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CHAPTER 7

THE USE OF WEAPONS IN PEACE OPERATIONS

Nigel D. White

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Chapter 7. The Use of Weapons in Peace Operations

Nigel D. White*

Introduction

Modern peace operations represent a challenge for the development of international human rights-based standards for the use of weapons since such operations are both multinational and contain a number of armed components. The first such component, and the most significant, consists of peacekeepers who are military personnel drawn from troop contributing nations (TCNs); the second comprises police officers drawn from troop sending nations (TSNs); and the third is private military and security contractors (PMSCs), who work for companies specialising in the provision of military and security services, ranging from the servicing of equipment to the guarding of property, convoys, and detainees. PMSCs may be contracted directly by an international organisation or will operate under contracts with the TCNs/TSNs. These components will generally attract different forms of immunity from the jurisdiction of the courts of the State in which they are deployed (the host State), pointing even more markedly to any international standards relevant to the use of weapons.

This chapter will focus primarily on peace operations under the mandate, command, and control of the United Nations (UN); and then within such operations it concentrates on the military and police components.¹ It makes reference to other types of multinational military operations under which command and control is normally with States, even though operating under a mandate from an international organisation. Such operations have been variously labelled 'peace support', 'stability', 'peace enforcement', and 'military enforcement' operations. In other words the focus of this chapter will be on the 'blue helmets' of the UN, which were traditionally called 'peacekeeping' forces but now form part of broader multinational and multifunctional 'peace operations'.

The chapter traces the development of peace operations from their inception as limited military forces in the 1950s to their modern form, which is not only multifaceted but appears, from the mandates being given to such operations over the last decade, to be more belligerent than their predecessors. Peacekeepers, even at their inception, have been given functions that are less than those of combat but more than law enforcement, but this chapter argues that this does not somehow place them in a legal no-man's land. Instead, it posits that peacekeepers are normally subject to international human rights law standards when using weapons and, only exceptionally, when actively engaged as combatants within an armed conflict situation, to international humanitarian law (IHL) standards. The chapter examines the standards developed by the UN for the use of force and weapons by peacekeepers (and where applicable UN police), both at the doctrinal

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¹ On PMSCs working for the UN see Chia Lehnardt, 'Peacekeeping' in Simon Chesterman and Angelina Fisher (eds), *Private Security, Public Order: The Outsourcing of Public Services and Its Limits*, Oxford University Press, Oxford, 2009, p. 222. On the responsibility of the UN for PMSCs, see Nigel D. White, 'Institutional Responsibility for Private Military and Security Companies' in Francesco Francioni and Natalino Ronzitti (eds), *War by Contract: Human Rights, Humanitarian Law, and Private Contractors*, Oxford University Press, Oxford, 2011, p. 381.

level as found in Secretariat and other UN documents, and at the more practical level in the form of the Rules of Engagement (RoE) given to peacekeepers.

The chapter then analyses the UN's standards, rules and practice in terms of their conformity with human rights law and, where exceptionally applicable, IHL. As well as the obligations on peacekeepers not to use weapons in violation of such international laws, the chapter considers the positive obligations upon the UN under human rights law to reduce as much as possible the occurrence of such incidents by: promulgating clear standards prohibiting the arbitrary use of potentially lethal force; undertaking adequate training of all armed UN personnel in weapons usage in compliance with human rights standards; planning peace operations so as to reduce the risk of arbitrary loss of life; carrying out independent investigation of any loss of life; and providing mechanisms of accountability including access to justice for the victims of unlawful use of weapons by UN peacekeepers.

A. The origins and nature of peace operations

Modern peace operations have their roots in peacekeeping. Peacekeeping was essentially a development of the stifling and ubiquitous effects of the Cold War that started in earnest in the 1950s. As such, peacekeeping was not envisaged in the 1945 UN Charter, but it was vital in securing the basic goal of the UN and regional security organisations, namely a minimum level of peace and security in trouble spots around the world. This initially resulted in very small UN forces in colonial and post-colonial conflict zones in Indonesia, Kashmir, and Palestine in the late 1940s, consisting of unarmed observers dispatched to provide the UN Security Council (UNSC) with a reliable account of the facts. An evolutionary process led, in 1956, to a fully-fledged, lightly armed but several thousand-strong force (the UN Emergency Force – UNEF I), deployed to secure the peace by acting as a buffer between formerly hostile nations, following the British/French/Israeli intervention in Suez.

Although new in its day this now 'traditional' type of peacekeeping embodied in UNEF I reflected classical principles of international law, in that it was based on the consent of the host State or States, and, even though it appeared to constitute military intervention, its respect for sovereignty was reflected in the neutrality of such forces. The restrictions on the use of force to defence of peacekeepers or their equipment meant that the trinity of peacekeeping principles of consent, impartiality, and non-use of force very much reflected fundamental principles of international law — of sovereignty, non-intervention and non-use of force found in Article 2 of the UN Charter — and located more specifically in Chapters IV and VI of the Charter containing the powers of the UN General Assembly (UNGA) and the UNSC as regards the pacific settlement of disputes.

The fact that the UNGA mandated the original force (UNEF I) is no coincidence, in that its functions reflected the views of the Non Aligned majority as well as traditional principles of international law that gave such States protection from intervention. However, peacekeeping subsequently crossed into the domain of the UNSC as part of its primary responsibility for peace and security under Article 24 of the UN Charter. This has led to the possibility of a more coercive peacekeeper. Article 2 (specifically paragraph 7) and Chapter VII (specifically Article 42) of the Charter both recognise that the UNSC has exceptional powers to authorise military enforcement action, which has led to peacekeeping forces being given more coercive mandates, particularly after the Cold War ended. Thus, while traditional consensual, inter-positional forces can be said to be constitutionally derived from Chapter VI of the Charter, those with Chapter VII elements are more properly based in Article 40 of Chapter VII, which empowers the UNSC to demand provisional measures such as cease-fires. Coercive peacekeeping can thus be seen to constitute a method of enforcing that demand. Clearly, the different types of peacekeeping that emerged from the Cold War had varying implications for the

use of weapons, with more extensive, potentially lethal force being used by operations with Chapter VII elements in their mandates.

The dialectic between consensual peacekeeping and its more belligerent variant was established as early as the second full peacekeeping force in the Congo in 1960–64, and was repeated, with less success, in the force in Somalia in 1993–5; and is currently back on the agenda as the UN struggles to implement the ‘responsibility to protect’, ‘protection of civilians in armed conflict’, and ‘human security’ agendas, *inter alia*, through ‘protection’ mandates given to UN forces.² In general, judges and jurists have still maintained that such mandates are compatible with the traditional principles of international law and peacekeeping,³ and therefore do not constitute full-blown military enforcement action on a par with the UN-authorized actions in Korea in 1950–3 and the Gulf in 1991 (whose constitutional base in the Charter is Article 42 of Chapter VII), since they are not directed against the government of a State but against rebel factions, armed groups, mercenaries, or ‘spoilers’ (those non-State actors who seek to undermine the peace). Nevertheless, coercive mandates mean that peacekeepers can cross the line to become war-fighters or ‘combatants’ in the language of IHL, sometimes causing confusion as to the legal status of peacekeepers who are traditionally not seen as legitimate targets. Indeed, attacks on them remain prohibited under the 1994 UN Safety Convention.⁴ In 1999, the UN Secretary General (UNSG) clarified the non-combatant status of peacekeepers even in situations of armed conflict, by declaring that they are to be viewed as or civilians under international humanitarian law unless and until they actively engage as combatants in an armed conflict.⁵

Post-Cold War peacekeeping forces have remained largely consensual but have developed significantly from the traditional buffer forces of the Cold War in the Middle East (UNDOF, UNEF II, UNIFIL) and Cyprus (UNFICYP), evolving in the early 1990s towards complex civilian-military operations designed to build the peace as well as keep it, and including within their structure military, police, humanitarian, and other civilian elements. Arguably, the developing nature and function of modern complex peace operations reflect changes in international law, in which the prominence of external self-determination in the period of decolonisation and independence of new States has been replaced to a large extent by concerns for internal self-determination within existing States, while the protection and enhancement of human rights and human security (of individuals and groups) have supplemented the traditional concern for security between States. This has led to 21st century peace operations being furnished as a matter of course with Chapter VII elements in their mandates, empowering them to protect the peace process and civilians under threat of attack, while still being based on the consent of the host State. Thus, the move towards greater coercion by UN peace operations has continued apace with the end of the Cold War though they are still distinct from military enforcement action taken by Coalitions of the Willing (CoWs). Such CoWs sometimes appear to function as peacekeeping operations, for example the NATO-led IFOR and KFOR operations: in Bosnia and Herzegovina (after the Dayton peace agreement in 1999) and Kosovo (after Serbian withdrawal in 1999). Although they have UN mandates, they operate under delegated command and control and, moreover, are equipped and mandated to undertake potentially much deadlier levels of force than UN-commanded and controlled blue-helmeted forces.

² See Hitoshi Nasu, ‘The Place of Human Security in Collective Security’, 17 *Journal of Conflict and Security Law*, (forthcoming, 2012).

³ *Certain Expenses of the United Nations (Article 17, paragraph 2, of the Charter)*, Advisory Opinion of 20 July 1962, *ICJ Reports 1962*, pp. 163–4; Alexander Orakhelashvili, ‘The Legal Basis of the United Nations Peace-Keeping Operations’, 43 *Virginia Journal of International Law*, 2003, pp. 485–524; and Derek W. Bowett, *United Nations Forces: A Legal Study of United Nations Practice*, Stevens, London, 1964, pp. 265–312.

⁴ 1994 UN Convention on the Safety of United Nations and Associated Personnel, Articles 7–9.

⁵ UNSG’s Bulletin, ‘Observance by United Nations Forces of International Humanitarian Law’, UN doc. ST/SGB/1999/13, 1999, section 1.2.

With the end of the Cold War, UN interventions changed in the late 1980s and early 1990s, with operations becoming multi-functional by combining peacekeeping with limited peacebuilding. The latter was usually centred on the holding of elections as the pivotal event between conflict and a stable State. Such operations were a mixed success, with a number failing because the electoral process did not engage factions sufficiently to prevent a fresh outbreak of fighting (for instance, in Angola in the 1990s). More integrated and extensive peace operations have emerged since the 2000 Brahimi Report.⁶ Such operations combine peacekeeping with more ambitious peacebuilding; the latter consisting of much more than the crude introduction of Western-style democracy to an often alien environment. Given that such operations are often conducted in fragile or failed States, there has been a trend, examined below, towards enabling the military element of such an operation to use force beyond the traditional limited form of self-defence possessed by peacekeepers.

Post-Cold War peace operations, where peacekeeping was combined with peacemaking under the principles of consent, impartiality and the limited use of force, started with the UN operation in Namibia (UNTAG) in 1989. In the early 1990s, the UN rapidly developed a multi-dimensional peacekeeping and peacebuilding model, a number of examples of which were successful in achieving their more ambitious mandates, for example in Nicaragua (ONUCA 1989–92); in El Salvador (ONUSAL 1991–5); in Cambodia (UNTAC 1991–3); and in Mozambique (ONUMOZ 1992–4), although a number struggled, most notably UNAVEM in Angola (1989–97).

In straightforward terms, such operations took the form of combined military/civilian missions, which supervised the end of the hostilities and oversaw peacebuilding including an election process with the aim of producing a stable State. The force consisted of a military component whose function was to 'serve in a supporting role: to guarantee and maintain a secure environment in which the civilian components' could work, by helping to maintain a cease-fire, and by the cantonment or withdrawal and disarmament of factions as provided by the peace agreement. Mine clearance was also included in most. Second, a police element, 'between the military and civilian actors', assisted in the maintenance of public order, through crowd control, general law enforcement, and by training local police officers. This was often accompanied by the development or reform of the judicial system. Finally, there was a sizeable civilian component consisting of both international governmental and non-governmental organisation (NGO) actors with political, electoral, human rights, and humanitarian functions. The political function included overall guidance in the peace process and help with rebuilding or developing political institutions. The electoral function included advice, education, monitoring, and verification of the electoral process. The human rights function consisted of promoting, educating, monitoring, and investigating abuses. Finally, the humanitarian function included the delivery of aid, the implementation of the right of return for refugees, and the re-integration of former combatants.⁷ All of these elements are found and developed in complex peace operations that followed the recommendations of the 2000 Brahimi Report. Such developments have been described as the 'civilianisation' of peace operations, whereby the still large military peacekeeping component is matched by the inclusion of 'civil administration, humanitarian assistance, policing, electoral, human rights monitoring, economic revival functions and personnel'.⁸

The Brahimi Report outlined the three principal elements of UN peace operations to include peacemaking, peacekeeping as traditionally defined, and peacebuilding; namely, those 'activities

⁶ ['Report of the Panel on United Nations Peace Operations'](#), UN doc. A/55/305 and S/2000/809, 21 August 2000 (Brahimi Report).

⁷ Wibke Hansen, Olivier Ramsbotham and Tom Woodhouse, *Hawks and Doves: Peacekeeping and Conflict Resolution*, Berghof Research Centre for Constructive Conflict Management, 2004, p. 5.

