will often insist upon certain restrictions upon the operational deployment of the forces they contribute to a particular mission as a condition of their participation in the mission. (An example of such a caveat could be that the troops provided by a particular TCC will not be used for crowd and riot control duties since they may not be trained or authorized to carry out such tasks.)

3. Once the OPLAN and ROE have been drawn up in consultation with the TCCs providing forces and other personnel and equipment for the mission in question, and the voluntary contribution of the troops by the participating States has been agreed, the forces provided will be transferred to the operational command and control of the UN or regional organization which has mandated and is carrying out the mission through a 'Transfer of Authority Agreement' (TOA) between the relevant organization such as the UN and the individual TCCs contributing forces to the mission.²¹ For further specifics concerning the command and control arrangements in UN peace operations, see below, sub-Chapter 6.5 'Authority, Command and Control in UN Peace Operations'.

4. The Security Council or relevant organ within a regional organization carrying out a specific peace support operation will retain overall political control and authority over the mission, while the actual conduct of the mission falls under the responsibility of the UN Secretary General and his delegated officials for UN peace support operations, or the counterpart organ, agency, and officials within the context of a regional peace support operation.

While all consent-based peace operations share the above mentioned general characteristics which define their legal status and which differentiate them from enforcement and peace enforcement operations, their mandates and objectives, the challenges they face, and their resulting practices will differ (widely) from case to case. In cases where peacekeeping forces become involved in hostilities, the principles and rules of international humanitarian law will be applicable for the duration of their occurrence.

6.05

1. As stated previously (see Sections 5.01, 5.02, and 6.01 with supporting commentary above), peace operations differ conceptually and in the nature of their objectives, legal basis and in many of their operational aspects from enforcement operations, including peace enforcement operations. Nevertheless, modern UN peacekeeping is multifaceted and often faces complex challenges. These can include the use of force in the context of self-defence and mission accomplishment, sometimes even reaching the threshold of conduct of hostilities within the context of a (non-international) armed conflict. In such cases, UN forces are bound by the principles of humanitarian law as set out in the Secretary General's Bulletin on

²¹ See sources cited in n. 20 above.

6.05 the Observance by United Nations Forces of International Humanitarian Law,²² as well as by humanitarian law rules contained in treaties and in customary law to which individual TCCs are bound. Whenever force is employed, even within a relatively localized and temporary context, which rises to the level of conducting hostilities, these humanitarian principles and rules would be applicable. In all other situations, short of hostilities and whenever UN forces exercise jurisdiction over persons or a geographical area, human rights standards and rules would be applicable to UN forces as customary law.

²² Of 6 August 1999 (ST/SGB/1999/13).

6.2 Status of Forces in Peace Operations

Forces participating in peace operations enjoy functional immunity vis-à-vis the Receiving State and any other (Transit) State. Their status may be further specified in status-of-forces agreements (SOFAs).

6.06

1. *General.* The status of foreign armed forces participating in peace operations derives from both their functional immunity as organs of their Sending States and the international mission they are authorized to perform. There are no fundamental status differences between forces participating in peace operations and those participating in enforcement and peace enforcement operations, other than the fact that most (peace) enforcement operations are not carried out under direct United Nations command and control and that their status will normally be regulated by agreement between the participating regional organization or coalition of States conducting the operation and the Receiving State, rather than on the basis of agreement between the UN and the Receiving State (see Section 5.12). In practical terms, status regulation for personnel participating in peace operations falls in three different categories: the general status and protection; special regulations under specific agreements distributing also tasks and responsibilities between the Sending State and the Receiving State; and a regime against impunity to be secured primarily by the Sending State.¹

2. *Conventional Specifications.* While the functional immunity of military and civilian personnel participating in UN peace operations is specified in Article VI of the 1946 UN Convention on the Privileges and Immunities of the United Nations and the 1994 UN Convention on the Safety of United Nations and Associated Personnel (see above, Section 5.12, commentary para. 4), status issues should be further regulated for each peace operation in a status-of-forces agreement (SOFA) or status-of-mission agreement (SOMA). The advisability of such agreements, even where they may be not legally necessary, was stressed from the beginning of the UN peacekeeping practice,² yet often factual developments stayed behind for lack of time for negotiations which would be necessary for that purpose, lack

¹ See O. Engdahl, 'The legal status of United Nations and associated personnel in peace operations and the legal regime protecting them', International Institute of Humanitarian Law (ed.), *International Humanitarian Law, Human Rights and Peace Operations*. 31st Round Table on Current Problems of International Humanitarian Law, San Remo, 4–6 September, 2008, 113–117, at 113; same author, *Protection of Personnel in Peace Operations: The Role of the 'Safety Convention' against the Background of General International Law* (Stockholm University, 2005, republished in Leiden: Brill, 2006).

² See D.W. Bowett *et al.*, *United Nations Forces: A Legal Study of United Nations Practice* (London: Stevens & Sons, 1964), Chapter 13 'Agreements with Host States', 428–467.

6.06 of expertise by the States involved, and a preference for *modus vivendi* solutions where treaty implementation and the implied administrative efforts appeared too complicated and unreliable. To the extent that SOFAs and SOMAs affect the legislative order of the participating States, they will be subject to ratification, another barrier that may be difficult to overcome. Decades ago, upon request of the UN General Assembly a Model Status-of-Forces Agreement for Peacekeeping Operations (UN Model SOFA),³ and also a Model Agreement between the United Nations and Member States Contributing Personnel and Equipment to United Nations Peace-Keeping Operations⁴ were prepared with great care by the Secretary General. Neither text was ever adopted in treaty form, yet they may be considered as influential guidance in practice.⁵ In addition, issues of mutual cooperation may be settled by Memoranda of Understanding (MOU), Technical Arrangements (TA), or similar instruments. Different requirements for military and civilian components of a Force, private companies, and humanitarian workers could be addressed in such arrangements. But in the absence of such agreements and arrangements participants must rely on general principles and rules as deriving from existing conventions and customary law (see above, Section 5.2, para. 3). The provisions of NATO SOFA and its extension to the new partners of the Alliance, the PFP (Partnership for Peace) SOFA,⁶ should be considered as illustrative examples rather than exact guidelines for regulations on peace operations. The close cooperation between Sending States and Receiving States within NATO and its Partnership for Peace programme includes sharing responsibilities, e.g. for the exercise of jurisdiction and also for the settlement of claims, which in the case of peace operations may be impossible or even unacceptable. In contrast to allied training exercises, a Receiving State should not have concurring jurisdiction on members of a peace operation and in most cases it will also be unable to participate in the settlement of claims.

a) *Armed forces* as organs of their Sending States enjoy functional immunity irrespective of any special agreement. This principle fully applies to individual soldiers as members of the Sending State's mission. SOFAs or SOMAs might limit that immunity in offering the Receiving States rights vis-à-vis the Sending State's forces that otherwise would not exist. They may also confirm obligations of the Sending State's forces under international law (see below, Section 6.07), underline the respect for and application of the law of the Receiving State, and regulate its mode of application.

