The Human Rights Obligations of UN Peacekeepers

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Abstract (200 words max)

Over 100,000 UN peacekeeping personnel are deployed on missions with authority from the Security Council, under Chapter VII of the UN Charter, to use force to protect civilians. Nevertheless, they have repeatedly failed to do so and yet there does not appear to be a single case where the UN has taken disciplinary action against senior staff for failing to act in line with a mission mandate in this regard. This article argues that the ´positive´ and ´negative´ obligations of international human rights law, protecting the right to life and physical integrity, provide the most appropriate guidance to the tactical use of force by UN peacekeeping soldiers. Mechanisms also need to be created to improve the accountability of UN missions to those that they are responsible for protecting.

Keywords (4-6)

International law, human rights, Protection of Civilians

Bio note

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Introduction

What are the obligations of UN peacekeeping soldiers under international human rights law? The legal discussions surrounding this debate are complex, and will be explored further below, but they also have extremely practical implications that directly impact on the future of peacekeeping operations.

There are now over 100,000 UN uniformed peacekeeping personnel deployed around the world in missions that have legal authority from the Security Council, under Chapter VII of the Charter, to use force to protect civilians (POC).[1] A number of independent reviews have, however, been sharply critical of their records in actually doing so.[2] In March 2014, for example, a report by the UN Office of Internal Oversight Services (OIOS) stated that while POC mandates create a 'legal obligation' on missions to 'use force, including deadly force . . . within their capabilities when civilians are in imminent physical danger or actually being attacked in their areas of deployment' they routinely avoided doing so and that 'force is almost never used to protect civilians under attack.'[3] Internal inquiries and lessons learned reports into particular incidents where missions failed to protect civilians have often identified failures of both management and political leadership. Missions have also failed to investigate fully and speak out against violations, particularly when these are committed by, or with the acquiescence of, government forces in the host state.[4] In some cases missions have been complicit in these violations by providing support to the forces that committed them.[5] Yet there does not appear to be a single case where the UN has initiated disciplinary action against senior mission or headquarters staff for failing to protect civilians in line with a mission mandate.

[1] *Surge in Uniformed UN Peacekeeping Personnel from 1991 present*, which gives a total of 104,688 for all uniformed peacekeeping personnel (soldiers, police and military observers) on 31 March 2015.
[2] Victoria Holt and Glyn Taylor, *Protecting civilians in the context of UN peacekeeping operations*, New York: United Nations, 2009.
[3] *Evaluation of the implementation and results of protection of civilians mandates in United Nations peacekeeping operations,* Report of the Office of Internal Oversight Services, UN Doc A/68/787, 7 March 2014, para 55.
[4] *Foreign Policy*, Why is the U.N. soft-pedalling its criticism of Sudan?, 4 August 2011*; Foreign Policy*, Report, 'They just stood watching' 7 April 2014*; Foreign Policy*, 'See no evil speak no evil: UN covers up Sudan´s bad behaviour in Darfur', 21 November 2014; *Guardian, '*Don't abandon Darfur, UN whistle-blower says', 19 January 2015; International Crisis Group, *The Chaos in Darfur*, Crisis Group Africa Briefing N°110, 22 April 2015; Human Rights Watch, *Men with no mercy: rapid support forces attacks against civilians in Darfur,* New York: HRW, 9 September 2015.
[5] See, for example, *Press statement by Professor Philip Alston, UN Special Rapporteur on extrajudicial executions. Mission to the Democratic Republic of the Congo, 5–15 October 2009*, 15 October 2009 and Amnesty International, *UN aids Sudanese official wanted for war crimes*, 13 January 2011.

The UN is not a party to any international human rights or humanitarian treaties and there is no mechanism for reviewing the UN´s human rights record. There are, however, a growing number of UN resolutions, reports and policy documents that refer to the relevance of both IHL and international human rights law to its peacekeeping missions.[6] The UN's own Legal Counsel stated in an internal memorandum, in 2009, that the Organization had ´obligations under customary international law and from the Charter to uphold, promote and encourage respect for human rights, international humanitarian law and refugee law.´[7] In 2013 this was expressly recognized in the Security Council´s endorsement of the UN´s Human Rights Due Diligence Policy (HRDDP) and Human Rights Up Front (HRUF).[8]

Individual states contributing troops to UN peacekeeping missions have also faced legal challenges for actions, or inactions, which resulted in violations of the right to life.[9] Challenging individual troop contributing countries (TCCs) for alleged violations, however, could lead to a potential crisis in peacekeeping because states that are party to strong regional human rights mechanisms, or with strong domestic human rights accountability, may become even more reluctant to participate in such missions.

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[6] See, for example: *United Nations Peacekeeping Operations, Principles and Guidelines* (*Capstone Document*), New York: Department of Peacekeeping Operations, 2008, p.60; *We are United Nations Peacekeepers*, New York: United Nations Department of Peacekeeping Operations Training Unit, undated; See also: UN Office for the Coordination of Humanitarian Affairs, *Security Council Norms and Practice on the Protection of Civilians in Armed Conflict: Analysis of Normative Developments in Security Council Resolutions 2009-2013*, OCHA, 2014; DPKO/DFS *Policy on the Protection of Civilians in United Nations Peacekeeping*, Ref. 2015.07, 1 April 2015; *Protection of Civilians: Implementing Guidelines for Military Components of United Nations Peacekeeping Missions,* Department of Peacekeeping Operations / Department of Field Support, February 2015; OCHA, UN Office for the High Commissioner of Human Rights and the UN High Commissioner for Refugees, *The Protection of Human Rights in Humanitarian Crises, Geneva: OHCHR/UNHCR, 8 May 2013; and* OHCHR/DPKO/DPA/DFS *Policy on Human Rights in United Nations Peace Operations and Political Missions*, Ref. 2011.20, 1 September 2011.

[7] Confidential note, leaked by the *New York Times*, from the UN Office of Legal Affairs to Mr. Le Roy, Head of the Department of Peacekeeping Operations, 1 April 2009, para.10.

[8] *Human rights due diligence policy on United Nations support to non-United Nations security forces*, UN Doc. A/67/775–S/2013/110, 5 March 2013. *Human Rights Up Front*, http://www.un.org/sg/rightsupfront/, accessed 30 July 2015.

