



## UNITED NATIONS PEACEKEEPING LAW REFORM PROJECT SCHOOL OF LAW

### BRIEFING PAPER #1

## Contemporary issues in UN Peacekeeping and International Law

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### Summary

This briefing paper reviews the contemporary issues in UN Peacekeeping and international law. As it explains, the key issues and problems currently relate to the use of force, international human rights, international criminal law and accountability. There is a real need for a greater clarity on these issues, because of their significant policy and operational implications. Success in better understanding and addressing these issues is central to improving the performance of UN Peacekeeping, which has become a crucial international tool for enhancing peace and security.

### 1 Introduction and background

Section 1 of this paper explains the background to the development of UN peacekeeping. Section 2 explains some of the key contemporary issues in UN peacekeeping and international law. Section 3 discusses current work and literature on each of these issues, and Section 4 identifies areas for further research and potential improvements in UN Peacekeeping effectiveness, before the paper concludes in Section 5.

The immense growth of United Nations (UN) peacekeeping in quantitative, qualitative and normative terms is one of the major developments of the post-Cold War era. Peacekeeping has become a key activity of the UN despite the fact that it was not envisaged in the UN Charter. Today the Secretary-General currently has command of around 124,000 UN peacekeeping personnel, at a cost of over US\$7 billion during the last financial year.

Since its inception, the demand for UN peacekeeping has grown dramatically, and the United Nations Security Council (UNSC) has mandated ever more robust and complex tasks for UN peacekeepers. UN Peacekeeping traces its origins to the failings in practice of the United Nations' collective security mechanisms in

the aftermath of the Second World War. The UN Charter contained provisions that envisioned a UN standing force to enforce and police the peace, but rifts between the major powers in the early days of the Cold War ensured this never happened. UN Peacekeeping emerged as an alternative to the standing force to be used in particular situations.

Traditional UN Peacekeeping operations (UNPKOs) were limited in the scope of their operations. What is often seen as the first UN Peacekeeping force, the UN Emergency Force I (UNEF I), was deployed to Sinai in Egypt in 1956 as an inter-positional force and mandated to monitor the ceasefire and ensure the withdrawal of forces, with very little authority to intervene.

With the notable exception of the UN operation in the Congo (ONUC) deployed in 1960, prior to 1990, most UN Peacekeeping missions followed the UNEF I model: small observer forces, they were sent in to monitor ceasefires and act as buffers between conflicting parties. The number of operations was also relatively small, as the main powers in the UN Security Council (UNSC) were able to limit peacekeeping missions to ensure they did not significantly impact on their sphere of influence.

The political space and developments brought about by the end of the Cold War led to significant developments. As post-Cold War conflicts broke out (and peace negotiations for some commenced), a proliferation of UNPKOs were authorised by the UNSC to undertake varied, but on the whole increasingly robust, tasks in countries such as Angola (UNAVEM II), El Salvador (ONUSAL) and Cambodia (UNTAC). Although some of these missions followed the traditional model, in that they were predominantly observer missions, other operations, such as UNTAC were given broad mandates and charged with multidimensional tasks ranging from promoting human rights to maintaining law and order. Most recently, the UN Mission in the Democratic Republic of Congo (MONUC) has been authorised to use force and even to assist the Congolese army in operations against rebel groups.

Whilst the general evolution can be charted of UN Peacekeeping from observer missions to robust operations, the development has not been clear cut and strategically formulated, and has not been clearly framed by international law. Rather, the history of UN Peacekeeping to-date is one of ad-hoc responses, driven by the demands of the international political situations and realities, and the situations on the ground. Thus, when the USSR and France became uneasy about ONUC, they protested and UNPKOs on the whole remained limited in scope until the end of the Cold War. At that point, with the balance of power no longer an issue, and Western powers in the UNSC under domestic pressure to act in response to conflicts and massive human rights violations, UNPKOs were mandated increasingly to intervene in different conflict situations around the globe.

The history of UN Peacekeeping as one of reactive rather than proactive measures, without a strong legal framework to guide it, has brought with it significant problems. With more robust and far reaching mandates has come

greater engagement with the local populace and recent allegations that peacekeepers have committed human rights violations and could be potentially complicit in war crimes. This has threatened the credibility and viability of operations and underlined the need for an articulated legal framework.

The following section introduces some of the key contemporary issues in international law and UN peacekeeping: (a) the international legal framework for UN Peacekeeping; (b) the use of force by UNPKOs; (c) International Human Rights Law (IHRL) and UN Peacekeeping; (d) International Criminal Law (ICL), transitional justice and UN Peacekeeping; (e) Attribution of conduct and responsibility; and (f) Accountability and reparations. Section 3 discusses current work and literature on each of these issues, and Section 4 identifies areas for further research in these areas, before the paper concludes in Section 5.

## **2 Key issues and problem areas**

This section introduces some of the key contemporary issues in international law and UN peacekeeping: (a) the international legal framework for UN Peacekeeping; (b) the use of force by UNPKOs; (c) International Human Rights Law (IHRL) and UN Peacekeeping; (d) International Criminal Law (ICL), transitional justice and UN Peacekeeping; (e) attribution of conduct and responsibility; and (f) accountability and reparations.

