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Contents

<i>Acknowledgements</i>	ix
<i>Series Preface</i>	xi
<i>Introduction</i>	xiii

PART I THE ROLE AND THE RULE OF LAW IN INTERNATIONAL PEACEKEEPING

- 1 Oscar Schachter (1964), 'The Uses of Law in International Peace-Keeping', *Virginia Law Review*, **50**, pp. 1096–1114. 3
- 2 Nina Lahoud (2002), 'Rule of Law Strategies for Peace Operations', in Jessica Howard and Bruce Oswald (eds.), *The Rule of Law on Peace Operations*, The Hague: Kluwer Law International, pp. 127–45. 23

PART II THE CONSTITUTIONAL BASIS OF PEACEKEEPING

- 3 Alexander Orakhelashvili (2003), 'The Legal Basis of the United Nations Peace-Keeping Operations', *Virginia Journal of International Law*, **43**, pp. 485–524. 45
- 4 Nigel D. White (1996), 'The UN Charter and Peacekeeping Forces: Constitutional Issues', *International Peacekeeping*, **3**, pp. 43–63. 85

PART III PRINCIPLES OF INTERNATIONAL PEACEKEEPING

The Consent of the Parties

- 5 David Wippman (1996), 'Military Intervention, Regional Organizations, and Host-State Consent', *Duke Journal of Comparative and International Law*, **7**, pp. 209–39. 111
- 6 Christine Gray (1996), 'Host-State Consent and United Nations Peacekeeping in Yugoslavia', *Duke Journal of Comparative and International Law*, **7**, pp. 241–70. 143

Peacekeeping and the Use of Force

- 7 Katherine E. Cox (1999), 'Beyond Self-Defense: United Nations Peacekeeping Operations and the Use of Force', *Denver Journal of International Law and Policy*, **27**, pp. 239–73. 175

The Legal Principles of Peacekeeping and the Brahimi Report

- 8 Heike Spieker (2000), 'Changing "Peacekeeping" in the New Millennium? – The Recommendations of the Panel on United Nations Peace Operations of August 2000', *International Peacekeeping*, **6**, pp. 144–52. 213

PART IV LAW APPLICABLE TO PEACEKEEPING OPERATIONS

International Humanitarian Law

- 9 Ray Murphy (2003), 'United Nations Military Operations and International Humanitarian Law: What Rules Apply to Peacekeepers?', *Criminal Law Forum*, **14**, pp. 153–94. 227
- 10 Marten Zwanenburg (1999), 'The Secretary-General's Bulletin on Observance by United Nations Forces of International Humanitarian Law: Some Preliminary Observations', *International Peacekeeping*, **5**, pp. 133–39. 269
- 11 Peter Rowe (2000), 'Maintaining Discipline in United Nations Peace Support Operations: The Legal Quagmire for Military Contingents', *Journal of Conflict and Security Law*, **5**, pp. 45–62. 277
- 12 Robert C.R. Siekmann (1998), 'The Fall of Srebrenica and the Attitude of Dutchbat from an International Legal Perspective', *Yearbook of International Humanitarian Law*, **1**, pp. 301–12. 295

Human Rights

- 13 Bruce M. Oswald (2001), 'The Creation and Control of Places of Protection during United Nations Peace Operations', *International Review of the Red Cross*, **84**, pp. 1013–35. 309

International Criminal Law

- 14 Diane F. Orentlicher (1998), 'Responsibilities of States Participating in Multilateral Operations with Respect to Persons Indicted for War Crimes', in C. Joyner and C.M. Bassiouni (eds), *Reining in Impunity for International Crimes and Serious Violations of Fundamental Human Rights, Nouvelles études pénales: Toulouse: Érès*, **14**, pp. 193–206. 335
- 15 Carsten Stahn (2003), 'The Ambiguities of Security Council Resolution 1422 (2002)', *European Journal of International Law*, **14**, pp. 85–104. 349

Responsibilities and Liabilities of Peacekeeper

- 16 Borhan Amrallah (1976), 'The International Responsibility of the United Nations for Activities Carried out by U.N. Peace-Keeping Forces', *Revue Egyptienne de Droit International*, **32**, pp. 57–82. 371
- 17 Daphna Shruga (2000), 'UN Peacekeeping Operations: Applicability of International Humanitarian Law and Responsibilities for Operations-Related Damage', *American Journal of International Law*, **94**, pp. 406–12. 397

Protection of Peacekeeping Forces

- 18 Ola Engdahl (2006), 'Protection of Personnel in Peace Operations', *International Peacekeeping: The Yearbook of International Peace Operations*, **10**, pp. 53–69. 407