[9] *Mothers of Srebrenica v. the Netherlands* ECLI:NL:RBDHA:2014:8748 (The Hague District Court) 2014; and *Mukeshimana-Ngulinzira and Others v Belgium and Others*, Court of First Instance Judgment, RG No 04/4807/A, 07/15547/A, ILDC 1604 (BE 2010) 8th December 2010.

It will be argued instead that the UN should issue a Secretary General's Bulletin acknowledging the applicability of international human rights law to its peacekeeping missions and setting out the obligations that this entails. Monitoring mechanisms should also be established which could receive individual complaints and issue advisory opinions on the compliance of missions with these obligations.

The rest of this article will first discuss the applicability of international human rights law to international military operations and then the particular problems of applying this legal framework to operations authorised by the UN Security Council under Chapter VII of the Charter. It will first outline the provisions of international human rights law that appear, *prime facie*, to be of considerable relevance to the POC tasks of UN peacekeepers. It will be shown that these provisions can, in principle, apply extra-territorially and continue to apply during a conflict where they may be concurrently applicable with the provisions of international humanitarian law (IHL). The ´positive´ and ´negative´ obligations of international human rights law are, therefore, potentially applicable to peacekeeping soldiers and appear to provide more appropriate guidance on the use of force for POC purposes than IHL. The UN Charter, however, specifies that its provisions take precedence over all other international treaties. There is no mechanism to judicially review the Security Council's actions and the legal immunities that cover UN missions, makes it extremely difficult to scrutinise their records for compliance with international human rights law.

International human rights law in war zones: nonsense upon stilts?

A Chapter VII mandate provides a UN mission with the *jus ad bellum* authority to use force, but is silent on the rules that would govern the resulting actions. These must either be found in the *jus in bello* provisions of IHL or the regulations on the use of force contained in international human rights law. Most existing guidance produced by the UN stresses the applicability of IHL, but this there are strong grounds for thinking that – unless the mission actually becomes a party to the conflict that it was sent to help resolve – international human rights law will usually provide more appropriate guidance.

International human rights law applies to all human beings at all times in all places within a state's jurisdiction.[10] It imposes both 'negative' and 'positive' obligations. A 'negative' obligation is a duty to 'respect', or not to directly violate, a particular right. A 'positive' obligation is a duty to 'ensure' its protection. It is also now generally accepted that states may be held accountable for acts carried out by private individuals if it supports or tolerates them, or fails in other ways to provide effective protection in law against them.[11] This can include 'in certain well-defined circumstances a positive obligation on the authorities to take preventive operational measures to protect an individual' from threats to their life and physical integrity.[12] A positive obligation could arise if the authorities knew, or ought to have known at the time, of the existence of a real and immediate risk to civilians and failed to take measures within the scope of its powers, which, judged reasonably, might be expected to have avoided or ameliorated the risk.[13]

[10] The Secretary-General, *Report of the Secretary-General on Respect for Human Rights in Armed Conflicts*, 25, UN Doc. A/8052 (1970); 'Vienna Declaration and Programme of Action', World Conference on Human Rights, Vienna, A/CONF.157/23, 14-25 June 1993.
[11] *L.C.B. v. UK*, Appl. No. 14/1997/798/100, Judgment 9 June 1998, para 36.
[12] *Osman v UK*, Appl. No. 23452/94, Judgment 28 October 1998, paras 115-6. See also Inter-Am. Ct HR *Velásquez Rodríguez Case*, Judgment 29 July 1988, Inter-Am. Ct HR Series C, No. 4. .
[13] ECtHR *Mahmut Kaya v. Turkey*, Appl. No. 22535/93, Judgment 28 March 2000, para 86.

There is considerable jurisprudence about the nature and extent of these obligations at the domestic level. The extent to which these provisions continue to apply outside a state´s national territory is more controversial, although it is widely accepted that if a state controls a foreign territory as a result of military occupation, all of the provisions in the human rights treaties to which it is a party are applicable in that territory.[14] It is also generally agreed that if a state detains people on foreign territory then the relevant human rights treaties will be applicable.[15] It is less clear, however, whether this extends to all other uses of force.

In *Bankovic v. Belgium and 16 Other Contracting States* the European Court of Human Rights ruled inadmissible a claim brought by relatives of five employees of a Serbian television centre who were killed by a NATO bomb during the Kosovo crisis.[16] This decision appears in contradiction with many of the Courts other decisions and may have been partly motivated by a desire to avoid entering into the controversy about whether the attack – carried out during a ´humanitarian intervention´ – constituted a war crime.[17] In the *Al-Skeini* case, which concerned six Iraqis killed by British occupation forces in 2003, the Court stated that 'in certain circumstances, the use of force by a State's agents operating outside its territory may bring the individual thereby brought

[14] For example: ECtHR *Al-Skeini and Others v. UK*, Appl. No. 55721/07, Judgment (Grand Chamber) 7 July 2011; *Andreou v. Turkey*, Appl. No. 45653/99.
[15] ECtHR *Al-Jedda v. UK*, Appl. No. 27021/08, Judgment (Grand Chamber) 7 July 2011; *Al-Saadoon and Mufdhi v. UK*, Appl. No. 61498/08, Judgment 2 March 2010; *Medvedyev and Others v. France* Appl. No. 3394/03, Judgment (Grand Chamber) 23 March 2010; *Ocalan v Turkey*, Appl. 46221/99, Decision on Admissibility 12 May 2005; Inter-Am Com HR, *Precautionary Measures on Guantanamo Bay*, Cuba 13 March 2002; HRC *Lopez Burgos v Uruguay*, UN Doc. CCPR/C/13/D/52/1979.
[16] *Bankovic v. Belgium and 16 Other Contracting States*, Appl. No. 52207/99, (Grand Chamber), Decision on Admissibility, 19 December 2001.
[17] For further discussion, see, for example, Kerem Altiparmak, 'Bankovic: An Obstacle to the Application of the European Convention for Human Rights in Iraq?', 9 J. *Conflict & Security Law*, 2004, pp. 213, 223-24; and Alexander Orakhelashvili, 'Restrictive Interpretation of Human Rights Treaties in the Recent Jurisprudence of the European Court of Human Rights', *European Journal of International Law*, Vol. 14, No. 3, 2003, pp.529-68.