### **(a) The international legal framework for UN peacekeeping**

UN Peacekeeping has had great difficulty in providing adequate guidance for UN Peacekeeping. The general legal framework for UN Peacekeeping is unclear, and policy developments have very much led the way in providing the framework for UN Peacekeeping.

The 'Guiding Principles' of UN peacekeeping - consent, impartiality and non-use of force except in self-defence (and defence of the mandate) - were developed during the UNEF I deployment and expanded upon during the later UNEF II and UNFICYP missions in Sinai and Cyprus. The three principles were initially intended to guide the deployment and activity of UN inter-positional cease-fire monitoring missions in inter-state conflicts. As UN peacekeeping evolved to meet the needs of the changing international security environment, and missions were often deployed into complex intrastate conflicts, the principles were stretched and constantly reinterpreted, to the point that they appeared of questionable relevance to some missions, such as MONUC.

Notwithstanding this, each year the UN Special Committee for Peacekeeping Operations (C-34) reaffirms the principles in its annual report, and the Secretariat publication, 'UN Peacekeeping Operations, Principles and Guidelines' (the Capstone Doctrine), also includes a reference to the three principles. While the principles may provide guidance for ensuring a successful UN peacekeeping operation, they do not have any formal legal status, nor have they been explicitly adopted by the UNSC.

As mentioned, UN Peacekeeping evolved as a practical response to fill the gap left by the failure of the UN collective security mechanisms. There is no express legal provision for UN Peacekeeping in the Charter, and this may be one of the reasons for the lack of an articulated legal framework, although it is now generally agreed that UN peacekeeping is authorised as an implied or inherent power of the UN.

However, there is a lack of a more detailed understanding of the parameters that regulate and limit the actions of UNPKOs. The UN is not a party to treaties in the same way that States are, thus making it far harder to determine which obligations are binding on the UN. The UN has only a partial legal personality (as opposed to States, who have full legal personality), and this makes it difficult to determine how the UN is bound by international law.

The lack of clarity is accentuated by the UNSC resolutions that mandate the missions. Such UNSC resolutions are subject to highly politicised negotiations driven significantly by the five permanent members' political interests. For example, in some cases responding to domestic civil society pressures at home, specific interests in relation to allies (e.g. example China and Sudan), whilst the main troop-contributing countries (TCCs) and the Non-Aligned Movement on the whole remain cautious or opposed to the enhancement of, for example, of human rights standards in relation to UNPKOs.

The language in the resolutions themselves is often difficult to discern as a result of deliberate political ambiguity. There is also often debate as to which clauses of each resolution are operational or legally binding and which are merely suggestive, and this leads to uncertainty in implementing the mandate on the ground. Commanders on the ground, and even the senior UN decision makers at the top, have been left devoid of a clear policy and legal framework within which to carry out their UN peacekeeping missions.

### **(b) Use of Force by UNPKOs**

The use of force by UN peacekeeping operations is a difficult and politically sensitive issue. The legal position is one issue among a number that makes the use of force issue challenging in practice. It is often unclear in what circumstances and what level of force peacekeepers may legally use. This lack of clarity can have a significant impact on an operation. Any use of force beyond self-defence requires a mandate from the Security Council. The Security Council resolution mandating an operation will often indicate the purpose of the authorisation of the use of force (e.g. the protection of civilians). However, what is less clear is the legal right of UN peacekeepers to use force in circumstances in which the use of force is not specifically authorised by the Security Council.

Although the UN has the power, under Chapter VII of the Charter, to authorise the use of force, it is not always clear in UNSC resolutions mandating UNPKOs where force has been authorised.

The legal basis for a mission mandate will also have implications for the use of force. The absence of a clear indication that a mandate is issued under Chapter VII can create uncertainty regarding the extent of the use of force authorised (e.g. in self-defence or beyond). The UNSC has often used the phrase 'all necessary means' to signal the authorisation of the use of force, but this is a broad and imprecise formulation.

The use of force by UNPKOs is further clouded by the concept of self-defence. The right to use force in self-defence is one of the guiding principles of UN Peacekeeping, but its interpretation has evolved over the years from defence of UNPKO personnel and property in missions such as in UNEF I, to defence of the mandate as was first conceptualised in the UNFICYP and UNEF II operations. What amounts to use of force in defence of the mandate can be therefore very difficult to implement.

The use of force by missions has come to prominence for example with the recent development of the protection of civilians policy by the UN in missions such as MONUC, and the involvement of UNPKOs such as MONUC as direct parties to the conflict. The right of UN peacekeepers to use force to protect civilians is part of the inherent rights of a UN peacekeeping operation, consistent with the purposes and principles of the UN Charter, but this needs to be made clearer.

In summary, there are many uncertainties about the legal basis for the use of force in UN peacekeeping. These uncertainties have a real and negative impact on decision made in UN peacekeeping operations, often with unfortunate consequences including the harm of civilians.

### **(c) UNPKOs and International Human Rights Law**

The general problem of applying international law to UNPKOs is particularly apparent in the case of International Human Rights Law (IHRL). The UN does not have any clear obligations under any human rights treaties and it is not party to them, and it is difficult to understand how customary international law binds the UN.