³ UN Doc A/45/594 (9 October 1990), reprinted in Fleck (ed.), *The Handbook of the Law of Visiting Forces* (Oxford: Oxford University Press, 2001), Annex F.

⁴ UN-Document: A/46/185 (23 May 1991), reprinted in Fleck (ed.), *op. cit.* (n. 3), Annex G.

⁵ See Fleck, 'Securing Status and Protection of Peacekeepers', in R. Arnold and G.-J.A. Knoops (eds.), *Practice and Policies of Modern Peace Support Operations Under International Law* (Ardsey, N.Y.: Transnational Publishers, 2006), 141–156, at 150.

⁶ Agreement Among the States Parties to the North Atlantic Treaty and the Other States Participating in the Partnership for Peace Regarding the Status of their Forces (PFP SOFA) of 19 June 1995, reprinted in Fleck (ed.), *op. cit.* (n. 3), Annex B.

b) *Civilian personnel including police.* The functional immunity of foreign personnel participating in a peace operation also applies to civilian members of the foreign armed force and to police personnel on mission in a Receiving State. The 1990 UN Model SOFA provides that military observers, UN civilian police, and civilian personnel other than UN officials shall be considered as experts on mission within the meaning of Article VI of the 1946 Convention, while military personnel of national contingents of a UN peacekeeping operation 'shall have the privileges and immunities specifically provided for in the present Agreement'.⁷ The latter distinction remains of course subject to the conclusion of a SOFA which may be missing in the actual case (see below, para. 3). It does not exclude that both groups, military and civilian members of a peace contingent, may be considered as experts on mission, as described above (Section 5.12, para. 4 b). The same applies to foreign *police* personnel involved in peace operations: operating under the control of their Sending States, police officers also enjoy functional immunity in the Receiving State.

c) *Private companies* may be hired by Sending State's military or police forces. As they do not enjoy functional immunity absent agreement, their status may be that of foreign workers in the Receiving State, unless otherwise agreed. Private companies should be limited to a strictly civilian function. Their manpower management must observe that certain activities are inherently governmental and remain military in nature.⁸ Best practice activities should aim at ensuring better supervision and accountability.⁹ The regulatory regime of such companies remains unsatisfactory when the legislation of the Sending State does not apply to their performance abroad and the Receiving State does not provide sufficient regulation.¹⁰ It should be in the interest of both the Receiving State and the Sending State to address these aspects in the SOFA and provide for cooperative solutions of any contentious issue in this respect. For further discussion see below, Chapter 27 'Private Contractors and Security Companies'.

d) *Humanitarian workers* will often have no opportunity to be included in status agreements before entering an area of operations in a foreign State. In international and non-international armed conflicts humanitarian relief personnel as well as objects used for humanitarian relief operations must be respected and protected under customary international humanitarian law.¹¹ In territories under foreign occupation they may point to the rule stated in Article 59 of the Fourth Geneva

⁷ See above (n. 3), Sections 26 and 27.

⁸ See e.g. US Department of Defense Instruction 3020.41 USD (AT&L) of 3 October 2005 'Contractor Personnel Authorized to Accompany the US Armed Forces' and US Department of Defense Instruction 1100.22 USC (P&R) of 7 September 2006 'Guidance for Determining Workforce Mix'.

⁹ Montreux Document on pertinent international legal obligations and good practices for States related to operations of private military and security companies during armed conflict of 17 September 2008, UNGA Doc. A/63/467 and UNSC Doc. S/2008/636 (6 October 2008), <[http://www.icrc.org/web/eng/siteeng0.nsf/htmlall/montreux-document-170908/\\$FILE/Montreux-Documents-eng.pdf](http://www.icrc.org/web/eng/siteeng0.nsf/htmlall/montreux-document-170908/$FILE/Montreux-Documents-eng.pdf)>.

¹⁰ See O. Quirico, 'National Regulatory Models for PMSCs and Implications for Future International Regulation', European University Institute Working Papers MWP 2009/25, Max Weber Programme, <http://cadmus.eui.eu/dspace/bitstream/1814/11759/1/MWP_2009_25.pdf>.

¹¹ Rules 31–32 CIHL.

- 6.06 Convention which provides that '[i]f the whole or part of the population of an occupied territory is inadequately supplied, the Occupying Power shall agree to relief schemes on behalf of the said population, and shall facilitate them by all the means at its disposal'. For humanitarian assistance in Kosovo 1999, the Security Council referred to the right of access of humanitarian organizations to the theatre in the following terms:

Bearing in mind the provisions of the Charter of the United Nations and guided by the Universal Declaration of Human Rights, the international covenants and conventions on human rights, the Conventions and Protocol relating to the Status of Refugees, the Geneva Conventions of 1949 and the Additional Procols thereto of 1977, as well as other instruments of international humanitarian law, ...

Calls for access for United Nations and all other humanitarian personnel operating in Kosovo and other parts of the Federal Republic of Yugoslavia.¹²

3. *Practice in UN Peace Operations.* In the past many UN peace operations have been initiated and conducted without specific status agreement, although since the mid-1990s the UN has sought to negotiate such agreements for each mission. For military and civilian personnel in current peace operations SOFAs and SOMAs are more widely available,¹³ even if many of them are not published and the state of their implementation is uncertain. In no case has such agreement been considered as a condition for deployment. In fact, many SOFAs were prepared months after the beginning of the deployment¹⁴ or not at all. Even after conclusion of such agreements their legal validity under the law of the Receiving State may be questionable absent parliamentary approval. SOFAs should include provisions on jurisdiction (criminal and civil), entry and exit modalities, force protection, freedom of movement in the area of operations, licences and permits, weapons and ammunition, communications, host nation support, exemptions from import restrictions, and exemption from taxation by the Receiving State.¹⁵ Yet many Receiving States are unable or unwilling to deal with these issues in a forthcoming and effective manner. The Security Council has occasionally drawn attention to the need of a SOFA for peace operations. In 1993 the Government of Georgia was called to conclude expeditiously a SOFA with the United Nations to facilitate deployment of the UN

¹² SC Res. 1239 (1999), 14 May 1999; see also SC Res. 1653 (2006), 27 January 2006, on the situation in the Great Lakes region.