PART V INTERNATIONAL ADMINISTRATIONS

- 19 Ralph Wilde (2001), 'From Danzig to East Timor and Beyond: The Role of International Territorial Administration', *American Journal of International Law*, **95**, pp. 583–606. 427
- 20 Boris Kondoch (2001), 'The United Nations Administration of East Timor', *Journal of Conflict and Security Law*, **6**, pp. 245–65. 451
- 21 Marcus G. Brand (2001), 'Institution-Building and Human Rights Protection in Kosovo in the Light of UNMIK Legislation', *Nordic Journal of International Law*, **70**, pp. 461–88. 473
- 22 John Cerone (2001), 'Minding the Gap: Outlining KFOR Accountability in Post-Conflict Kosovo', *European Journal of International Law*, **12**, pp. 469–88. 501
- 23 Leopold von Carlowitz (2004), 'Crossing the Boundary from the International to the Domestic Legal Realm: UNMIK Lawmaking and Property Rights in Kosovo', *Global Governance*, **10**, pp. 307–31. 521
- 24 Frederick Rawski (2002), 'To Waive or Not to Waive: Immunity and Accountability in U.N. Peacekeeping Operations', *Connecticut Journal of International Law*, **18**, pp. 103–32. 547
- Name Index* 577

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Series Preface

Open a newspaper, listen to the radio or watch television any day of the week and you will read or hear of some matter concerning international law. The range of matters include the extent to which issues of trade and human rights should be linked, concerns about refugees and labour conditions, negotiations of treaties and the settlement of disputes, and decisions by the United Nations Security Council concerning actions to ensure compliance with international law. International legal issues have impact on governments, corporations, organisations and people around the world and the process of globalisation has increased this impact. In the global legal environment, knowledge of international law is an indispensable tool for all scholars, legal practitioners, decision-makers and citizens of the 21st century.

The Library of Essays in International Law is designed to provide the essential elements for the development of this knowledge. Each volume contains essays of central importance in the development of international law in a subject area. The proliferation of legal and other specialist journals, the increase in international materials and the use of the internet, has meant that it is increasingly difficult for legal scholars to have access to all the relevant articles on international law and many valuable older articles are now unable to be obtained readily. These problems are addressed by this series, which makes available an extensive range of materials in a manner that is of immeasurable value for both teaching and research at all levels.

Each volume is written by a leading authority in the subject area who selects the articles and provides an informative introduction, which analyses the context of the articles and comments on their significance within the developments in that area. The volumes complement each other to give a clear view of the burgeoning area of international law. It is not an easy task to select, order and place in context essays from the enormous quantity of academic legal writing published in journals – in many languages – throughout the world. This task requires professional scholarly judgment and difficult choices. The editors in this series have done an excellent job, for which I thank and congratulate them. It has been a pleasure working with them.

ROBERT McCORQUODALE
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Introduction

Most scholars and practitioners in the field of peacekeeping will agree with Alan James that ‘the fullest perspective on peacekeeping ... is one which places it firmly in the context of international politics’ (James, 1990, p. 13). However, to understand this unique form of conflict resolution, one must also take other factors into consideration – for example, the diplomatic, historical, psychological, military and legal aspects of peacekeeping. The essays collected in this volume look at peacekeeping from the angle of international law, an often neglected and sometimes misunderstood facet of it. Most general textbooks on international law do not cover peacekeeping in great detail and there is no general and updated textbook for students on the subject, which comprehensively addresses the legal issues arising from modern peacekeeping operations. It is hoped that this volume on international peacekeeping can raise greater interest of this subject and contribute to a better understanding of how law applies to international peacekeeping efforts.

This volume covers the traditional legal topics in regard to international peacekeeping, such as the constitutional basis of international peacekeeping, the legal competence to create peacekeeping forces, the legal principles of peacekeeping, the application of humanitarian law to peacekeeping forces, and the responsibilities and liabilities, as well as the legal status of peacekeepers, under international law. It also deals with those legal issues that have moved to the forefront in the last 15 years, such as the legal protection of peacekeeping personnel and the relevance of human rights law and criminal law in peace operations, as well as legal questions arising from the administration of territories.

What is international peacekeeping? There is no generally accepted definition. The United Nations (UN) and its member states, international organizations, political and legal scholars have developed various approaches to define peacekeeping (Diehl, 1993; Katayanagi, 2002). One may follow the definition of the UN, which has defined peacekeeping in various documents by reference to the three key principles: consent of the parties; impartiality; and the non-use of force except in self-defence. According to the *Agenda for Peace*:

... peacekeeping is the deployment of a United Nations presence in the field, hitherto with the consent of all parties concerned, normally involving United Nations military and/or police personnel and frequently civilians as well. Peacekeeping is a technique that expands the possibilities for both the prevention of conflict and making of peace (Boutros-Ghali, 1992, para. 20).

This definition provides general guidance, but peacekeeping operations have also been established based on Chapter VII of the UN Charter¹ and in circumstances where force was used beyond self-defence.