under the control of the State's authorities into the State's Article 1 jurisdiction'.[18] The Court has used similar reasoning in a number of other cases.[19]

It is also now widely – although not universally – agreed that the traditional paradigm by which international human rights law governed relations between states and their own citizens in times of peace, while IHL primarily regulated the conduct of international armed conflicts is outdated.[20] Although the exact relationship between the two bodies of law is complex, it is increasingly recognised that IHL and international human rights law may be concurrently applicable in conflict zones.[21]

Many violations of international human rights law are also violations of IHL. For example, 'the deliberate killing of civilians, the wanton destruction of civilian property and looting, the use of civilians as human shields, the destruction of infrastructure vital to civilian populations survival, rape and other forms of sexual violence, torture and the carrying out of indiscriminate attacks are violations of both sets of law.'[22] The two bodies of law, however, take an entirely different approach to the use of lethal force and also treat concepts such as 'necessity' and 'proportionality' very differently.[23] Under international human rights law, lethal force is only permissible in circumstances where it is 'absolutely necessary' for certain specified purposes. A state's responsibility for violations of the right to life may be engaged where its agents

[18] *Al-Skeini and Others v. UK*, Appl. No. 55721/07, Judgment (Grand Chamber) 7 July 2011.
[19] See, for example, *Ocalan v. Turkey*, Appl. No. 46221/99, Decision on Admissibility12 May 2005; *Issa and others v Turkey*, Appl. No. 31821/96, Judgment 16 November 2004; and *Jaloud v. The Netherlands* Appl. No. 47708/08, Judgment (Grand Chamber), 20 November 2014.
[20] For further discussion see, for example, Jean Pictet, *Humanitarian Law and the Protection of War Victims*, Geneva: Henri Dunant Institute, 1975, p.15and Gerd Oberleitner, *Human Rights in Armed Conflict*: *law, practice, policy*, Cambridge: Cambridge University Press, 2015, pp.9-77.
[21] *Legality or Threat of Use of Nuclear Weapons*, Advisory Opinion of 8 July 1996, ICJ Reports 1996; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion of 9 July 2004, ICJ Reports 2004; *Armed activity on the territory of the Congo (Democratic Republic of the Congo v. Uganda)*, Judgment of 19 December 2005 ICJ Reports 2005. See also General Comment No. 31 on the Nature of the General Legal Obligation Imposed on State Parties to the Covenant, CCPR/C/21/Rev.1/Add.13, 26 May 2004, para 1.
[22] *Increasing Respect for Civilians in Non-International Conflicts*, Geneva: International Committee of the Red Cross, 2008.
[23] Noam Lubell, 'Human rights obligations in military occupation', *International Review of the Red Cross*, Vol. 94 No. 885 Spring 2012, pp.317-37.

'fail to take all feasible precautions in the choice of means and methods of a security operation mounted against an opposing group with a view to avoiding and, in any event, to minimising, incidental loss of civilian life.' [24]

In *Albekov v. Russia*, in 2009, the European Court found that it was not necessary to determine who had laid anti-personnel mines around a village in Chechnya, which subsequently killed and injured several people, since the government did not deny that it was aware of them and therefore had a positive obligation to either clear or mark the site.[25] In *Matzarakis v. Greece* the Court found that deficiencies in the domestic legal framework on the use of lethal – or potentially lethal – force or in the training and instructions given to law enforcement officials can, in themselves, amount to a violation of the right to life.[26] In *Gorovenky and Bugara v. Ukraine*[27] and *Sašo Gorgiev v. the Former Yugoslav Republic of Macedonia*[28] the Court found violations because the authorities had not vetted police officers to ensure that they were fit to be issued with weapons. In *Hamiyet Kaplan and others v. Turkey*, the Court found a violation because security force officers attempting to arrest armed Kurdish guerillas in a house raid did not have non-lethal weapons and were not trained in non-lethal methods of arrest.[29] A series of cases have also found violations due to a lack of an

[24] ECtHR: *Ergi v. Turkey*, Appl. No. 23818/94, Judgment 28 July 1998. See also ECtHR: *McCann and others v. UK*, Appl. No. 18984/91, 5 September 1995, para 161. See also ECtHR: *Finucane v UK*, Appl. No. 29178/95, Judgment, 1 July 2003, para 84; *Osmanoglu v. Turkey* Appl. No. 488804/99, Judgment 24 January 2008, para 75; and *Koku v. Turkey*, Appl. No. 27305/95, Judgment 31 May 2005, para 132.
[25] ECtHR: *Albekov v. Russia*, Appl. No, 68216/01, Judgment 6 April 2009, paras 85-6.
[26] *Matzarakis v. Greece*, Appl. No.50385/99 Judgment (Grand Chamber) 20 December 2004. See also *Putintseva v. Russia*, Appl. No. 33498/04, Judgment 10 May 2012; *Nachova and Others v. Bulgaria*, Appl. No. 43577/98, Judgment (Grand Chamber), 6 July 2005; *Soare and Others v. Romania*, Appl. No. 24329/02, Judgment 22 February 2011.
[27] ECtHR: *Gorovenky and Bugara v. Ukraine*, Appl. Nos. 36146/05 and 42418/05, Judgment 12 January 2012.
[28]ECtHR: *Sašo Gorgiev v. the Former Yugoslav Republic of Macedonia*, Appl. No. 49382/06 Judgment 19 April 2012.
[29] ECtHR: *Hamiyet Kaplan and others v. Turkey*, Appl. No. 36749/97, Judgment 13 September 2005.

effective investigation into the circumstances surrounding the use of lethal force by the security forces followed by appropriate remedies.[30]