¹³ For almost half of the many operations currently conducted by the UN or by the EU, NATO, AU, ECOWAS, and OAS (for an inventory of such operations see <<http://conflict.sipri.org/>>), SOFAs or SOMAs are publicly accessible. Implementing legislation is not available.

¹⁴ For the United Nations Mission in Liberia (UNMIL) which started on 1 October 2003 a SOFA was concluded on 6 November 2003. For the African Union–United Nations Hybrid Operation in Darfur (UNAMID) comprising more than 19,000 troops from 40 States which started on 31 October 2007, a SOFA was signed by Joint Special Representative Adada and Sudanese Foreign Minister Deng Alor on 10 February 2008.

¹⁵ For details see A.P.V. Rogers, 'Visiting Forces in an Operational Context', in Fleck (ed.), *op. cit.* (n. 3), 533–557 (with checklist for lawyers involved in pre-deployment negotiations, at 554–557; see also P.J. Conderman, 'Status of Armed Forces on Foreign Territory Agreements (SOFA)', in: *Max Planck Encyclopedia of Public International Law (MPEPIL)*, <<http://www.mpepil.com/>>.

Observer Mission in Georgia (UNOMIG).¹⁶ For the UN Mission in Ethiopia and Eritrea (UNMEE), the Security Council requested both governments to conclude, 'as necessary', SOFAs within 30 days; pending conclusion the Model SOFA of 9 October 1990 should apply provisionally.¹⁷ Ethiopia did conclude a SOFA, but Eritrea did not.¹⁸ Similar requests were made with respect to other missions, e.g. the UN Missions in Sierra Leone (UNAMSIL)¹⁹ and the Democratic Republic of Congo (MONUC).²⁰ The language used in these resolutions shows certain interesting deviations between the English²¹ and the French²² texts. But it appears that in practice it does not make much difference whether the UN Model SOFA 'should' or 'will' or even 'shall' apply. Yet it is essential to have clear provisions implemented and for this purpose sustained efforts should be undertaken by responsible authorities. For UNMEE the Lessons Learned Report recorded a requirement to negotiate SOFAs as early as possible to secure the mission's full legal rights and protection, even recognizing that political exigencies may militate against such negotiations. The Report underlines that:

whether there be a specific agreement with the host country or the imposition of the Model SOFA, it is suggested that greater efforts could be made to ensure that there is a meeting of minds between the host country and the mission on the legal rights and protection to be afforded to the mission and its staff.²³

This reveals that the conclusion and joint implementation of SOFAs, although they may not be considered 'necessary', could have facilitated operations and improved cooperation with competent authorities of the host country. For effective peace operations the immunity of military and civilian personnel deployed in the Receiving State and the exclusive jurisdiction of their respective Sending State on any act committed by peacekeepers remains essential. In any case, peacekeepers must remain exempt from jurisdiction of the Receiving State.²⁴

4. *Security and Safety of Peace Operations.* Devastating bomb attacks against the UN Headquarters in Baghdad²⁵ on 19 August and 22 September 2003 were investigated by an independent panel which also submitted proposals for a new security strategy for the UN system as a whole, including the use of professional assessment tools for the

¹⁶ SC Res. 858 (1993), 24 August 1993, para. 8.

¹⁷ SC Res. 1320 (2000), 15 September 2000, para. 6.

¹⁸ R. Zacklin, 'United Nations Management of Legal Issues', in J. Howard and B. Oswald (eds.), *The Rule of Law on Peace Operations. A Challenge of Peace Operations' Project Conference* (Melbourne: Asia-Pacific Centre for Military Law, 2003), 115–126, at 119.

¹⁹ SC Res. 1270 (1999), 22 October 1999, para. 16.

²⁰ SC Res. 1291 (2000), 24 February 2000, para. 10.

²¹ '... pending the conclusion of such an agreement the model status-of-forces agreement dated 9 October 1990 (A/45/594) should apply provisionally'.

²² '... c'est le modèle d'accord sur le statut des forces en date du 9 octobre 1990 (A/45/594) qui s'appliquera provisoirement'.

²³ United Nations Mission in Ethiopia and Eritrea (UNMEE) Lessons Learned Interim Report: Updated Plan of Action (24 November 2004), <<http://www.un.org/Depts/dpko/lessons/>>, 36.

²⁴ See Model Status-of-Forces Agreement for Peacekeeping Operations, UN Doc A/45/594 (9 October 1990), Sections 7, 15, 24–31, and 46–49.

²⁵ See above, Section 5.2, para. 8 b.

- 6.06 collection of information on potential threats, clear guidance by and clear responsibilities of the United Nations to ensure the security of its staff, a robust security management system with adequate disciplinary measures to counter non-compliance, and significant increases in resources to develop and maintain the necessary security infrastructure.²⁶ Following the appointment in 2005 of an Under-Secretary General for Safety and Security, the issue is under continuous review of the General Assembly,²⁷ which expressed its deep concern that, 'over the past decade, threats and attacks against the safety and security of humanitarian personnel and United Nations and associated personnel have escalated dramatically and that perpetrators of acts of violence seemingly operate with impunity',²⁸ and recommended that:

the Secretary-General continue to seek the inclusion of, and that host countries include, key provisions of the Convention on the Safety of United Nations and Associated Personnel, among others, those regarding the prevention of attacks against members of the operation, the establishment of such attacks as crimes punishable by law and the prosecution or extradition of offenders, in future as well as, if necessary, in existing status-of-forces, status-of-mission, host country and other related agreements negotiated between the United Nations and those countries, mindful of the importance of the timely conclusion of such agreements.²⁹

5. *Training.* Professional training of the personnel engaged in relevant missions should include implementation of existing rights and obligations with respect to the mandate of the mission, the status of military and civilian personnel, and security management.³⁰ Ideally, such training would also involve competent authorities of the Receiving State to develop confidence-building and ensure effective cooperation.