Whilst it is generally accepted in a broad sense that the UN is bound by IHRL,<sup>1</sup> the particular legal basis for the application of IHRL to UNPKOs is still in some doubt, as discussed further in the Section 3.<sup>2</sup> Although these issues are quite technical in nature, they have a real practical bearing on the ground, in terms of

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<sup>1</sup> See for example the UN's own recognition of the application of IHRL in a general sense in the Capstone Doctrine and the 'We are United Nations Peacekeeping Personnel' (UN Doc A/61/645, Annex III) prepared by the UN Secretariat and given to all individual peacekeepers.

<sup>2</sup> It should be noted that there is no doubt as to the scope and extent of the application of IHRL to the UN in situations where the UN is acting as the State and is bound by IHRL, as, for example, in the transitional administrations in Kosovo (UNMIK) and Timor L'este (UNTAET).

understanding what particular obligations the UN is bound by and the operational guidance given to UN peacekeepers on the ground.

Furthermore, using terminology borrowed from the main international human rights treaties, it is not clear whether UN Peacekeepers must not only respect but also “ensure” respect for IHRL by others. This raises questions such as whether UN peacekeeping operations have duties in relation to preventing non-State actors (e.g. rebel forces), and potentially even State actors (e.g. military), from committing human rights violations in the area in which the mission is operating and the ability to act. The key issue is the extent to which UN peacekeeping missions can be obliged to prevent human rights violations by other actors within their field of operation.

The rules of international human rights law may also allow in certain circumstances for derogations and limitations of those rights. Derogations are permitted only in very specific situations and providing specific formalities are complied with (e.g. an announced declaration of a state of emergency by the State concerned). Although UNPKOs will frequently be involved in situations that may amount to a state of emergency, it is unclear whether any derogation is permitted or what mechanism would allow the UN to derogate from its human rights responsibilities in this way.

In short, it is very difficult to ascertain the extent and scope of the application of IHRL to UNPKOs. This results in a lot of uncertainty at mission level. This has become an increasingly important issue as UNPKOs have found themselves operating in territories (such as the eastern DRC) where there is a lack of State control. In such instances, to what extent should the UN be “ensuring” respect for human rights in its areas of operation? There have also been increasing numbers of cases involving allegations that UN peacekeepers have committed human rights violations. Aside from the accountability issues discussed at 2(f) below, clarity is needed as to what obligations the UN has in order to ascertain how it may violate those standards, and to help reinforce regulations on UN personnel conduct.

If the extent and scope of the application of IHRL to the UN was clarified, there is still the issue of resolving what mechanism might be used to put this into practice. It can perhaps be useful to consider by analogy the UN Secretary-General’s promulgation of the “SG’s Bulletin on the Observance by UN forces of international humanitarian law”. This Bulletin is a set of internal UN rule which set out how UNPKOs are bound by international humanitarian law. However, as discussed above, the application of IHRL may be different to each UNPKO if basing its obligations on its functions. For example, UNFICYP in Cyprus is engaged mainly only in monitoring a ceasefire, with little or no intervention in any other capacity, whilst MONUC in DRC has been engaged in combat operations. As such, their differing functions, and differing capacities, may entail different human rights obligations, and finding a suitable mechanism that is able to incorporate this flexibility is a real challenge.

#### **(d) UNPKOs, International Criminal Law and Transitional Justice**

As previously discussed, the extent to which the UN is bound by international law remains unclear. This results in lack of clarity in a number of different areas, including in international criminal law (ICL). In relation to ICL, the problem is understanding the obligations that UNPKOs have in relation to international courts and tribunals, and in relation to individuals suspected of committing international crimes. The role of UNPKO in transitional justice is also unclear, and stems from the lack of clarity in relation to IHRL and ICL, as well as the failure to incorporate the concept of transitional justice into the UN policy and legal frameworks for UN Peacekeeping.

Despite the conclusion of the UN-International Criminal Court (ICC) Relationship Agreement (the “Relationship Agreement”), it is unclear what duties the UN has towards institutions such as the ICC. The importance of this issue has become extremely relevant with the Bosco Ntaganda case in the DRC, where the UN was working with this Congolese army commander who was subject to an ICC arrest warrant. Actioning any arrest might involve a challenge to the sovereignty of the host State, the DRC, if consent was not obtained. This presents a number of problems for the UN, particularly as it would seem to be clearly against the principles and purposes of the UN Charter which include “promoting and encouraging respect for human rights” for the UN to be working with a military commander suspected of war crimes.

Clearly the UN itself has become more concerned with these issues. In DRC the UN eventually decided to develop a “conditionality” policy to guide MONUC’s operations with the Congolese army, whereby MONUC was advised it could not support Congolese army units where there was a real risk those army units might violate the relevant international law.

How the UN deals with individuals suspected of international crimes is also relevant for its role in transitional justice. UNPKOs, by their very nature, often operate in transitional contexts, and will have to deal with persons who may have been involved in war crimes or crimes against humanity. However, the concept of transitional justice is conspicuously absent from UN Peacekeeping’s policy and legal framework and is almost never included in any of the operative language in UN mandates, despite the promulgation of the Secretary General’s Guidance Note on the United Nations approach to Transitional Justice.

