

Normative and Legal Challenges to UN Peacekeeping Operations

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Abstract

The application of law and norms in military operations is complex. This article provides an overview of legal and normative aspects in UN peace operations. It will focus on key challenges to UN peace operations. First, it will review UN peacekeeping from the perspective of international law. After providing an overview of the legal framework of UN peacekeeping and the application of human rights law, international humanitarian law, and international criminal law, the article turns to issues related to the accountability and immunity of UN peacekeepers. The final section addresses normative concepts including the responsibility to protect, the protection of civilians, human security and their relevance in regard to UN peacekeeping.

Keywords

United Nations – peacekeeping operations – challenges – norms – international law

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If the rule of law means anything at all, it means that no one, including peacekeepers is above the law.¹

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The clarity of the applicable law and the consistency of its application is an essential pre-requisite to a well managed operation.²

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- 1 Report of the Secretary General, 'The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies', UN doc. S/2004/616, 23 August 2004, para. 33.
- 2 Ralph Zacklin, 'United Nations Management of Legal Issues', in Jessica Howard and Bruce Oswald (eds.), *The Rule of Law on Peace Operations. A Challenges of Peace Operations Project Conference* (Melbourne: Asia-Pacific Centre for Military Law, 2002), p. 118.

1 Introduction

Since the early days of the United Nations (UN), legal and normative issues have played a significant role in peacekeeping operations (PKOs). Throughout the intervening period scholars such as Derek W. Bowett,³ Rosalyn Higgins,⁴ Oscar Schachter⁵ and Finn Seyersted⁶ have made important contributions toward the better understanding of the complex role of law in the context of peacekeeping operations. Traditionally, international lawyers have addressed the constitutionality of UN peacekeeping, the rule of law in the peacekeeping context, the legal status of UN peacekeepers, issues related to command and control, the legal constraints arising from the application of international humanitarian law, international human rights law and international criminal law, specific problems under the domestic law of the sending state, the protection of UN personnel serving in UN peacekeeping missions, as well as the responsibilities and liabilities of the United Nations, sending states, and individual peacekeepers under international law.⁷ Another area of study has concerned legal problems related to the UN administrations, such as those in Cambodia, East Timor and Kosovo.⁸

3 Derek W. Bowett, *United Nations Forces: A Legal Study of United Nations Practice* (London: Stevens, 1964).

4 See the four volumes on peacekeeping missions conducted in Africa, Asia, Europe and the Middle East, Rosalyn Higgins, *United Nations Peacekeeping: Documents and Commentary* (Oxford: OUP, 1969–1981).

5 Oscar Schachter, 'The Uses of Law in International Peace-keeping', *Virginia Law Review*, vol. 50, 1964, pp. 1096–1114; 'Legal Aspects of the United Nations Action in the Congo', *American Journal of International Law*, vol. 55, 1961, pp. 1–61 (under the pseudonym E.M. Miller).

6 Finn Seyersted, *United Nations Forces. In the Law of Peace and War* (Leiden: A.W. Sijthoff, 1966).

7 For a comprehensive overview of these legal issues, see Michael Bothe, 'Peacekeeping' in Bruno Simma, Daniel-Erasmus Khan, Georg Nolte, Andreas Paulus (eds.), *The Charter of the United Nations* (Oxford: Oxford University Press, 2012), pp. 1171–1199; Bruce Oswald, Helen Durham, Adrian Bates, *Documents on the Law of Peace Operations* (Oxford: Oxford University Press, 2010) and the contributions on peace operations by Ben Klappe, Patrick C. Cammaert, Dieter Fleck, and Terry D. Gill in Terry D. Gill, Dieter Fleck, *The Handbook of the International Law of Military Operations* (Oxford: OUP, 2011), pp. 135–162. See also the contributions in Boris Kondoch, *International Peacekeeping. The Library of Essays in International Law* (Aldershot: Ashgate, 2007), the articles published in the special issue on Multinational Operations and the Law published in the *International Review of Red Cross*, vol. 95, numbers 891/892, 2013 and the excellent bibliography by Nigel D. White, *Peacekeeping, International Law*, Oxford Bibliographies Online, 2012.

8 See, for example, Boris Kondoch, 'The United Nations Administration of East Timor', *Journal of Conflict and Security Law*, vol. 6, 2001, 245–265; Carsten Stahn, *The Law and Practice of*

In recent years, the focus has moved to legal issues concerning the protection of civilians,⁹ detentions by UN peacekeepers,¹⁰ international policing,¹¹ the use of new weapon systems including drones,¹² legal issues related to peacekeeping and private security,¹³ and the responsibility to

International Territorial Administration: Versailles to Iraq and Beyond (Cambridge: Cambridge University Press, 2008/2010) and Ralph Wilde, *International Territorial Administration: How Trusteeship and the Civilizing Mission Never Went Away* (Oxford: OUP, 2008). For a general overview regarding the administration of territories by international organizations or states, see Markus Benzing, 'International Administration of Territories', *Max Planck Encyclopedia of Public International Law* (OUP, 2010).

- 9 For a groundbreaking study, demonstrating how international humanitarian law and human rights law are providing legal obligations to protect civilians, see Siobhán Wills, *Protecting Civilians: The Obligation of Peacekeepers* (Oxford: OUP, 2009). See also Rebecca Barber, "Reflections on the Peacekeeping Failure in Darfur: Is There Any Substance to the 'Responsibility to Protect'?" *Journal of International Peacekeeping*, vol. 13, issue 3–4, 2009, pp. 294–326; and Nigel D. White, 'Empowering Peace Operations to Protect Civilians: Form over Substance?', *Journal of International Peacekeeping*, vol. 13, issue 3–4, 2009, pp. 327–355.
- 10 For further reading, see, for example, Bruce Oswald and Thomas Winkler, 'The Copenhagen Process: Principles and Guidelines on the Handling of Detainees in International Military Operations', *Nordic Journal of International Law*, vol. 83, issue 2, 2014, pp. 128–167; Bruce Oswald, 'The Copenhagen Principles, International Military Operations and Detentions', *Journal of International Peacekeeping*, vol. 17, issue 1–2, 2013, pp. 116–147 and Bruce Oswald, 'Detention by United Nations Peacekeepers: Searching for Definition and Categorisation', *Journal of International Peacekeeping*, vol. 15, issue 1–2, 2011, pp. 119–151.
- 11 See, for example, the special section on legal challenges for international policing edited by Tim McCormack and published in the *Journal of International Peacekeeping*, vol. 15, issue 1–2, 2011.
- 12 See, for example, Kasaija Phillip Apuuli, 'The Use of Unmanned Aerial Vehicles (Drones) in United Nations Peacekeeping: The Case of the Democratic Republic of Congo', *ASIL Insights*, vol. 18, issue 3, 2014 available at <http://www.asil.org/insights/volume/18/issue/13/use-unmanned-aerial-vehicles-drones-united-nations-peacekeeping-case> (accessed on 20 February 2015).
- 13 See, for example, Matija Kovač, 'Legal Issues Arising from the Possible Inclusion of Private Military Companies in UN Peacekeeping', *Max Planck Yearbook of United Nations Law*, vol. 13, 2009, pp. 307–374; Mirko Sossai, "The Privatisation of "the Core Business of UN Peacekeeping Operations": Any Legal Limit?", *International Community Law*, vol. 16, issue 4, 2014, pp. 405–422; Nigel D. White, 'Peacekeeping, Private Security and International Human Rights Law: A Review of UN Policies', *International Community Law*, vol. 16, issue 4, 2014, pp. 443–460.

rebuild.¹⁴ Ongoing debates are related to the use of force in peacekeeping operations¹⁵ and the legal standards for holding UN peacekeepers accountable for violations of human rights.¹⁶ In the last decade, there have been a number of decisions by domestic and international courts which have stimulated academic debates.¹⁷ Furthermore, there is growing literature on normative concepts, the