6. *Conclusions.* The status of personnel participating in peace operations is essentially the same as in enforcement and peace enforcement operations. While it largely derives from established custom, the United Nations and regional organizations, as well as Sending States and Receiving States should take further efforts to ensure that relevant rules and provisions are specified in treaty law, considering that this will facilitate and support cooperation with local authorities which is essential for the success of the mission. For each peace operation a SOFA or SOMA should be concluded, making full use of international experience and responding to requirements at local level.

²⁶ Report of The Independent Panel on the Safety and Security of UN Personnel in Iraq of 20 October 2003, <<http://www.un.org/News/dh/iraq/safety-security-un-personnel-iraq.pdf>>.

²⁷ A/RES/62/95 of 17 December 2007; *Safety and security of United Nations personnel*. Report of the Secretary General, UN Doc A/63/305 (18 August 2008), <<http://unispal.un.org/unispal.nsf/eed216406b50bf6485256ce10072f637/c695482a57ba6cdf852574f30050e7bf?OpenDocument>>; a further report on institutional issues concerning staff, premises, and security will be submitted to the 63rd General Assembly for the consideration of the relevant Main Committee.

²⁸ A/RES/63/138 of 5 March 2009, para. 9. ²⁹ *Ibid.* para. 15; see also para. 14.

³⁰ On the latter see *Towards a Culture of Security and Accountability*. The Report of the Independent Panel on Safety and Security of UN Personnel and Premises Worldwide (9 June 2008), <http://www.humansecuritygateway.info/documents/UN_panelonsafety_9Jun08.pdf> as well as www.un.org/News/dh/infocus/terrorism/PanelOnSafetyReport.pdf.

Forces participating in peace operations shall observe their obligations under international law, in particular human rights law. They shall also respect the laws applicable in the Receiving State and any Transit State. Local institutions and individuals should be given appropriate access to independent review mechanisms to control and ensure these obligations.

6.07

1. *General.* The obligations of foreign armed forces and civilian personnel participating in peace operations derive from international law, in particular human rights law, a general obligation to respect the law of the Receiving State and any Transit State,³¹ and the law of the Sending State. For the applicability of human rights law, see above, Chapter 4. These obligations apply irrespective of the status of the personnel involved.

2. *Specific Standards.* The extent to which forces participating in peace operations may enjoy rights and must fulfil obligations under international law may be specified in agreements between participating States. Yet their functional immunity as such will not be affected.

3. *Responsibilities.* For the responsibility of Sending States and international organizations, see below, Chapter 30, 'The Responsibility of Peacekeepers, their Sending States, and International Organizations'. This responsibility includes acts committed in excess of authority or in contravention of instructions.

a) The responsibility of the United Nations Organization for acts committed in a UN peace operation is limited to acts committed under UN command and control (see above, Section 5.14, para. 2 a).

b) The responsibility of the Sending State extends to all acts performed by peacekeepers on its behalf.

³¹ There may be diverging views on the practical consequences of that respect. Respect for the aims and purposes of the law of the Receiving State, does not necessarily include its procedural requirements. See R. Batstone in Fleck (ed.), *op. cit.* (n. 3), 61–67.

6.3 Legal Parameters for the Use of Force within the Context of Peace Operations

6.08 The conduct of peace operations with the consent of the Receiving State excludes any use of force other than in self-defence. According to UN doctrine, this includes any force which is authorized and necessary for mission accomplishment and the protection of civilians (see Chapter 22). In cases of such authorization, self-defence may extend beyond mere reaction to direct threat of force against the peacekeeping forces and can include reactions in response to armed threats against the integrity of the mission and the protection of civilians accompanying the mission and of the civilian population of the Receiving State within the capability of the mission.

1. The UN doctrine of self-defence has evolved over the years from a strictly personal level of self-defence in response to acts directed against individual peacekeepers into a significantly broader concept of self-defence which allows for the use of force in response to armed actions directed against UN personnel, equipment, installations, and to the extent possible within the capabilities of the mission in the protection of civilians and the execution of the mandate.¹ This concept of self-defence has its legal basis in the UN's powers in the realm of maintaining international peace and security and in the terms of the mandate.

2. For a more detailed discussion relating to the application of force in the context of UN Peace Operations and the UN doctrine of self-defence see above sub-Chapter 6.1 'Characterization and Legal Basis for Peace Operations', and below sub-Chapter 6.4, 'Application of Force and Rules of Engagement in Peace Operations' and Chapter 22 'Unit Self-Defence, Extended Self-Defence, and Force Protection'.

¹ See Findlay, 87 *et seq.*, especially at 89–93. See, also, Section 22.04 and supporting commentary below.

6.4 Application of Force and Rules of Engagement in Peace Operations

Rules of engagement should be established for each peace operation. They may limit the use of force, but must not exceed existing legal limitations. The inherent right of personal self-defence must be respected (see above, Section 5.24, and below, Sections 10.02–10.03). Where hostilities take place, the rules of humanitarian law will be applicable (see Section 5.25 above).

6.09

1. When analysing the mandate and drafting a concept of operations for a peace operation, the commander and his planning staff will make an assessment of the participating components (sea, air, land), the type and number of units, and weapon systems necessary to conduct the mission. Simultaneously, planners will develop a set of tailor-made rules of engagement based on the missions' mandate, political guidance, and the concept of operations, taking into consideration limitations based on law. Rules of engagement for peace operations would normally contain a description of principles applicable to the use of force under all circumstances referring to international humanitarian law as a guiding parameter for any use of force irrespective of whether the situation qualifies *de jure* as an armed conflict. These principles include distinction, proportionality, humanity, and military necessity.
2. Specific rules are developed for the various components, based upon a generic set of rules of engagement (United Nations and African Union-led operations) or are based on a detailed catalogue containing numbered rules (NATO and European Union led operations). Self-defence must be addressed in detail to ensure that soldiers are clear as to what sort of actions against oneself or one's unit would authorize the use of force. Although rules of engagement traditionally are developed for military personnel, nowadays police units are also using rules of engagement or similar directives for the use of force. Private (military) contractors are gradually becoming more involved during peace operations and under certain circumstances contractors are authorized to carry weapons. In these situations, rules on the use of force (mainly based on the principle of self-defence) should be available and personnel should be thoroughly familiar with the application of the rules.