IHL, by contrast, permits troops to launch a surprise attack on an enemy military base even if this involves 'collateral damage' to civilians and civilian objects proportional to the military benefit, and a soldier may shoot an enemy soldier, so long as he is not *hors de combat*, even if he or she is unarmed and does not pose an 'immediate threat' at that particular point.[31] Similarly, while international human rights law requires an effective investigation into the circumstances surrounding the use of lethal force, in all circumstances, IHL only requires investigations of potential war crimes.[32] While IHL does require 'immediate' investigations into the death of prisoners and internees, it contains very little detail about the nature of the investigation required.[33] IHL also does not contain the express provisions found in international human rights law for providing victims of its violations with the right to an effective remedy.[34]

Clearly international human rights law´s provisions governing the use of force are both more demanding and more restrictive than IHL, but recent cases brought to the European Court in relation to Iraq and Afghanistan have put it beyond dispute that these

[30] ECtHR: *McCann and others v. UK*, Appl. No. 18984/91, 5 September 1995, para 161. See also ECtHR: *Kashiyev and Akayeva v. Russia*, Appl. Nos. 57492 and 57945/00, Judgment 24 February 2005; *Yaşa v. Turkey*, Appl. No 22495/93, Judgment of 2 September 1998; *Wasilewska and Kalucka v. Poland*, Appl. Nos. 28975/04 and 33406/04, Judgment 23 February 2010; *Finogenov and Others v. Russia* Appl. Nos. 18299/03 and 27311/03, Judgment 20 December 2011. Human Rights Committee, General Comment 6, Article 6 (Sixteenth session, 1982), Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, UN Doc HRI\GEN\1\Rev.1 at 6 (1994), para 4; *Herrero Rubio v. Colombia*, HRC 2 November 1987, UN Doc. A/43/40, 190, para 10.3; *Bautista de Arellana v. Columbia*, HRC 27 October 1995, UN Doc. A/51/40, Vol.II, 132, para 8.2, 10.

[31] Additional Protocol I, Article 41 (2).

[32] ICRC Expert Meeting, 2013, p.55.

[33] See Geneva Convention III, Article 121 and Geneva Convention IV, Article 131.

[34] The right to an effective remedy can be found in ECHR, Article 13, Article 6 (access to court) and Article 41(reparations); ICCPR Article 2.3; Article 14 (fair trial); ACHR, Article 1 and Article 25 (judicial protection); African Charter, Article 7 (fair trial). See also Human Right Committee General Comment No. 31 - Nature of the General Legal Obligation Imposed on States Parties to the Covenant, paras 15-17.

are applicable to extraterritorial military action by member states.[35] Some legal scholars argue that the two bodies of law may sometimes need to be ´blended together´ given that IHL provides guidance on issues such as necessary precautions when carrying out attacks on military targets or the rules governing aerial bombardment, which international human rights law is not equipped to provide.[36] The European Union (EU) also accepts that its conduct of military operations is bound by both IHL and international human rights law when both bodies of law are applicable.[37]

In 1999, the same year that the UN Security Council gave its first POC mandate to a peacekeeping operation, the UN Secretary General issued a Bulletin stating that:

> The fundamental principles of international humanitarian law are applicable to UN forces when in situations of armed conflict they are actively engaged therein as combatants, to the extent and for the duration of their engagement. They are accordingly applicable in enforcement actions or in peacekeeping operations when the use of force is permitted in self-defence.[38]

There is no similar Bulletin on the applicability of international human rights law and the assumption that IHL will always provide the appropriate legal framework regulating the use of force by UN peacekeeping missions is reflected in much of the UN's existing

[35] Silvia Borelli, 'Jaloud v Netherlands and Hassan v United Kingdom: Time for a principled approach in the application of the ECHR to military action abroad', *Questions of International Law, QIL-QDI, Zoom-in*, 12 May 2015, p.26.
[36] Francoise Hampson, and Noam Lubell, *Amicus Curiae brief submitted by Professors in the case of Hassan v. United Kingdom, Appl. No. 29750/09*, Human Rights Centre, University of Essex, 2013 paras 26-7.
[37] Frederik Naert 'Observance of international humanitarian law by forces under the command of the European Union', *International Review of the Red Cross*, Vol. 95 No. 891/892 Autumn/Winter 2013, pp.639-40. When IHL does not apply, the EU primarily looks towards human rights law as the appropriate standard for the conduct of EU military operations (furthermore, human rights may be relevant when IHL does apply as both regimes may apply concurrently).
[38] *Secretary General's Bulletin, Observance by UN Forces of International Humanitarian Law*, ST/SGB/1999/13, 6 August 1999, [Hereinafter, Secretary General's Bulletin on IHL 1999].

guidance.[39] Numerous mission-specific documents related to the use of force have references to IHL, but not to international human rights law[40] and public statements by senior Department of Peacekeeping Operations (DPKO) staff refer to IHL but not international human rights law.[41] More recent guidance issued by DPKO in 2015, did refer to customary international human rights law, while also drawing heavily on IHL language when stressing the importance of 'principles of distinction between civilians and combatants, proportionality, the minimum use of force and the requirement to avoid and, in any event, minimize collateral damage'.[42] The UN has yet, however, to produce comprehensive guidance on how the negative and positive obligations of international human rights law apply to UN peacekeeping missions, to ensure that this is fully integrated into the training and direction of its personnel and to create mechanisms by which it can be held to account under these provisions.

This creates both principled and practical problems as peacekeeping missions struggle to implement their POC mandates. The provisions of IHL will only be relevant to situations of armed conflict. If the situation to which a UN peacekeeping mission has been deployed has not reached the threshold of an armed conflict, or no longer fulfils this criteria, then it is difficult to see how IHL could be the appropriate legal framework

[39] See, for example, *United Nations Infantry Battalion Manual Volume I*, Department of Peacekeeping Operations/ Department of Field Support, August 2012; *Policy on the Protection of Civilians in United Nations Peacekeeping,* Department of Peacekeeping Operations / Department of Field Support Ref. 2015.07, 1 April 2015; and *Protection of Civilians: Implementing Guidelines for Military Components of United Nations Peacekeeping Missions,* Department of Peacekeeping Operations / Department of Field Support, February 2015.

[40] Scott Sheeran, (Research Director), *Background Paper Prepared for the Experts' Workshop, 26 August 2010, London, UK, Hosted by the New Zealand High Commission*, United Nations Peacekeeping Law Reform Project, School of Law, University of Essex, 2010, p33.

