

Security Council Mandates and the Use of Lethal Force by Peacekeepers

Nigel D. White*

The Problem

Since the turn of the 21st century peacekeepers have been under pressure to use 'necessary measures' to protect civilians and to protect the peace process. Peacekeepers have been criticised for being inactive in the face of violence when the mandates given to them by the Security Council clearly enable them, arguably require them, to use 'necessary measures' against those who would undermine the peace or threaten civilians.

Increasingly coercive mandates would suggest that peacekeepers can cross the line to become war-fighters or 'combatants' in the language of the laws of war (international humanitarian law), 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 Convention on Safety of United Nations and Associated Personnel. In 1999, the UN Secretary General attempted to clarify 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.¹

Although peacekeepers have been given functions that are less than those of combat but more than those of law enforcement, it is argued that this does not somehow place them in

* Professor of Public International Law, University of Nottingham, UK. This is a summary of a lecture given to the Australian Centre for Military & Security Law, Australian National University, on 21 February 2013. A developed chapter will appear in a forthcoming collection of essays – C. Harvey, J. Summers and N.D. White (eds), *The Law of War: Fit for Purpose*, which should be published in 2013.

¹ UNSG's Bulletin, UN Doc ST/SGB/1999/13, 1999.

a legal no-man's land. Instead, it is argued that, despite increasingly coercive Security Council mandates, peacekeepers remain 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 standards, where the right to life is qualified by those laws of war that allow 'enemy' combatants to be engaged with lethal force.²

Peacekeeping had to be reformed following the disasters of Rwanda in 1994, and Srebrenica in 1995, when forces stood by in the face of genocide. Since the Brahimi Report of 2000 peacekeepers have been expected to actively support the peace process and peacebuilding within a state as well as protect civilians within their areas of deployment.³ This is significantly different from the Cold War model developed by the UN whereby the force oversaw the peace in the form of a cessation of hostilities.

Widening of Defensive Use of Force

Over the lifetime of peacekeeping operations there has been confusion as to the nature and level of force that peacekeepers are permitted to use. At its core the limited use of force available to peacekeepers means self-defense, which is normally interpreted narrowly to cover a peacekeeper using force in defense of his own life and those of his comrades.

While the first force deployed to Suez in 1956 (UNEF) stuck to a narrow interpretation of self-defense by using light arms to defend itself, by 1960 there was an alternative version of peacekeeping in the Congo (ONUC). ONUC did initially confine its use force to self-defense when overseeing the withdrawal of Belgian troops, but that proved inadequate when its task became the elimination of the mercenaries supporting the Katangese secession. In reality, in 1961, ONUC had ceased to act in a defensive way and began to take the initiative and enforce the peace by engaging the forces of non-state actors.⁴ This has occurred in more recent operations in the Congo, where, for example, MONUSCO has used offensive force including the use of attack helicopters against M23 rebels, for example in July 2012.

² See excellent analysis by Rob McLaughlin, 'The Legal Regime Applicable to the Use of Lethal Force When Operating under a United Nations Security Council Chapter VII Mandate Authorising "All Necessary Means" (2007) 12 *Journal of Conflict and Security Law* 389-417.

³ UN Doc A/55/305 and S/2000/809, 21 August 2000 (Brahimi Report).

⁴ But see *Expenses Case* 1962 ICJ Rep 163-4.

Despite a post-Cold War trend towards allowing more offensive action to be taken by peacekeepers, there remains reluctance, especially from troop contributing nations (TCNs), to move away from self-defence as this makes the force less acceptable to the host state and the parties within it. TCNs are also reluctant to engage as combatants as this will potentially mean that their troops will lose the protection from attack afforded to peacekeepers under the 1994 Convention. Thus, self-defense remains the norm for modern peacekeeping, even those peace operations having Chapter VII elements to their mandates, requiring them to protect the peace process and civilians. However, despite this reticence in practice, at the doctrinal level the UN has expanded the concept of self-defense to include defence of the mission and of civilians. This development is reflected in the UN Department of Peacekeeping Operations' latest statement of peacekeeping doctrine in the 2008 Principles and Guidelines document (sometimes known as the Capstone Document)—which, while still distinguishing peacekeeping from enforcement action, states that it is 'widely understood that peacekeeping forces may use force at the tactical level, with the authorization of the Security Council, if acting in self-defense and defense of the mandate'.

Applicable Law

Although increasingly coercive mandates mean that peacekeepers can potentially cross the line to become 'combatants'; in the language of the laws of war, this remains the exception and not the norm. Normally peacekeepers are deployed to violent but *post*-conflict situations where, unless the violence increases to the level of a protracted armed conflict in which both the government and peacekeepers are engaged against organized armed groups within a state,⁵ as occurred in the Congo in 1960s and again at the turn of the 21st century, then the laws of war remain inapplicable to the vast majority of peacekeeping operations. Being based in the host state with the consent of that government signifies that a peacekeeping force will not become engaged against the forces of the host state in an international armed conflict. Indeed, if were to, the peacekeeping force would cease to be a peacekeeping operation and would become a peace enforcement action requiring authorization under Article 42 of the UN Charter.

This would all suggest that international humanitarian law does not play a significant role in a post-war situation to which peacekeepers are deployed, and it is the *jus post bellum*, more

⁵ *Prosecutor v. Tadić* (1996) 105 ILR 488.

accurately those aspects of general international law, human rights law, refugee law, and international criminal law, as well as the national criminal and military laws of the TCNs and national law of the host state, which together frame the work of a peace operation.