- 14 Dieter Fleck, 'The Responsibility to Rebuild and Its Potential for Law-Creation: Good Governance, Accountability and Judicial Control', *Journal of International Peacekeeping*, vol. 16, issue 1–2, 2012, pp. 84–98; Sylvia Maus, 'The Responsibility to Rebuild – Some Remarks on a UN Obligation to Conduct Peacebuilding Activities', *Humanitäres Völkerrecht – Informationsschriften* (HuV-I), vol. 23, issue 2, 2010, pp. 52–61. In general on the question, who should rebuild after conflict, see James Pattison, 'Just Post Bellum and the Responsibility to Rebuild', *British Journal of Political Science*, November 2013, pp. 1–27.
- 15 For a detailed account when peacekeeping and enforcement overlap, see James Sloan, *The Militarisation of Peacekeeping in the Twenty-First Century* (Oxford and Portland: Hart Publishing, 2011). See also the articles by James Sloan and Otto Spijkers in this issue and Bruce Oswald, 'The Security Council and the Intervention Brigade: Some Legal Issues', *ASIL Insights*, vol. 17, issue 15, 2013, available at <http://www.asil.org/insights/volume/17/issue/15/security-council-and-intervention-brigade-some-legal-issues> (accessed on 20 February 2015).
- 16 For the major study in this field of peacekeeping law, see Marten Zwanenburg, *Accountability of Peace Support Operations* (Leiden, Boston: Martinus Nijhoff, 2005). See also the contributions in the special issue, Accountability of Peacekeepers in *Die Friedens-Warte*, vol. 3–4, 2013; Boris Kondoch, 'The Responsibility of Peacekeepers, Their Sending States; and International Organizations', in Dieter Fleck, Terry D. Gill, eds., *The Handbook of International Law of Military Operations* (Oxford: Oxford University Press, 2010), pp. 515–534 and Stephan Hollenberg, 'Immunity of the UN in the Case of Haitian Cholera Victims' in this issue.
- 17 See the Belgian case of *Mukeshimana – Ngulinzira and ors. v. Belgium and ors.*, Brussels Court of First Instance, ILDC 1604 (BE 2010), 8 December 2010; *Behrami v France* (Application no. 71412/01), *Saramati v France, Germany and Norway* (Application no. 78166/01), Admissibility Decision of 31 May 2007, 45 EHRR SE10; *Mothers of Srebrenica Association et al. versus the Netherlands*, District Court The Hague, case no. C/09/295247/HA ZA 07–2973, Judgment of 16 July 2014; *Mustafić versus the State of The Netherlands and Nuhanović versus the State of The Netherlands*, District Court The Hague, case nos. 265618 / HA ZA 06–1672 and 265615 / HA ZA 06–1671 of 10 September 2008; *Mustafić and Nuhanović versus the State of The Netherlands*, Court of Appeals The Hague, case nos. 200.020.173/01, and 200.020.174/01, judgments of 5 July 2011 and 26 June 2012 (the Appeal was dealt with in two stages); *Mustafić and Nuhanović versus the State of The Netherlands*, Supreme Court ("HogeRaad"), case nos. 12/03329 and 12/03324, Judgments of 6 September 2013; *R (Al Jeddah) v Secretary of State for Defence* (2005) EWHC 1809 (Administrative Court); *R (Al Jeddah) v Secretary of State for Defence* (2006) EWCA Civ 327 (Court of Appeal); *R (Al Jeddah) v Secretary of State for Defence* (2007) UKHL 58.

responsibility to protect (R2P), the protection of civilians and human security and how they relate to international peacekeeping operations.¹⁸

Scholars and practitioners have identified a number of grey areas and challenges surrounding the legal and normative limitations upon the Security Council when adopting Chapter VII mandates in UN peace operations, and the difficulty of reconciling increasingly coercive mandates with traditional norms of peacekeeping (consent, impartiality, non-use of force except in self-defence/defence of the mandate). This debate has intensified with the establishment of the Force Intervention Brigade in the Congo.¹⁹ Greater complexity has been introduced into contemporary PKOs with normative concepts like human security and the R2P, forcing consideration not only of how PKOs can impact on these areas, but also how these new normative considerations can impact on peacekeeping in practice. The normative momentum at the UN provides the challenge of how effectively to mainstream these concepts into UN PKOs.

Further questions can be raised concerning the implementation of peacekeeping operations on the ground, including the applicability of human rights law (treaties and customary law) and the efficacy of human rights protection in peacekeeping operations, whether UN peacekeepers not only have a legal duty to respect but also to ensure respect for international human rights law by other actors, the legal regulation of use of force in UN peacekeeping operations beyond the right to self-defence, and whether the law of occupation should be applied when peacekeepers are in “effective control of territory”. There are specific legal issues connected with international policing, the legal responsibility of the UN (and member states) to send peacekeepers, whether the UN has a duty under international humanitarian law (IHL) to prosecute mass violations of human rights or to conduct peacebuilding activities, the use of private contractors in UN PKOs, and the extent to which the UN and troop contributing countries can ensure accountability for peacekeepers for serious violations of human rights and IHL before national and international courts. A key question

18 On the R2P, see, for example, Angus Francis, Vesselin Popovski, Charles Sampford, *Norms of Protection. Responsibility to Protect, Protection of Civilians and Their Interaction* (Tokyo: UNU Press, 2012); Sabine Hassler, ‘Peacekeeping and the Responsibility to Protect’, *Journal of International Peacekeeping*, vol. 14, issue 1–2, 2010, pp. 134–183; and Charles T. Hunt and Alex Bellamy, ‘Mainstreaming the Responsibility to Protect in Peace Operations’, *Civil Wars*, vol. 13, no. 1, 2011, pp. 1–20. On human security, see Wolfgang Benedek, Matthias C. Kettmann, Markus Möstl (eds.), *Mainstreaming Human Security in Peace Operations and Crisis Management. Policies, Problems, Potential* (London: Routledge, 2010).

19 See the article by Spijkers in this special issue.

is whether a convention on criminal responsibility of UN peacekeeping personnel could solve the accountability gap.

The following article provides an overview of the normative and legal challenges to UN peacekeeping operations.²⁰ This article proceeds in five parts. The first highlights general aspects of the legal framework applicable to UN peacekeeping operations. The second summarizes the relationship between international humanitarian law, international criminal law, and international human rights law and UN peacekeeping. The next two parts consider immunity and accountability issues from the perspective of international law. Section four explores how international normative shifts since the end of the Cold War have had both a constraining and enabling impact on UN PKOs, with particular emphasis on the evolution of the doctrine of the Responsibility to Protect and the protection of civilians (POC). The conclusions of the study are set out in the final section.

2 The General Legal Framework of UN Peacekeeping Operations

Peacekeeping has been the technique most frequently used by the United Nations to end violent conflicts. However, neither the United Nations, member states of the UN, nor scholars have found a consensus on how to define this unique tool of conflict resolution.²¹ The so-called Capstone Doctrine defines peacekeeping as an “action undertaken to preserve peace, however fragile, where fighting has been halted and to assist in implementing agreements achieved by the peacemakers”.²² Another often quoted definition can be found in the *Agenda for Peace*:

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- 20 On regional organizations and peacekeeping, see, for example, Eric P.J. Myjer, Nigel D. White, ‘Peace Operations Conducted by Regional Organizations and Arrangements’ in Dieter Fleck, Terry D. Gill, eds., *The Handbook of International Law of Military Operations* (Oxford: Oxford University Press, 2011), pp. 163–184.
 - 21 For a more detailed discussion of the term peacekeeping and the related terms (peace operations, peace enforcement, peacebuilding and peacemaking), see, for example, Alex Bellamy, Paul D. Williams, *Understanding Peacekeeping* (Cambridge: Polity, 2010), pp. 14–18; Patryk I. Labuda, ‘Peacekeeping and Peace Enforcement’, *Max Planck Encyclopedia of Public International Law* (OUP, 2014); and Thilo Marauhn, Sven Simon, ‘Peacebuilding’, *Max Planck Encyclopedia of Public International Law* (OUP, 2011).
 - 22 The Capstone Doctrine outlines key principles and guidelines for UN peacekeepers. See *United Nations Peacekeeping Operations. Principle and Guidelines* (Capstone Doctrine), New York, 2008, Annex 2, available http://pbpu.unlb.org/pbpps/library/capstone_doctrine_eng.pdf (accessed on 20 February 2015).

peacekeeping is the deployment of a United Nations presence in the field, *hitherto* with the consent of all parties concerned, normally involving United Nations military and/ or police personnel and frequently civilians as well. Peacekeeping is a technique that expands the possibilities for both the prevention of conflict and making of peace.²³

Many authors also prefer the broader term 'peace operations', which may be defined as "field operations deployed to prevent, manage, and/or resolve violent conflicts or reduce the risk of their recurrence".²⁴ United Nations peace operations entail "three principal activities: conflict prevention and peacemaking; peacekeeping; and peace-building".²⁵ The first comprehensive peacekeeping doctrine, Principles and Guidelines for UN peacekeeping operations the so-called Capstone Doctrine²⁶ did not include the term peace operations. As Winrich Kuehne explains "it smelled too Western and interventionist" for member states from the South.²⁷

In general, the legal framework of UN peacekeeping operations can be derived from the UN Charter; the mandate provided by the Security Council; mission specific legal instruments including agreements with the troop contributing states, so-called Participation Agreements and with the host state, so-called Status of Forces Agreements (SOFAs) or Status of Missions Agreements (SOMAs), rules of engagement, and UN regulations. In addition, international human rights law; international humanitarian law; the Convention on the Privileges and Immunities of the United Nations; the Convention on the Safety of United Nations and Associated Personnel and the Optional Protocol to the Convention on the Safety of United Nations and

23 Boutros Boutros-Ghali, *An Agenda for Peace: Preventive Diplomacy, Peacemaking and Peacekeeping*, UN doc. A/47/277-S24111, 17 June 1992.

24 United Nations Peacekeeping Operations: Principles and Guidelines (2008) Annex 2 (also known as the Capstone doctrine), available at http://pbpu.unlb.org/pbps/library/capstone_doctrine_eng.pdf (accessed on 20 February 2015).

25 Report of the Panel on United Nations Operations (Brahimi Report), UN Doc. A/55/305-S/2000/809 of August 2000, para. 10, available at http://www.un.org/en/ga/search/view_doc.asp?symbol=A/55/305 (accessed on 20 February 2015).