[41] See, for example, 'Interview with Lieutenant General Babacar Gaye United Nations Military Adviser for Peacekeeping Operations', *International Review of the Red Cross,* Vol. 95 No. 891/892 Autumn/Winter 2013, p.490.

[42] *Policy on the Protection of Civilians in United Nations Peacekeeping,* Department of Peacekeeping Operations / Department of Field Support Ref. 2015.07, 1 April 2015, pp.5-6. See also *Protection of Civilians: Implementing Guidelines for Military Components of United Nations Peacekeeping Missions,* Department of Peacekeeping Operations / Department of Field Support, February 2015, p.15.

regulating the tactical use of force.[43] Even if such a conflict exists, if the UN is not a party to it and enjoys legal protection against attack from its parties, then it cannot simultaneously enjoy the 'belligerent rights' of IHL, since this would contradict a basic principle of reciprocity on which *jus in bello* rests.[44]

While it is clear from the Secretary General's 1999 Bulletin that IHL will be applicable to UN peacekeeping missions with POC mandates, it is not clear whether this means that its peacekeeping soldiers have civilian or military status. Since UN peacekeepers will not generally be engaged in an armed conflict as combatants, their legal status under IHL would seem to be that of civilians.[45] As such they are protected from attack except when taking a direct part in hostilities.[46] Clearly they lose this protection when engaged in an armed conflict as combatants, but it is less clear what their status will be when using force in 'self-defence', which, is generally understood to include 'defence of their mandates'.[47] For example, during the post-election crisis in Côte d'Ivoire in 2011, the UN claimed that its peacekeeping mission (UNOCI) was not a party to the conflict on the same day that its helicopters were firing missiles at the besieged forces of President Gbagbo in defence of its POC mandate.[48] Nevertheless, in November 2012, UNOCI soldiers allegedly refused to defend an IDP camp from an

[43] For further discussion see: Bruce 'Ossie' Oswald,, '*The Law on Military Operations: Answering the Challenges of Detention during Contemporary Peace Operations' Melbourne Journal of International Law*, Vol. 8, 2007, pp.1-16; and Chris Faris, '*The Law of Occupation and Human Rights: Which Framework Should Apply to United Nations Forces?',* Australian International Law Journal, Vol. 12, 2005, pp.6.

[44] See, for example, François Bugnion, 'Just Wars, Wars of Aggression and International Humanitarian Law', *International Review of the Red Cross*, Vol. 84, No. 847, September 2002, pp.523-546.

[45] Rome Statute of the International Criminal Court 1998, Articles 8.2(b)(iii) and 8.2(e)(iii)) which makes it a war crime to attack personnel involved in a peace-keeping mission 'as long as they are entitled to the protection given to civilians or civilian objects under the international law of armed conflict'.

[46] Common Article 3 to the Four Geneva Conventions.

[47] For further discussion see: Christopher Greenwood, 'Protection of peacekeepers', 7 *Duke Journal of Comparative and International Law* 185 (1996-1997); and Katarina Grenfell, 'Perspective on the applicability and application of international humanitarian law: the UN context', *International Review of the Red Cross*, July 2014, pp.645-52.

[48] *Guardian*, 'Ivory Coast: Laurent Gbagbo under siege', Tuesday 5 April 2011. See also Secretary General statement, expressing concern over violence in Côte d'Ivoire, informing that the United Nations has undertaken military operation to prevent heavy weapons use against civilians, Office of the Secretary General 4 April 2011.

armed mob on the basis that their RoE did '*not allow them to open fire if civilians are attacking other civilians', which implies they believed they were operating within an IHL paradigm.*[49] Similar controversy has surrounded the actions of the UN mission in the Democratic Republic of Congo which appeared to become a party to the conflict in the country´s long-running civil war with the formation of the Intervention Brigade in 2013.[50]

If the conduct of UN peacekeeping operations is not governed by IHL then it would seem, *prime facie*, that the appropriate legal framework governing the use of force would be international human rights law as it is employed in the context of law enforcement operations. As such UN peacekeeping soldiers would be subject to the restrictions surrounding the use of force described above, but also under a positive obligation 'in certain well-defined circumstances . . . to take preventive operational measures to protect an individual' from threats to their life and physical integrity.´[51] In principle these provisions appear entirely in line with the language of POC mandates in UN peacekeeping missions, which stress that lethal force should only be used as a last resort and for the specific purpose of protecting civilians.

The argument that international human rights law should be part of the binding legal framework governing the use of force in UN peacekeeping operations is, however, controversial and will be discussed further below.

The UN: what is it good for?

[49] Inner-City News, *'UN Peacekeepers Inaction on IDP Killings in Cote d'Ivoire Due to DPKO Rules?', 23 October 2012. The author of the present article was in Côte d´Ivoire and interviewed residents of the camp a week before it was attacked.*
[50] UN Security Council Resolution 2098, 28 March 2013, para 12(b). See also *Report of the Secretary-General on the implementation of the Peace, Security and Cooperation Framework for the Democratic Republic of the Congo and the region*, S/2013/569, 24 September 2013.
[51] *Osman v UK*, Appl. No. 23452/94, Judgment 28 October 1998, paras 115-6. See also Inter-Am. Ct HR *Velásquez Rodríguez Case*, Judgment 29 July 1988, Inter-Am. Ct HR Series C, No. 4.