The problems in applying IHRL to UNPKOs translates through to issues in the UN’s role in transitional justice. For example, it remains unclear what role UNPKOs have, or the boundaries they are to respect, in post-conflict accountability for serious crimes in States where there are UN missions. The lack of clarity in relation to IHRL means that the parameters for UN actions are not clear.

### **(e) Attribution of conduct and responsibility**

The issues surrounding legal attribution of conduct need to be dealt with as a pre-requisite to the substantive problems relating to potential violations of law

such as IHRL or ICL by UNPKOs discussed above. For UNPKOs to be clearer about what standards to apply, it needs to be established what activities are attributed to the UNPKO under the international law of responsibility of international organisations. While a simple enough sounding question, it has led to problems in practice.

The most widely accepted approach, reflected in the International Law Commission's draft Articles on the responsibility of International Organisations, is that if the UN exercises "effective control" over the conduct of its peacekeepers, it is responsible for their acts. Generally, that means where the Secretary-General assumes the command and control of military forces, the UN is responsible under international law for the acts of those forces. This general rule is supplemented by the assumption that a subject of international law (e.g. the UN or a State) is responsible for the actions of its organs (e.g. peacekeepers, police) regardless of whether those organs act within their legal powers (e.g. torture by the police).

However, the legal practice is not entirely clear on what satisfies the test of "effective control". Practical issues arise in relation to how much control the UN has over its forces, with varied mandates and operations with different organisational structures. These complications are amplified in situations where, for example, the UNSC authorises missions but the UN does not lead or command them, as is the case with the ISAF force in Afghanistan, which was originally deployed as a multi-lateral force led by the US and the UK and was only subsequently authorised by the UNSC.

Further difficulties arise in relation to ascertaining the 'parallel responsibility' of States for the activities of national military or police contingents part of UN peacekeeping operations. It is possible for responsibility to be attributed both to the UN and a contributing State. However as a matter of practice, the conduct of UN peacekeeping forces has tended to be attributed to the UN only and UN immunities asserted, rather than also attributed to the contributing State of contingent members.<sup>3</sup> As will be discussed below, this has resulted at times in an accountability gap, whereby in effect neither the UN nor the individual State can be held legally responsible for UN peacekeepers' activities.

#### **(f) Accountability and reparations**

If the issue of attribution and responsibility is a pre-requisite to understanding what legal standards apply to the UN, and when there has been a violation of those standards. The issue of accountability and reparations arises at this stage as a consequence of finding a violation, for example, of IHRL or ICL.

As touched upon in the previous section, there is an overarching problem in terms of holding the UN accountable for violations of international law, even if it is possible to identify the applicable legal standards. In some of the recent case-

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<sup>3</sup> See for example *Behrami and Behrami v France, Samarati v France, Germany and Norway*, App Nos 71412/01 & 78166/01 (2 May 2007).



law involving the situations in Iraq and Bosnia-Herzegovina, national courts have shown a willingness to attribute responsibility to the UN, rather than to individual contributing States, but not always in appropriate situations.<sup>4</sup> The Courts in these cases have stated that they are unable to exercise jurisdiction over the UN, and it is for the UNSC to deal with the UN's responsibility in such situations. Clearly, the current lack of an independent forum to deal with accusations of UN legal responsibility in these situations is inadequate, for example, for acting inconsistently with human rights obligations.

International law has in place a complex and strong regime of immunities for UN personnel that also impacts on accountability. The immunities regime makes it extremely difficult for local courts in, for example, host states in which there are UNPKOs, to hear cases against UN personnel. Although the UN's immunities are essential to the workings of the UN (it would, for example, be very difficult to get States to contribute staff to UNPKOs if immunities were not in place, and could make it much easier for host states to hamper the work of the UN), the increasing numbers of cases where UN personnel have been accused of committing IHRL violations have meant that the immunities regime has undermined the UN's international and local credibility and support. Although the Secretary-General has, in most cases, the power to waive immunity, this is rarely exercised, in part because of the political fallout and legal problems that might ensue from such a waiver.

In cases involving allegations against military members of a UNPKO, the contributing State has the right (which is not exercised only in exceptional circumstances) to repatriate the individual concerned and subject him/her to its own disciplinary and/or court procedures. However, although there have been cases where this has occurred, such as cases in Canada following allegations against Canadian peacekeepers in Somalia.<sup>5</sup> While contributing States have a legal obligation to carry out national investigations and prosecutions, the lack of an international accountability mechanism means such national processes are often not fully effective.

The UN has in place a system for UN peacekeeping missions for claims and reparations. However, this system is very focused on contractual or similar claims, it has very strong conditions and limitations,<sup>6</sup> and is not designed to deal with the kind of human rights and criminal claims against UNPKOs that are becoming more common.