¹ Recent examples of Chapter VII peacekeeping operations are the United Nations Mission in the Sudan (UNMIS), the United Nations Stabilization Mission in Haiti (MINUSTAH) and the United Nations Operation in Côte d’Ivoire (UNOCI), which were established in 2004 and 2005. See Security

Instead of peacekeeping, one may also speak of peace operations. UN peace operations may be understood as an umbrella term comprising the various types of peacekeeping mission carried out by the UN. According to the Brahimi Report (2000, para. 10), UN peace operations entail the activities of conflict prevention and peacemaking, peacekeeping and peace-building.

The institution and the concept of international peacekeeping (for early concepts of peacekeeping, see Bellamy, Williams and Griffin, 2004) was invented during the Suez Crisis when the United Nations Emergency Force (UNEF I) was created by the General Assembly in 1956.² As an institution, peacekeeping was born out of necessity, because the Security Council was deadlocked during the Cold War and it was the only acceptable practical way for dealing with international and non-international conflicts at that time. Peacekeeping, which involves military, civilian and police personnel, has been the most frequent military operation conducted by the UN. Between 1948 and mid-2007, there have been more than 60 peacekeeping operations conducted by the UN (for a categorization of the different types of peacekeeping operations, see Chapter 20, this volume). These operations have been undertaken in Europe, South America, Asia and Africa. There are currently 100 251 military personnel and civilian personnel serving in 15 peacekeeping operations (UN Department of Public Information, 2007).

Regional organizations or groups of states were rarely engaged in peacekeeping activities during the Cold War. Indeed, most regional organizations did not even provide for peacekeeping or peace-enforcement in their constituent instruments. Since the 1990s this situation has changed, and today peacekeeping operations are conducted by the European Union, NATO and many other regional organizations. These organizations have not only conducted their own operations, but they have also contributed to UN peace operations by mediation in conflicts before the establishment of a UN peacekeeping mission, by providing logistic support and ensuring the safety of the UN missions, and by conducting joint peacekeeping missions (McCoubrey and Morris, 2000).

Since the main actor in the field of international peacekeeping is the United Nations, the focus of this volume is on international law applicable to UN peace operations, but legal issues of peacekeeping-related activities by other actors than the UN are covered as well.

The Role and the Rule of Law in International Peacekeeping

The application of law in peacekeeping operations is complex. The legal framework of peacekeeping can be found in both international law and in national law. If not otherwise regulated – for example, by status of forces agreements – the national law of the host state remains applicable. In cases of violations committed by peacekeepers, the military law and the criminal law of the sending state will come into play. Many states have adopted their own legislation regulating participation in peacekeeping operations. In the case of Germany

Council Resolution 1528 of 27 February 2004; Security Council Resolution 1542 of 30 April 2004; and Security Council Resolution 1590 of 24 March 2005.

² Despite some earlier observer missions (UNTSO and UNMOGIP), the first mission explicitly labelled as peacekeeping was the UN Emergency Force (UNEF I).

and Japan, participation in peacekeeping operations raised controversial issues under the constitutions of both countries (see Stein, 2000).

Law is essential in every mission. As stated by Oscar Schachter in ‘The Uses of Law in International Peace-Keeping’ (Chapter 1), ‘[o]ne is the role of legal authority in providing a *locus standi* for third party intervention. ... [T]hird party activity is much less likely to raise objection if it rests on legal authority and is brought within the framework of the United Nations Charter’ (p. 5). The law also provides prescribed standards and rules to facilitate settlement, although ‘hostilities are not generally called off because legal norms are invoked’ (p. 6). Law serves to regulate and guide the international personnel. Only peacekeepers who are acting in conformity with international law are able to gain the trust, respect and cooperation of the local population they are serving. If the various tasks required during a peacekeeping mission are not performed in accordance with international and national legal standards, there can be no legitimacy, and thus no acceptability and credibility, of the mission. Therefore, the understanding of the rule of law³ and its application is considered to be one of the cornerstones of effective and successful UN peace operations.

In the second chapter of this volume, Nina Lahoud draws the reader’s attention to specific rule of law issues in UN peacekeeping operations and how they can be better addressed. As she points out, there are many challenges facing the UN if it is to strengthen the rule of law in post-conflict societies. These range from the establishment of a functioning criminal justice system; addressing property rights; ensuring the rights of the most vulnerable groups such as refugees, internally displaced persons, women and children during the post-settlement phase; and the drafting of constitutions. However, any effort to establish the rule of law must involve local actors and the adherence of the UN to rule of law standards.