⁸ James Cockayne and David Malone, 'United Nations Peace Operations: Then and Now', 9 *International Peacekeeping: The Yearbook of International Peace Operations*, 2005, p. 18.

undertaken on the far side of conflict to reassemble the foundations of peace and provide the tools for building on those foundations something that is more than just the absence of war'. It includes the reintegration of former combatants into civilian life, strengthening the rule of law (e.g. police and judiciary, prisons); improving respect for human rights; providing technical assistance for democratic development; and promoting conflict resolution and reconciliation techniques.⁹

Probably with the unsuccessful mission in Angola in the 1990s in mind, the Brahimi Report recognised that free and fair elections are just part of a process of building 'governance institutions', democratisation, the protection of human rights, and the development of civil society.¹⁰ A peace operation aims to develop a partnership with the local population and time is taken in developing political and civil processes. In a number of early peace operations 'hasty elections' took the 'place of finding legitimate interlocutors'.¹¹ Thus, there is no quick fix in which the international community supervises elections and then leaves, though there needs to be a developed exit strategy based on a clear timetable under which a stable government and society is formed. Once it is clear that the people have exercised, and are able to continue to exercise, their right of self-determination (which does not mean simply holding elections), and that secure institutions and processes are in place, then the sovereignty and independence of the people and the country should be respected and the operation withdrawn, unless a small residual operation is left in a more symbolic role. The problems in Bosnia and Herzegovina (UNMBIH, 1995–2002) and Kosovo (UNMIK, 1999 to date), in which civilian peace operations (supported by CoWs) have struggled to establish such conditions, are a salient reminder that these are ambitious projects. An essential element is that the process must engage the local population and ensure that they are the main stakeholders as well as the beneficiaries of the process.¹² Fundamentally, the process should allow for the local population to shape the society, not for that to be shaped by outside actors.¹³

It is in this complex, constantly shifting, and often dangerous environment that armed UN peacekeepers and police operate with the potential to (mis)use lethal weapons. Before establishing the relevant human rights standards in this regard, it is necessary to establish that human rights law is applicable to UN peace operations.

B. The applicability of human rights law to peace operations

International humanitarian law is applicable during armed conflict, and thus is primarily applicable to the *in bello* rather than the *post bellum* stage (with the exception of the law of occupation). It was thus applicable to the North Atlantic Treaty Organization (NATO)-led CoW, authorised by the UNSC to take necessary measures in Libya in 2011, though the application of IHL was qualified by the terms of the authorising resolution that confined NATO actions to the protection of 'civilians and civilian populated areas under threat of attack'.¹⁴ If, however, violence persists or flares up in the post-conflict phase and reaches the level of an armed conflict of a non-international character (defined by the International Criminal Tribunal for the former Yugoslavia (ICTY) as 'protracted armed violence between governmental authorities and organised armed groups within a state'¹⁵), then IHL applies to

⁹ Brahimi Report, §§10–13.

¹⁰ *Ibid.*, §38.

¹¹ Challenges Project, *Meeting the Challenges of Peace Operations: Cooperation and Coordination*, ElandersGotab, Stockholm, 2005, p. 48.

¹² Béatrice Pouligny, 'Local Ownership', in Vincent Chetail (ed.), *Post-Conflict Peacebuilding: A Lexicon*, Oxford University Press, Oxford, 2009, p. 174.

¹³ But see Roland Paris, 'International Peacekeeping and the 'Mission Civilisatrice'', 28 *Review of International Studies*, 2002, pp. 637, 638–9.

¹⁴ UNSC Resolution 1973 (2011).

¹⁵ *Prosecutor v. Tadić*, 105 *International Law Reports*, 1996, p. 488.

the parties to a conflict, and also to a UN peacekeeping operation if it engages as a party to the conflict. After much debate in the UN, this was finally recognised in a piece of UN internal law in the form of a bulletin by the UN Secretary General (UNSG) promulgated in 1999.¹⁶

Thus, IHL does not normally play a significant role in a post-conflict situation, and it is the *jus post bellum*, more realistically aspects of general international law, human rights law, refugee law, and international criminal law, which together frame the work of a peace operation. In identifying such a body of laws regard must be had to the priority of ensuring that peace and security in a fragile State is established, maintained, and then improved. Improvement will, though, only occur if justice is recognised as a value and is nurtured and protected, not only by forms of transitional justice but also by recognising the basic human rights of the population, and the obligations not only of the host State, but those outside states and organisations involved in the rebuilding process.

Richard Caplan, in discussing the normative basis of transitional administrations set up by the international community to establish societies in war-torn territories, admits that the UN Charter does not explicitly provide for such interventions, but asserts that they are readily implied within the confines of Chapter VII of the Charter, as essential responses to threats to the peace.¹⁷ Post-conflict peacebuilding reflects a primary purpose of the UN system — to establish a peaceful State, in that a State that is peaceful internally is less likely to spread violence externally. A peaceful State is no longer solely about having an effective government that is able to extend its authority and order throughout the territory of the State, as this may lead to unaccountable and, ultimately, despotic government, which in turn will lead to unrest and international violence. Thus, the international community can ill afford to support rebuilding on the basis of effective government alone; besides which, international law, in the form of human rights and self-determination, demands that rebuilding occurs within these parameters. As stated above, the movement towards promoting and supporting representative and accountable governments reflects changes in international law, from supporting the external self-determination of a State (i.e. its independence) to strengthening internal self-determination within a State. This is sometimes described as the promotion of democracy — indeed the UNGA uses this term¹⁸—but the content of the applicable normative framework reflects the promotion of self-determination and human rights, including the right to participate in elections and to hold public office, found in both the 1948 Universal Declaration of Human Rights (UDHR),¹⁹ and the 1966 International Covenant on Civil and Political Rights (ICCPR),²⁰ but also including core economic, social, and cultural rights derived from the 1966 International Covenant on Economic, Social and Cultural Rights (ICESCR).²¹

The primary obligation to respect and protect human rights is placed on the post-conflict State itself. Unless the State is already a party to international human rights treaties, its obligations at this stage are derived from customary international law covering those basic rights drawn from across the human rights spectrum — the right to life, freedom from torture or other forms of cruel, inhuman or degrading treatment; freedom from slavery or other similar practices; from discrimination based on ethnic, religious, racial grounds or on the basis of sex; freedom from arbitrary arrest or detention;

¹⁶ UNSG's Bulletin, 'Observance by United Nations Forces of International Humanitarian Law', UN doc. ST/SGB/1999/13, 1999, section 1.

¹⁷ R. Caplan, 'Transitional Administration' in V. Chetail (ed.), *Post-Conflict Peacebuilding*, p. 363.

¹⁸ Nigel D. White, 'The United Nations and Democracy Assistance: Developing Practice within a Constitutional Framework', in Peter Burnell (ed.), *Democracy Assistance: International Cooperation for Democratization*, Frank Cass, 2000, pp. 74–6.

¹⁹ Article 21.

²⁰ Article 25.

²¹ See Committee on Economic, Social and Cultural Rights, 'General Comment 3: The Nature of States Parties Obligations—Article 2(1) of the Covenant', UN doc. E/1991/23, §10.

and basic due process rights (covering arrest, detention, and trial);²² as well as the rights to food, water, shelter, medicine (health), and basic education.²³ Given that internal violence in the past may have been caused by the denial of group or minority rights, then as well as enforcing the principle of non-discrimination, the protection of cultural, minority, and other group rights is essential in the post-conflict State.²⁴

Once these basic rights are secured, the post-conflict State can look to become a party to the main human rights treaties, including the ICCPR and ICESCR, in order to realise the full range of human rights. If already a party to such treaties, the State Party may consider derogating from some of the derogable rights, as permitted by the ICCPR,²⁵ but only if the life of the nation remains threatened by violence extending beyond the peace treaty. Recognising that a State can move over time from a basic regime of human rights protection towards a full regime allows that State, and the international community, to place initial emphasis on security without denying the basic principles of justice.

In addition to having obligations not to breach the basic human rights of its citizens and other individuals within its jurisdiction, the post-conflict State has positive obligations to take steps to protect the human rights of those individuals from breach by third parties such as armed groups that are neither State agents nor under the effective control of the State. This very important principle was established by the Inter-American Court of Human Rights in relation to a number of Latin American 'dirty wars' in which individuals were 'disappeared' by 'death squads'.²⁶

These 'due diligence' obligations extend to third States and international organisations, whose agents are present in the post-conflict State. These States and organisations must ensure that they act with due diligence to prevent as far as possible the violation of human rights, by, for example, protecting civilians within their control (for instance, in UN bases or camps, detention centres, and arguably, in their areas of deployment) from attack by private actors, or from other potential sources of physical harm such as uncleared ordnance. Furthermore, the UNSC has committed peace operations to protect civilians under existential threat in their areas of deployment.²⁷ The duty on peacekeepers to protect in these circumstances is derived from UNSC decision irrespective of any applicable human rights obligations.

Thus, UN agents and soldiers of TCNs have duties of prevention as well as duties not to commit violations of human rights. Though peacekeepers are acting extra-territorially, the human rights obligations of their sending States arguably even attach to them in circumstances where they exercise control over areas or over individuals.²⁸ This principle was suggested by the Human Rights Committee in 2004 when it stated that parties to the ICCPR must ensure the human rights of persons 'within the power or effective control of the forces of a State Party acting outside its territory ... such as forces constituting a national contingent of a State Party assigned to an international peace-keeping or peace-enforcement operation'.²⁹ When the UN is in effective control of the conduct of peacekeepers (and it normally accepts that it is in such control in UN-commanded and -controlled

²² Ian Brownlie, *Principles of Public International Law*, Seventh edn, Oxford University Press, Oxford, 2008, pp. 562–4.

²³ See Committee on Economic, Social and Cultural Rights, 'General Comment 3', *op. cit.*

²⁴ Article 27, ICCPR; Article 15, ICESCR.

²⁵ Article 4(1), ICCPR.

²⁶ *Velasquez Rodriguez case*, 1988 Ser. C, No. 4 (1988), §172.

²⁷ Starting with UNSC Resolution 1265 (1999).

²⁸ See European Court of Human Rights, *Al-Skeini v United Kingdom*, Judgment (App. No. 55721/07), 7 July 2011.

²⁹ Human Rights Committee, General Comment 31, 'Nature of the General Legal Obligation on States Parties to the Covenant', UN doc. CCPR/C/21/Rev.1/Add.13 (2004), §10.

peacekeeping operations),³⁰ responsibility for human rights violations lies with the organisation, while normally in CoWs authorised by the Security Council under Chapter VII, responsibility lies with the TCNs.³¹ The somewhat stricter test proposed in the International Law Commission's Draft Articles on the Responsibility of International Organisations 2011, namely that the organisations must have been in effective control of the *conduct* of state organs (such as soldiers or police officers) for responsibility to fall on the organisation,³² seems to have added a degree of uncertainty over what had been established practice. Even though there is meant to be UN command and control of peace operations, the fact that military discipline remains with the TCN, and that the government of the TCN will veto any controversial order, signifies that establishing that the UN is in effective control of specific conduct will be difficult. This issue will be returned to when considering the issue of accountability.

Despite this potentially retrograde development, the International Law Commission (ILC) Draft Articles on the Responsibility of International Organizations clearly show that it is possible to attribute wrongful acts to the UN, and such responsibility is based on it having duties under customary international law including ones to uphold and protect human rights. As an autonomous entity, having international legal personality, the UN is recognised as having rights and duties under international law.³³ Thus, human rights obligations in the context of peace operations have two potential sources: the treaty and customary obligations of TCNs and the customary obligations of the UN.

The promotion and protection of civil and political rights, and economic, social, and cultural rights, is essential in developing fair and effective governance. Peace operations have to be careful to promote the different types of rights equally, and not see civil and political rights as a priority (whether for ideological or practical reasons). Only by so doing can the right to self-determination in both its political and economic aspects be protected. Of importance for the economic aspect of the right to self-determination are the tasks undertaken, in part, by peace operations of development and relief, which will include at the lowest level the meeting of basic needs (the fulfilment of the basic human rights to life, food, water, and shelter),³⁴ and then the development of economic and social infrastructure. Clearly there is a danger of interfering in the choices a society might make about economic, social, and political development, so the local population should have a clear say in these choices. 'The aim of any international support should not be to create replicas of their own home paradigms',³⁵ but should be to facilitate choices and decision-making by the local population.

Requiring TCNs and organisations such as the UN, as well as the post-conflict interim government, to act in compliance with human rights is not an impediment to the achievement of security within a post-conflict State. A truly peaceful State can only be achieved by combining security with justice, so that priority can be accorded to peace and security in the transitional phase. However, by protecting

³⁰ Iain Scobbie, 'International Organizations and International Relations' in René Jean Dupuy (ed.), *A Handbook on International Organizations* (1999) 891; G. Gaja, 'Second Report on Responsibility of International Organizations', UN doc. A/CN.4/541, 2 April 2004, pp. 16–19.

³¹ But see European Court of Human Rights, *Behrami and Saramati v France, Germany and Norway*, Judgment (App. Nos. 71412/01 and 78166/01), 2007.

³² ILC, Draft Articles on the Responsibility of International Organizations, Article 7, UN doc. A/66/10 (2011).

³³ *Reparation for Injuries Suffered in the Service of the United Nations*, 1949 ICJ Reports 174 at p. 178; *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt*, 1980 ICJ Reports 73 at pp. 89–90.

³⁴ N. D. White, 'Towards a Strategy for Human Rights Protection in Post-Conflict Situations', in N. D. White and D. Klaasen (eds), *The UN, Human Rights and Post-Conflict Situations*, Manchester University Press, Manchester, 2005, pp. 465–6.

³⁵ Challenges Project, *Meeting the Challenges of Peace Operations: Cooperation and Coordination*, ElandersGotab, Stockholm, 2005, p. 21.

core and non-derogable human rights in that phase, many of which reflect the need to establish security, the peace operation remains human rights-compliant. Thereafter, justice must form of part of the peacebuilding efforts of States and organisations, both by ensuring that past injustices are dealt with (thereby not endorsing blanket amnesties for example),³⁶ and by respecting and protecting basic civil and political, as well as economic, social, and cultural rights of the population.