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<sup>4</sup> See, for example, *Al Jeddah v Secretary of State for Defence* [2007] UKHL 58 and *Mothers of Srebrenica v Netherlands and the United Nations*, Appeal Judgment (May 30, 2010), Case number: 200.022.151/01, English translation available at: [http://www.haguejusticeportal.net/Docs/Dutch%20cases/Appeals\\_Judgment\\_Mothers\\_Srebrenica\\_EN.pdf](http://www.haguejusticeportal.net/Docs/Dutch%20cases/Appeals_Judgment_Mothers_Srebrenica_EN.pdf).

<sup>5</sup> *R v Brocklebank*, Court Martial Appeal Court of Canada, (1996) 134 DLR (4th) 377.

<sup>6</sup> General Assembly resolution 52/247, "Third-party liability: temporal and financial limitations", (1997).

### 3 Type of evidence and analysis

This section will review and briefly summarise current work on the issues raised in section 2 above.

#### (a) International law and UN Peacekeeping

A significant amount of discussion of international law and UN Peacekeeping over the years has been focused on the authority of the UN (in particular, the UNSC) to establish UNPKOs, whether by direct reference to specific articles in the UN Charter,<sup>7</sup> or through its interpretation as an implied or inherent power.<sup>8</sup> This discussion remains largely academic, because it has now been accepted including by the International Court of Justice that the UN has authority to establish UNPKOs.

Generally speaking, there has been very little recent work on UN Peacekeeping legal issues. Most analysis and reform efforts for UN peacekeeping have been focussed on policy only and not touched on legal issues. This is evident from a brief review of the UN's Peacekeeping Resource Hub of peacekeeping analysis and research<sup>9</sup> and relevant international journals.

#### (b) Use of force by UNPKOs

The issue of to what extent UNPKOs can use force has been debated for a number of years. Much of the academic and policy discussion has centred around the legal basis for UNPKOs and discussion of UNSC's use of Chapter VI or VII of the UN Charter, the latter clearly allowing the use of force. UNPKOs have at times been described as a "Chapter VI and a half" operations, underlining the uncertain nature of this area of law.

A lot of discussion has centred on the self-defence exception. Whilst it has clearly been accepted that UNPKOs have the right to use force in self-defence, the scope of the right is uncertain. The increasing use of force by ONUC in the Congo in the 1960s prompted the former director of the UN Office of Legal Affairs (OLA) to comment that the concept of self-defence had been stretched "to incredulity and beyond its usual legal meaning".<sup>10</sup> During the deployments of the UN Peacekeeping Force in Cyprus (UNFICYP) in 1964 and the second UN Emergency Force (UNEF II) in 1973 the use of force precept was expanded to encompass the non-use of force except in self-defence and in defence of the mandate and this

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<sup>7</sup> A. Orakhelashvili, 'The Legal Basis of the United-Nations Peacekeeping Operations', *Virginia Journal of International Law*, 43 (2003), pp 485-524.

<sup>8</sup> N. White, 'The UN Charter and Peacekeeping Forces: Constitutional Issues', *International Peacekeeping*, 3 (1996), pp 43-63.

<sup>9</sup> Available at:

<http://www.peacekeepingbestpractices.unlb.org/PBPS/Pages/Public/Home.aspx>

<sup>10</sup> Quoted in T. Findlay, *The use of force in UN peace operations*, (SIPRI, 2002), p. 9.

has been endorsed subsequently by the UN General Assembly each year. Whilst Romeo Dallaire proposed using the right to self-defence to protect civilians in Rwanda in 1994, on the whole the UN has been unwilling to sanction the application of the extended concept, and it remains unclear to what extent it can be used for such measures.

In recent years the use of force by UNPKOs has become bound up with other issues, as is evident from the 'conditionality' policy developed by the UN for MONUC, which tries to condition MONUC's collaboration with the Congolese army so that MONUC did not find itself complicit in any abuses committed by the Congolese army.

### **(c) IHRL and UNPKOs**

There are a number of different theories examining how international human rights law (IHRL) applies to the UN. The UN Charter clearly states that one of the purposes and principles of the UN is "promoting and encouraging respect for human rights and for fundamental freedoms" and it has been argued that this is legally binding on the UN.<sup>11</sup> Another perspective is that the Universal Declaration on Human Rights and the obligations it prescribes define the meaning of "human rights" in the Charter.<sup>12</sup>

It has also been suggested that, the UN, although not party to any human rights treaties, should have similar or the same obligations as its constituent members. Finally, and perhaps most persuasively, there is agreement in the literature reflected in various UN policy documents that the UN is bound by international human rights under customary (i.e. general) international law.<sup>13</sup> Although establishing customary international law in relation to international organisations can be difficult, references to human rights in UN documentation are too numerous to list. These approaches are usefully summarised by Megret and Hoffman<sup>14</sup>, however, the literature fails to address in any detail how and which human rights apply to UNPKOs.

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<sup>11</sup> B. Simma et al., *The Charter of the United Nations: A Commentary* (Oxford University Press, 2002), p. 40.

<sup>12</sup> J. Humphrey, 'The Universal Declaration of Human Rights: Its History, Impact and Juridical Character,' in B.G. Ramcharan, *Human Rights – Thirty Years after the Universal Declaration: Commemorative Volume on the Thirtieth Anniversary of the Universal Declaration of Human Rights* (Kluwer Law International, 1979).