It follows that for most peacekeepers the relevant international laws will be those governing human rights. The existence of human rights obligations on peacekeepers flows from two main sources. The first source for peacekeepers is as state agents and comes from the human rights obligations of their sending states under human rights treaties, which attaches to them even when acting extra-territorially in circumstances where they exercise control over areas or over individuals.⁶

The second source of human rights obligation applies to peacekeepers as members of a UN force, given the UN's obligations under customary international law that attach to it as an international legal person.⁷ The International Law Commission's 2011 Articles on the Responsibility of International Organizations clearly show that it is possible to attribute wrongful acts to the UN,⁸ and such responsibility is based on it having duties under customary international law including ones to uphold and protect human rights.

The Use of Lethal Force and the Right to Life

Having established that human rights law is normally applicable to peacekeepers, it would appear the modern peacekeepers are placed between the rock of human rights constraints and the hard place of a Security Council mandate that appears to require them to use lethal force in a range of circumstances.

The fact that UN peacekeepers and armed police carry weapons and their use may cause deaths seems at first glance to be incompatible with the right to life. However, major human rights treaties make it clear that the right to life, though fundamental, is not absolute. The basic principle is that life cannot be taken arbitrarily. Drawing on human rights jurisprudence under Article 2 of the European Convention on Human Rights and Article 6 of the International Covenant on Civil and Political Rights, essentially, during peacetime and situations short of armed conflict, lethal force can be used by peacekeepers when absolutely

⁶ Human Rights Committee, General Comment 31 (2004), para 10.

⁷ *Reparation case*, 1949 ICJ Rep, 174-178.

⁸ Taken note of in UNGA Res 66/100 (2011).

necessary for self-defense (including defense of third parties), to effect an arrest or prevent escape of a detainee, or in action taken to quell a riot or insurrection. This provides a relatively clear legal framework within which peacekeepers should operate.

A more detailed examination of UN policy and guidelines on when peacekeepers can use force, including lethal force, shows that the UN largely acts within this legal framework, indeed, that the UN frames its policies and directives largely within the parameters of international human rights law, rather than international humanitarian law. As mentioned above the 2008 Capstone Document expands somewhat on when potentially lethal force may be used, but the Document does explain that 'all necessary means' in the context of a peacekeeping mandate, includes lethal force where necessary 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'.

It is possible to interpret these guidelines as being compatible with human rights standards if the provisions that recognise that potentially lethal force may be used when absolutely necessary to effect an arrest or in tackling riots and insurrections is applied to include these and analogous situations faced by peacekeepers when force is absolutely necessary to tackle militias, criminal gangs and other armed spoilers who undermine the peace or threaten civilians. If this purposive interpretation is adopted then it follows that there is sufficient leeway in human rights law to enable peacekeepers to perform their functions using potentially lethal force where absolutely necessary.

There remains the problem of ensuring that peacekeepers do not exceed these standards under the guise of a Chapter VII mandate that authorize 'necessary measures', for necessary measures in a situation short of armed conflict are those absolutely necessary to defend civilians or to defend peacekeepers when tackling those who undermine the peace. There remains the problem found in many UN documents, including UN Rules of Engagement, of peacekeepers being permitted to use deadly force to protect UN property, which is generally

difficult to reconcile with human rights law,⁹ though it is permissible in some circumstances under international humanitarian law.

Article 103 of the UN Charter, which states that obligations derived from the UN Charter prevails over those in any other international treaty; does not affect the analysis given above for a number of reasons, two of which will be mentioned. First, Article 103 does not affect customary obligations under human rights law, and protecting the right to life is one of those; and, second, Security Council obligations cannot override human rights treaty obligations unless the Security Council expressly states that this is the case. Drawing upon the European Court of Human Rights judgment in the *Al-Jedda* of 2011 it is for TCNs to interpret Security Council mandates to peacekeepers to use necessary measures in line with their human rights obligations unless, and until, the Security Council clearly exempts states from these obligations.¹⁰

Conclusion

While the Security Council may feel it has discharged its primary responsibility for peace and security by introducing Chapter VII and ‘necessary measures’ into the mandates of modern peace operations, it leaves the situation on the ground unclear. Peacekeepers are required to use lethal force to protect civilians and to protect the peace process but what this chapter has argued is that, in so doing, they are bound by the principles of human rights law and only exceptionally by those of international humanitarian law.

While it is possible to reconcile the ‘protection mandates’ given to modern peace operations with the restrictions on the arbitrary deprivation of life contained in human rights law, care must be taken, as pressure is increased on peacekeepers and TCNs from mandates being produced by the Security Council, not to stray into a legal no-man’s land between human rights law and humanitarian law. In this zone individuals would not have clear rights under human rights law nor would they be protected under the laws of war, meaning that the use of lethal force in such a zone is likely to be both abused and unaccountable.

⁹ ‘Protection of property cannot be invoked as a justification for the use of potentially lethal force unless it is somehow linked to the defence of life’, Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, annexed to UN Doc A/66/330 (2011), para 43.

¹⁰ *Al Jedda v The United Kingdom* (Application No. 27021/08, Judgment, 7 July 2011, para 105.

Of course there is great concern that peacekeepers use force when necessary to protect civilians under existential threat, but we must be careful to ensure that while more is done to achieve this laudable aim we do not encourage the excessive use of force by peacekeepers that may itself leads to the arbitrary deprivation of life.