C. Peace operations and the use of force

Despite the growth in PMSCs, States seek to maintain a monopoly on the application of force so that both defensive and offensive military actions in the international arena are essentially taken by the armed forces of States, although if military enforcement action against a sovereign government is contemplated then UNSC authority is needed,³⁷ even if undertaken by a competent regional organisation.³⁸ When that authority is granted the armed forces of contributing State or States can use significant levels of force and armaments (evidenced, for example, by Operation Desert Storm undertaken pursuant to UNSC Resolution 678 of 1990), but when the mandate is for a peace operation the levels of permitted force are much reduced (and this is reflected in the lighter weaponry carried), although there has been a lack of clarity on this issue over the life of peacekeeping.

Two reasons for this lack of clarity are suggested. The first is the fact that peace operations, despite being constituted by contingents from TCNs, are seen as 'UN' forces rather than 'State' forces. This raises the question whether the UN has the same rights and duties as a State to act in self-defence or to take enforcement action. Doctrine has generally fallen short of this, initially at least limiting peacekeepers to a form of self-defence more akin to that of personal self-defence rather than the defence of a State or organisation. Arguably, however, peace operations should have wider rights to use force in pursuit of UN goals and to uphold UN and international norms though, because of the nature of peacekeeping, it will fall short of full enforcement. Interestingly, in 1993 the UN's Office of Legal Affairs (OLA) explained the right of self-defence in the context of peacekeeping as something belonging to the UN, not just for individual peacekeepers. According to this view, the right of self-defence is not 'limited to States and applies as an inherent right also to the United Nations'.³⁹ However, conceptually there is a vast difference between recognising that peacekeepers have the right to personal self-defence on the one hand, and equating the UN's right to self-defence with States' rights under Article 51 of the Charter on the other. The OLA's statement seems to go against UN practice, but given the UN's recognised personality such an argument is possible though it has not been put into practice. The second reason for confusion as to the nature and level of the force that can be used by the peacekeeping component of a peace operation is that it sits somewhat uncomfortably between a military combat operation fighting a clear enemy and an armed policing operation enforcing public order laws. This second reasons partly explains why the UN standards on the use of force (examined below) for the police component of a UN peace operation are much clearer than those for the military component.

Historically the acceptability of a peacekeeping operation lies in the fact that it usually has limited objectives, normally helping to maintain a cease-fire and a separation of the belligerents, not by means of enforcement but by consent and co-operation. Hence, peacekeeping is stated by the UNGA Special Committee on Peacekeeping to be based on a trinity of virtues — consent, impartiality, and

³⁶ Mark Freeman, *Necessary Evils: Amnesties and the Search for Justice*, Cambridge University Press, Cambridge, 2009, pp. 88–109; Anne-Marie La Rosa and Xavier Philippe, 'Transitional Justice', in V. Chetail (ed.), *Post-Conflict Peacebuilding*, *op. cit.*, p. 376.

³⁷ Article 42, UN Charter.

³⁸ Article 53, UN Charter.

³⁹ [UN Juridical Yearbook](#), 1993, pp. 371–2.

restrictions on the use of force.⁴⁰ The restricted nature of the latter was established by the basic principles guiding UNEF I in 1956. In the UNSG's 'Summary Study' of UNEF 1958, he stated that while there was some margin for judgment on the level of force to be used by peacekeepers, they were not combat operations, and were limited to the right of self-defence. He warned that 'a wide interpretation of the right of self-defence might well blur the distinction between [peacekeeping] operations ... and combat operations, which would require a decision under Chapter VII of the Charter'. A 'reasonable definition', used by UNEF, was that 'men engaged in the operation may never take the initiative in the use of armed force, but are entitled to respond with force to an attack with arms, including attempts to use force to make them withdraw from positions they occupy under orders from the Commander, acting under the authority of the Assembly and within the scope of its resolutions'. The essence is a prohibition on the use of offensive force in which the initiative would be taken by peacekeepers, thereby restricting them to defensive and reactive force.⁴¹ Although Findlay points out this was a somewhat retrospective construction of the rules governing UNEF,⁴² it has become UN doctrine, and was applied, at least initially, even to the UN operation in the Congo (ONUC), which was deployed in 1960 in very different circumstances to UNEF. UNEF was imaginatively described by Finn Seyersted as 'acting like a plate-glass window', incapable of withstanding any significant assault upon it but nevertheless acting as a 'lightly armed barrier that all see and tend to respect'.⁴³

At its core the limited use of force available to peacekeepers means self-defence, interpreted narrowly to cover a peacekeeper using force in defence of his own life, his 'comrades and any person entrusted in [his] care, as well as defending [his] post, convoy, vehicle or rifle'.⁴⁴ Beyond this there has been a continuing lack of clarity as to whether the force could also 'defend' its mandate. As UN Secretary-General Hammarskjöld recognised in 1956, the wider the right of self-defence is drawn, the more blurred the distinction between peacekeeping and enforcement action under Chapter VII becomes.⁴⁵ In general, peacekeeping was acceptable during the Cold War because it was kept distinct from enforcement action. Such a limited military operation not only suited the veto-wielding powers in the Security Council, it also met with the approval of the Non-Aligned States. It is no coincidence that the major troop contributors to peacekeeping forces during the Cold War were smaller volunteer States drawn from outside the five permanent members of the Security Council and their immediate allies (with the exception of the United Kingdom in Cyprus).

As has been seen above, even early in the development of peacekeeping, an exception to the view that limited peacekeeping force to a narrow concept of self-defence was to be found in the Congo operation (ONUC) of 1960–64. In his first statement to the UNSC on the creation of ONUC, UNSG Hammarskjöld stated that ONUC was to have the same basis and would operate in the same manner as UNEF.⁴⁶ As Draper points out, however, 'in relation to their respective constitutional bases, their essential nature and the tasks they were called upon to perform, the differences between these two United Nations Forces were so great that it could only be a matter of time before the precedents afforded by UNEF would prove inadequate, if not inapplicable' to ONUC.⁴⁷ This was especially 'true in the matter of the quantity and quality of the armed force that would have to be used' by ONUC, due

⁴⁰ Special Committee on Peacekeeping, 'Comprehensive review of the whole question of peacekeeping operations in all their aspects', Report, UN doc. A/56/767, 2003, §46.

⁴¹ ['Summary study of the experience derived from the establishment and operation of the force, report of the Secretary-General'](#), UN doc. A/3943, 1958.

⁴² Trevor Findlay, *The Use of Force in UN Peacekeeping*, Oxford University Press, Oxford, 2002, pp. 22–3.

⁴³ Finn Seyersted, *United Nations Forces in the Law of Peace and War*, Sijthoff, Dordrecht, 1966, p. 48.

⁴⁴ [General Guidelines for Peace-Keeping Operations](#), UN doc. UN/210/TC/CG95, 1995.

⁴⁵ 'Report of the Secretary General on UNEF I', UN doc. A/3943 (1956), §179.

⁴⁶ UN Security Council 873rd meeting, Security Council Official Records, 1960.

⁴⁷ Gerald I. A. D. Draper, 'The Legal Limitations Upon the Employment of Weapons by the United Nations Force in the Congo', 12 *International and Comparative Law Quarterly*, 1963, p. 391.

to the formidable amount of force opposing ONUC.⁴⁸ Draper does not see this change from UNEF as being as constitutionally problematic since ONUC had the backing on the UNSC, which has Chapter VII enforcement powers at its disposal (though these were not explicitly invoked by the Security Council), while UNEF I was the creation of UNGA and the UNSG.⁴⁹

ONUC used a variety of weapons including mortars, fighter and bomber aircraft, light armoured vehicles as well as rifles, light automatic weapons and bayonets, and anti-tank and anti-aircraft weapons.⁵⁰ This use of force flowed from the resolutions adopted by the UNSC and UNGA, as interpreted by the UNSG. However, at the outset of the operation, UNSG Hammarskjöld clearly viewed ONUC's right to use force as being the same as UNEF's i.e. being based on a narrow conception of self-defence.⁵¹ Draper states that this was probably sufficient to justify the force used by ONUC when, at its outset, it was concerned with overseeing the withdrawal of Belgian troops, but was inadequate when its task became the elimination of mercenaries supporting the Katangese secession, who, in November 1961, were considered by the UNSC to be the main threat to international peace and security, a threat that could widen to drag in the superpowers.⁵²

Certainly in the early period of ONUC's presence, the doctrine was one of reactive self-defence. In his first report on ONUC of September 1960, the UNSG referred to the problems for a highly trained soldier of reconciling his training with the strictures of being part of a UN peace force: 'He is allowed the right to use force in the last resort of legitimate self-defence. The troops are also compelled by the demands of non-intervention not to resort to military initiative in situations which would normally call for a strong reaction from courageous and responsible troops'.⁵³ All ONUC troops received the following press release: 'You serve as members of an international force. It is a peace force not a fighting force.... Protection against acts of violence is to be given to all the people, white and black. You carry arms, but they are to be used *only* in self-defence. You are in the Congo to help *everyone*, to harm no one'.⁵⁴

It is possible, as Draper points out, to argue that the host State's agreement that ONUC had freedom of movement throughout the Congo when combined with the right of self-defence would have justified ONUC protecting itself when asserting its freedom of movement in Katanga; but this 'telling example of the expanding nature of the right of self-defence' provokes speculation as to the point at which 'that right has yielded up all that it can properly provide' and the moment 'when it becomes necessary' to mandate the force with Chapter VII authorisation to use 'all necessary means'. Draper also suggests that the line between peacekeeping and war fighting is not passed until the force ceases to react in a defensive way and starts to take the initiative, in other words it starts to enforce the peace. Once it starts to take anticipatory or pre-emptive military action a peace operation will need to be armed appropriately, beyond the light defensive weaponry it normally carries.

Anticipatory action, Draper suggests, is often undertaken in wartime by military commanders, but could not be justified in conditions short of that.⁵⁵ This might appear to contrast with the UNSG's General's Bulletin of 1999, which states that IHL applies when UN peacekeepers are engaged in enforcement actions or in self-defence, but only after making it clear that this applies only when

⁴⁸ *Ibid.*

⁴⁹ *Ibid.*, p. 392.

⁵⁰ *Ibid.*, p. 396.

⁵¹ UN Security Council 873rd meeting, Security Council Official Records (1960).

⁵² G. I. A. D. Draper, 'The Legal Limitations Upon the Employment of Weapons by the United Nations Force in the Congo', *op. cit.*, p. 398. See UNSC Resolution 169 (1961).

⁵³ UN doc. S/4531 (1960).

⁵⁴ UN Press Release CO/15 (1960).

⁵⁵ G. I. A. D. Draper, 'The Legal Limitations Upon the Employment of Weapons by the United Nations Force in the Congo', *op. cit.*, pp. 400–02.

engaged as combatants within an armed conflict.⁵⁶ Thus, it would not be the case that peacekeepers using defensive force outside a situation of armed conflict, for example, to protect a convoy or to confront spoilers engaged in low-level violence, would lose their non-combatant status. Thus, in most instances, even when using weapons, peacekeepers remain outside the laws of war, but within the scope of human rights law. Only exceptionally will they engage as combatants as they did in the Congo in 1961, and in some instances since the end of the Cold War, one of which (reviewed below) is the modern operation in the Congo (MONUC/MONUSCO).

By February 1961, the UNSC widened ONUC's mandate considerably to 'take immediately all appropriate measures to prevent the occurrence of civil war in the Congo, including arrangement for cease-fires, the halting of all military operations, the prevention of clashes and the use of force, if necessary in the last resort'.⁵⁷ Initially, in the period after this resolution was adopted, ONUC responded using force as a last resort in a defensive way, responding to mercenary attacks against it, but then it had to cross the line into offensive action in order to achieve such a wide mandate so that it became 'heavily engaged in normal combat activities in which all force is used which is necessary to secure military objectives'.⁵⁸ At this point the laws of war (IHL) became applicable. The severest fighting, which led to the elimination of the mercenary elements in Katanga, followed a later UNSC resolution adopted in November 1961 that authorised the UNSG to take vigorous action, including force, to tackle the mercenaries in Katanga.⁵⁹

Despite modern moves towards allowing more offensive action to be taken by peacekeepers, there is a reluctance to move away from the doctrine of self-defence as being the basis for the use of force and weapons by peacekeepers. This remains the reality in modern peacekeeping practice. Tsagourias' explanation of why self-defence remains the prevailing practice, even with peace operations moving towards having coercive elements to protect the peace process and civilians, is that it makes them more acceptable to the host State and the factions within it.⁶⁰ At the doctrinal level, however, the UN has expanded the concept of self-defence. The Brahimi Report did this by unequivocally extending self-defence from individual self-defence to defence of the mission.⁶¹ As Tsagourias states, this follows the 'gradual expansion of the meaning of self-defence in PKOs, from individual self-defence inherent to military personnel, to freedom of movement and defence of positions, to the defence of the mandate and the protection of third parties'.⁶² This is reflected in the UN's latest statement of peacekeeping principles – the 2008 Capstone Doctrine— that, while still distinguishing peacekeeping from enforcement action, stated that it is 'widely understood' that peacekeepers 'may use force at the tactical level, with the authorization of the Security Council, if acting in self-defence and defense of the mandate'.⁶³ However, the reality is that once self-defence is so-expanded it is no longer individual self-defence, but is a mandate that permits a certain amount of enforcement (of measures of the type envisaged by Article 40 of Chapter VII such as cease-fires), though short of full peace-enforcement under Article 42 of Chapter VII. Ultimately, if peacekeepers' right to use force was based solely on the inherent right of self-defence there would be no need for

⁵⁶ UNSG's Bulletin, 'Observance by United Nations Forces of International Humanitarian Law', UN doc. ST/SGB/1999/13, section 1.1.