26 Available at http://pbpu.unlb.org/pbps/Library/Capstone_Doctrine_ENG.pdf (accessed on 20 February 2015).

27 Winrich Kuehne, 'Peace Operations and Peacebuilding in the Transatlantic Dialogue', *zif analysis*, 08/09, p. 7.

Associated Personnel are of particular relevance.²⁸ The mandate formulated in an enabling resolution by the Security Council or exceptionally in a General Assembly resolution, contains the legal basis under international law for the deployment of a UN peacekeeping operation.²⁹ As Michael Bothe remarks, “(t)he mandate of a peace operation is the source of its powers and at the same time the limitation of its powers”.³⁰

From a legal perspective one may distinguish between consensual and non-consensual peacekeeping operations based on Chapter VII of the UN Charter. It is commonplace to point out that peacekeeping is nowhere mentioned in the UN Charter. The concept developed in response to the deadlock of the Security Council during the Cold War. The first peacekeeping operation was the United Nations Emergency Force (UNEF I) established by the General Assembly in the aftermath of the Suez Crisis. In 1957, Secretary-General Dag Hammarskjöld laid down the three key principles of classical peacekeeping operations. First, peacekeeping operations require the consent of the parties to the conflict. Second, peacekeepers should be impartial. The third principle refers to the non-use of force except in self-defence.³¹ Even though these bedrock principles of international peacekeeping have been confirmed by the United Nations in policy documents and by member states in the annual meetings of the Special Committee on Peacekeeping (C34) ever since, peacekeeping has evolved over time and in practise challenged these core principles repeatedly.

Many contemporary peacekeeping operations are established under Chapter VII of the UN Charter and they do not *stricto sensu* require the consent of the parties to the conflict. PKOs are also authorised to use force for the protection of civilians, and not just in self-defence. In 2013, the Security Council established an Intervention Brigade within the United Nations Stabilization Mission in the Democratic Republic of the Congo. The Intervention Force has a mandate to use force preventively and to carry out offensive operations

28 The most relevant legal instruments are reprinted in Bruce Oswald, Helen Durham, Adrian Bates, *Documents on the Law of Peace Operations* (Oxford: Oxford University Press, 2010).

29 On the interpretation of mandates, see the general report submitted by Terry Gill, J.A. Mario Léveillé, and Dieter Fleck, *The Rule of Law in Peace Operations*, XVIIth Congress of the International Society for Military Law and the Law of War, Scheveningen, 16–19 May 2006 (on file with the authors).

30 Michael Bothe, ‘Syndicate Remarks’ in Jessica Howard and Bruce Oswald (eds.), *The Rule of Law on Peace Operations: A ‘Challenges of Peace Operations’ Project Conference* (Asia Pacific Center for Military Law, 2003), p. 265.

31 On the trinity of peacekeeping principles, see the contributions by James Sloan and Otto Spijkers in this issue.

against spoilers.³² These trends have been criticised for their lack for conceptual clarity.³³ In 2013 and 2014, Russia warned that “what was once the exception now threatens to become unacknowledged standard practise”³⁴ and “such actions would be counter to the basic principles of peacekeeping”.³⁵

While there is presently relatively little debate as to the constitutionality of consensual peacekeeping operations and those established under Chapter VII, in the early days of international peacekeeping, the legality of the new institution of conflict resolution was controversial. France and the Soviet Union refused to pay the cost of the United Nations Operation in the Congo (ONUC) and UNEF I. In the famous advisory opinion on *Certain Expenses of the United Nations*, the International Court of Justice rejected the argument these operations were illegally established.³⁶ Even though the UN Charter does not provide for an explicit authorisation of peacekeeping operations, there is agreement that the legal basis for consensual peacekeeping operations falls between Chapter VI and Chapter VII.³⁷ Dag Hammarskjöld conceptualised this as “Chapter VI and a half”.³⁸

There has been considerable debate over the years which Charter provisions are exactly the legal basis of international peacekeeping and how to allocate authority among the Security Council, the General Assembly and the Secretariat, represented by the Secretary-General. The Security Council has the primary responsibility for the maintenance of international peace and security (see Article 24(1) of the UN Charter). The Security Council has the power to create peacekeeping forces as its subsidiary organs (see Article 29 of

32 See UN doc. SC Resolution 2098 of 2013. See also the article by Otto Spijkers in this issue.

33 On these trends, see Vesselin Popovski in this issue and Ian Johnstone, ‘Dilemmas of Robust Peace Operations’, *Annual Review of Global Peace Operations 2006* (Boulder/London: Lynne Rienner Publishers, 2006), pp. 1–17.

34 Annex to the letter, dated 1 June 2014 from the Permanent Representative of the Russian Federation to the United Nations addressed to the Secretary General, UN doc. A/68/899, S/2014/384, p. 3.

35 Security Council meeting on the situation in Mali, UN doc. S/PV. 6952 of 25 April 2013, p. 2.

36 International Court of Justice, *Certain Expenses of the United Nations (Article 17, paragraph 2, of the Charter)*, Advisory Opinion of 20 July 1962.

37 Under Chapter VI the Security Council can adopt various techniques in pursuit of peaceful settlement of disputes (mediation, negotiation, etc.). Under Chapter VII the Security Council may take enforcement measures to maintain or restore international peace and security.

38 Oliver Ramsbotham & Tom Woodhouse, *Encyclopedia of International Peacekeeping Operations* (Santa Barbara: ABC-CLIO, 1999), p. xi.

the UN Charter). According to Article 98 of the UN Charter, the Council may entrust the Secretary-General with certain functions. The question which Charter provisions grant the power to create peacekeeping operations has been debated over the last decade. Scholars have suggested that different articles within Chapter VII serve as the legal foundation, for example, by pointing to Articles 39, 40, 41, 42 and 48 of the UN Charter, either alone or in conjunction with each other.

Depending on the type of peacekeeping operation, different provisions in the Charter may be considered as the legal basis. For example, Articles 41 or 42 of the UN Charter with regard to the UN administrations in Kosovo and East Timor. In case of other UN operations, Article 36(1), 39 or 40 of the UN Charter may be invoked. Instead of searching for an explicit Charter provision an elegant way out of the legal dilemma is to suggest that the UN possesses either an inherent or implied power to establish peacekeeping operations.³⁹ Another possibility would be to view customary law of the United Nations as the legal basis for peacekeeping.

3 The Role of International Humanitarian Law, International Human Rights Law and International Criminal Law

The following section provides a short summary of the role of international humanitarian law, international human rights law and international criminal law.⁴⁰ International humanitarian law can be defined as “those international

39 As the International Court of Justice stated in the Reparations Opinion: ‘under international law, the [UN] Organization must be deemed to have those powers which, though not expressly provided in the Charter, are conferred upon it by necessary implication as being implication as being essential to the performance of its duties’ (Reparations Opinion 1969).

40 Lack of space prevents a thorough discussion. For further analysis, see Alexandre Faite, Jérémie Labbé Grenier, *Expert Meeting on Multinational Peace Operations. Applicability of International Humanitarian Law and International Human Rights Law to UN Mandated Forces* (Geneva, 2004), available at https://www.icrc.org/eng/assets/files/other/icrc_002_0912.pdf (accessed on 20 February); International Institute of Humanitarian Law, *International Humanitarian Law, Human Rights and Peace Operations* (San Remo: 2008), available at https://www.icrc.org/eng/assets/files/other/sanremo-2008_peace_ops.pdf (accessed on 20 February 2015); Kjetil Mujezinović Larsen, *The Human Rights Treaty Obligations of Peacekeepers* (Cambridge: Cambridge University Press, 2012); Guglielmo Verdirame, *The UN and Human Rights. Who Guards the Guardians?* (Cambridge: Cambridge University Press, 2013), pp. 196–229.

rules, established by treaty or custom, which are specifically intended to solve humanitarian problems directly arising from international or non-international armed conflicts and which, for humanitarian reasons, limit the rights of the parties to a conflict to use methods and means of warfare of their choice or protect persons and property that are or may be, affected by the conflict".⁴¹ In regard to IHL, the Capstone Doctrine explains that "United Nations peacekeepers must have a clear understanding of the principles and rules of international humanitarian law and observe them in situations where they apply".⁴² The Secretary General's Bulletin on Observance by United Nations Forces on International Humanitarian Law of 1999 sets out "the fundamental principles and rules of international humanitarian law [are] applicable to United Nations forces when in situations of armed conflict they are actively engaged therein as combatants, to the extent and for the duration of their engagement".⁴³ In the field, it might be difficult to determine whether the threshold of an armed conflict has been reached and whether IHL applies to UN peacekeepers. Furthermore, the UN might be reluctant to accept that the organization has become party to an armed conflict because of the principle of impartiality.⁴⁴

No human rights treaty explicitly addresses the applicability of human rights law to UN peacekeeping operations. However, the Capstone doctrine acknowledges that "international human rights law is an integral part of the normative framework for United Nations peacekeeping operations".⁴⁵ Nowadays, many UN peacekeeping operations have a human rights component and specific human rights obligations may be found in the mandate or in UN regulations. Although the United Nations is not party to any international human rights convention, the UN possesses legal personality which means that it can be bound by customary international law *mutatis mutandis*. Human rights obligations for peacekeepers can be derived from civil, cultural, economic, political and social rights. Every peacekeeper should have a basic understanding of human rights related to vulnerable groups, including refugees, internally displaced people, women, minorities and children, because these groups often require special protection.