<sup>13</sup> A. Clapham, 'Human Rights Obligations of Non-State Actors' in *The Collected Courses of the Academy of European Law*, XV/1:1, New York, USA: Oxford University Press, available at: <http://iheid.ch/faculty/clapham/NSAlecture/HR%20obligations%20of%20non-State%20actors.pdf>.

<sup>14</sup> F. Megret and F. Hoffman, 'UN as a Human Rights Violator-Some Reflections on the United Nations Changing Human Rights Responsibilities', *Human Rights Quarterly* 25 (2003), pp. 314-342.

NGOs have also repeatedly called for UN Peacekeepers to respect human rights.<sup>15</sup> The UN itself acknowledges that it is bound by international human rights law in a number of its internal documents, including its main peacekeeping policy document the Capstone Doctrine, although these acknowledgements are couched in very general terms and do not offer much specific guidance.

At the University of Essex, the Peacekeeping Law Reform Project is attempting to remedy this defect by examining in detail the applicability of international human rights law to UNPKOs in a consultation-based research project. The preliminary findings of this project will be available online shortly at [www.essex.ac.uk/plrp](http://www.essex.ac.uk/plrp).

#### **(d) International Criminal Law, Transitional Justice and UNPKOs**

Until recently, literature and policy on international criminal law (ICL) and peacekeeping has focused on the prosecution of individuals who are the parties to the conflict. It has not dealt in much detail with the role UNPKOs have in international criminal processes, including relating to International Criminal Court, and how UNPKOs should deal with those individuals subject to international criminal arrest warrants.<sup>16</sup>

Although the 2010 Secretary General's Guidance Note on the United Nations Approach to Transitional Justice is helpful in outlining the general principles of transitional justice, little has been done in the way of follow up or integrate this into the framework for UN Peacekeeping. Transitional justice is mentioned in some of the UNSC mandates and resolutions, but hardly ever in the operative sections, and it remains conspicuously absent from the UN's main peacekeeping policy documents such as the Capstone Doctrine and the annual UNGA resolution on peacekeeping. In the academic literature there is in general a dearth of materials on the legal and policy integration of transitional justice in UNPKO activities.

Recently, however, the controversy over the issue of the UN's potential complicity in war crimes in DRC, highlighted by its involvement with the ICC indictee and Congolese army commander, Bosco Ntaganda, has brought issues of international criminal law, transitional justice and UN Peacekeeping to the fore. Questions have been asked as to whether the UN should be supporting units led by such individuals, and NGOs such as Human Rights Watch have called for MONUC to assist in arresting him.<sup>17</sup> Similarly, although different in terms of politics and law, some of the literature discussing the indictment of Sudanese

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<sup>15</sup> See, for example, Human Rights Watch, 'You Will Be Punished: Attacks on Civilians in Eastern Congo' December 13, 2009, available at: <http://www.hrw.org/node/87151>.

<sup>16</sup> See, for example, G-J.A. Knoops, *The Prosecution and Defense of Peacekeepers under International Criminal Law*, (Martinus Nijhoff, 2004).

<sup>17</sup> Human Rights Watch, 'DR Congo: Arrest Bosco Ntaganda,' 2 February, 2009, available at: <http://www.hrw.org/en/news/2009/02/02/dr-congo-arrest-bosco-ntaganda>.

President Omar Al-Bashir has touched on the possibility of the UNSC authorising an international force to arrest him.<sup>18</sup>

### **(e) Attribution of conduct and responsibility**

Attribution of conduct and responsibility are quite a technical area of law. The debate in this area has resided mainly in the academic and judicial arenas, the latter comprising the case-law on this issue, discussed at 2(e) above. The International Law Commission (ILC) has led the way in trying to codify the international law of the responsibility of international organisations, basing its draft Articles on the Responsibility of International Organizations (the DARIOs) on the subject mainly on the existing Articles on State Responsibility for Internationally Wrongful Acts.

The DARIOs are not as widely accepted as the Articles on State Responsibility, which are generally considered to reflect customary international law. There are difficulties in ascertaining customary international law for international organisations, and in coming up with a code that is flexible but cohesive enough to cover all international organisations, ranging from institutions as diverse as the World Trade Organization to the UN. Indeed, the DARIOs have been criticised in some quarters for precisely this reason,<sup>19</sup> as well as the lack of practice in some areas covered by the draft Articles. It remains to be seen whether the DARIOs will be able to achieve the same status as the Articles on State Responsibility.

### **(f) Accountability and reparations**

Much of the debate surrounding issues relating to IHRL and ICL and UNPKOs has centred on the problem of accountability. A number of human rights NGOs have called for UNPKOs to be held accountable for breaches of IHRL and ICL,<sup>20</sup> and have advocated that troop-contributing states conduct vetting exercises to ensure that individuals suspected of committing human rights violations do not participate in UNPKOs.<sup>21</sup> These issues have also been dealt with in the academic literature, which has, for example, documented cases where troop-contributing

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<sup>18</sup> A. Dworkin & K. Iliopoulos, 'The ICC, Bashir, and the Immunity of Heads of State,' 19 March, 2009, available at:

<http://www.crimesofwar.org/onnews/news-darfur9.html>.