The primary purpose of the UN is to 'maintain international peace and security'.[52] Its other purposes include: developing friendly relations amongst nations based on respect for the principle of equal rights and self-determination of peoples, and promoting economic, social, cultural and humanitarian cooperation, and respect for human rights.[53]

The Security Council has the 'primary responsibility for the maintenance of international peace and security' and 'in order to ensure prompt and effective action' the members of the UN 'agree that in carrying out its duties under this responsibility' it 'acts on their behalf.'[54] All members of the UN 'agree to accept and carry out the decisions of the Security Council in accordance with the present Charter'[55] and in the event of a conflict between the obligations of the UN Charter ´and their obligations under any other international agreement, their obligations under the present Charter shall prevail.'[56]

The UN Charter is often compared to a constitution as it sets out the legal powers, roles and inter-relationships of its constituent components, and provides the legal framework that governs their activities.[57] It can also be seen as a 'living' document, which allows for 'constitutional development' and the UN and its various organs have reinterpreted their own competencies in ways that, at times, have plainly departed from the original text.[58] The Charter does not, however, incorporate the

[52] UN Charter Article 1 (1).
[53] UN Charter Article 1(2).
[54] UN Charter Article 24.
[55] UN Charter, Article 25. See also *Legal consequences for States of the Continued Presence of South Africa in Namibia notwithstanding Security Council Resolution 276 (1970)*. Advisory Opinion, ICJ Rep. 1971, para 114.
[56] UN Charter, Article 103. The Vienna Convention on the Law of Treaties recognises the absolute priority of Article 103 over other treaty obligations. Vienna Convention on the Law of Treaties, Article 30. See also *Golder v. UK*, Appl. No. 4451/70, Judgment of 21 February 1975, para 29.
[57] For an overview of this discussion see Blaine Sloan, 'The United Nations Charter as a Constitution', *Pace International Law Review*, Vol. 1 Article 3, September 1989, pp.61-126.
[58] *Scott Sheeran* A Constitutional Moment?: United Nations Peacekeeping in the Democratic Republic of Congo**,** *International Organisations Law Review*, Vol. 8 Issue 1, 2011, pp.122 and 129.

'checks and balances' that are often associated with constitutional theory, and nor does it does it provide for a clear separation of powers within the UN.[59]

Legal traditionalists note that the wording of the Charter is so 'open textured' and 'discretionary' as to make the powers of the Security Council practically unchallengeable.[60] One argues that 'a threat to peace . . . seems to be whatever the Security Council says is a threat to peace',[61] while another warns that subjecting the Security Council's decisions to judicial review would 'bind it in a legal strait-jacket' and 'run counter the Council's purpose' to take prompt and effective action to preserve international peace and security.[62]

Chapter VII of the UN Charter contains no references to human rights, IHL or the protection of civilians and nor were these issues initially considered concerns of the Security Council.[63] This state-centred approach has, however, changed considerably in recent decades. *T*he Security Council has, exercised its Chapter VII powers in relation humanitarian emergencies, the overthrow of democratically-elected leaders, extreme repression of civilian populations, cross border refugee flows, and measures to combat impunity and international terrorism.[64] As the Security Council has expanded its areas of competence this has inevitably raises issues of legal accountability.[65]

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[59] Thomas Franck, 'The Powers of Appreciation: Who is the ultimate guardian of the powers of UN legality?' *American Journal of International Law*, Vol. 86, 1992, pp.519-23; Derek Bowett, 'The Impact of Security Council Decisions on Dispute Settlement Procedures, *European Journal of International Law* Vol. 5, 1994, pp.89-101.

[60] For discussion see: Herbert *Hart,* Lionel Adolphus, *The Concept of Law*, Oxford: Clarendon Press, *1961*, p.120.

[61] Peter Malanczuk, *Akehurst's Modern Introduction to International Law*, 7th Edition, Routledge, 1997, pp.212 and 426.

[62] Michael Wood, 'The UN Security Council and International Law'. Second lecture: 'The UN Security Council and International Law', *Hersch Lauterpacht Memorial Lectures*, Lauterpacht Centre for International Law, University of Cambridge, 8 November 2006, paras 5-6.

[63] For discussion see Gregor Schotten and Anke Biehler, 'The Role of the UN Security Council in Implementing International Humanitarian Law and Human Rights Law', in Roberta Arnold & Noelle Quénivet (eds) *International Humanitarian Law and Human Rights Law*, Leiden and Boston: Martinus Nijhof, 2008, p.310.

[64] Michael Matheson, *Council Unbound: the growth of UN decision-making on conflict and post-conflict issues after the Cold War*, Washington: US Institute for Peace, 2006.

[65] Ibid.

In 2007, the European Court of Human Rights declared inadmissible *Behrami and Behrami v. France* and *Saramati v. France, Germany and Norway,*[66] which respectively focussed on 'negative' and 'positive' obligations under the Convention.[67] The first was brought by the father of a boy killed, in March 2000, by an exploding shell, dropped by NATO during its air campaign over Kosovo the previous year, which it was alleged that French KFOR soldiers had subsequently failed to mark or clear. The second was brought by an Albanian militia leader who was allegedly detained in administrative KFOR military custody for several months in 2001 and 2002 without effective access to a court.[68]

The Court recalled *Bankovic* in ruling that 'jurisdictional competence is primarily territorial'.[69] It stated that the central question in the present case, however, was 'whether this Court is competent to examine under the Convention those States' contribution to the civil and security presences which did exercise the relevant control of Kosovo.'[70] It noted that UNMIK 'was a subsidiary organ of the UN created under Chapter VII of the Charter' and so its actions were 'in principle, attributable to the UN'.[71] According to the Court:

> it is evident from the Preamble, Articles 1, 2 and 24 as well as Chapter VII of the Charter that the primary objective of the UN is the maintenance of international peace and security. While it is equally clear that ensuring respect

[66] *Behrami and Behrami v. France* (Appl. No. 71412/01) 31 May 2007 (Grand Chamber) Decision on Admissibility and *Saramati v. France, Germany and Norway* (Appl. No. 78166/01), (Grand Chamber) Decision on Admissibility, 2 May 2007.
[67] For discussion see P. Bodeau-Livinec, G. P. Buzzini and S. Villalpando, 'Agim Behrami & Bekir Behrami v. France; Ruzhdi Saramati v. France, Germany & Norway. Joined App. Nos. 71412/01 & 78166/01'*American Journal of International Law*, Vol. 102, 2008.
[68] Ibid,
[69] *Behrami and Behrami v. France* (Appl. No. 71412/01) 31 May 2007 (Grand Chamber) Decision on Admissibility and *Saramati v. France, Germany and Norway* (Appl. No. 78166/01), (Grand Chamber) Decision on Admissibility, 2 May 2007, para 152.
[70] Ibid., para 71.
[71] Ibid., para 143.