41 Hans-Peter Gasser, *International Humanitarian Law* (1993), p. 16.

42 Capstone Doctrine, p. 15.

43 UN Doc. ST/SGB/1999/13, the Bulletin can be accessed at <https://www.icrc.org/eng/resources/documents/misc/57jq71.htm> (accessed on 20 February 2015).

44 For a concise summary on the application of IHL, see Marten Zwanenburg, 'United Nations and International Humanitarian Law', *Max Planck Encyclopedia of Public International Law* (OUP, 2013).

45 Capstone Doctrine, p. 17.

In practice, there may be uncertainty when and which human rights apply to UN peacekeeping operations. Such problems could be at least partly resolved by the adoption of an official UN document comparable to the SG's Bulletin on Observance by United Nations Forces on International Humanitarian Law. The document could outline the specific duties under international human rights law. When the state delegates its right to exercise jurisdiction over part of its territory formally to the UN peacekeeping force, through a SOFA, and when the UN peacekeeping force is in fact exercising state-like jurisdiction over that part of the territory, it could be argued that it becomes the obligation of the UN to secure to everyone residing within that part of the territory the rights and freedoms as defined in international human rights law.

International criminal law plays a role in UN peacekeeping operations on different levels. Peacekeepers may be deployed to areas where genocide, crimes against humanity or war crimes have occurred or are occurring. Do peacekeepers have a legal duty to stop mass atrocities in the absence of an explicit mandate? Does or should the United Nations have a legal obligation to prosecute mass atrocities when the UN administers territories? Another issue concerns the prosecution of UN peacekeepers by domestic and international courts, including the International Criminal Court.⁴⁶ There are relatively few cases dealing with attacks against peacekeepers. Examples include the cases brought before the International Criminal Tribunal for Rwanda (ICTR) and the Special Court for Sierra Leone (SCSL). In 2008, the Trial Chamber of the ICTR found Colonel Théoneste Bagosora guilty of conspiracy to commit genocide; genocide; complicity in genocide; and crimes against humanity.⁴⁷ In 2009, the Trial Chamber of the SCSL convicted three military commanders of the Revolutionary Front, Sesay, Kallon and Gbao, for multiple counts of war crimes and crimes against humanity, including attacks against peacekeepers.⁴⁸ Intentionally directing attacks against personnel or equipment which are involved in a peacekeeping mission in accordance with the Charter of the United Nations may trigger the

46 See, for example, Arnd Düker, *Die Strafverfolgung von Angehörigen einer Friedenstruppe der Vereinten Nationen* (Hamburg: Verlag Kovač, 2008); Ole Engdahl, 'Prosecution of Attacks against Peacekeepers in International Courts and Tribunals', *The Military Law and the Law of War Review*, vol. 51, no. 2, 2012, pp. 249–284; Magdalena Pacholska, '(Il)legality of Killing Peacekeepers. The Crime of Attacking Peacekeepers in the Jurisprudence of International Criminal Tribunals', *Journal of International Criminal Justice*, vol. 13, no. 1, 2015, pp. 43–72.

47 ICTR, *Théoneste Bagosora et. al. v. The Prosecutor*, Case No. ICTR-98-41-T, Judgment of 18 December 2008, 2245 (Bagosora Trial Chamber).

48 SCSL, *Prosecutor v. Issa Hassan Sesay, Morris Kallon and Augustine Gbao*, Case No. SCSL-04-15-T, 2 March 2009 (RUF Case).

jurisdiction of the International Criminal Court.⁴⁹ As Dieter Fleck remarks “(t)here is currently no jurisprudence concerning this matter, but it would be interesting to see whether these two provisions will be applied to acts against personnel involved in more robust action in defence of a mandate originally designed for a peacekeeping mission in the classical sense”.⁵⁰ Of course, in theory it is also possible for a peacekeeper to commit international crimes him- or herself. But there have not been many examples of such criminal prosecutions, at international or domestic level.

4 Accountability

An important matter which needs to be addressed in a special issue devoted to the legal and normative foundations of UN peacekeeping operations is, of course, the question of legal accountability.⁵¹ Accountability in general is about being answerable to someone, about the obligation to justify your behavior – or lack thereof – to someone else.⁵² There are different kinds of accountability, of which legal accountability is one. Legal accountability is about one entity being answerable to another because of some legal relationship that exists between the two, such as a contract or a relationship governed by general law. Such legal accountability is normally effectuated through procedures which are themselves governed by law, such as a court or another form of legal dispute settlement.

Mechanisms of accountability apply to various actors involved in a UN peacekeeping operation. Individual peacekeepers have to explain their actions to their employer, which is normally the United Nations and/or the troop contributing state. Even though the overall command and control over the peacekeepers is exercised by the UN, the troop-contributing state normally retains the authority to impose disciplinary or criminal sanctions in such cases as a

49 See Article 8 (2)(b) (iii) and (e)(iii) of the ICC statute, pp. 206–247.

50 Dieter Fleck, ‘The Law Applicable to Peace Operations’ in Andrew Clapham and Paola Gaeta (eds.), *The Oxford Handbook of International Law in Armed Conflict* (Oxford: OUP, 2014), available at <http://www.oxfordhandbooks.com/view/10.1093/law/9780199559695.001.0001/law-9780199559695-e-9> (accessed on 20 February 2015), p. 242.

51 See also Otto Spijkers, ‘Legal Mechanisms to Establish Accountability for the Genocide in Srebrenica’, *Human Rights & International Legal Discourse*, vol. 1, no. 2, 2007, pp. 231–265.

52 Black’s Law Dictionary, 8th edition, 2004. For further discussion on accountability and international responsibility, see, Marten Zwanenburg, *Accountability of Peace Operations* (Leiden, Boston: Martinus Nijhoff Publishers, 2005), pp. 61–64.

peacekeeper misbehaves. And thus the peacekeeper continues to be accountable towards his or her own state. In the unlikely event that individual peacekeepers commit international crimes, they are also answerable to the international community as a whole. This is where international criminal law has a role to play. Below, we will look at the difficulties involved in effectuating this responsibility through some legal process. Depending on who exercised effective control over the specific act causing damage to a third person – a local civilian, for example – both the troop-contributing state of the peacekeeping operation and/or the United Nations can be held legally accountable towards that person for the damage caused. Here too, the problem is where this person can go to hold the UN and/or the troop-contributing state to account for the actions of the peacekeepers.

Apart from the peacekeepers themselves, various organs of the United Nations are involved in a peacekeeping operation. Generally speaking, the Security Council, by defining the mandate, provides the overall instructions, direction and control. The Secretary-General is responsible for the executive direction and control of the mission. The Force Commander, as chief of mission, takes care of the command in the field.⁵³

The Security Council consists of fifteen states, known to disagree with each other. This raises questions about these states' individual responsibility, especially when acting in their capacity as a Security Council member. It has been argued that the permanent members of the UN Security Council should not be permitted to use their veto when the protection of civilians from genocide, war crimes, crimes against humanity or ethnic cleansing is involved. This, so it is argued, can be derived from the responsibility to protect. As early as 2005, all states of the United Nations indicated they were "prepared to take collective action, through the Security Council, in accordance with the Charter, including Chapter VII [...] should peaceful means be inadequate and national authorities manifestly fail to protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity".⁵⁴ In 2013, French President Francois Hollande proposed that "a code of good conduct be defined by the permanent members of the Security Council, and that in the event of a

53 *Comprehensive Review of the Whole Question of Peace-Keeping Operations in all their Aspects: Command and Control of United Nations Peace-keeping Operations* (report of the Secretary-General), published 21 November 1994, UN Doc. A/49/681, para. 4.

54 2005 *World Summit Outcome*, GA RES. 60/1, UN Doc A/RES/60/1, 24 October 2005, 30, para. 139.

mass crime they can decide to collectively renounce their veto powers".⁵⁵ The details were worked out by Laurent Fabius, as follows:

Our suggestion is that the five permanent members of the Security Council — China, France, Russia, Britain and the United States — themselves could voluntarily regulate their right to exercise their veto. The Charter would not be amended and the change would be implemented through a mutual commitment from the permanent members. In concrete terms, if the Security Council were required to make a decision with regard to a mass crime, the permanent members would agree to suspend their right to veto. The criteria for implementation would be simple: at the request of at least 50 member states, the United Nations secretary general would be called upon to determine the nature of the crime. Once he had delivered his opinion, the code of conduct would immediately apply. To be realistically applicable, this code would exclude cases where the vital national interests of a permanent member of the Council were at stake.⁵⁶

This proposal does not require an amendment of the UN Charter, which is notoriously difficult as it requires the consent of all permanent members themselves. Regardless of whether the French proposal is acceptable to other states, it raises an interesting question. If, due to a veto, the Security Council cannot act effectively in a particular situation, is the responsibility of the Council engaged? Or only of the particular state exercising the veto, thereby paralyzing the entire UN? And to whom is the Council answerable? When the UN Charter was drafted, the authorization to use force was left entirely at the discretion of the Security Council. The Council, or any one of its members, is thus not answerable to the UN Membership at large. And unless there is some specific treaty or other source of international law obliging the UN to intervene in a particular situation – think of a promise made by a UN official to a group

55 Statement by Mr. François Hollande, President of the Republic, of 24 September 2013, at the opening of the 68th Session of the United Nations General Assembly. Available at <http://www.franceonu.org/>. See already the *Report of the Secretary General's High Level Panel on Threats, Challenges, and Change: A More Secure World. Our Shared Responsibility*, 2004. para. 256 and Anne Peters, 'The Security Council's Responsibility to Protect', *International Organizations Law Review* vol. 8, issue, 8, 2011, pp. 15–45.