<sup>19</sup> See José E. Alvarez, "International Organizations: Accountability or Responsibility?," Luncheon Address, Canadian Council of International Law, Proceedings of the Annual Meeting, 2007 (available at <http://www.asil.org/aboutasil/documents/CCILspeech061102.pdf>).

<sup>20</sup> See, for example, Amnesty International's long-standing '15-point programme for Implementing Human Rights in International Peace Operations', available at: [http://www.genderandpeacekeeping.com/resources/5\\_Amnesty\\_International.pdf](http://www.genderandpeacekeeping.com/resources/5_Amnesty_International.pdf).

<sup>21</sup> Amnesty International, 'Nepal: Bar human rights violators from UN peacekeeping missions,' 18 December, 2009, available at: <http://www.amnesty.org.au/news/comments/22304/>.

countries have failed to ensure the proper investigation and trial of their personnel.<sup>22</sup>

There has also been academic discussion of whether the Secretary-General's discretion to waive immunity is unfettered, or if, in certain situations, particularly where serious human rights violations are concerned, the Secretary-General has a duty to waive immunity.<sup>23</sup> However, this has to date gained little traction in practice, and is indeed unlikely to, given the political context and consequences, as troop-contributing countries would react negatively to any such finding.

## **4 Practical implications**

This section will examine the practical implications of each of the issues discussed above and identify areas where further work and research is needed.

### **(a) International law and UN Peacekeeping**

The lack of a foundational legal framework in UN Peacekeeping underpins many of the other issues and problems discussed in this paper. Clearly, it would be politically impossible to resolve this by trying to amend the UN Charter, and very difficult to get consensus on a complete legal framework for UN Peacekeeping. In addition, this may not be the most effective way to better frame UN Peacekeeping, in that some of the larger, contextual issues, such as the UN's ability to establish UNPKOs, are already settled including by case law of the International Court of Justice.

What is needed, therefore, is more work on some of the specific issues along the lines set out below to ensure that UNPKOs have a legal framework to guide their actions in the areas most relevant to UN Peacekeeping today. Such approaches will need to incorporate a certain level of flexibility so that UNPKOs are still able to respond to evolving demands, but provide a frame of reference that will help UN Peacekeeping to become a more coordinated and holistic, and principle-based and consistent with international law.

### **(b) Use of force in UNPKOs**

While the inherent right of UNPKOs to engage in self-defence has not been in question, commanders are often left in doubt as to the extent they can use the right of defence of the mandate to, for example, protect civilians from imminent harm. The lack of certainty may impact operational effectiveness, and leaves members of military and police contingents open to criticism for failing to act or

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<sup>22</sup> A. Ladley, 'Peacekeeper Abuse, Immunity and Impunity: The Need for Effective Criminal and Civil Accountability on International Peace Operations,' *Politics and Ethics Review* 1, no. 1 (2005), pp. 81–90.

<sup>23</sup> F. Rawski, 'To Waive or Not to Waive: Immunity and Accountability in UN Peacekeeping Operations,' *Connecticut Journal of International Law*, 18 (2002-3), pp. 103-132.

acting contrary to the legal limitations on the use of force. Further research on the legal, policy and operational limits of the right to self-defence, such as that being done by the UN Peacekeeping Law Reform Project at the University of Essex in the context of a review of the Model Status of Forces Agreement,<sup>24</sup> would assist commanders to understand their rights and obligations in this area.

### **(c) International Human Rights Law and UNPKOs**

Much is needed in the way of analysing the applicability of international human rights law to UNPKOs. The plethora of instances in which UN Peacekeepers are alleged to have committed human rights violations, from involvement in human trafficking to allegations of illegal detention and mistreatment in UNPKOs, makes this an urgent imperative.

While some flexibility in the policy framework has been necessary as UN Peacekeeping has evolved, the lack of a foundational legal framework has led to the policy-based principles of human rights being treated as almost irrelevant in some cases. The lack of a legal framework and understanding of how IHRL applies to UNPKOs has resulted in ad-hoc approaches which have led to violations and inconsistent implementation of IHRL by UNPKOs. An improved top down-approach is required, providing guidance and standardisation across different missions, to ensure that UNPKOs remain cohesive and coordinated, and IHRL violations minimised. This will also help the UN to fulfil one of its guiding principles, to encourage and promote human rights and fundamental freedoms. A failure to address these issues will only undermine the UN's credibility.

Accordingly, research in this field is required, particularly detailed analysis of how and to what extent, IHRL binds the UN, and being carried out by the UN Peacekeeping Law Reform Project at the University of Essex. Research on the functions carried out by UNPKOs, together with the specific application of particular rights in a UN Peacekeeping context (such as the right not to be arbitrarily detained), would be useful to help piece together a universal application of IHRL to the UN. Further to this research, detailed work is also needed on both the policy and legal sides to understand better which mechanisms would be most sensible to operationalise the application of IHRL to the UN.