While remaining predominantly defensive in nature, the ROE allow for the potential need for offensive action if necessary, in order to ensure the implementation of the tasks assigned. The ROE contain definitions for the circumstances under which the use of force may be justified. Whenever the operational situation permits, every reasonable effort

6.10

6.10 must be made to resolve any hostile confrontation by means other than the use of force. Any force used must be limited in its intensity and duration to what is strictly necessary to achieve the objective.

1. In peace operations, force, defined as the use of physical means to achieve a legitimate objective, should be used only as a means of last resort. Although the presence of the mission in the area of operations is based on an international mandate, usually a Security Council Resolution, and consent of the host country, the relationship between a foreign force and the population is not self-evident. Although ongoing hearts-and-minds projects will help build a strong relationship between the two, use of force incidents involving the unintended killing of civilians may jeopardize the relationship overnight. All efforts should be aimed at avoiding casualties within the civilian population in order not to lose the necessary respect and support of those whom the peacekeepers came to protect in the first place.

2. Rules of engagement may therefore limit the use of force when the target is in the proximity of the civilian population. Although under international law this would be a regular precaution, rules of engagement may add extra precautionary measures, not required under treaty law. Such measures could include the obligation to deploy forward observers in case of indirect fires (mortars, artillery) or fire only after visual verification of the target. Rules may also contain operational considerations of importance to the commander and may limit the use of force in such a way that it will be used in a manner consistent with the overall military and mission objective. This may include the prohibition on destroying critical infrastructure, communication facilities, and other potential military targets, whilst allowing the disabling or disruption of such objects.

3. Limitations may also regulate command involvement in battle by vesting authority in a commander or subordinate commander to authorize pre-planned strikes, or the use of certain weapon systems, weapons, types of fires, and aircraft. For example, use of heavy weapons such as long-range artillery, may have a high risk of escalation and senior commanders with their additional staff capacity are normally better suited to oversee all consequences of employing those weapons. Whenever appropriate, commanders will consider the use of unarmed force instead of the use of armed force, for example deception, psychological methods, or negotiation. Stop, search, and apprehension of opponents using at most physical restraint can be qualified as unarmed force, even if weapons are on the scene or at hand.

4. If unarmed force is inappropriate, a gradual escalation of force will be considered. Two distinct levels of armed force can be applied: deadly force or non-deadly force. Non-deadly force is the level of force which is neither intended nor likely to cause death, regardless of whether death actually results.¹ It entails the use of non-lethal weapons, including batons, teargas and other means of crowd and riot control

¹ Standard Generic Rules of Engagement, United Nations, Department of Peacekeeping Operations, Military Division, May 2002, on file with authors.

and the use of firearms firing warning shots or shots aimed at lower body parts. Non-deadly force would be appropriate if the opponent is not carrying firearms and poses a non-deadly threat to peacekeepers or to those under their protection. The ultimate degree of force of peacekeepers would be deadly force, the level of force intended or likely to cause death, regardless of whether death actually results.² This generally will be applied if no other means or methods are available to react to a hostile act or hostile intent of armed opponents. 6.10

5. One of the most controversial issues is the use of armed force (including and up to deadly force) against unarmed civilians. Such a situation occurred between 15 and 20 January 2006 in Côte d'Ivoire when a group known as the Young Patriots organized violent demonstrations against the Government and the United Nations peacekeeping operation in Abidjan and in western areas of the country.³ The UNOCI headquarters in Abidjan, the French Embassy, and the 43rd French marine infantry battalion were besieged and repeatedly attacked for several days by crowds of the Young Patriots.⁴

During the siege, United Nations property suffered extensive damage. In Guiglo, groups of people incited by hate media attacked UNOCI troops, forcing them to use their rules of engagement to ensure their own safety. On at least one occasion a UN compound with peacekeepers was overrun as a result of the absence of sufficient means of riot control, no adequate fence, and the unwillingness to use deadly force against the violent demonstrators climbing over fences. Those same groups pillaged and burned the offices of humanitarian agencies and non-governmental organizations, while their staff were molested and chased from their houses, which were also vandalized. The direct threats to United Nations personnel led to a temporary relocation to safe havens of staff based in the west and in Abidjan.⁵ In such a situation peacekeepers are authorized to use force, including deadly force, in self-defence. Whether or not soldiers will actually use force in such a situation is a matter of culture, training, and leadership. It depends also on how the commander on the scene assesses the situation. Especially in a rapidly deteriorating situation, the commander, with or without the assistance of his staff, should be able to quickly review his possible courses of action and make a decision and communicate it to everyone. What if he orders the use of firearms? Are his troops

² Ibid. 5.

³ Eighth Report of the Secretary General on the United Nations Operation in Côte d'Ivoire, UN Doc. S/2006/222 dated 11 April 2006.

⁴ Ibid. 3, The anti-United Nations propaganda and incitement to violence, especially on the Radio Télévision Ivoirienne (RTI) and local radio networks, resulted in the extensive looting and destruction of assets and property of United Nations and humanitarian agencies in the western towns of Daloa and San-Pédro, and most seriously in Guiglo.

⁵ As a result of the violent demonstrations organized by the Young Patriots, the security situation in Côte d'Ivoire deteriorated sharply at the beginning of the year. There were serious obstructions to the freedom of movement of the impartial forces, interruption of socio-economic activities and rampant insecurity in Abidjan, as well as in various parts of Government-controlled areas. Humanitarian activities came to a standstill as a result of the destruction by protesters of the offices of the United Nations and those of other humanitarian agencies, their relief supplies, warehouses, communications, and other equipment. UN Doc. S/2006/222 dated 11 April 2006, para. 18 at 4.

adequately trained to handle such situations? Will a few warning shots or aimed shots de-escalate or have the opposite effect? It may be clear from the example that a thorough understanding of the applicable rules of engagement alongside such principles as distinction and proportionality is necessary; while the required de-escalation of the situation is also a matter of training, experience, and soldiers' fortune.

6.11 In some circumstances operational urgency may dictate the immediate use of deadly force. The use of force must be commensurate with the level of the threat and all necessary measures are to be taken to avoid collateral damage. During peace operations, use of force beyond personal self-defence may only be used in the circumstances as specified in the ROE.