56 Laurent Fabius, 'A Call for Self-Restraint at the U.N.', published on the Opinion Pages of the *New York Times*, 4 October 2013.

of people that the UN will protect them⁵⁷ – it could be argued that the Organization is not under an obligation to do so.

The UN Secretary-General cannot on his own establish a UN peacekeeping mission. He can refer a situation threatening international peace and security to the Council – Article 99 of the UN Charter gives him this power – and he might get a very vague and general mandate from the Council, for example, to take “all necessary action”.⁵⁸ What action is necessary must then be worked out by the Secretary-General. Such direct involvement and leadership of the UN Secretary-General is more a thing of the past. Nowadays, the instructions of the Council are often quite detailed, and addressed directly to the peacekeeping mission itself, and no longer to the Secretary-General.

Legally speaking, all these organs – Security Council, Secretary-General, Peacekeeping Force – are primary or subsidiary organs of the UN. And thus, vis-à-vis third parties, their actions normally engage the responsibility of the organization. Besides the accountability of individual peacekeepers, troop-contributing states and the UN, we can also look at the accountability of those states, or other actors, that *failed or refused* to act. It seems unjust that only the actors involved in a peacekeeping operation can be held accountable for the consequences of a failed peacekeeping mission, whilst other states that could have contributed troops but refused to do so, or states that could otherwise have assisted the peacekeeping mission in successfully carrying out its tasks, cannot be held responsible for their total lack of action.⁵⁹ In 2005, the UN General Assembly held that whenever genocide, war crimes, ethnic cleansing and crimes against humanity were (about to be) committed, the international community and all states had to act.⁶⁰ But what does this obligation to act

57 Think of the promise, made by UNPROFOR Commander Philippe Morillon, when he first visited the enclave of Srebrenica in April 1993. He told the people there: “Vous êtes maintenant sous la protection de l’ONU. [...] Je ne vous abandonnerai jamais”. See the *Rapport d’Information déposé en application de l’article 145 du Règlement par la mission d’information commune sur les événements de Srebrenica*, published 22 November 2001 by the Assemblée Nationale of France, p. 22.

58 This was the very vague task given to UN Secretary-General Dag Hammarskjöld which he then used as basis for the peacekeeping mission in the Congo, ONUC. United Nations Security Council, Resolution 143 and 145, adopted 14 July and 9 August 1960.

59 See also Otto Spijkers, ‘Bystander Obligations at the Domestic and International Level Compared’, *Goettingen Journal of International Law*, vol. 6, no. 1, 2014, pp. 47–79.

60 2005 *World Summit Outcome*, GA RES. 60/1, UN Doc A/RES/60/1, 24 October 2005, 30, paras 138–139.

entail?⁶¹ And is it a legal or a political or moral obligation? An obligation to prevent genocide can be directly derived from the *Genocide Convention*.⁶² In 2007, the International Court of Justice reaffirmed that all states ought “to employ all means reasonably available to them, so as to prevent genocide so far as possible”.⁶³ Important in the assessment of whether a state has done enough to prevent genocide is the state’s “capacity to influence effectively the action of persons likely to commit, or already committing, genocide”, a capacity which “depends, among other things, on the geographical distance of the state concerned from the scene of the events, and on the strength of the political links, as well as links of all other kinds, between the authorities of that state and the main actors in the events”.⁶⁴ These criteria were later reiterated by the UN Secretary-General.⁶⁵ There is no reason to assume that these criteria are only applicable to the obligation to prevent genocide, and not to the other atrocity crimes. For war crimes, the *Geneva Conventions on the Laws of War* could be referred to.⁶⁶ When it comes to ethnic cleansing and crimes against humanity, the case is less clear.

Where to go to effectuate accountability? In practice, this is the big question. Individual peacekeepers can be held accountable before the military courts of their own state. It is more difficult to hold them accountable before the jurisdiction of foreign states, as issues of state immunity might complicate

61 See UN Secretary-General, *Implementing the Responsibility to Protect*, UN Doc A/63/677, 12 January 2009; UN Secretary-General, *Early Warning, Assessment, and the Responsibility to Protect*, UN Doc A/64/864, 14 July 2010; UN Secretary-General, *The Role of Regional and Subregional Arrangements in Implementing the Responsibility to Protect*, UN Doc A/65/877, 28 June 2011; UN Secretary-General, *Responsibility to Protect: Timely and Decisive Response*, UN Doc A/66/874, 25 July 2012; and UN Secretary-General, *Responsibility to Protect: State Responsibility and Prevention*, UN Doc A/67/929, 9 July 2013.

62 *Convention on the Prevention and Punishment of the Crime of Genocide*, 9 December 1948, Art. 1, 78 UNTS 277, 280.

63 *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment, ICJ Reports 2007, 43, 182, para. 430.

64 *Ibid.*

65 GA, *Responsibility to Protect: Timely and Decisive Response: Report of the UN Secretary-General*, UN Doc A/66/874, 25 July 2012, esp. 11, para. 40.

66 *Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*, 12 August 1949, Art. 1, 75 UNTS 31, 32; *Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea*, 12 August 1949, Art. 1, 75 UNTS 85, 86; *Geneva Convention Relative to the Treatment of Prisoners of War*, 12 August 1949, Art. 1, 75 UNTS 135, 136; *Geneva Convention Relative to the Protection of Civilian Persons in Time of War*, 12 August 1949, Art. 1, 75 UNTS 287, 288.

matters. troop-contributing states can be held accountable before their own domestic courts. They might also be brought before an international human rights court, when a complaint against them is brought either by an individual – after local remedies have been exhausted – or another state. Generally, the United Nations has effective control over the acts of peacekeepers, and thus a troop-contributing state cannot, as a rule, be held accountable for acts of the peacekeepers it put at the disposal of the UN. This is different when the troop-contributing state actually has effective control over “its” peacekeepers when they commit the specific acts that have led to the damage. Such a situation has occurred, but it is very rare. Normally, the acts of a peacekeeping force can be attributed to the United Nations. Any legal action must thus be taken against the UN. Such legal action can be initiated before a domestic court, or before the UN’s own dispute settlement mechanism. The problem is that the UN does not always provide the latter type of mechanism, and when a claim against the Organization is brought before a domestic court, the UN generally relies on its immunity from proceedings before the domestic courts of its member states. This immunity is hardly ever waived by the Organization.

Individual peacekeepers can be held accountable for international crimes, proceedings can be commenced against them before a domestic court with criminal jurisdiction, or an international court. Some individuals have indeed suggested that the ICTY indict the key players at the United Nations.⁶⁷ But the prosecutor of the ICTY ultimately decided against indicting any of these individuals. In the future, peacekeepers could be brought before the International Criminal Court.

5 Immunity of Peacekeepers

The immunity of the United Nations from the jurisdiction of the domestic courts of its member states is an important hurdle to the effectuation of legal accountability. The United Nations does not want domestic courts to interfere with its activities, and thus it relies on its immunity whenever a claim is brought against it in a domestic court. This is particularly problematic when it comes to claims relating to peacekeeping operations, because in relation to such claims, the UN often does not provide an alternative legal remedy at the UN level. The domestic court is then faced with a dilemma: it cannot both

67 The Mothers of Srebrenica and the Podrinja Association filed a criminal complaint with the ICTY Prosecutor in 2001 against UN commanders and staff ‘for the role they played in the fall and genocidal massacre at Srebrenica’ in July 1995.

accept to hear the complaint against the UN thereby granting the claimants their right to a fair trial, and respect the UN's immunity from the jurisdiction of domestic courts. The two obligations clash directly with each other, and cannot be reconciled. Domestic courts have applied the conflict rule of Article 103 UN Charter to solve this dilemma, by seeing it as a basis for preferring granting immunity to the UN to the right to a fair trial of the claimants. This Charter provisions says that, in case of a clash between obligations under the UN Charter and obligations under any other international agreement, the former prevail. According to the UN Charter, the UN enjoys all immunities necessary for the fulfilment of its purposes (105 UN Charter), and the domestic courts must let this obligation prevail over the obligation of the state to guarantee the claimants a fair and public hearing by an independent and impartial tribunal established by law in the determination of their civil rights.⁶⁸

If Article 103 UN Charter was not so decisive, there might be room to really balance the two obligations against each other. The question would then be whether granting immunity to the UN reduces the access left to the individual in such a way or to such an extent that the very essence of the right is impaired, and to see whether the UN's immunity pursues a legitimate aim, and to investigate whether there is a reasonable relationship of proportionality between the means employed and the aim sought to be achieved.⁶⁹ In assessing proportionality, an important factor is the lack of an alternative legal remedy provided at the UN level. Many Status of Forces agreements (SOFAs) oblige the UN to provide such a remedy, but this is often not done. The UN prefers paying compensation for injuries sustained during peacekeeping missions on an *ad hoc* basis. Although such *ad hoc* arrangements might be considered an appropriate solution by the victims, it does make it possible for the UN to avoid being held responsible, by a court with some authority to make such a determination, for the breach of an international legal obligation.