### **(d) International Criminal Law, Transitional Justice and UNPKOs**

Research is also needed to understand what obligations the UN has under international criminal law, and what is the scope of its obligations and duties towards the International Criminal Court (ICC) and the other international criminal tribunals. The ICC's cases will invariably be in the same places where there are UNPKOs (as is the case in the DRC, Central African Republic and Sudan), as they both are operating in conflict and post-conflict situations. The Bosco Ntaganda case has made it abundantly clear that the UN needs to

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<sup>24</sup> The Model Status-of-Forces Agreement is the default agreement governing relations between the UN and the host State.

understand better how it should engage for example with those subject to international criminal arrest warrants.

The prospect of involvement with individuals suspected of committing war crimes also begs the question of the UN's position in relation to transitional justice, from both a legal and a policy perspective. Research needs to be done to link the UN's existing work on transitional justice (such as the Secretary-General's Guidance Note on Transitional Justice) to the normative framework for UN Peacekeeping. Ultimately, this will be closely related to understanding the UN's human rights obligations, and could play a role in enhancing the ability and capacity of UNPKOs to engage in rule of law activities in the crucial post-conflict period. Again, a failure to do this would undermine UN credibility, as the UN would be seen to be failing to meet the standards that it publicly espouses.

### **(e) Attribution of conduct and responsibility**

Attribution of conduct is an overarching theme that provides the backdrop to the substantive issues of IHRL and ICL listed above. In order to ensure that the UN is responsible for its conduct, there is a need for a greater understanding of legally how responsibility can be attributed to the UN and other international organisations. Presently, national and international courts have tentatively cited (and in some cases ignored) the draft Articles on Responsibility of International Organizations as the basis for establishing responsibility. However further work is needed in this area to understand fully in what circumstances the UN is responsible. This is most evidently the case in situations of potential parallel responsibility, that is where the individual State and the UN may jointly or separately be held liable for breaches of IHRL, ICL and other aspects of international law. At present, many national courts have used the international law of responsibility to attribute conduct to the UN, thus avoiding the perhaps politically dangerous precedent of finding their national State liable for such a breach. This has been done in cases where many have considered it unacceptable, for example, the European Court of Human Rights holding that the UN is responsible for the actions of NATO forces. Further research is needed on when and how parallel responsibility can be achieved, and the legal and policy implications of such findings, in the interests of narrowing what amounts to a gap in accountability caused by legal uncertainty in this area.

### **(f) Accountability and reparations**

There is clearly a problem of accountability in relation to the conduct of UNPKOs, caused both by the wide immunities that benefit UN personnel, the significant limitations on claims against the UN, and the lack of an adequate forum to hear cases against the UN. Research in this area is required, particularly on how to hold the UN accountable for breaches of international law in a fair and transparent way, as well as on how to ensure better redress for victims. This would also be consistent with closer analysis of the UN's IHRL obligations as presently it is unlikely that the UN reparations scheme meets the requirements of an adequate, effective and timely remedy under IHRL. An improvement in UN



accountability for failings will lead to better UN practices and processes in peacekeeping.

Whilst accountability is a problem, there are good reasons why the immunity regime was implemented, and the policy questions of resources, and freedom of action for the UN (including not being held as a hostage to fortune by host or other States) will need to be weighed against the imperatives of improving the human rights situation and the credibility of the UN.

## **5 Summary and conclusions**

As outlined above, there is a significant need for a greater understanding of the way that the UN and UNPKOs are bound by international law, and the legal, policy and operational implications resulting from such an understanding.

Clarity in the law in the UN Peacekeeping context would serve a number of different objectives. As in other spheres, it would help to regulate and set the parameters for policy choices and activities. UN Peacekeeping is a highly politicised environment and more clarity of the law in this area would help ensure that peacekeeping activities are mandated and carried out in accordance with proven common values, and act as a counter-balance against short-term political thinking and pressures. This would also help to further the international rule of law by grounding the UN's actions in its obligations under the UN Charter, as States' individual actions are already grounded in their own obligations generally.

This paper has focused on the legal issues most pressing on UN Peacekeeping at the moment, particularly in relation to the use of force, and international human rights and international criminal law. The involvement of UN peacekeepers in potential violations of these areas of law has embroiled the UN in controversy and undermined its credibility and its attempts to achieve the principles and purposes of the UN Charter. Success in understanding and addressing these issues is key if UN Peacekeeping is to continue to grow and to operate as a tool to enhance peace and security in the 21<sup>st</sup> century. The impact on UN Peacekeeping's effectiveness of improved trust and support should not be underestimated.

The UN Peacekeeping Law Reform Project at the University of Essex and the Institute of Democracy and Conflict Resolution have made a start in examining some of the issues raised in this paper, engaging with academics, government and UN officials, military personnel with peacekeeping experience, non-governmental organisations, and other experts from different backgrounds and disciplines in a consultative research project intended to resolve some of the questions identified above, particularly in relation to the applicability of IHRL to the UN.

As set out in Section 4, further multi-disciplinary research is needed in this area, both to clarify the law, but also to weigh the political, policy and operational challenges and implications of the application of international law and standards to UNPKOs.