⁵⁷ UNSC Resolution 161 (1961).

⁵⁸ G. I. A. D. Draper, 'The Legal Limitations Upon the Employment of Weapons by the United Nations Force in the Congo', *op. cit.*, p. 406.

⁵⁹ UNSC Resolution 169 (1961).

⁶⁰ Nicholas Tsagourias, 'Consent, Neutrality/Impartiality and the Use of Force in Peacekeeping: Their Constitutional Dimension', 11 *Journal of Conflict and Security Law*, 2006, p. 473.

⁶¹ Brahimi Report, §§48–51.

⁶² N. Tsagourias, 'Consent, Neutrality/Impartiality and the Use of Force in Peacekeeping: Their Constitutional Dimension', *op. cit.*, p. 473.

⁶³ ['United Nations Peacekeeping Operations: Principles and Guidelines'](#) UN, 2008, (Capstone), p. 31.

the mandate of modern peace operations to contain Chapter VII elements.⁶⁴ This does, though, nudge modern peace operations up the scale of coercive action from consensual peacekeeping towards military enforcement; peacekeeping largely remains at the lower end of this scale and thus within the remit of human rights law and not IHL.

A common criticism is that peacekeeping, developed during the Cold War as a limited military option, has been used out of context and contrary to its limited functions, in more violent post-Cold War situations.⁶⁵ Thus, it is important for the UN to clarify more precisely the nature and extent of force that can be used by peacekeepers, as well as the type of weaponry that can be employed; in other words, how far self-defence may lawfully be extended. Given that it is not an easy task legally, politically, or indeed practically to move from peacekeeping to enforcement,⁶⁶ it is important for the UN to be clear on the levels of force appropriate to each, and to deploy the right type of force and equipment to meet to meet the force, or threat of force, deployed against it. The next section will show that it has done this to some extent, when looking at the RoE of modern peace operations.

The argument for keeping peacekeeping distinct from enforcement is often strongest within the UN itself, as evidenced by the defence of UNPROFOR's record in Bosnia (1992–5) by Yasushi Akashi, the Special Representative of the UNSG for the former Yugoslavia.⁶⁷ Akashi viewed UNPROFOR as a peacekeeping force with a narrow right of self-defence, and was critical of the UNSC in adopting Resolution 836, which required UNPROFOR to forcefully deter attacks on the safe areas, as making the UN the enemy of the Bosnian Serbs and, as the UNSG recognised at the time, as requiring a much larger force than the one deployed.⁶⁸ Akashi argues that the peacekeeping force 'was faced with a peculiar situation: on the one hand, there was a strongly stated commitment by the Security Council to protect the civilian populations in the safe areas, while on the other hand, none of the Security Council members, including those most supportive of the safe areas mandate and some of whom already had troops within UNPROFOR', were willing or able to provide the resources necessary to carry out the mandate.⁶⁹

Irrespective of NATO's presence in the air, UNPROFOR 'posed no threat to any of the parties because it was a lightly armed peace-keeping force, equipped to use force only in self-defense'.⁷⁰ The UNSC arguably added to this perception by framing the mandate as a form of self-defence: defence of the safe areas. Akashi argues strongly for the separation of Chapter VI peacekeeping where self-defence is a personal one beyond which defence of mandate action should be exceptional, and enforcement operations under Chapter VII. There should be no creep ('upgrade') from Chapter VI to Chapter VII; if extensive coercion is required then, he argues, a Chapter VI peacekeeping operation should be withdrawn and replaced with a Chapter VII-authorized CoW equipped with a coercive mandate and weapons to match.⁷¹

⁶⁴ N. Tsagourias, 'Consent, Neutrality/Impartiality and the Use of Force in Peacekeeping: Their Constitutional Dimension', *op. cit.*, p. 473.

⁶⁵ Katherine E. Cox, 'Beyond Self-Defense: United Nations Peacekeeping Operations & the Use of Force', 27 *Denver Journal of International Law and Policy*, 1998–9, p. 240. See more generally James Sloan, *The Militarisation of Peacekeeping in the Twenty-First Century*, Hart, UK, 2011, pp. 282–96.

⁶⁶ Oscar Schachter, 'Authorized Uses of Force by the United Nations and Regional Organizations', in Lori F. Damrosch and David J. Scheffer (eds), *Law and Force in the New International Order*, Boulder, San Francisco, 1991, p. 84.

⁶⁷ Y. Akashi, 'The Use of Force in a United Nations Peace-Keeping Operations: Lessons Learnt from the Safe Areas Mandate', 19 *Fordham International Law Journal*, 1995, p. 312.

⁶⁸ *Ibid.*, pp. 313, 315 citing UNSG's report, UN doc. S/25939 (1993).

⁶⁹ *Ibid.*, p. 316.

⁷⁰ *Ibid.*, pp. 316–7.

⁷¹ *Ibid.*, p. 321.

While UNEF I was based on personal self-defence, as we have seen ONUC was not, at least after a time. However, UN doctrine did not then fully return to personal self-defence. In the case of the UN Peacekeeping Force in Cyprus (UNFICYP), UNSG U Thant stated in 1964 that self-defence could be exercised where: 'specific arrangements accepted by both communities have been or ... are about to be violated, thus risking a recurrence of fighting or endangering law and order ... [or where there were] attempts by force to prevent them from carrying out their responsibilities as ordered by their commanders'.⁷² Thus, force could be used in response to efforts, or anticipated attempts, to stop peacekeepers carrying out their responsibilities (thus introducing an element of anticipatory action).⁷³ This was reinforced by UNSG Waldheim in 1973 in the context of the creation of UNEF II, when he stated that 'self-defence would include resistance to attempts by forceful means to prevent the force from discharging its duties under the mandate of the Security Council'.⁷⁴ Although this seemed to raise the prospect of a widely drawn mandate giving rise to action in defence of mission, in practice RoE were interpreted quite conservatively.⁷⁵ The 'defence of mission' principle crossed the end of the Cold War evidenced by UNSG Boutros-Ghali's comment in 1993 that 'existing rules of engagement allow [peacekeepers to open fire] if armed persons attempt by force to prevent them from carrying out their orders'.⁷⁶ As Cox explains, however, although these interpretations of the right of self-defence come very close to enforcement, commanders on the ground have, until more recent times, been conservative in their interpretation of their mandates in order to ensure the continued impartiality of the UN, thereby attempting to secure the cooperation of the parties.⁷⁷

Recent, post-Brahimi mandates, though, require peacekeepers to defend third parties as well as the mandate, thereby reducing the commander's discretion in interpreting the 'right' to self-defence. Add to this the growth of the various UN agendas aimed at protecting civilians from existential threats,⁷⁸ then pressure is on peacekeepers actively, and coercively where necessary, to use force to protect civilians under attack or under threat of attack. Given that peacekeeping is more than a police force but less than an army, it is not surprising that it appears to be accepted that in 'UN peacekeeping missions, the right of self-defence of armed peacekeepers is somewhat wider than self-defence in other fields of international law'.⁷⁹ Cox agrees that self-defence when considered in the context of peacekeeping 'differs from its usual legal meaning', evolving over time in response to the changing conditions in which peacekeepers found themselves. 'Initially, a narrow approach was taken: force should only be used in defense of the peacekeeping operation itself and strictly in response to an armed attack ("personal self-defense")', which gradually evolved towards 'defense of one's mandate',⁸⁰ which now includes protection of civilians within areas of deployment.

The crucial issue of whether it remains possible to reconcile an expanded concept of self-defence with international human rights law, which, as has been established, is applicable to peace modern operations, will be considered following a more detailed consideration of when and how, more precisely, are peacekeepers directed to use force and weapons.

⁷² 'Aide Memoire of the UNSG on Functions of UNFICYP', UN doc. S/5653 (1964), §§17(c)–18(c).

⁷³ K. E. Cox, 'Beyond Self-Defense: United Nations Peacekeeping Operations & the Use of Force', *op. cit.*, p. 254.

⁷⁴ '[Report of the Secretary-General on the implementation of Security Council Resolution 340 \(1973\)](#)', UN doc. S/11052/Rev.1, 1973.

⁷⁵ Marrack Goulding, 'The Evolution of United Nations Peacekeeping', 69 *International Affairs*, 1993, p. 455.

⁷⁶ Boutros Boutros-Ghali, 'Empowering the United Nations', 71 *Foreign Affairs*, 1993, p. 91.

⁷⁷ K. E. Cox, 'Beyond Self-Defense: United Nations Peacekeeping Operations & the Use of Force', *op. cit.*, p. 255.

⁷⁸ Susan Breau, 'The Impact of the Responsibility to Protect on Peacekeeping', 11 *Journal of Conflict and Security Law*, 2006, p. 429.

⁷⁹ Guido den Dekker and Eric P. J. Myjer, 'The Right to Life and Self-Defence on Private Military and Security Contractors in Armed Conflict', in Francioni and Ronzitti (eds), *War by Contract*, *op. cit.*, p. 183.

⁸⁰ K. E. Cox, 'Beyond Self-Defense: United Nations Peacekeeping Operations & the Use of Force', *op. cit.*, p. 250.

D. Rules of Engagement (RoE) in UN peace operations

When the UNSC authorises a CoW to use force ('necessary measures'), or if it creates a peacekeeping force with the right to use force in self-defence and defence of mission, this does not in itself determine the use of force or weapons by the military operation. RoE perform a mediatory role between the mandate and the actual use of force by peacekeepers. RoE 'specify the circumstances in which armed force may be used by a military unit and its permissible extent and degree'.⁸¹ RoE 'provide as clearly as possible the parameters within which armed military personnel assigned to a peacekeeping operation may use force'.⁸² In this way it has been argued that RoE are arguably more important than the UNSC's mandate in determining the actual level and extent of force used by a peacekeeping component.⁸³ RoE are usually not 'regarded as legal instruments in their own right, but rather they reflect the law and thus are intended to ensure that military forces act within the law. The "law" in question may comprise both national and international law'.⁸⁴

Each mission's RoE govern the use of force by military peacekeepers, and Directives on the Use of Force (DUF) govern the use of force by any police contingent to the mission. Both are developed by the UN Department of Peacekeeping Operations (DPKO) in New York. In 2002, the UN produced draft RoE,⁸⁵ though their current status is unclear. Oswald, Durham, and Bates assert that the 'legal foundation for DUF is primarily' international human rights law, whereas the 'legal framework for RoE is a combination of' international humanitarian law and international human rights law.⁸⁶ This analysis of the legal framework for the RoE of the peacekeeping component raises some concerns. The RoE of such forces should only reflect IHL if, and only to the extent, that they exceptionally become engaged as combatants within an armed conflict; and therefore normally should be framed by international human rights law. Though a systematic review of RoE is not possible, materials that reflect the RoE such as soldiers' pocket cards, training materials, standards, and rules (reviewed below) all suggest that it is the case that RoE are largely framed by human rights law and, indeed, should be framed by such law and only exceptionally by IHL. Of course, if the mandate is for military enforcement action wherein the force will be engaged as combatants in an armed conflict then the framework for the RoE will largely be IHL, although it must not be forgotten that human rights law continues to apply during armed conflict.

Though the UN produces RoE for each mission, the TCNs that send troops for particular operations will also give directives to their contingents to ensure compliance with their respective domestic law. The existence of dual instructions to troops may, as argued by Stephens, help to explain the gap between the mandating resolution, where the language is increasingly of 'necessary measures', and 'the more prosaic question of legal authority *in situ* which has it been properly resolved and, furthermore, it is at this "tactical level" that the success of the operation is often decided'.⁸⁷

⁸¹ Hilaire McCoubrey and Nigel D. White, *The Blue Helmets: Legal Regulation of United Nations Military Operations*, Dartmouth, UK, 1996, p. 146.

⁸² Ralph Zacklin, 'The Use of Force in Peacekeeping Operations' in Niels Blokker and Nico Schrijver (eds), *The Security Council and the Use of Force*, Martinus Nijhoff, The Hague, 2005, p. 100.

⁸³ Peter Rowe, 'The United Nations Rules of Engagement and the British Soldier in Bosnia', *International and Comparative Law Quarterly*, 1994, p. 947.

⁸⁴ Dale Stephens, 'The Lawful Use of Force by Peacekeeping Forces: The Tactical Imperative', 12(2) *International Peacekeeping*, 2005, p. 163.

⁸⁵ UNDPKO, 'Guidelines for the Development of Rules of Engagement (ROE) for United Nations Peace-keeping Operations', May 2002, UN doc. MD/FGS/0220.0001, in Christopher K. Penny, 'Drop That or I'll Shoot ... Maybe: International Law and the Use of Deadly Force to Defend Property in UN Peace Operations', 14(3) *International Peacekeeping*, 2007, p. 365.

⁸⁶ Bruce Oswald, Helen Durham, and Adrian Bates (eds), *Documents on the Law of UN Peace Operations*, Oxford University Press, Oxford, 2010, p. 562.

⁸⁷ D. Stephens, 'The Lawful Use of Force by Peacekeeping Forces: The Tactical Imperative', *op. cit.*, p. 157.