Most courts will probably not engage in such a balance, because they see Article 103 UN Charter as obliging them always to prefer UN immunity over the right to a fair trial of the claimants. If UN immunity always prevails over the right to a fair trial, this is highly problematic. After all, if the failure to prevent atrocity crimes can be attributed to the UN, and if this also excludes attribution to the troop-contributing state, then the claimants are basically left

68 See Otto Spijkers, 'The Immunity of the United Nations before the Dutch Courts', *Military Law and the Law of War Review / Revue de Droit Militaire et de Droit de la Guerre*, vol. 51, no. 1, 2012, pp. 361–393.

69 These criteria are derived from European Court of Human Rights, *Waite and Kennedy v. Germany* (18 February 1999, no. 26083/94), esp. paras. 59, 67–69.

empty-handed. It is thus a good thing that in some recent decisions the possibility has been accepted that the same acts *can* be attributed to both the UN and the troop-contributing state, depending on who exercises effective control.⁷⁰

The article by Stephan Hollenberg in this special issue shows how problematic it is to prefer immunity over the right to a fair trial. In Haiti, a cholera epidemic broke out in late 2010, after the earthquake, killing more than seven thousand Haitians. Victims of this epidemic, and relatives of victims, believe that the United Nations Stabilization Mission in Haiti (MINUSTAH), a United Nations peacekeeping force, brought the cholera to the country. They argued *inter alia* that “the UN is liable for negligence, gross negligence, recklessness, and deliberate indifference for the health and lives of Haitian people resulting in petitioners’ injuries and deaths from cholera.”⁷¹ They thus want the UN to compensate them for the damage caused by this negligence. The victims, represented by a US based association called the Institute for Justice and Democracy in Haiti (IJDH),⁷² have asked the UN to issue a public acknowledgment of responsibility and pay appropriate compensation. To see how the New York District Court dealt with the question, we kindly refer the reader to Hollenberg’s article.

6 Normative Constraints

In addition to strictly binding rules under international law, international norms⁷³ including the R2P and the protection of civilians (POC) (about the interpretation of which there is much debate) raise expectations how the UN, member states and peacekeepers should act. International norms have generally become more permissive of an expanded role for peacekeepers, including, but not limited to, the expansion of conditions under which deadly force may

70 *Mustafić and Nuhanović versus the State of The Netherlands*, Court of Appeals The Hague, Case Nos. 200.020.173/01 and 200.020.174/01, judgments of 5 July 2011.

71 Petition for Relief, submitted to the United Nations by the Institute for Justice and Democracy in Haiti (IJDH), on 3 November 2011, §§ 72–79.

72 See the website of the Institute for Justice & Democracy in Haiti: ijdh.org.

73 From an ethical point of view, a norm may be defined as “a pattern of behaviour that should be followed in accordance with a given value system; that is, to refer to the moral code of a society: *a generally accepted standard of proper behaviour*”, Ramesh Thakur, *The Responsibility to Protect. Norms, Laws and the Use of Force in International Politics* (Oxon: Routledge, 2011), p. 2. For a broader discussion on norms and laws in international relations, see Ramesh Thakur, *ibid.*, pp. 1–13.

be used, the protection of civilians and vulnerable groups in conflict affected societies, whether or not the situation is created by an inter-state war. At the same time, changing norms have impacted what behaviour is expected of peacekeepers (responsibility while protecting), including guidelines as to what actions and inactions are permitted while carrying out their duties. Much of this normative expansion has taken place since the end of the Cold War, and in general revolves around the related, but nevertheless distinct, paradigms of POC and R2P, both of which, in turn, are impacted by the international normative transition from state-centric security considerations, to the growing human security paradigm.

During the Cold War the majority of the limited number of UN PKOs were deployed to interstate conflicts with essentially a mandate to keep parties to a conflict separated and to police cease-fires. With the end of the Cold War, the number of UN PKOs mushroomed, with the vast majority being deployed in situations of intra-state conflict or “failed” states.⁷⁴ The prevalence of non-state conflict, or one-sided violence has continued into the new millennium. The 10-year period 2002–11 saw 73 active state-based conflicts, including 37 that were active in 2011; 223 non-state conflicts, including 38 that were active in 2011; and 130 actors recorded as carrying out one-sided violence, including 23 in 2011.⁷⁵

The Protection of Civilians

POC has a lengthy legal heritage and foundation in principles of international humanitarian law (IHL) which assert that non-combatants should, so far as is possible, be spared the harms of war. Traditions of just war and customary law dating back centuries enshrine the principle of discrimination, whereby all combatants have a duty not only to avoid targeting civilians, but also to do all in their power to minimise the suffering of non-combatants, even at the cost of an increased risk to the combatants themselves. As a consequence of the horrific total wars of the 19th and 20th Centuries these principles were codified in such treaties as the Geneva Conventions of 1949 and the Additional Protocols of 1977.⁷⁶ In the contemporary discourse, scholars distinguish between different concepts of protection, for example,

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- 74 Yuji Uesugi, ‘The Nexus between UN Peacekeeping and Human Security: Reviewing the Functions of UN Peacekeeping from a Perspective of Human Security’ in *Conflict and Human Security: A Search for New Approaches of Peace-Building* (Hiroshima: IPSHU English Research Report Series no. 19, 2004, pp. 96–123, p. 96).
 - 75 *SIPRI Yearbook* (OUP, Oxford, 2013), available at <http://www.sipri.org/yearbook/2013/01> (accessed on 4 May 2015).
 - 76 Hugh Breakey, Angus Francis, Vesselin Popovski, Charles Sampford, Michael G. Smith, and Ramesh Thakur, *Enhancing Protection Capacity: Policy Guide to the Responsibility to*

humanitarian POC, Security Council POC, Combatant POC and Peacekeeping POC. Hugh Breakey defines the four different concepts in the following way:

Combatant POC. Directed to combatants in armed conflicts, *combatant POC* is the principle: “We must not harm or unduly risk harm to non-combatants”.

Peacekeeping POC. Directed to peacekeeping forces that have protection mandates, peacekeeping POC is the principle: “Taking responsibility for peace enforcement in an area necessarily involves taking responsibility for the protection of civilians in that area”.

Security Council POC. Directed to the UN Security Council (UNSC) and Secretariat, *Security Council POC* is the concept that: “Where feasible, basic rights should be protected from large scale violation”.

Humanitarian POC. Directed to humanitarian actors such as the Red Cross, United Nations High Commissioner for Refugees (UNHCR) and Oxfam, *humanitarian POC* is the concept that: “Where possible and acting within all relevant constraints, humanitarian organizations at work in a region should aim to contribute through peaceful means to the protection from violence and deprivation of local civilians”.⁷⁷

The following paragraphs discuss the protection of civilians in the context of UN peacekeeping operations which refers to a set of tasks “to protect civilians under imminent threat”, authorized by the Security Council under Chapter VII of the UN Charter. POC tasks in peacekeeping operations include among others, securing safe corridors, establishing safe havens, military observation, de-mining, training local security forces, stopping hate media, direct use of force against killers. Since the end of the Cold War explicit references to POC have proliferated in the UNSC, with a series of reports by the UN Secretary-General, five UNSC resolutions, and nine presidential statements.⁷⁸

Protect and the Protection of Civilians in Armed Conflicts (Institute for Ethics, Governance and Law, 2012), p. viii.

77 Hugh Breakey, ‘The Protection of Civilians in Armed Conflict: Four Concepts’ in Angus Francis, Vesselin Popovski, Charles Sampford, *Norms of Protection. Responsibility to Protect, Protection of Civilians and their Interaction* (Tokyo, New York, Paris: United Nations University Press, 2012), pp. 40–41.

78 Reports by the UN Secretary-General (S/1999/957, S/2001/331, S/2002/1300, S/2004/431, S/2005/740, S/2007/643, S/2009/277, and S/2010/579); UNSC resolutions (Res. 1265 in 1999; 1296 in 2000; 1674 and 1738 in 2006; and 1894 in 2009); presidential statements (1999/6, 2002/6, 2002/41, 2003/27, 2004/46, 2005/25, 2008/18, 2009/1, 2010/25) http://www.un.org/en/peacekeeping/documents/sc_poc_meetings.pdf (accessed on 4 May 2015).