1. The United Nations generic Rules of Engagement authorize under certain circumstances the use of force up to deadly force in situations where there is a hostile act. Hostile act is defined as: '[a]n attack or other use of force, intended to cause death, bodily harm or destruction'.⁶ As most mandates nowadays explicitly include as a duty of the peacekeeping force 'to protect civilians under imminent threat of physical violence', no hesitation should exist on the part of commanders and soldiers in using up to deadly force if civilians are attacked or are about to be attacked and time does not allow for negotiation or the use of non-lethal means. It should be clearly understood at all levels that this is the *raison d'être* of peacekeeping: if peacekeepers are unable, unwilling, or not authorized, then what is their role in the first place? Attention should be paid to the precise wording of the mandate. It raises questions whether there is any difference in the execution of the mission when the relevant passage reads: 'to protect',⁷ 'to ensure protection'⁸ or 'to contribute to the protection'.⁹ If discussions in the Security Council do not result in clarity, then answers should be found in the mission implementation plan, the operational plans, and orders for military and police components. An independent study recently examined the creation, interpretation, and implementation of mandates for United Nations peacekeeping missions to protect civilians. The study contains insights and recommendations for the entire range of UN protection actors, including the Security Council, troop and police contributing countries, the Secretariat, and the peacekeeping operations implementing protection of civilians' mandates.¹⁰

⁶ See above (n. 1), 7.

⁷ SC Res. 1542 (2005) of 30 April 2005 (MINUSTAH, Haiti): to protect civilians under imminent threat of physical violence, within its capabilities and areas of deployment.

⁸ SC Res. 1565 (2004) of 1 October 2004 (MONUC, Democratic Republic of Congo): to ensure the protection of civilians, including humanitarian personnel, under imminent threat of physical violence.

⁹ UNAMID, Darfur, SC Res. 1769, 2007: to contribute to the protection of civilian populations under imminent threat of physical violence and prevent attacks against civilians, within its capability and areas of deployment, without prejudice to the responsibility of the Government of the Sudan.

¹⁰ Victoria Holt and Glyn Taylor, Independent study commissioned jointly by the UN Office for the Coordination of Humanitarian Affairs (OCHA) and the UN Department of Peacekeeping Operations (DPKO) 17 November 2009.

2. Having witnessed confusion on mandates in the past (Rwanda 1994, Srebrenica 1995), a contemporary example of differing views related to the interpretation of the mandate and the ensuing Rules of Engagement which occurred at the end of May 2004 with the UN Mission in the Democratic Republic of Congo (MONUC) serves as an illustration of the possible repercussions. Nkunda, a former ANC commander refusing to adhere to the ceasefire agreement, marched from North-Kivu with ex-ANC soldiers to join Mutebutsi north of Bukavu, a city of 600,000 inhabitants. He was reinforced along the route and his force increased to about 2,000 men. MONUC, led by the deputy Force Commander, was planning to disarm Mutebutsi's units and use attack-helicopters to canalise Nkunda's troops along the shore of Lake Kivu, preventing Nkunda from seizing Bukavu. Tactics were to warn Nkunda verbally, followed, if necessary, by warning shots and finally, if Nkunda still did not stop, to attack his advance units. HQ MONUC Kinshasa then decided that in the given situation deadly force was prohibited. Nkunda passed Bukavu airport and headed for Bukavu. Subsequently, MONUC troops blocked the road and delayed the attack for 18 hours. The next day, Nkunda's troops reached Bukavu and spread out across the city. Houses and shops were looted and citizens robbed. Summary executions and widespread rape occurred and many lives were lost and many citizens injured. UN HQ New York had expected MONUC and the Kivu-brigade to use force and did not share the views of HQ MONUC Kinshasa on taking a neutral position in Bukavu. The Bukavu crisis influenced the peace process seriously and delayed it politically and militarily for more than five months. When Nkunda arrived in Bukavu demonstrations started in all major cities in the DRC. The UN was blamed for not stopping Mutebutsi and Nkunda. HQ MONUC, under pressure from severe attacks on UN establishments in Kinshasa, prepared for evacuation and UN property was destroyed.¹¹

3. Decisions to use force will often have to be taken at the lowest tactical level, sometimes by individual soldiers. It is for that reason that soldiers should be aware of all possible scenarios. During pre-deployment exercises individual soldiers should have gone through extensive shoot or no-shoot scenarios, providing the clarity needed once they are confronted with real-life situations. An imminent attack on property necessitates a more sophisticated approach when circumstances such as limited numbers of troops or limited (air) mobility dictate the concentration of scarce means to protect mission-essential assets or designated infrastructure. In addition, troop contributing countries using caveats may have excluded the use of deadly force to defend property, based on national legislation. Hostile intent has been defined in UN Rules of Engagement¹² as: '[t]he threat of imminent use of force, which is demonstrated through an action which appears to be preparatory to a hostile act'. In case of hostile intent, Rules of Engagement will authorize an incremental escalation of force to counter the threat. The remainder of the definition,

¹¹ Excerpt from 'Experiences from UN Military Peace Enforcement Operations in the DRC April 2003–January 2005', Brigadier General Jan Isberg, Former Deputy Force Commander and Brigade Commander MONUC, on file with authors.

¹² See above (n. 1), 7.

'only a reasonable belief in the hostile intent is required, before the use of force is authorized' will provide back-up for a soldier or the on-scene commander if he has chosen to use force. Whether or not hostile intent is being demonstrated must be judged on the basis of one or a combination of factors, including: the capability and preparedness of the threat, the available evidence which indicates an intention to attack, and the historical precedent within the mission's area of responsibility.

4. In sum, the phrase: 'use of force beyond self-defense may only used be in the circumstances as specified in the ROE' suggests a severe limitation on the use of force, while on the contrary the phrase 'only a reasonable belief in the hostile intent is required before the use of force is authorized' suggests a free hand leaving the decisions to use force to the discretion of the soldier or commander-on-scene. The often suggested limitation in UN ROE, referred to as 'peacekeepers with arms tied behind their backs', seems not to be correct.

6.12 The implementation of the ROE is a command responsibility. The ROE are normally addressed to the Force Commander, who is then responsible for issuing them to all subordinate commanders. All commanders have an obligation to seek clarification, if the authorized ROE are considered to be unclear or inappropriate for the military situation.