Stephens makes clear that the limitations on the UN force commander 'to actually command or even control a participating national contingent', signifies that the division between national and international RoE and laws remains strong with peacekeeping operations.⁸⁸ He makes the case that on the issue of command at least, the distinction between UN-authorized CoWs and UN-commanded peacekeeping is less significant than may appear; indeed 'the conditions in which the force is deployed, the weapons carried and, to some extent, its actions all remain subject to single-state discretion'.⁸⁹ Thus, he explains the 'red card' regularly played by the TCN commanders,⁹⁰ or what he calls the 'phone home syndrome', not solely as an issue of command but also of law, in that the national commander of a contingent will often have to check the compatibility of any order with national law – 'such guidance is usually sought to ensure the compatibility of domestic legal standards with the methods and means prescribed by the operations' command structure through RoE or other "command directives" to achieve the mission's goals'.⁹¹

As Stephens explains, although UN RoE have moved towards 'defence of mission', such 'broad authorities have been effectively "read down" and have been given a very narrow application by force commanders in the field'. He argues thus such 'reading down' is correct, because national law and RoE that flow from it are applicable, but it limits the UN force's ability to meet the threats against it.⁹² This is supported by Peter Rowe who asserts that UN RoE have no binding application to UK troops, who are subject to British criminal law.⁹³ Thus, while UN RoE allow the use of lethal force to defend property in certain circumstances, a TCN's national law may not.⁹⁴ This signifies that if a peacekeeper uses lethal force to defend property he will be subject to the military discipline of the TCN (there being no UN disciplinary system in any case), and may only escape punishment at the discretion of his national court if it accepts the argument that he was acting under UN RoE.⁹⁵ Stephens concludes by stating that it is a 'fact that most peacekeepers operate under both UN and national-issued RoE and sometimes there is a contradiction between the two'.⁹⁶

The argument that national RoE prevail even in the face of Chapter VII mandates for peace operations seems suspect. On the one hand, the argument can be supported on the basis that UNSC decisions cannot, by themselves, override national laws since the UN Charter's so called 'supremacy clause' only applies to treaty obligations, and not national laws that are inconsistent with those arising from the UN Charter.⁹⁷ On the other hand, Member States, including TCNs, are bound by the UN Charter (Article 25) to comply with decisions of the UNSC and therefore should ensure that the mandate is reflected in their instructions to troops. Although RoE themselves are not binding, they are based on decisions or laws that oblige TCNs to act in certain ways. Thus, on this basis, a TCN commander is faced with a choice between his obligations under national law and his government's obligations under UN law. It is not surprising that in these circumstances the TCN commander will choose national law.

⁸⁸ *Ibid.*, pp. 158, 160.

⁸⁹ *Ibid.*

⁹⁰ Ramesh Thakur and Dipankar Banerjee, 'India: Democratic, Poor, Internationalist' in Charlotte Ku and Harold Jacobson (eds.), *Democratic Accountability and the Use of Force in International Law*, Cambridge University Press, Cambridge, 2003, p. 198.

⁹¹ D. Stephens, 'The Lawful Use of Force by Peacekeeping Forces: The Tactical Imperative', *op. cit.*, p. 160.

⁹² *Ibid.*, pp. 163–5.

⁹³ P. Rowe, 'The United Nations Rules of Engagement and the British Soldier in Bosnia', *op. cit.*, p. 954.

⁹⁴ D. Stephens, 'The Lawful Use of Force by Peacekeeping Forces: The Tactical Imperative', *op. cit.*, p. 165.

⁹⁵ *Ibid.*, p. 166.

⁹⁶ *Ibid.*, p. 169.

⁹⁷ Article 103, UN Charter. But see Article 27, Vienna Convention on the Law of Treaties 1969, which provides that a 'party may not invoke the provisions of its internal law as justification for its failure to perform a treaty'.

In terms of human rights law it may be the case that if the TCN has fully incorporated its obligations under the ICCPR or regional human rights treaty (or both) into its national law, including its criminal and military laws, then the fact that the national laws and RoEs of TCNs are applied in peace operations will strengthen the application of human rights standards. However, it is arguably much more likely that a TCN will not have incorporated human rights law in such a way; and will apply largely unreconstructed criminal and military law to its contingents. Furthermore, it may not recognise the extraterritorial applicability of its human rights treaty obligations. Thus, in these circumstances, there may well be a conflict between UN RoE (which, given the UN's own human rights obligations, should be based on international human rights law), and the national RoE of TCNs.

Despite these problems, it is worth examining the mission-specific 'Soldier's Pocket Cards' produced by DPKO, based on the mission's RoE, in order to consider their compatibility with applicable international laws, particularly international human rights law. Given that UN RoE should prevail, it is important that they reflect human rights law.

E. Human rights and the use of lethal force by UN peacekeepers and UN police

The RoE of a peacekeeping force should reflect human rights law, and, if applicable, IHL. Given that it has been established that *jus in bello* plays a marginal role in peace operations, and that human rights law continues to apply during armed conflict in any case, this analysis is largely confined to an examination of whether RoE reflect applicable principles of human rights law, especially the obligation not to take life arbitrarily. Where IHL is applicable to peacekeepers, the prohibition on the arbitrary deprivation of life is qualified and combatants can be targeted, although civilians remain protected unless they take a direct part in hostilities.⁹⁸ Applicable human rights law governing the right to life, for the purposes of this section, are those principles that can be drawn from major human rights treaties, and from treaty bodies and courts. Of course, all such law may not be directly applicable (for instance, decisions of the European Court of Human Rights may only relate to the obligations of some TCNs, and then extraterritorial jurisdiction also has to be established), but with increasing judicial dialogue between human rights courts, the standards identified are, in principle, applicable.

Major human rights treaties make it clear that the right to life, though fundamental, is not absolute. Life cannot be taken arbitrarily.⁹⁹ Doswald-Beck suggests that in order to understand when life is not taken arbitrarily a good starting place is Article 2(2) of the European Convention on Human Rights (ECHR), which details when the right to life is not violated: 'when it results from the use of force which is no more than is absolutely necessary: (a) in defence of any person from unlawful violence; (b) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained; (c) in action taken for the purpose of quelling a riot or insurrection'. While (a) covers self-defence and includes within it defence of third parties, (b) and (c) go wider than the use of lethal force in self-defence. Article 15(2) of the ECHR provides that the right to life is non-derogable except 'in respect of deaths resulting from lawful acts of war'. Thus, the ECHR provides some detail on when lethal force is permitted – during peacetime and situations short of armed conflict when absolutely necessary for self-defence, to effect an arrest or prevent escape of a detainee, or in action taken to

⁹⁸ UNSG's Bulletin, 'Observance by United Nations Forces of International Humanitarian Law', 1999, Section 5.1, 5.2.

⁹⁹ Louise Doswald-Beck, *Human Rights in Times of Conflict and Terrorism*, Oxford University Press, Oxford, 2011, p. 161.

quell a riot or insurrection; and during armed conflict in accordance with IHL.¹⁰⁰ This provides peace operations with a clear framework in contrast to the ICCPR, which (in Article 6) provides for a non-derogable right not to be deprived of life arbitrarily, without providing any detail.

Therefore, in traditional operations in which peacekeepers are restricted to self-defence, the use of permitted lethal force is clearly within the confines of human rights law. Furthermore, an examination of the Soldier's Pocket Card reflecting RoE developed by the UN for a modern peace operation – UN Mission in Sudan (UNMIS) in 2005 – shows that in reality peacekeepers are still primarily operating from a basis of self-defence, though within that concept is now included the protection of civilians subject to the threat of imminent violence. As Article 2, paragraph 2(a) of the ECHR shows, defence of third parties is within the concept of self-defence, a concept also supported in the literature.¹⁰¹ The Pocket Card goes wider than indicated by the European Convention, by permitting the use of lethal force in defence of property, but in other ways, it is more restrictive, notably when it prohibits the use of lethal force to prevent the escape of any apprehended or detained person.

The UNMIS Pocket Card states that minimum force and proportionality in the use of force are applicable at all times; that force must be limited in intensity and duration to achieve the authorised objective; and that it must be commensurate with the level of the threat. Deadly force is justified in some cases but force should be used 'only when absolutely necessary to achieve [the] immediate aim, to protect yourself, your soldiers, UN or other designated personnel, installations, equipment and civilians under imminent threat of physical violence'. The 'decision to open fire shall only be made by order of the on-the-scene commander', 'unless there is insufficient time to obtain an order'. 'Before opening fire', peacekeepers must give a 'final warning at least three times', either in Arabic or English. 'Fire must be aimed and controlled – automatic fire will be opened only as a last resort' – and 'if possible, a single shot should be aimed at non-vital parts of the body in order not to kill'. 'Indiscriminate fire is not permitted'; and 'Fire for effect must not last longer than is necessary to achieve the immediate aim'. Peacekeepers firing weapons must 'avoid or minimize collateral damage', and 'when in doubt, always seek clarification from higher command'.

Subject to these conditions the Pocket Card allows peacekeepers to use force (up to and including deadly force) 'to defend oneself, other UN personnel, individuals designated by the Head of Mission or other international personnel against a hostile act or a hostile intent'; to resist attempts to abduct the above people; to protect designated installations, facilities, and equipment from hostile acts or hostile intent; 'to protect civilians under imminent threat of physical violence, when competent local authorities are not in a position to render immediate assistance; and to 'resist attempts by any person or group that limits or intends to limit the freedom of movement of UN personnel, humanitarian workers or individuals designated by the Head of Mission'. 'Hostile act' is defined as 'an action where the intent is to cause death, bodily harm or destruction of designated property'; and 'hostile intent' is defined as the 'threat of imminent use of force, demonstrated through an action which appears to be preparatory to a hostile act. Only a reasonable belief in the hostile intent is required, before the use of force is authorized'. Force, excluding deadly force, is allowed to prevent the escape of any apprehended or detained individual; to prevent forcible passage of individuals or groups through checkpoints; and to detain those who effect forcible passage.

Thus, the on-the-ground interpretation of the right to use force in peace operations shows a fair degree of caution as to when lethal and non-lethal force can be used, and although it goes beyond a

¹⁰⁰ See P. Rowe, *The Impact of Human Rights Law on Armed Forces*, Oxford University Press, Oxford, 2006, pp. 134–47.

¹⁰¹ George P. Fletcher and Jens D. Ohlin, *Defending Humanity: When Force is Justified and Why*, Oxford University Press, Oxford, 2008, pp. 67–76.

strict reading of self-defence, it falls a long way short of military enforcement action, and it largely complies with the obligation on States and the UN not to take life arbitrarily. Indeed, the UNMIS Pocket Card does not reflect Article 2(2)(c) of the ECHR that, when unavoidable, life can be taken when confronting riots and insurrections, which would cover the situations when a peace operation is faced with violence from non-State actors. Indeed, given the conditions that modern peace operations often find themselves in, where there are serious levels of violence but not of the intensity or duration for an armed conflict, the right to use lethal force when absolutely necessary in the face of such violence seems essential. In this regard, Principle 14 of the 1990 Basic Principles on the Use of Force and Firearms by Law Enforcement Officials provides that 'in the dispersal of violent assemblies, law enforcement officials may use firearms only when less dangerous means are not practicable and only to the minimum extent necessary'.¹⁰² This should clearly be applicable to UN police but also to UN peacekeepers when they are undertaking riot-control functions.

The main problem, in terms of human rights, compliance appears to be that the UN Pocket Card (and, therefore, presumably the RoE) allows the use of deadly force to protect UN property and equipment as well as to resist attempts to restrict the freedom of movement of the operation. These appear to go beyond what international human rights law, at least as reflected in Article 2(2) of the ECHR, considers the circumstances in which lethal force is permitted. Penny considers the circumstances in which peacekeepers can use lethal force to protect property in some detail. He points to many instances where UN property, including weapons, have been threatened or stolen.¹⁰³ He correctly points out that peacekeepers 'need to know when they are entitled to use deadly force in these situations; more precisely, they must be issued with and trained in rules of engagement (RoE) that comply with international law'.¹⁰⁴ Penny focuses on the compatibility of UN RoE with international legal standards under human rights law, and he does not consider that Chapter VII decisions would override obligations on TCNs arising under human rights law (presumably because the issue is one of customary, perhaps peremptory, human rights law).¹⁰⁵ Such issues must be interpreted in the light of the move from strict self-defence, to defence of mission found in the mandates of modern peace operations.

In considering the right to life, Penny argues, on the basis of self-defence, that deadly force may be used to protect inherently dangerous property (such as weapons or munitions) that will present a threat to peacekeepers or civilians if taken.¹⁰⁶ More problematically, he argues that for other UN property, which is not inherently dangerous – vehicles, food, uniforms – deadly force will only be justified if a proportionate and necessary response in defence of the mission. For example, theft of fuel would only justify deadly force if necessary to protect the mission. This would be the case, he argues, if the theft prevented the use of UN vehicles thereby endangering the lives of troops or civilians.¹⁰⁷ While this might be acceptable in an armed conflict situation,¹⁰⁸ under human rights law deadly force is not justified to prevent theft of mission-essential property such as fuel; and arguably lethal force is only allowed in the case of inherently dangerous property when necessary in self-defence of peacekeepers or civilians, or as a necessary part of an action against riots or insurrections. Beyond that, the peremptory nature of the right to life cannot be overridden, even by a Chapter VII mandate, unless the UN force is engaged as a party to an armed conflict. In the case of armed

¹⁰² Adopted at the Eighth UN Congress on the Prevention of Crime and the Treatment of Offenders, 1990; endorsed by UNGA Resolution 45/121 (1990). Available at <http://www2.ohchr.org/english/law/firearms.htm> (accessed 20 February 2012).

¹⁰³ C. K. Penny, 'Drop That or I'll Shoot ... Maybe: International Law and the Use of Deadly Force to Defend Property in UN Peace Operations', *op. cit.*, p. 353.

¹⁰⁴ *Ibid.*

¹⁰⁵ *Ibid.*

¹⁰⁶ *Ibid.*, p. 360.