As of February 2015, the Security Council has incorporated POC into thirteen different missions, including nine current ones.⁷⁹ Hence the final report of the 2000 Panel on United Nations Peace Operations (commonly termed the Brahimi Report after the Chair of the Panel, Lakhdar Brahimi) specifically addressed the challenges of protecting civilians.⁸⁰ Furthermore, the March 2009 report of the General Assembly's Special Committee on Peacekeeping Operations (C-34), made explicit the relationship between peacekeeping and POC.⁸¹ "Evidently, peace operations are now firmly in the business of protecting civilians from harm".⁸²

The codified or positive IHL approach to POC involves, however, a fairly narrow interpretation. The post-Cold War expanding normative operating environment has seen POC pursued as an activity and objective by a variety of institutional actors in accordance with a broader conceptualization. For example, when peacekeepers work alongside other UN agencies, international organizations, and NGOs, each with their own mandate and policies designed to

79 See Security Council Resolution 1270, UN Doc. S/RES/1270 (1999), 22 October 1999. See also Security Council Resolution 1291, UN Doc. S/RES/1291 (2000), 24 February 2000; Security Council Resolution 1493, UN Doc. S/RES/1493 (2003), 28 July 2003, regarding the United Nations Mission in the Democratic Republic of Congo (MONUC); Security Council Resolution 1528, UN Doc. S/RES/1528 (2004), 27 February 2004; Security Council Resolution 1609, UN Doc. S/RES/1609 (2005), 24 June 2005; Security Council Resolution 1793, UN Doc. S/RES/1793 (2007), 21 December 2007, regarding the United Nations Operation in Côte d'Ivoire (UNOCI); Security Council Resolutions 1590, UN Doc. S/RES/1590 (2005), 24 March 2005; Security Council Resolution 1870, UN Doc. S/RES/1870 (2009), 20 May 2009, regarding the United Nations Mission in Sudan (UNMIS); Security Council Resolution 1990, UN Doc. S/RES/1990 (2011), 27 June 2011, regarding the United Nations Interim Security Force for Abyei (UNIFSA); Security Council Resolution 1925, UN Doc. S/RES/1925, 28 May 2010, regarding United Nations Organization Stabilization Mission in the Democratic Republic of the Congo (MONUSCO); Security Council Resolution 1996, UN Doc. S/RES/1996, 8 July 2011, regarding the United Nations Mission in the Republic of South Sudan (UNMISS) and Security Council Resolution 2100, UN Doc. S/RES/2100, 25 April 2013, regarding the United Nations Multidimensional Integrated Stabilization Mission in Mali (MINUSMA).

80 UN Doc A/55/305–S/2000/809 *Comprehensive Review of the Whole Question of Peacekeeping Operations in All Their Aspects* http://www.un.org/en/ga/search/view_doc.asp?symbol=A/55/305 (accessed on 4 May 2015).

81 UN Doc A/63/19 *Report of the Special Committee on Peacekeeping Operations and its Working Group*, <http://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/Civilians%20A%2063%2019.pdf> (accessed on 5 May 2015).

82 Charles T. Hunt, and Alex J. Bellamy, 'Mainstreaming the Responsibility to Protect in Peace Operations', *Civil Wars*, vol. 13, issue 1, 2011, pp. 1–20, 4.

contribute to the protection of civilians affected by conflict and violence.⁸³ Whereas UN PKOs were traditionally deployed to support negotiated cease-fires and to prevent a return to interstate warfare, meaning that the POC was thus an indirect but welcome consequence of such activities rather than their direct or immediate goal, “a broader vision of POC reverses this prioritization”.⁸⁴

From the turn of the Millennium, the Security Council has included reference to “the protection of civilians” in peacekeeping mandates for operations under Chapter VII of the UN Charter, as well as for authorized missions led by other multinational organizations or coalitions, making explicit that which had long been expected of peacekeepers by the public at large.⁸⁵ Indeed, “protecting civilians from harm is at the core of the legitimacy, credibility, and popular support for peace operations and the peace processes they support”.⁸⁶ A broad interpretation of POC therefore, is much more explicitly normative, and focuses on questions of legitimacy (and public perceptions of legitimacy) rather than strict legality. The broadening of POC has been part of a larger normative trend in the contemporary international operating environment whereby the obligations, duties, and responsibilities of international actors are seen as perhaps more legitimate than traditional sovereign rights. At the heart of this normative evolution has been the contemporary discussion on the new paradigm of the Responsibility to Protect, and the extent to which R2P constrains, enables, and obliges certain actions and inactions.

The Responsibility to Protect

In response to normative discourse on the broadening of POC, international obligations, duties, and responsibilities, and the failure of international peace operations to protect civilians in the Rwandan genocide of 1994, and the controversies and shortcomings of international operations in Somalia, Bosnia, and Kosovo, the Government of Canada, together with a group of major foundations, announced at the General Assembly in September 2000 the establishment of the International Commission on Intervention and state Sovereignty (ICISS).⁸⁷ In 2001 ICISS released the Report entitled *The Responsibility to*

83 Breakey *et al.*, *Enhancing Protection Capacity*, p. ix.

84 Victoria K. Holt and Tobias C. Berkman, *The Impossible Mandate? Military Preparedness, the Responsibility to Protect and Modern Peace Operations* (Washington D.C.: Henry L. Stimson Center, 2006), p. 4.

85 *Ibid.*, pp. 4–5.

86 Hunt and Bellamy, ‘Mainstreaming the Responsibility to Protect in Peace Operations’, p. 2.

87 ICISS, *Report of the International Commission on Intervention and State Sovereignty: The Responsibility to Protect* available at <http://responsibilitytoprotect.org/ICISS%20Report.pdf> (accessed on 4 May 2015.), p. VII.

Protect which in fact covered three sets of responsibilities (to prevent, to react, and to rebuild), in the face of “large scale loss of life”, or “large scale ethnic cleansing”.⁸⁸ It further included a specific endorsement of humanitarian intervention for “[w]here a population is suffering serious harm, as a result of internal war, insurgency, repression or state failure, and the state in question is unwilling or unable to halt or avert it, the principle of non-intervention yields to the international responsibility to protect”.⁸⁹ This last element, however, proved to be very controversial, and not generally supported by non-Western states. Thus when the doctrine was authoritatively (and unanimously) formulated and adopted by the General Assembly in the World Summit Outcome Document of 2005, and further affirmed in 2006 by UNSC Resolution 1674, the interventionary provisions were dropped, and the focus narrowed to the international crimes of genocide, war crimes, crimes against humanity and ethnic cleansing, rather than the more generic humanitarian language used in the ICISS report. Four Secretary-General Reports in four years helped develop the principle,⁹⁰ and on September 14, 2009, after extensive debate during the preceding months, the General Assembly issued its defining Resolution on R2P.⁹¹

Clearly there is a close relationship between a broad definition of POC and R2P and the normative rather than strictly legal implications of these humanitarian regimes. For Breakey et al, R2P and Broad POC both have elements comprising international law and elements going beyond the law’s strict requirements, whereas “Narrow POC—IHL—is strict international law, based both on universally signed treaties and customary international law. In this respect Narrow POC must be sharply distinguished from both R2P and Broad POC”.⁹² The concept of POC, therefore, is seen as both broader than that of R2P, “to the extent that the rights and needs of those caught up in armed conflict go well beyond their protection from the particular mass atrocity crimes on which R2P is specifically focused”, but also narrower, “to the extent that POC is only concerned with armed conflict situations, whereas R2P is concerned with preventing and halting mass atrocity crimes regardless of whether they occur in a war environment”.⁹³ Hunt and Bellamy note that the POC from mass atrocity crimes has become a key contemporary challenge for international institutions, with unprecedented development of norms aimed at addressing past

88 *Ibid.*, pp. XI–XII.

89 *Ibid.*, p. XI.

90 Breakey et al., *Enhancing Protection Capacity*, p. ix.

91 UN Doc. A/RES/63/308 available at http://www.un.org/en/ga/search/view_doc.asp?symbol=A/RES/63/308 (accessed on 4 May 2015).

92 *Ibid.*, p. xxvi.

93 Gareth Evans, ‘Foreword’ in Breakey et al., *Enhancing Protection Capacity*, pp. iv–v.

failure, most notably the R2P, and contemporary peace operations are now routinely mandated to protect civilians in unstable situations.⁹⁴ They argue that the three major roles for peace operations that contribute to implementing the R2P are capacity-building (assisting local authorities to build indigenous capacity to protect civilians); indirect protection (the inclusion of and assistance to civilian components with protection mandates); and direct protection (provision of civilian protection through immediate action in accordance with robust mandates).⁹⁵

Although POC has been at the core of many UN missions, an ongoing problem has been how to implement POC effectively in practice.⁹⁶ As pointed out in the Security Council debate on UN peacekeeping operations in October 2014 “a gap persists between ambitious normative frameworks and tragic realities on the ground”⁹⁷ and “there remain large gaps between principle and practice, between mandates and implementation”.⁹⁸ In 2014, the Office of Internal Oversight Services which evaluated the implementation and results of protection of civilian mandates criticized that even though the use of force had been legally authorised by the Security Council there is “a persistent pattern of peacekeeping operations not intervening with force when civilians are under attack”.⁹⁹ The report found that of the 507 incidents involving civilians only twenty per cent had attracted an immediate mission response. The incidents included civilian deaths, injuries, sexual violence, etc. The report also pointed out that “in cases where response was reported, missions almost never used force, even as a last resort”.¹⁰⁰ The report also attempted to provide reasons for the lack of protection. These included: a) different views among the SC and troop-contributing countries; b) dual line of command; c) lack of understanding when to act; d) missions viewed themselves as “weak, outnumbered and

94 Hunt and Bellamy, ‘Mainstreaming the Responsibility to Protect in Peace Operations’, p. 1.

95 *Ibid.*, p. 5.