> for human rights represents an important contribution to achieving international peace (see the Preamble to the Convention), the fact remains that the UNSC has primary responsibility, as well as extensive means under Chapter VII, to fulfil this objective, notably through the use of coercive measures . . . operations established by UNSC Resolutions under Chapter VII of the UN Charter are fundamental to the mission of the UN to secure international peace and security . . . the Convention cannot be interpreted in a manner which would subject the acts and omissions of Contracting Parties which are covered by UNSC Resolutions . . . to the scrutiny of the Court.[72]

The Court has similarly ruled that it has no jurisdiction to hear a number of other cases where alleged violations of Convention rights were attributable to subsidiary organs of the UN established in the former Yugoslavia.[73] Dutch district courts also cited *Behrami and Saramati* in ruling that they lacked jurisdiction to hear two other similar cases relating to the Srebrenica genocide of 1995.[74] While a Dutch court did, in July 2014, eventually find a violation of the right to life of the 300 civilians expelled from the

[72] Ibid., paras 148-9.
[73] *Kasumaj v. Greece*, Appl. No. 6974/05 Decision on Admissibility, 5 July 2007; *Gajić v. Germany,* Appl. No. 31446/02 Decision on Admissibility, 28 August 2007; *Berić and others v. Bosnia and Herzegovina*, Appl. Nos. 36357/04; 36360/04; 38346/04; 41705/04; 45190/04; 45578/04; 45579/04; 45580/04; 91/05; 97/05; 100/05; 101/05; 1121/05; 1123/05; 1125/05; 1129/05; 1132/05; 1133/05; 1169/05; 1172/05; 1175/05; 1177/05; 1180/05; 1185/05; 20793/05; 25496/05, Decision on Admissibility, 16 October 2007.
[74] *Judgment in the case of Mustafić, Court of Appeal in the Hague*, Civil Law Section, Case number: 200.020.173/01, Case-/cause-list number District Court: 265618/ HA ZA 06-1672, Ruling of 5 July 2011; and *Judgment in the case of Nuhanović, Court of Appeal in the Hague*, Civil Law Section, Case number: 200.020.174/01 Case-/cause-list number District Court : 265618/ HA ZA 06-1672 Ruling of 5 July 2011. Hasan Nuhanović had been a translator for the Dutch Battalion in Srebrenica at the time of the genocide. Rizo Mustafić, was a UN electrician. Mustafić was ordered to leave the base by the UN soldiers of Dutch Battalion. The soldiers did evacuate Mustafić but refused to take his father and brother, both of whom were subsequently killed in the genocide.

Dutch Battalion compound during this genocide it was only able to do so by attributing this action solely to the Dutch state and excluding the UN from these provisions.[75]

The case of *Al-Jedda,*[76] an Iraqi with dual British citizenship who was detained without trial in Baghdad for several years, raised some similar issues.[77] The British government accepted that the applicant's detention in a British facility brought him within the extra-territorial jurisdiction of the European Convention, in the light of *Al-Skeini,*[78] but argued that his detention was authorized by the Chapter VII Security Council resolutions, which set out the mandate of the UN Assistance Mission for Iraq.[79] In 2006, one year before the *Behrami and Saramati* decision, the English Court of Appeal dismissed his complaint, holding that:

> if the Security Council, acting under Chapter VII, considers that the exigencies posed by a threat to the peace must override, for the duration of the emergency the requirements of a human rights convention (seemingly other than *jus cogens*, from which no derogation is possible), the UN Charter has given it the power to so provide . . . There is no need for a member state to derogate from the obligations contained in a human rights convention by which it is bound in so far as a binding Security Council resolution overrides those obligations.[80]

[75] *Mothers of Srebrenica v. the Netherlands* ECLI:NL:RBDHA:2014:8748 (The Hague District Court), 2014.
[76] *Al-Jedda v. Secretary of State for Defence*, Court of Appeal [2006] EWCA Civ 327, 29 March 2006.
[77] Hilal Abdul-Razzaq Ali Al-Jedda, an Iraqi national, who had also been granted British citizenship, was arrested in Baghdad in 10 October 2004 and detained without trial in a detention centre run by British forces in Basra until 30 December 2007.
[78] ECtHR *Al-Skeini and Others v. the United Kingdom* , Appl. No. 55721/07, Judgment (Grand Chamber) 7 July 2011.
[79] Security Council Resolutions 1511, of 16 October 2003 and 1546 of 8 June 2004.
[80] *Al-Jedda v. Secretary of State for Defence*, Court of Appeal [2006] EWCA Civ 327, 29 March 2006, para 71.

The Court noted that the UN Charter contained references to human rights, but insisted that these were 'clearly an agenda for future action rather than a statement of human rights and fundamental freedoms in itself.'[81] The European Court, however, ultimately found a violation in the case, in July 2011.[82] It noted that the language of the Security Council resolutions did not indicate that it 'intended to place Member States within the Multi-National Force under an obligation to use measures of indefinite internment without charge and without judicial guarantees, in breach of their undertakings under international human rights instruments´.[83] It also appeared to give considerably more weight to the human rights obligations contained in the UN Charter:

> As well as the purpose of maintaining international peace and security . . . the United Nations was established to 'achieve international cooperation in . . . promoting and encouraging respect for human rights and fundamental freedoms'. Article 24(2) of the Charter requires the Security Council, in discharging its duties . . . to 'act in accordance with the Purposes and Principles of the United Nations'. Against this background, the Court considers that, in interpreting its resolutions, there must be a presumption that the Security Council does not intend to impose any obligation on Member States to breach fundamental principles of human rights . . . it is to be expected that clear and explicit language would be used were the Security Council to intend States to take particular measures which would conflict with their obligations under international human rights law.[84]

[81] Ibid.
[82] *Al-Jedda v. the United Kingdom* Appl. No. 27021/08, Judgment (Grand Chamber) 7 July 2011.
[83] Ibid., paras 105-6.
[84] Ibid., para 102.

There have been numerous other cases – principally in relation to UN travel bans sanctions –where national and international courts have been confronted with situations where the Security Council has ordered states to take actions which, *prime facie*, appear to be in conflict with their obligations under international human rights law. In some cases the courts have responded by attributing the actions by member states, rather than the UN itself. This, however, risks increasing the fragmentation of international law and may make some states more reluctant to commit their soldiers, police to UN peacekeeping missions.