1. Rules of engagement are issued once they are approved by the competent authority. For UN led operations, the Military Advisor will propose Rules to the Under-Secretary General for Peace Operations who is the executive authority on behalf of the UN Secretary General for peace operations and is the approval authority for the Integrated Mission Plan, including the Operation Plan and the rules of engagement. For NATO-led missions, SACEUR will propose Rules to the Defence Planning Committee of the North Atlantic Council (NAC DPC) through the NATO Military Committee.

2. The Rules are issued to the Force Commander or to the Head of the Police Component if applicable. The Force Commander subsequently passes the ROE to subordinate unit commanders whom may seek additional guidance if necessary. Subordinate commanders are not authorized to alter the ROE. They may propose changes to the existing rules if they believe such is necessary for the adequate execution of their tasks. Proposals for change are reviewed by the Force Commander and if he concurs, approval will be sought from the competent authorities. It is the responsibility of the commanders of all national contingents to ensure that all those under their command understand these ROE. To assist in this process, they must issue a ROE aide-memoire or pocket card, translated into the language(s) appropriate for their own contingent, to each individual.

6.13 Rules of engagement will determine under what circumstances search, apprehension, and detention operations may take place. Minimum

principles must be observed during all search procedures: the purpose of the search must be clearly stated in the orders and to the individuals to be searched; searchers are not to humiliate, nor embarrass persons being searched; the search procedure must take into account gender and be sensitive to other factors such as race, religion, etc.

1. Search, apprehending, and detaining an individual is authorized when acting in self-defence or in case of hostile act or hostile intent. In such cases use of up to deadly force is authorized taking into consideration common principles of humanity and proportionality. It is for the latter principle that to ensure search and apprehension non-lethal means must have priority.
2. Other situations that may involve search, apprehension, and detention include third parties crossing roadblocks set up by the Force or when individuals enter restricted areas. Warning signs and information in the local language should be available and explain the procedure and rights of the individuals. All soldiers should be familiar with search and apprehension procedures and should have received adequate training.

Detainees must not be subjected to torture, to cruel, inhuman or degrading treatment or punishment, or to intimidation, deprivation, humiliation, mistreatment, or any form of abuse (see below, Chapter 25). Full respect is to be shown for their gender, race, and religious beliefs and for the customs and practices of the group to which they belong. Particular care is to be taken to ensure the protection and wellbeing of women and children. Detainees must be protected against all acts or threats of violence, insults, and public curiosity. Detainees are to be given rations, shelter, and access to medical care.

6.14

1. Before apprehension and detention, suspects must be searched. Ideally, the search is to be conducted in the presence of at least one witness, and should be conducted by a person of the same gender. The on-scene commander must ensure that all confiscated items are recorded properly. Persons may not be apprehended other than in accordance with the authorization given in the ROE. All apprehended persons are to be handed over to appropriate local authorities as soon as possible. Until hand-over takes place, such individuals may be detained. Regular peacekeeping forces are usually neither trained nor programmed to deal with civilian detainees. Therefore straightforward procedures should be established to act rapidly and hand over to units and levels that are better equipped and prepared to guarantee safety of the unit and the detained individual. Strict adherence to ROE and detention procedures based on accepted human rights norms and standards¹³ applied by peacekeeping forces should guarantee a minimum standard for detained individuals.

¹³ An example is the Professional Training Series No. 5/Add.3, Human Rights Standards and Practice for the Police, Geneva/New York 2004, <<http://www.ohchr.org/english/about/publications/training.htm>>.

6.14 2. Wherever possible, detainees are to be informed of the reason for their apprehension or detention. This rule, based on the Universal Declaration and various human rights treaties¹⁴ can be applied readily, provided that language assistants or interpreters are available. If such is not the case, peacekeepers should anticipate such circumstances by preparing translated written statements including the caution and detention grounds referring to language derived from the ROE. A ground for detention could be (attempted) use of armed force against a peacekeeper. Peace operations personnel are fully responsible for the safety and wellbeing of persons whom they apprehend or detain, as long as those persons are in their charge.

3. The authority to detain and the subsequent hand-over to appropriate national authorities is usually based on an agreement with the Host State and based on the notion that the Host State itself is not always in a position to apprehend and detain individuals whenever there may be a need. A recent phenomenon is the attention and sensitivity related to the responsibility of peacekeepers for detainees once they are handed over to appropriate national authorities. Claims based on violations of human rights obligations against peacekeepers may be brought by relatives or next of kin of a detained person if that person disappears or dies after hand-over.

4. Sometimes an agreement is concluded between troop contributing States and the Host State to stress the mutual obligation to respect basic standards of international humanitarian law, human rights law, and national law such as the right to life, to a fair trial, and the protection against torture. The agreement may include an obligation for the Host State to allow full access to detainees after their transferral to the Host State by representatives of a national human rights commission, the ICRC, or relevant human rights institutions within the UN system. The agreement may also include the responsibility for keeping an accurate account of all persons transferred to national authorities, making records available upon request, notifying the transferring State prior to the initiation of legal proceedings involving individuals, and prohibiting detainees being subjected to the death penalty.

5. Detainees must not be subjected to torture, to cruel, inhuman or degrading treatment or punishment, or to intimidation, deprivation, humiliation, mistreatment or any form of abuse. At no time in history has the treatment of detainees been more scrutinized by the international community based on photographs taken by perpetrators. It is therefore necessary to avoid ambiguity about the applicable rules or their interpretation. Mixed messages are not well understood or not understood at all by soldiers on the ground.

¹⁴ Universal Declaration of Human Rights, Art. 9; ICCPR, Art. 9.

6.5 Authority, Command, and Control in United Nations-led Peace Operations

The Security Council provides the legal authority, high-level strategic direction, and political guidance for all UN peace operations, and it vests the operational authority for directing these operations in the Secretary General of the United Nations. The Under-Secretary General for Peacekeeping Operations (USG DPKO) has been delegated responsibility from the Secretary General for the administration of, and provision of executive direction for, all UN peace support operations.