96 See in detail, the landmark study by Victoria Holt and Glyn Taylor with Max Kelly, *Protecting Civilians in the Context of UN Peacekeeping Operations. Successes, Setbacks and Remaining Challenges* (New York: United Nations, 2009).

97 UN doc. S/PV. 7275 of 10 October 2014, see the statement by the Permanent Representative of Lithuania to the United Nations, Ms. Murmokaitė at p. 14.

98 *Ibid.*, see the statement by the Permanent Representative of the United Kingdom to the United Nations, Sir Mark Lyall Grant at p. 10.

99 Office of Internal Oversight Services, *Evaluation of the Implementation and Results of Protection of Civilian Mandates in United Nations Peacekeeping Operations*, UN doc. A/68/787 of 7 March 2014.

100 *Ibid.*, p. 7–8.

stretched across vast areas"; e) concerns about possible penalties; and f) inadequate tactical-level guidance.¹⁰¹

Both broad POC and R2P further introduce elements of post-conflict development, re-construction, and indigenous capacity building which not only go beyond traditional and narrow concepts of peacekeeping and IHL, but also spill over into another realm of normative growth in the UN, that of Security Sector Reform (SSR).¹⁰² Key to all the documents related to SSR in the UN is an emphasis on norms and human rights and human rather than state-centric security considerations, and an awareness of the close relationship between security and development. Indeed the above mentioned Report of the Secretary-General is primarily entitled *Securing Peace and Development*, with the subtitle referring to *the Role of the United Nations in Supporting Security Sector Reform*. The Secretary-General established an Inter-Agency SSR Task Force that is co-chaired by DPKO and the United Nations Development Programme (UNDP) with representation from 14 UN entities engaged in SSR, with a goal to enhance the UN capacity to deliver more efficient and more effective support to national SSR efforts.¹⁰³ The broadening of the normative discourse on peacekeeping can now be seen, therefore, to include more sectors of international activity, and more agencies of the UN.

Human Security

Since the publication of the seminal UNDP human development report in 1994, these normative concepts and practical agendas have been encapsulated in the (relatively) new paradigm of human security.¹⁰⁴ Indeed, Yuji Uesugi finds the concept of human security to be an effective analytical tool to fill the gaps between today's intrastate conflictual reality and the existing strategies of interstate peacekeeping.¹⁰⁵ Human security suggests that international security, traditionally defined with its territorial emphasis, does not necessarily correlate with the concept of security for the individuals who comprise the state, and that an over-emphasis upon state security can be to the detriment of human welfare needs.¹⁰⁶ Human security is non-hegemonic in that the major

101 *Ibid.*, pp. 12–16.

102 Ban, Ki-moon, foreword to 'The United Nations SSR Perspective', UN Department of Peacekeeping Operations, http://www.un.org/en/peacekeeping/publications/ssr/ssr_perspective_2012.pdf (accessed on 20 February 2015).

103 *Ibid.*

104 United Nations Development Programme [UNDP], *Human Development Report 1994* (New York: Oxford University Press, 1994).

105 Yuji Uesugi, 'The Nexus between UN Peacekeeping and Human Security', p. 98.

106 Edward Newman, 'Critical Human Security Studies', *Review of International Studies*, vol. 36, issue 1, January 2010, pp. 77–94, p. 79.

impetus for the development of the paradigm has come from academics, from middle-ranked powers like Canada and Japan rather than the United States, and from international organizations and their spokespersons.¹⁰⁷ 20 years after the seminal report of UNDP, and more than a decade after initiatives from the chief national proponents, “the concept of human security has made significant contribution, not only by broadening the scope of security horizontally to non-military activities but also by shifting the reference point of security vertically from state to individuals”.¹⁰⁸

UN agencies have tended to reflect a broad approach to human security (when compared to narrow security-focused perspectives of some member states). Established in 2000, the goal of the UN sponsored Commission on Human Security (CHS) was “to promote public understanding of human security”, to develop the concept “as an operational tool for policy formulation and implementation”, and “to propose a concrete program of action”.¹⁰⁹ In 2003, the Commission on Human Security (CHS) presented its final report, *Human Security Now*, which included human dignity, means for financing human security in post-conflict situations, and linkage between the issues of human security and fair trade, minimum living standards, access to education, and respect for diversity.¹¹⁰ The UN has implemented more than 194 human security projects worldwide.¹¹¹ The disconnect between the narrow and broad approaches has, however, had serious consequences for the application of human security. Indeed, Japan and South Korea, taking a broad approach to human security, but applying a limited interpretation of the permissibility of intervention under the R2P have explicitly rejected linkages between the two.¹¹² Nevertheless, with the broadening of the POC doctrine, and the contemporary restricted non-interventionary interpretation of R2P, the two sides have also come closer

107 Kinhide Mushajori, ‘Three Reasons Why We Should Study Human Security’, *Journal of Human Security Studies*, vol. 1, winter 2012, p. 1.

108 Yukio Takaso, ‘Mainstreaming Human Security in the Global Agenda’, *Journal of Human Security Studies*, vol. 1, winter 2012, pp. 2–7, 2.

109 CHS, *Human Security Now: Final Report* (New York: CHS, 2003).

110 *Ibid.*

111 MOFA, *Evaluation on Multilateral ODA: The United Nations Trust Fund for Human Security* (Summary), (March, 2010), available at <http://www.mofa.go.jp/policy/oda/evaluation/FY2009/text-pdf/hsf.pdf> (accessed on May 8, 2013).

112 Park, Ik, ‘Permanent Representative of the Republic of Korea to the United Nations’, *Plenary Meeting of the General Assembly on Responsibility to Protect*, New York, United States, 23 July 2009, http://www.responsibilitytoprotect.org/Korea_ENG.pdf; Alex J. Bellamy and Sara E. Davies, ‘The Responsibility to Protect in the Asia-Pacific Region’, *Security Dialogue*, vol. 40, issue 6, 2009, pp. 547–74, p. 552.

together, with important implications for the normative construct of PKOs and obligations for the UN and its Members.

There may not be explicit use of the language of human security in peacekeeping mandates, but the discourse has had a major impact upon the normative framing of the UN agenda with regard to focusing on vulnerable groups and individuals. The coming together within the framework of the UN of various duties including but not limited to the R2P, the POC, and indeed, development issues such as the Millennium Development Goals (MDGs), have ensured a human-centred approach towards the evaluation of contemporary PKOs that goes far beyond the traditional conflict management perspective of keeping combatants apart, towards a more transformative approach wherein the underlying conditions which promote conflictual relationships are instead addressed. The human security perspective suggests new normative guidelines for peacekeeping should aim at fulfilling *transition assistance* functions.¹¹³ Thereby contributing to the transformation of underlying conflictual relationships, and the building of sustainable peace.

Hence the International Committee of the Red Cross (ICRC) has examined the legal, policy, and operational issues of protection and created a multi-layered “egg” model of protection, involving three categories of activity to support protection: responsive action, remedial action, and environment building.¹¹⁴ Holt and Berkman note that, therefore, protection (a key function of contemporary PKOs) can involve “encouraging peace and economic development; preventing conflict; promoting compliance with international law; addressing the special needs of women, children and the displaced; stopping small-arms proliferation; ensuring the safety of humanitarian-relief workers and their access to vulnerable populations; disarming, demobilizing, reintegrating and rehabilitating ex-combatants; and tackling ‘hate media’”.¹¹⁵

7 Conclusion

The legitimacy of UN peacekeeping operations depends on a number of factors. In addition to consensus among the members of the Security Council, consent from the host state and support from the local people, legitimacy

¹¹³ Yuji Uesugi, ‘The Nexus between UN Peacekeeping and Human Security’, p. 120.

¹¹⁴ Holt and Berkman, *The Impossible Mandate*, p. 19. See also Brendan Howe, *The Protection and Promotion of Human Security in East Asia* (Basingstoke: Palgrave Macmillan, 2013) for a detailed model of concentric circles of responsibility and entitlement rights.

¹¹⁵ *Ibid.*, p. 21.

requires compliance with normative expectations and legal standards as discussed above. Thus it is important that training before and during a peacekeeping mission should ensure that the individual peacekeeper has a basic understanding of the complex role of norms in UN peacekeeping operations. Addressing the accountability gap and implementing the protection of civilians in practice will remain a challenging task for the United Nations for the foreseeable future.