¹⁰⁷ *Ibid.*, pp. 360–1.

¹⁰⁸ Article 31(1)(c), 1998 Rome Statute of the International Criminal Court.

conflict, the legal regime is modified by IHL, so deadly force is permitted in circumstances when defending any mission property against enemy combatants, and arguably against civilians when they are either participating directly in hostilities or, when absolutely necessary in protecting property essential for personal survival or the accomplishment of the mission.¹⁰⁹

A contrast can be drawn between the RoE of a modern peace operation and the RoE of UN-authorized military enforcement action by a CoW, illustrated by the pocket card given to US troops to be followed when engaging Iraqi forces in Operation Desert Storm under a UN mandate in 1991. The rules open with a general statement that ‘all enemy military personnel and vehicles transporting the enemy or their supplies may be engaged’ but then it lists a number of prohibitions upon the use of force against: those enemy combatants that are rendered *hors de combat*, civilians and their property (unless necessary to save US lives), and protected targets such as hospitals and churches, unless force is necessary in self-defence.¹¹⁰

Thus, under the RoE in military enforcement operations self-defence is just one form of the use of force that is necessary, subject to the rules of *jus in bello*, to achieve the objectives of the mission (which in the case of Operation Desert Storm was to force Iraq troops and armour out of Kuwait).¹¹¹ Thus, there remains a qualitative difference between peacekeeping, its basis in self-defence (though increasingly widely drawn), and human rights law, on the one hand, and military enforcement actions on the other, with the latter’s emphasis on engaging the enemy as effectively as possible under the rules of IHL. The difficulty is that while the UN might not be willing or able (due to lack of volunteers) to take full enforcement action, it may be able to persuade States to contribute to a peace operation with a more coercive mandate, even though the situation may call for a more forceful response. Thus a peace operation may be put in a violent situation which, though short of armed conflict, may call for more coercive measures than allowed for in the concept of self-defence. In these circumstances human rights law should not be seen as condemning the peace operation to failure since, as has been seen, it can use force including, where necessary, lethal force to confront rioters and insurrectionists, terms that should be interpreted to include spoilers and armed groups that undermine the peace.

Thus the UN’s interpretation of when peacekeepers can use force seems to accord, with some exceptions, with the obligation on TCNs and the UN not to take life arbitrarily, but as the Human Rights Committee points out, the obligation on States, and by analogy the UN, is not only to ensure that their agents do not arbitrarily take life, but to take positive measures to protect the right.¹¹² Those positive obligations, drawn from treaty body practice on both law enforcement and military activities, are: first, the presence of clear laws prohibiting the ‘arbitrary use of potentially lethal force’; second, adequate training of military, security, and police personnel to ensure they respect the law; third, adequate planning of any peace operation to prevent arbitrary loss of life as much as possible;¹¹³ and, finally, provision for independent investigation and, if necessary, criminal prosecution of violators.¹¹⁴ Access to justice for victims should also be included in the last obligation, including non-judicial avenues of redress.

¹⁰⁹ *Ibid.*

¹¹⁰ In Adam Roberts and Robert Guelff (eds), *Documents on the Laws of War*, Third Edn, Oxford University Press, Oxford, 2000, pp. 562–3.

¹¹¹ UNSC Resolution 678 (1990).

¹¹² Human Rights Committee, ‘General Comment 6 on Article 6’, 30 April 1982, §5.

¹¹³ Drawing upon European Court of Human Rights, *McCann v United Kingdom*, Judgment (App. No. 18984/91), 27 September 1995.

¹¹⁴ L. Doswald-Beck, *Human Rights in Times of Conflict and Terrorism*, *op. cit.*, pp. 162, 167.

In order for the UN to have fulfilled these positive obligations, the remainder of this chapter examines whether there is UN law governing when lethal force may be used by peace operations; adequate training of personnel in respect for the law; adequate planning of peace operations in terms of mandate, size and equipment (including weapons) to limit to the greatest degree loss of life (including the lives of UN peacekeepers, UN police and civilians); and automatic investigation into when life is arbitrarily taken by a UN peacekeeper and provision for access to justice for victims. In looking for evidence of these in the UN system, some mention will be made of weapons usage by peace operations, though there is very little detail on this in UN or other reports.

F. UN law governing the use of lethal force and weapons by peace operations

Although there is no specific UN law governing the use of lethal force or weapons by UN peacekeepers or UN police, a number of resolutions and other documents partly cover this issue. Although they do not take the form of hard 'treaty' law, as soft law documents they may become customary, although more realistically they can be viewed as pieces of internal UN law, some of which, though usage by the UN and TCNs, have gained the status of customary institutional law.

It would be surprising if UN police were not subject to the 'Basic Principles on the Use of Force and Firearms by Law Enforcement Officials', adopted by the Eighth UN Crime Congress and promoted by the UNGA in 1990.¹¹⁵ As Doswald-Beck observes, this document has been frequently referred to by the Human Rights Committee in its observations on State reports.¹¹⁶ Principle 9 governs the use of firearms in the following terms:

Law enforcement officials shall not use firearms against persons except in self-defence or defence of others against the imminent threat of death or serious injury, to prevent the perpetration of a particularly serious crime involving grave threat to life, to arrest a person presenting such danger and resisting their authority, or to prevent his or her escape, and only when less serious means are insufficient to achieve these objectives. In any event, intentional lethal use of firearms may only be made when strictly unavoidable in order to protect life.

Assuming this is the governing principle for the use of firearms by UN police, it is compatible with human rights limitations on the use of lethal force discussed above.

A number of other documents cover the use of force and firearms by UN police. For instance, the Office of the UN High Commissioner for Human Rights (OHCHR)'s Expanded Pocket Book on Human Rights for the Police of 2004 provides that, in accordance with the 1990 Basic Principles, firearms are only to be used 'in extreme circumstances', and that the intentional 'lethal use of force and firearms shall be permitted only when strictly unavoidable in order to protect human life'. Furthermore, it provides that a 'range of means for differentiated use of force be made available' to UN police, who shall receive training in this and the use of non-violent means.¹¹⁷ The 2009 DPKO policy on 'Formed Police Units [FPUs] in United Nations Peacekeeping Operations' makes it clear that 'mission-specific guidance will be issued in each case to authorise FPUs to carry and use firearms, including the precise specifications of the firearms, and other items of police and enforcement equipment'. Law enforcement officials shall 'apply non-violent means before resorting to the use of force and firearms'; 'exercise restraint in such use and act in proportion to the seriousness of the offence'; and

¹¹⁵ UNGA Resolution 45/121 (1990). See also Code of Conduct for Law Enforcement Officials, UNGA Resolution 34/169 (1979).

¹¹⁶ L. Doswald-Beck, *Human Rights in Times of Conflict and Terrorism*, *op. cit.*, p. 164.

¹¹⁷ UNOHCHR Professional Training Series No. 5/Add3 – 'Human Rights Standards and Practice for the Police (Expanded Pocket Book on Human Rights for the Police)', 2004.

‘minimize damage and injury, and respect and preserve human life’. The document identifies three levels of the use of threat: passive, where dialogue is the norm; non-deadly threats such as during unlawful, but non-violent assemblies, where non-lethal means and weapons may be used where necessary and in a proportional manner; and finally where the situation has escalated to ‘present an imminent deadly threat or great bodily harm to police officers or third persons’, justifying the application of lethal force.¹¹⁸

DPKO’s Policy on FPU gives a little more detail on the types of weapons carried by UN police in stating that an FPU must ‘have a range of weapons – and the skills to use them appropriately – in order to be able to escalate the level of force in a graduated manner, among them potentially less-lethal weapons that are defined as devices used to stop, control and restrain individuals while causing less harm than lethal force to the individual as well as the police officer and any nearby persons’. The Policy indicates that the UN is developing a ‘list of standardised police equipment for FPUs, including similar technical specifications and numbers for firearms, shields, helmets, batons, etc.’¹¹⁹

In addition, there are ‘use of force’ guidelines produced by the UN Department of Safety and Security (UNDSS) directed at UN security officers and contracted security personnel responsible for the protection of UN personnel, visitors, and assets. For these individuals the use of deadly force is permitted in self-defence of themselves and third persons, to maintain order and security within UN premises and to prevent damage to them, to detain and prevent escape of a person who is a threat to security or who has committed a crime. Lethal force is only permitted for UN security personnel in self-defence (including third parties) when there is an ‘imminent threat of death or serious bodily injury and there is no other reasonable alternative available’.¹²⁰ Again, apart from the possible use of lethal force to protect UN property from criminal damage, these guidelines are compatible with human rights law. Interestingly, the UNDSS guidelines refer to the ‘UN Weapons Manual’ for ‘detailed guidance on the implementation’ of the guidelines,¹²¹ but this document, which could potentially be crucial in identifying UN regulation of weapons usage, does not appear to be publicly available.

Documents purporting to regulate the use of force and weapons by the military component of a peace operation – peacekeepers – are, surprisingly, less specific than for UN police and for UN security personnel. The DPKO’s ‘Handbook on United Nations Multidimensional Peacekeeping Operations’ of 2003 bases the limitation on the use of force to self-defence with the fact that peacekeeping operations are based on consent. It provides that self-defence includes the ‘right to protect oneself, other UN personnel, UN property and other persons under UN protection’, though it does recognise that the UNSC can authorise an operation to use armed force in situations other than self-defence. Beyond that the Handbook leaves it to the mission-specific RoE to ‘clarify the different levels on the use of force that can be used in various circumstances, how each level of force should be used and any authorizations that may need to be obtained from commanders’.¹²² The 2008 Capstone Doctrine expands somewhat on when potentially lethal force may be used, stating that peacekeeping operations may ‘use force at the tactical level, with the authorization of the Security Council, if acting in self-defense and defense of the mandate’. ‘All necessary means’, which would

¹¹⁸ Policy on ‘Formed Police Units in United Nations Peacekeeping Operations’ (UNDPKO, 2009.32), §§27–39; citing the Basic Principles on the Use of Force and Firearms by Law Enforcement Officials, the Code of Conduct of Law Enforcement Officials, and mission-specific guidance such as ‘Directives on the Use of Force and Firearms’.

¹¹⁹ DPKO Policy on FPUs (2009.32), *op. cit.*, §§45 and 72.

¹²⁰ UNDSS, ‘Security Policy Manual’, 8 April 2011, Chapter IV, Section H, §§4, 10, and 11.

¹²¹ *Ibid.*, §2, note 1.

¹²² DPKO, [Handbook on United Nations Multidimensional Peacekeeping Operations](#), UN, New York, 2003, p. 57.

include lethal force where necessary, may be used against ‘militias, criminal gangs, and other spoilers who may actively seek to undermine the peace process or pose a threat to the civilian population’, in order to ‘deter forceful attempts to disrupt the political process, protect civilians under imminent threat of physical attack, and/or assist the national authorities in maintaining law and order’.¹²³

These documents seem compatible with human rights principles on when lethal force can be used, identified above, if the provision on riots and insurrections is extended to situations to which peacekeepers are often deployed to include forceful actions against militia, criminal gangs and other spoilers who undermine the peace or threaten civilians. There remains the problem of using deadly force to protect UN property, which is generally difficult to reconcile with human rights law.

At the operational level there are documents which purport to guide peacekeepers whatever mission they are on, in other words distinct from the mission-specific RoE. However, these are not helpful in providing specifics about when force and weapons can be used. For instance, ‘We are UN Peacekeepers’ pledges soldiers on mission never to ‘use unnecessary violence or threaten anyone in custody’, while the ‘Ten Rules of Personal Conduct for Blue Helmets’, *inter alia*, urge soldiers not to ‘act in revenge or with malice, in particular when dealing with prisoners, detainees or people in your custody’.¹²⁴

While there are a number of UN documents (more for UN police than for peacekeepers) specifying when lethal force can be used, they are primarily concerned with redefining the notion of self-defence. The detail is left to RoE for the military component of peace operations and DUF for the police element, arguably leaving a gap in which the UN should provide more precise, but generally applicable, regulations on when lethal force can be used. The key document is the 1990 Basic Principles on the Use of Force and Firearms by Law Enforcement Officials, which is viewed in the UN system as normative.¹²⁵ Although it may well have become custom, its terms are limited to UN police. Though some of its principles are also applicable to peacekeepers, there is a need for an equivalent document for UN peacekeepers. This document should still be based on human rights law, but should clarify when lethal force can be used against spoilers and other armed gangs. It should also clarify the UN’s position on protection of UN property, which is inconsistent with human rights standards.¹²⁶

G. Adequate training to limit misuse of weapons and the loss of life

There is plenty of reference to adequate training of peacekeepers and UN police in UN documents, for instance as regards the latter the DPKO’s ‘Policy on Formed Police Units’ of 2009 provides that the Head of Police Components in any mission is ‘responsible for ensuring that police officers serving in an FPU shall be well-trained and familiarized with the’ DUF. It provides further that ‘appropriate training will enable FPUs to deal with difficult circumstances in line with a restrictive approach to the use of force while at the same time serving and protecting the lives of civilians’.¹²⁷ For the military

¹²³ Capstone Doctrine, pp. 34–5.

¹²⁴ www.un.org/en/peacekeeping/documents/un_in.pdf; www.un.org/en/peacekeeping/documents/ten_in.pdf (both accessed 20 February 2012).

¹²⁵ DPKO Policy on FPUs (2009.32), *op. cit.*, p. 21.

¹²⁶ For efforts to promote a ‘human rights’ revision of the UN’s standard SOFA, see the project based at Essex University:

www.essex.ac.uk/.../model_sofa_peliminay_report_august_2010.pdf www.essex.ac.uk/.../model_sofa_peliminay_report_august_2010.pdf (accessed 11 June 2012).