Although the Security Council has avoided giving executive powers to its missions, since the widely acknowledged disasters surrounding the creation of UNMIK, POC mandates do raise questions relating to accountability over the use of force and arrest and detention powers, which clearly have human rights implications. Paradoxically, the legal uncertainty surrounding the use of lethal force and arrest and detention provisions has made missions extremely cautious about using these powers at all. For example, when rebel forces were advancing on Goma, in eastern DRC, in 2012, some senior officials in the UN mission expressed uncertainty as to whether their rules of engagement (RoE) permitted the use of force to engage with or detain rebel fighters unless they were actually threatening civilians at the time.[85] The UN Mission in South Sudan reluctantly began to detain people within its POC sites in 2014, using the authority provided under its authority to maintain safety and security within its premises, but this raises serious issues in the absence of an effective legal review procedure.[86]

[85] This view was expressed to the author of this thesis by several senior MONUSCO officials during interviews conducted in Goma and Kinshasa in June 2012.
[86] Ralph Mamiya, 'Legal Challenges for UN Peacekeepers Protecting Civilians in South Sudan', *American Society of International Law*, Vol. 8, Issue 26, December 2014.

The UN OIOS Protection Evaluation 2014, referred to above, found a general lack of understanding concerning the legal obligation of missions to use force for protective purposes[87] and noted that some troops had expressed concerns that they could face prosecution by the International Criminal Court for excessive use of force.[88] While some of the current failures of missions to provide effective protection to civilians points to the need for clearer legal guidance, it could also *reflect risk-aversion due to the fact that there are no meaningful mechanisms by which peacekeepers can be held to account by those that they are supposed to be protecting.* One interviewee told the evaluation that: 'There are penalties for action, but no penalties for inaction'.[89]

If it is accepted that UN peacekeeping missions do have 'protection' obligations under international human rights law, however, it will be important to clarify the extent of these and which rights missions are obligated to protect. The UN is not the functional or legal equivalent of a state and so the scope of its rights and duties, and those of its subordinate bodies, must depend upon their purposes, functions and practices.[90] It is clearly beyond the scope and powers of a peacekeeping mission to secure for everyone in its area of deployment all the rights and freedoms guaranteed by the entire corpus of international human rights law. The obligations of a POC mandate could be deemed more narrowly as a positive obligation to protect people from threats to their rights to life and physical integrity, while respecting – that is not infringing – these rights in the process. If POC is defined in this way, though, should the 'protection' just be from physical violence or also from arbitrary deprivations of the right to liberty or violations of basic economic, cultural such as the right to food, heath, and adequate shelter?

[87] OIOS Protection Evaluation 2014, para 40
[88] Ibid., para 50.
[89] Ibid.
[90] *Reparations for Injuries Suffered in the Service of the United Nations*, 11 April 1949, International Court of Justice, advisory opinion, ICJ Reports (1949), pp.178-9.

Conclusions

There are few references to POC in the existing academic literature and, where it is mentioned, it is often treated as an 'operationalization' of the Responsibility to Protect (R2P).[91] This is partly because it is still a comparatively new concept and partly because POC mandates have mainly developed and adapted in the field 'below the radar' of much of the current legal and academic discourse. As two DPKO staff members have observed: 'While the international community struggled with the revolutionary strategic concepts of humanitarian intervention and the Responsibility to Protect (R2P), a quiet evolution was taking place in UN peacekeeping, through the development of POC.'[92]

Although the books written on R2P could ´fill a small library´, it is difficult to point to a single positive practical difference it has made to the protection of civilians in conflict zones.[93] POC, by contrast, has had a huge impact on the UN missions in Sierra Leone, the Democratic Republic of Congo, South Sudan, Darfur, Haiti, Côte d´Ivoire, Mali and the Central Africa Republic. The vast majority of UN personnel currently deployed are also now in missions that have POC mandates.[94] The integration of POC tasks has been an incremental and reactive process, much like the original development of peacekeeping itself. It can, however, claim to be an emerging norm in international

[91] See Siobhán Wills, *Protecting Civilians*, Oxford: Oxford University Press, 2009; Edward Luck, 'The Responsibility to Protect: Growing Pains or Early Promise?' *Ethics and International Affairs* Vol. 24 Issue 4, September 2010; and Nicholas Tsagourias, 'Self-defence, protection and humanitarian values and the doctrine of impartiality and neutrality in enforcement mandates', in Marc Weller (ed.), *The Oxford Handbook on the Use of Force in International Law*, Oxford: Oxford University Press, 2014.
[92] Haidi Willmot and Ralph Mamiya, 'Mandated to Protect: Security Council Practice on the Protection of Civilians', in Marc Weller (ed), *The Oxford Handbook on the Use of Force in International Law, Oxford:* Oxford University Press, 2014.
[93] For some sceptical discussions of R2P´s significance see: Carlo Focarelli, 'The responsibility to protect doctrine and humanitarian intervention: too many ambiguities for a working doctrine', *Journal of Conflict & Security Law*, 2008; Anne Orford, 'From Promise to Practice? The Legal Significance of the Responsibility to Protect Concept', *Global Responsibility to Protect*, Martin Nijhoff Publishers, Vol. 3, Issue 4, 2011, p.400–424; and Aidan Hehir, *The responsibility to protect: rhetoric, reality and the future of humanitarian intervention*, Basingstoke and New York: Palgrave Macmillan, Basingstoke, 2012.
[94] OIOS Protection Evaluation 2014, para 5.

law because it has been driven forward through a succession of Security Council resolutions, which have themselves been largely based on the experiences of its missions in the field.

One measure of progress is that – in contrast with its abdication during the genocides in Rwanda and at Srebrenica – the UN feels at least under a moral obligation to protect the civilians currently sheltering on its bases in Darfur and South Sudan. Nevertheless, the lack of clear guidance about the legal framework within which the UN expects its peacekeeping missions to act, particularly when using force for protective purposes, contributes to a fatal ambiguity about the tasks involved. Armed soldiers are now regularly being given legal permission to enter into the territory of other states in order to protect people from grave violations of international human rights and humanitarian law. The obvious question this now poses is who guards the guards?