6.15

1. The management of a peacekeeping operation at UN Headquarters in New York is considered to be the strategic level of authority, command, and control. The USG DPKO directs and controls UN peacekeeping operations and formulates policies and develops operational guidelines based on Security Council resolutions. In addition, the Under-Secretary General for Management has financial authority and the Under-Secretary General for Safety and Security is responsible for the safety and security of UN staff, responsibilities which affect UN peacekeeping operations. The Under-Secretary General for Field Support is responsible for delivering dedicated support to the field operations, including on personnel, finance, procurement, logistics, communications, information technology, and other administrative and general management issues.¹

United Nations Member States may transfer authority to the United Nations to use the operational capabilities of their national military contingents, units, and/or uniformed personnel to undertake mandated missions and tasks. Operational authority over such forces and personnel is vested in the Secretary General, under the authority of the Security Council. Contributing Member States that provide uniformed personnel to United Nations peace operations retain full and exclusive strategic level command and control of their personnel and equipment.

6.16

1. Contributing Member States that provide military and police personnel to United Nations peacekeeping operations retain full and exclusive strategic level command and control of their personnel and equipment. Contributing Member

¹ The text below is partly based on the contribution of the authors to the approved intern policy document on Authority, Command and Control in UN Peacekeeping Operations, Department of Peacekeeping Operations, 15 February 2008, on file with authors.

States may assign these personnel and assets to serve under the authority of the Secretary General of the United Nations and under the operational control of the Head of the Military Component of a UN peacekeeping operation for a specified period and purposes as agreed in the MOU with UN HQ. Administrative control is exercised by a senior national officer of a contributed military contingent within a mission area. The authority is limited to administrative matters such as personnel management, supply, and services and must not adversely influence the management and conduct of UN operations within a mission area. Member States may withdraw their military and police personnel and the operational control of those personnel from the United Nations through formal communication with United Nations Headquarters.²

2. UN Operational Authority involves the authority to issue operational directives within the limits of: (1) a specific mandate of the Security Council; (2) an agreed period of time, with the stipulation that an earlier withdrawal of a contingent would require the contributing country to provide adequate prior notification; and (3) a specific geographic area (the mission as a whole). UN Operational Authority does not include any responsibility for certain personnel matters of individual members of military contingents and formed police units, such as pay, allowances, promotions, and so on. These functions remain a national responsibility. With regard to disciplinary matters it should be noted that while the discipline and administration of military justice of military personnel remains the responsibility of the troop contributing countries, the UN may take administrative steps in relation to misconduct including the repatriation of military contingent members and staff officers.

6.17 The Head of Mission is the senior UN Representative and has overall authority over the activities of the United Nations in the mission area. He leads and directs the heads of all mission components and ensures unity of effort and coherence among all UN entities in the mission area. The Head of Military Component exercises operational control over all military personnel, including military observers and in the mission. The Head of Police Component exercises operational control over all members of the police component of the mission.

1. The field-based management of a peacekeeping operation at Mission Headquarters is considered to be the operational level, while Head of Mission, Head of Military Component, Head of Police Component, Deputy Special Representative of the Secretary General, and the Director of Mission Support hold operational level authority, command, and control responsibilities.³ The Head of Mission of a multi-dimensional peacekeeping operation is generally the Special Representative of the Secretary General.⁴ He reports to the Secretary General through the USG DPKO.

² Ibid. 7. ³ Ibid. 7.

⁴ For an excellent insight on the work of a Head of Mission see 'On Being a Special Representative of the Secretary-General', UNITAR, 2004.

The Head of Mission has overall authority over the activities of the United Nations in the mission area. The Head of Mission (HOM) represents the Secretary General, leads UN political engagement, and speaks on behalf of the UN within the mission area. The HOM leads and directs the heads of all mission components and ensures unity of effort and coherence among all UN entities in the mission area, in accordance with the UN Integrated Strategic Framework. The HOM provides political guidance for mandate implementation and sets mission-wide operational direction including decisions on resource allocation in case of competing priorities. The HOM delegates the operational and technical aspects of mandate implementation to the heads of all components of the mission.⁵ 6.17

2. The Head of Military Component (HOMC) reports to the HOM.⁶ The HOMC exercises operational control over all military personnel, including Military Observers, in the mission. United Nations Operational Control is defined as the authority granted by Member States 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 a combination), to deploy units concerned and/or military personnel, and to retain or assign tactical command or control of those units/personnel.⁷ The HOMC may establish subordinate Sector Commands, as appropriate. In doing so, the HOMC places military units under the tactical control of military commanders in the operational chain of command. The HOMC maintains a technical reporting and communication link with the DPKO Military Advisor in UN Headquarters. The technical reporting link must not circumvent or substitute the command chain between USG DPKO and the HOM, nor should it interfere with decisions taken by the HOM.

3. The Head of Police Component (HOPC) reports to the Head of Mission, exercises operational control, and provides direction to all members of the police component of the mission.⁸ This includes all UN police officers (including all members of formed police units) and relevant civilian staff serving in the police component. The HOPC shall determine the police chain of command in the mission. The HOPC shall also determine appropriate succession arrangements within the police component to ensure effective command and control in his/her absence. The HOPC maintains a technical reporting and communication link with the DPKO Police Advisor in UN Headquarters. The technical reporting link must not circumvent or substitute the command chain between USG DPKO and the HOM, nor should it interfere with decisions taken by the HOM.⁹

4. The management of military, police, and civilian operations below the level of Mission Headquarters is considered to be at the tactical level and is exercised at various levels by subordinate commanders of respective components and designated civilian heads at levels below the Mission Headquarters. For military

⁵ Ibid. 7.⁶ Ibid. 8.⁷ Ibid. 11.⁸ Ibid. 9.⁹ Ibid. 9.

6.17 components, the tactical level includes all subordinate command levels established within the military command frameworks (for example Brigade, Regional, and Sector Command). Tactical level commanders report directly to their respective operational commanders.

5. The HOMC is accountable and responsible to the HOM for the supervision and technical management of the military component with particular responsibility to ensure effective and efficient mandate implementation and strict compliance with UN policies and procedures. Decisions on major operations or re-deployment of troops should result from consultations between the HOM and HOMC and must have HOM's concurrence.¹⁰ This is clearly different in non-UN led operations such as operations led by NATO, where Force Commanders supported by political advisors or senior representatives have decision-making authority in the field and report directly to senior military commanders located at strategic headquarters outside the mission area.

¹⁰ Ibid. 11.