¹²⁷ *Ibid.*, p. 10.

component, DPKO's 2003 Handbook provides for 'designing and conducting human rights training programmes'.¹²⁸

Analysis of UN documents on training reveals that for peacekeepers, according to a 1995 UNGA resolution, the responsibility to ensure that soldiers are properly trained, including presumably basic weapons training, falls on Member States, though the UNSG is requested to prepare training materials to assist those States in this regard.¹²⁹ The development of training materials at UN level, and ensuring that TCNs use them, are both essential if the UN is to reduce the unevenness of training within TCNs, where it can be envisaged that left to their own devices there will be contingents with little or no training, some that are well trained in international humanitarian law but not in human rights law, and others that have comprehensive training programmes.

The evidence is that the training of UN peacekeepers and police has become much more central to the UN in recent years. In 2007, the UNSG produced a 'Comprehensive Report on Strengthening the Capacity of the United Nations to Manage and Sustain Peace Operations', in which a Policy, Training and Evaluation Division was created within the DPKO.¹³⁰ This seems to be a positive development since the evaluation of a mission's mandate and its implementation will be indicative of the nature and level of training required. The Report makes it clear that evaluation would 'focus on mission performance rather than compliance issues, which fall strictly under the purview' of the Office of Internal Oversight Services (OIOS – discussed further below).¹³¹

Although these are positive developments, it is alarming that these feature in a report as late as 2007 when complex peace operations date back to before Brahimi in 2000, to the early forces in Central America and Africa in the late 1980s/early 1990s. The prescription in the 2007 Report to the DPKO to work closely with the Department of Field Support (DFS) 'to ensure adequate security resourcing for field missions, in particular in the areas of staff, equipment, training, security services and associated budget processes', is perhaps also indicative of the slowness of the UN to properly manage UN peace operations. In the same document the statement that work by DPKO on the development of training programmes is 'already underway' is again somewhat surprising,¹³² but is indicative that such matters have historically been left to TCNs.

By 2009, with the adoption of the DPKO's Policy on 'Support to Military and Police Pre-Deployment Training [PDT] for UN Peacekeeping Operations', standards were being developed by the DPKO that TCNs and any peacekeeping training institution should refer to in order to ensure that all UN peacekeeping personnel complete PDT, in accordance with the relevant PDT standards, prior to their deployment to a DPKO-led peacekeeping operation.¹³³ Standards are posted on the Peacekeeping Resources Hub website as soon as they are available.¹³⁴ In his report on the progress of training in peacekeeping of 2010, the UNSG makes it clear that Member States remain responsible for ensuring PDT (to UN standards) of uniformed personnel, while DPKO and DFS have responsibility for induction and ongoing training.¹³⁵

¹²⁸ DPKO, [Handbook on United Nations Multidimensional Peacekeeping Operations](#), p. 101.

¹²⁹ UNGA Resolution 49/37 (1995).

¹³⁰ UN doc. A/61/858, §74.

¹³¹ *Ibid.*, §76.

¹³² *Ibid.*, §54.

¹³³ DPKO/DFS, 'Support to Military and Police Pre-Deployment Training for UN Peacekeeping Operations', Policy 2009.21, 28 September 2009, §§3, 10, 17–18.

¹³⁴ <http://peacekeepingresourcehub.unlb.org> (accessed 24 February 2012).

¹³⁵ UN doc. A/65/644, 2010, §§10–12.

An initial examination of these pre-deployment training ‘standards’ shows that they are still at an early stage of development in that they do not appear to be precise, exacting requirements for all peacekeepers, for example by specifying when force can be used or weapons fired. Rather they refer to documents such as the DPKO/DFS Guidelines on Roles and Training Standards for Military Staff Officers and UN Pre-Deployment Training Standards for Police Officers. The latter, for example, consists of a list of training course specifications, one component of which is a ‘Human Rights Standard in the Use of Force’, which does not contain a ‘standard’ as such but states that the training module on this issue will ‘provide participants with a clear understanding of the human rights implications relating to the use of force and firearms by law enforcement officials’.¹³⁶

In 2011, the DPKO produced the ‘UN Protection of Civilian PDT Standards’, which purport to contain a restatement of the existing norms governing the use of force by peacekeepers. On the one hand, these restate the rules on self-defence that have been identified since 1956; on the other, they then go much further than this when contemplating mandates adopted under Chapter VII. The document provides that all UN peacekeepers have an inherent right to defend themselves, if necessary, by using force, up to and including deadly force; and also that peacekeepers, authorised under Chapter VII, can use such force ‘to prevent, pre-empt, and respond effectively to acts of, or imminent threat, of violence against civilians from any source, including host state bodies or authorities’.¹³⁷ As a ‘standard’ this leaves a great deal to be desired, potentially encouraging broad interpretations of when deadly force can be used and when weapons can be fired, for instance ‘pre-emptively’. Furthermore, though it is true to say that the impartial enforcement of a protection mandate should not distinguish between State and non-State actors who threaten civilians, the fact is that action against the government will constitute enforcement action rather than peacekeeping.

H. Planning to reduce risk to life

Training, no matter how comprehensive, will only be effective if there has been adequate planning so that the force deployed is capable of meeting the exigencies of the situation and environment it is deployed to. This is recognised by the 2008 Capstone Doctrine:

The Secretariat has a responsibility to provide the Security Council with an accurate assessment of the risks associated with its decision to deploy a United Nations peacekeeping operation, and ensure that its mandate and capabilities are tailored to the requirements of the situation.¹³⁸

The realities of putting a peace operation together often result in peace operations that are, at least initially, inadequate for the task. An examination of the UNSG’s initial reports to the UNSC advising on the nature and extent of the operation for a particular situation reveals this. For example, in his report on preparations for UN deployment to the DR Congo of 15 July 1999, the UNSG makes the following prescient comment:

In order to be effective, any United Nations peacekeeping mission in the Democratic Republic of the Congo, whatever its mandate, will have to be large and expensive. It would require the deployment of thousands of international troops and civilian personnel. It will face tremendous difficulties, and will be beset by risks. Deployment will be slow. The huge size of the country, the degradation of its infrastructure, the intensity of its climate, the intractable nature of some aspects of the conflict, the number of parties, the high levels of mutual suspicion, the large population displacements, the ready availability of small arms, the general climate of impunity

¹³⁶ ITS/DPET, ‘[Police STM: Human Right Standard in the Use of Force](#)’, 4/2009, p. 9.

¹³⁷ DPKO, [UN Protection of Civilian PDT Standards](#), First Edn, 2011, p. 20.

¹³⁸ Capstone Doctrine, p. 49.

and the substitution of armed force for the rule of law in much of the territory combine to make the Democratic Republic of the Congo a highly complex environment for peacekeeping.¹³⁹

The failures of the Congo operation to protect lives are well documented.¹⁴⁰ By 2001, a wholly inadequate UN force (MONUC) of 5,500 was unable to prevent horrific violence in the Bunia region, despite a mandate that contained a provision under Chapter VII, which enabled necessary measures to be taken to protect civilians.¹⁴¹ Indeed, a European Union (EU) force (CoW) was required in 2003 to tackle the violence in that region. With the MONUC force struggling to maintain order, especially in the Ituri Province centred around the town of Bunia, the EU decided to send a 1,800 strong French-led force to that area, acting under a mandate from the UNSC.¹⁴² Although the operation was stated to be limited to humanitarian or crisis management within the so-called 'Petersberg tasks' of the EU,¹⁴³ the line between such operations and war fighting was not entirely clear, as evidenced by the clashes between French troops and rival militias shortly after the EU force's deployment. Having restored some calm, EU Operation Artemis was withdrawn on 1 September 2003.

Another temporary EU force was sent in mid to late 2006 to support MONUC while elections were held in the country.¹⁴⁴ These temporary deployments were only sufficient to quell the violence for a while and in the interim violence flared again despite significant increases in the size and mandate of MONUC.¹⁴⁵ Ultimately, MONUC, which by 2010 had reached 20,586 troops, was involved in fighting rebels alongside government troops.¹⁴⁶ It was replaced by the UN Organization Stabilization Mission in the DR Congo (MONUSCO) in 2010 but still had a mandate to support the government in providing security and consolidating the peace, and in protecting civilians.¹⁴⁷ To do this MONUSCO has used offensive weapons; for instance on 12 July 2012 the UN reported that the force had used attack helicopters firing rockets and missiles to deter the advance of M23 rebels towards civilian population centres in the east of the country.¹⁴⁸ In these circumstances the UN is exceptionally engaged as party to an armed conflict of a non-international character and should be applying the rules of international humanitarian law..

Possibly greater levels of force have been used by the African Union (AU) peacekeeping mission in Somalia. The African Union Mission in Somalia (AMISOM), a UNSC-authorized regional peacekeeping force,¹⁴⁹ has fought alongside the Somali National Army against factions opposing the Transitional Federal Government, including *al-Shabaab*. Clearly, in these operations, the rules of IHL are more likely to be applicable, permitting significantly greater levels of force and use of weaponry than in normal peacekeeping operations. It is worth noting that AMISOM personnel received pre-

¹³⁹ Report of the UNSG on the United Nations Preliminary Deployment in the Democratic Republic of the Congo, UN doc. 1999/70, §15.

¹⁴⁰ For example, N.D. White, 'Empowering Peace Operations to Protect Civilians: Form Over Substance?', 12 *Journal of International Peacekeeping*, 2009, p. 327.

¹⁴¹ UNSC Resolution 1291 (2000), §8.

¹⁴² UNSC Resolution 1484 (2003).

¹⁴³ Treaty on European Union, Article 17.

¹⁴⁴ UNSC Resolution 1671 (2006).

¹⁴⁵ Initially MONUC consisted of 5,500 troops (UNSC Resolution 1291, 2000); in 2002 it was increased to 8,700 (Resolution 1445, 2002); Resolution 1493 (2003) increased it to 10,800; Resolution 1565 of 2004 increased it to 16,700.

¹⁴⁶ UNSC Resolution 1856 (2008). UNSG's Report, UN doc. S/2009/303, 19.

¹⁴⁷ UNSC Resolution 1925 (2010).

¹⁴⁸ UN News Centre, '[UN mission using helicopters to protect civilians from rebel fighters in DR Congo](#)', 12 July 2012.

¹⁴⁹ UNSC Resolution 1744 (2007).

deployment training in IHL in May 2012.¹⁵⁰ Although official AU/UN reports on the fighting lack detail, it is clear that UN Operations in Somalia (UNISOM) forces were involved in heavy street-to-street fighting against *al-Shabaab* in Mogadishu in 2011–12 and, after forcing the insurgents' withdrawal, were engaging them in open fighting where the greater firepower of AMISOM troops brought further military successes.¹⁵¹

The weapons and equipment carried by each peacekeeping mission, whether UN, regional or ad hoc, will depend on the nature of the operation as well as the equipment brought to the operation by TCNs in agreement with the UN or regional organisation. In the Model Memorandum of Understanding (MoU) between the UN and TCN to a peacekeeping operation, the TCN agrees to provide personnel and equipment in some or all the following categories: headquarters staff, infantry, engineers, helicopters, transport, military police, and formed police units.¹⁵² The MoU should be read alongside the Contingent-Owned Equipment (COE) Manual, which provides for TCNs to be reimbursed for troops and equipment. That manual lists the equipment that can potentially be brought into a peace operation and includes (on the police side): riot control equipment (including helmets, batons and shields), teargas, tasers, and police crowd control vehicles; while the military side includes: aircraft, machine guns, guns, anti-air missiles, anti-armour missiles, anti-tank grenades, howitzers, naval vessels, tanks, and armoured personnel carriers.¹⁵³ There is no specific detail on weapons or munitions, though clearly aircraft and naval vessels, for instance, may well carry precision weaponry. Some detail may be found in the UN Stand-By Arrangement System (UNSAS), which was launched by the UN in the mid-1990s in order to improve the rapid deployment of peacekeepers. In essence, UNSAS is a database of military, police and civilian assets that government have indicated are available for peacekeeping operations.¹⁵⁴

Clearly the level of weaponry will in normal circumstances be far less for a peacekeeping force than that used in a theatre of operations by a CoW, although the UN's current operations in Congo and the AU's in Somalia come closer to such operations. Furthermore, UN operations will not carry weaponry that is illegal,¹⁵⁵ or even indeed controversial. For example, in 2007, the use of rubber bullets by UN police was banned in Kosovo following the deaths of two protesters who were fired at by a Romanian FPU.¹⁵⁶

I. Investigation into use of weapons causing loss of life

Proper investigation by the UN into incident where life is taken by UN peacekeepers or police is crucial, especially when considering that the UN and its agents enjoy functional immunity before national courts, while UN peacekeepers are normally, according to practice and the provisions of the

¹⁵⁰ AMISOM, '[AMISOM peacekeepers successfully complete an advanced course on International Humanitarian Law and the rules of conduct](#)', Press Release, Mogadishu, 13 May 2012.

¹⁵¹ A. Harding, '[On Somalia's Front Line](#)', *BBC*, 22 February 2012.

¹⁵² In 'Manual on Policies and Procedures Concerning the Reimbursement and Control of Contingent-Owned Equipment of Troop/Police Contributors Participating in Peacekeeping Missions', UN Doc A/C.5/66/8, 27 October 2011, Chapter 9.

¹⁵³ *Ibid.*, chapter 8, annex A.

¹⁵⁴ Brahimi Report, *op. cit.*, §102.

¹⁵⁵ As recognised by the UNSG's Bulletin on the Observance by United Nations Forces of International Humanitarian Law (UN doc. ST/SGB/1999/13), which states in §6.1 that 'the right of the United Nations force to choose methods and means of combat is not unlimited', and in §6.2 invokes the prohibitions on poisonous gases and biological methods of warfare, exploding bullets, antipersonnel mines, booby-traps and incendiary weapons; and in §6.4 prohibits a UN force 'from using weapons or methods of combat of a nature to cause unnecessary suffering'.

¹⁵⁶ UN, '[UN outlaws use of rubber bullets in Kosovo and consults on possible wider ban](#)', Press Release, 3 July 2007.

Status of Forces Agreement (SOFA), subject to TCN discipline. With no real UN disciplinary system in place to punish individual UN peacekeepers or police officers, it is important for the investigation to be independent and to provide victims with access to justice and means of redress.

In the case of UN police, the official commentary on the 1979 Code of Conduct for Law Enforcement Officials states that 'in every instance where a firearm is discharged, a report should be made promptly to the competent authorities'.¹⁵⁷ The OHCHR's 'Expanded Pocket Book' of 2004 provides a little more detail in terms of lines of accountability by stating that 'all incidents of the use of firearms shall be reported and reviewed by superior officials', but this is undermined by the next sentence which provides that 'superior officials shall be held responsible for the actions of police under their command if their superior know or ought to have known of abuses but failed to take concrete action'.¹⁵⁸ The 1990 Basic Principles on the Use of Force and Firearms by Law Enforcement Officials provide that where injury or death is caused by the use of firearms a report shall be made to superior authorities and that any 'arbitrary or abusive use of force and firearms' by law enforcement officials shall be punished as a criminal offence under the law of their sending government.¹⁵⁹ Furthermore, it provides that:

Governments and law enforcement agencies shall ensure that an effective review process is available and that independent administrative or prosecutorial authorities are in a position to exercise jurisdiction in appropriate circumstances. In cases of death and serious injury or other grave consequences, a detailed report shall be sent promptly to the competent authorities responsible for administrative review and judicial control.¹⁶⁰

While there is some development of investigation and accountability for UN police, there are no clear avenues for victims to access to justice. As regards the military component of any peace operation, the system of investigation and accountability appears undeveloped and ad hoc. Yet it is here that greater loss of life of both peacekeepers and individuals (either from armed groups, spoilers or civilians) occurs. These are accounted for only briefly and factually in the UNSG's reports on peace operations. An example given here is contained within a small extract from a 2006 report on ONUC in the Congo:

On 18 January, MONUC deployed its Guatemalan special forces unit to the Garamba National Park following the receipt of information about the alleged presence there of LRA, including the militia leader, Vincent Otti, for whom the International Criminal Court had issued an arrest warrant. On 23 January, while approaching a militia camp, the MONUC special forces unit came under heavy fire by suspected LRA elements. Eight troops were killed and five were injured. The United Nations, the Government of the Democratic Republic of the Congo and the international community mourn the loss of the eight courageous Guatemalan troops who gave up their lives in the service of peace.¹⁶¹

In December 2005, a joint operation conducted by FARDC and MONUC against several hundred Allied Democratic Forces (ADF) elements in the Beni area resulted in the disintegration of this armed group; nearly 100 ADF combatants were killed and 14 camps destroyed. Furthermore, sensitization concerning the disarmament, demobilization, repatriation, resettlement and

¹⁵⁷ UNGA Resolution 34/169 (1979). See also 1990 Basic Principles, Principles 6, 22.

¹⁵⁸ OHCHR Professional Training Series No.5/Add3, p. 24.

¹⁵⁹ Principles 6 and 7.

¹⁶⁰ *Ibid.*, Principle 22.

¹⁶¹ 'Twenty-first report of the Secretary-General on the United Nations Organization Mission in the Democratic Republic of the Congo', UN doc. S/2006/390, 13 June 2006, §35.

reintegration process was successful in getting 97 Congolese members of ADF to surrender. Sadly, one Indian MONUC soldier was killed and five wounded during the operation.¹⁶²

Arguably, even in the exceptional circumstances of armed conflict, independent investigation of uses of lethal force by UN peacekeepers or police, as well as when the lives of UN personnel are themselves lost, is required. In conditions short of armed conflict such investigation is clearly required under human rights law. Within the UN system, this function is performed by the Office of Internal Oversight Services (OIOS), which was established by the UNGA in 1994 to, *inter alia*, monitor and evaluate the efficiency and effectiveness of the implementation of programmes and mandates; to conduct inspections of programmes and organizational units; and to investigate reports of mismanagement and misconduct.¹⁶³

The OIOS 'Investigations Manual' of 2009 contains sections on UN police and contingent personnel (as well as contractors).¹⁶⁴ Regarding peacekeepers from TCNs the investigative competence of the OIOS is limited as the following section of the Manual explains:

OIOS authority to investigate conduct of contingent military personnel is limited by agreement with the [TCN]. Personnel provided by a [TCN] remain under the command of their national military commander. The overall operational authority for the troops of a peacekeeping mission lies with the Head of Mission and the Force Commander, but this does not include disciplinary measures for national military contingent members. Because [TCN] military personnel are under their respective national disciplinary authorities, the investigative methodology adopted by OIOS must be adjusted accordingly.¹⁶⁵

The Manual makes it clear that each TCN has 'sovereign rights and primary responsibility' to investigate allegations of misconduct by its military personnel, but OIOS investigators may play a role if the TCN so requests, or if the TCN has failed to respond to a complaint, but such an investigation is subject to the national and military law of the TCC.¹⁶⁶ In relation to UN police, the Manual provides that 'although United Nations Police officers are under the disciplinary authority and procedures of the Sending State, their signed undertaking includes the obligation to cooperate fully and actively with an OIOS investigation'.¹⁶⁷ Though this provides for some level of investigation, it does not appear to guarantee that every use of lethal force is investigated, as required by human rights law, as misconduct is defined in OIOS Guidelines as a failure to observe to rules of conduct or standards of behaviour of the UN.¹⁶⁸

In terms of access to justice for victims of unlawful use of weapons by peacekeepers, although there are a number of UN laws and practices on providing remedies, none of them specifically relate to human rights violation. The 1946 Convention on the Privileges and Immunities of the United Nations, which grants the UN and its agents legal immunities, does require that the UN 'shall make provisions for appropriate modes of settlement' for contractual disputes or disputes of a private law character to which the UN is a party.¹⁶⁹ The 1990 model UN SOFA provides for the establishment of a standing claims commission for disputes or claims of a private law character,¹⁷⁰ though in practice such commissions have not been created but claims have been settled through internal claims review

¹⁶² *Ibid.*, §36.

¹⁶³ UNGA Resolution 48/218B (1994).

¹⁶⁴ Available at www.un.org/Depts/oios/pages/id_manual_mar2009.pdf (accessed 24 February 2012).

¹⁶⁵ *Ibid.*, §2.2.8. See also §1.2 on investigation authorities.

¹⁶⁶ *Ibid.*, §6.5.5.

¹⁶⁷ *Ibid.*, §2.2.6. See also §2.2.7 on FPU.

¹⁶⁸ [Uniform Principles and Guidelines for Investigations](#).

¹⁶⁹ Article VIII, s.29.

¹⁷⁰ UNGA Resolution 45/594, Annex (1990), §51.

boards.¹⁷¹ The 1985 UNGA Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power¹⁷² provides that ‘mechanisms should be established ... where necessary to enable victims to obtain redress through formal or informal procedures that are expeditious, fair, inexpensive and accessible’. Furthermore, there has been considerable practice by the UN dating back to the first forces in 1956 and 1960 where the UN has paid compensation to third parties.¹⁷³

More relevant is the Declaration on ‘Third Party Liability’ adopted by the UNGA in 1998, which establishes a regime for dealing with claims brought by individuals covering, inter alia, personal injury, illness or death ‘resulting from or attributable to the activities of members of peacekeeping operations in the performance of their official duties’; but not accepting liability for claims arising from ‘operational necessity’.¹⁷⁴ The latter exemption covers damage resulting ‘from necessary actions taken by a peacekeeping force in the course of carrying out its operations in pursuance of its mandate’.¹⁷⁵ Nor does the resolution cover off-duty acts of a peacekeeper, which the OLA has explained as being when the peacekeeper was ‘acting in a non-official/non-operational capacity when the incident occurred and whether he/she was in military or civilian attire at the time of the incident or whether the incident occurred inside or outside the area of operations’.¹⁷⁶ The 1998 UNGA resolution also indicates that successful claims for personal injury, illness, or death will be compensated to cover economic loss such as loss of earnings, loss of financial support, and medical expenses, but not for non-economic loss, such as pain and suffering. A ceiling of US\$50,000 for any claim was set.¹⁷⁷

Furthermore, the UNSG has accepted the responsibility of the UN to compensate individuals ‘who have suffered damages for which the Organization was legally liable’.¹⁷⁸ The OLA has added that ‘an act of a peacekeeping force is, in principle, imputable to the Organization, and if committed in violation of an international obligation entails the international responsibility of the Organization and its liability in compensation’.¹⁷⁹ As has been discussed, the UN only accepts liability when wrongful acts are attributable to it and not to TCNs, but this has normally been accepted by the UN in operations where there is UN command and control.¹⁸⁰

Are these principles and practices on access to justice and compensation in accord with human rights standards? Certainly the upper limit for payments and the refusal to pay for non-pecuniary damages is contrary to significant human rights jurisprudence.¹⁸¹ Furthermore, the absence of human rights violation as an express ground for complaint is outdated and does not accord with the basic principles of access to justice.¹⁸²

¹⁷¹ Oswald, Durham and Bates, op. cit., p. 324.

¹⁷² UNGA Resolution 40/34 (1985)

¹⁷³ Oswald, Durham and Bates, 323.

¹⁷⁴ UNGA Resolution 52/247: ‘Third Party Liability: Temporal and Financial Limitations’ (1998).

¹⁷⁵ UNSG Report, ‘Administrative and budgetary aspects of the financing of the United Nations peacekeeping operations’, UN Doc A/51/389 (1996).

¹⁷⁶ OLA, *UN Juridical Yearbook 1986*, 300–01.

¹⁷⁷ UNGA Resolution 52/247 (1998)

¹⁷⁸ UN doc. S/6597 (1956).

¹⁷⁹ OLA, *UN Juridical Yearbook 2004*, pp. 352–6.

¹⁸⁰ OLA, *UN Juridical Yearbook 2004*, 352-5.

¹⁸¹ D. Shelton, *Remedies in International Human Rights Law*, Second Edn, Oxford University Press, Oxford, 2005, pp. 306–9.

¹⁸² In addition see UNSG, *Comprehensive Review of the Whole Question of Peacekeeping Operations In All Their Aspects, delivered to the General Assembly*, UN Doc A/59/710 (24 March, 2005) (Zeid Report) – a response to sexual abuse alleged to have been committed by peacekeepers and other UN personnel in the DR Congo.

Conclusion

Peace operations, though remaining distinct from peace enforcement by CoWs, are increasingly empowered (and sometimes required) to act coercively resulting in an increased use of weapons. International human rights law, along with general principles of international law, is applicable to UN peace operations, peacekeepers, and police. IHL is only applicable when the thresholds of enforcement and armed conflict are crossed.

The legal framework applicable to peacekeepers is complicated by the unclear intersection of international and national laws and RoE. There appears to be no general acceptance that UN RoE prevail over national instructions, though if UN RoE are derived from decisions of the UNSC then TCNs are obliged to implement them. Besides which, uniformity in the application of lethal force by peacekeepers across TCNs can only be achieved if human-rights-compliant UN RoE prevail over inconsistent national instructions.

When acting beyond their right to personal self-defence, peacekeepers are more likely to use force and weapons in a way that violates the right to life and other human rights. Although, in general, the UN principles and policies governing the use of force and weapons by UN peacekeepers, police, and security personnel are compatible with human rights law, the extension of the conditions in which force may be used by peacekeepers preventively, or indeed pre-emptively, becomes increasingly problematic in terms of human rights.

UN laws on when force and weapons can be used need rationalisation and clarification, more so in the case of military personnel. Reports on the actions of AMISOM strongly indicate that clarification on the regulation of force in regional peacekeeping operations is also essential. Peace enforcement operations are mandated to use measures necessary to restore peace or tackle aggression, thus requiring significant levels of force and weaponry, which will normally be applied during armed conflict in accordance with IHL. However, current peace operations are normally mandated to use necessary measures to tackle non-State actors who endanger the peace or threaten civilians. While this may require greater levels of force and weaponry than deployed under classical peacekeeping operations, modern peace operations are not coercive enforcement actions, but remain consensual and largely act in reactive and defensive ways in conditions of instability or, sometimes, violence short of armed conflict. In these conditions international human rights law remains applicable and, moreover, can accommodate the use of weapons and potentially lethal force by peacekeepers where necessary in self-defence, defence of civilians, and in actions against violent rioters and spoilers.

Training, preparation, and risk assessment prior to the deployment of peace operations is improving, but the development of clear standards by the UN is still unsatisfactory. Ensuring that TCNs provide proper training appears to be embryonic. In any case where life is taken by UN peacekeepers, police or security personnel, or where weapons are used which arbitrarily endanger life, there should be an investigation by the OIOS, independent of the TCNs, and accountability should ensue if human rights violations are found to occur. While there is considerable practice on compensation within peace operations, as well as developing UN law and doctrine on liability for death and personal injury caused by peacekeepers, access to justice is severely limited by weaknesses in investigations, the ad hoc nature of any accountability and remedial mechanisms, and the absence of express remedies for human rights violations.