The Constitutional Basis of Peacekeeping

When the UN started the first peacekeeping operations, the legality and precise constitutional basis of peacekeeping was widely debated. In the early 1960s, a financial crisis broke out after several member states, including France and the Soviet Union, refused to pay the cost of ONUC and UNEF I. They rejected the principle that the cost of peacekeeping operations had to be shared by the members of the General Assembly according to Article 17(2) of the UN Charter, which provides that ‘the expenses of the Organization shall be borne by the members as apportioned by the General Assembly’. In an Advisory Opinion, the International Court of Justice refused the Soviet Union’s argument that the forces sent to the Middle East in 1956 and to the Congo in 1960 were illegally created because they were not established in accordance with Article 43 of the UN Charter. The Court held that Article 43 was only applicable to forces designed to take enforcement action, but UNEF and ONUC were not created to take enforcement action (Expenses Opinion, 1962). Since the Court was concerned with the legal duty of the member states to pay for the forces, it only made short remarks in respect of the constitutionality of the forces and left the question open as to which article in the UN Charter could serve as the constitutional foundation for peacekeeping forces.

³ For a definition of the rule of law, see the Rule of Law Report (Report of the Secretary-General, 2004).

Today, the constitutionality of consensual peacekeeping operations and missions established under Chapter VII is commonly accepted. Although the UN Charter neither explicitly authorizes peacekeeping operations nor mentions peacekeeping, there is a consensus that the legal basis for consensual peacekeeping operations falls between Chapter VI and Chapter VII,⁴ which Dag Hammarskjöld referred to as the mythical ‘Chapter VI and a half’.

Nonetheless, there is a dispute among international lawyers as to which Charter provisions are exactly the legal basis of international peacekeeping and how to allocate authority among the Security Council, the General Assembly and the Secretariat, represented by the Secretary-General. The essays by Alexander Orakhelashvili, ‘The Legal Basis of the United Nations Peace-Keeping Operations’ (Chapter 3), and Nigel White, ‘The UN Charter and Peacekeeping Forces: Constitutional Issues’ (Chapter 4), examine these issues in great detail.

The Security Council, endowed by the UN Charter with the ‘primary responsibility for the maintenance of international peace and security’ (see Article 24(1)), has established almost all peacekeeping operations. According to Article 29 of the UN Charter, the Security Council may establish peacekeeping forces as its subsidiary organs, and under Article 98 the Council may entrust the Secretary-General with certain functions. However, there is a dispute among international lawyers as to which Charter provisions grant the power to establish peacekeeping operations. Some writers refer to different articles within Chapter VII (Articles 39, 40, 41, 42 and 48), either alone or in conjunction with each other (see, for example, Hufnagel, 1996).

One possible way of solving the dilemma is suggested by Orakhelashvili, who proposes different Charter provisions as the legal authority for the various types of peacekeeping operation. Certain operations may therefore fall under Article 36(1) of the UN Charter as a method of dispute settlement or under Article 39, which grants recommendatory powers to the Council. Peacekeeping operations may also be regarded as provisional measures under Article 40 of the UN Charter. Articles 41 or 42 of the UN Charter can be invoked when an operation has been established under Chapter VII – as in the case of UNTAET⁵ and UNMIK. Other authors, such as Nigel White, argue that there is no need to find an express Charter base because either the UN possesses an inherent or implied power⁶ to perform activities like peacekeeping or the legal foundation could be a customary rule of the law of the UN. White subsumes peacekeeping under the doctrine of inherent powers, namely as an action which is not expressly forbidden by the UN Charter and which achieves one of the aims of the organization (pp. 89–91).

What are the powers of the General Assembly and the Secretary-General? The General Assembly has only established peacekeeping forces in a few cases. It may be authorized under Article 22 in conjunction with either Article 10, 11 or 14. The Secretary-General has only a limited competence in regard to peacekeeping operations. He can negotiate and conclude

⁴ Under Chapter VI the Security Council can adopt various techniques in pursuit of the peaceful settlement of disputes (mediation, negotiation and so on). Under Chapter VII the Security Council may take enforcement measures to maintain or restore international peace and security.

⁵ Another possible approach is to see the legal basis in the implied powers of Security Council. See Ruffert (2001) and De Hoogh (2001).

⁶ As the International Court of Justice stated in the Reparations Opinion: ‘... under international law, the [UN] Organization must be deemed to have those powers which, though not expressly provided in the Charter, are conferred upon it by necessary implication as being essential to the performance of its duties’ (Reparations Opinion, 1949).

agreements in regard to peacekeeping forces or establish and conduct a peacekeeping operation if appropriate functions are delegated to him by the Security Council (for example, in the case of UNEF, the Secretary-General was authorized by the General Assembly to issue all regulations and instructions to the functioning of the force). However, there are two major limitations concerning the powers of the Secretary-General. First, as the majority of international lawyers agree, the Secretary-General cannot launch a peacekeeping force on his or her own, even with the consent of the parties.⁷ Second, the Secretary-General has no power to require states to send troops to UN peacekeeping missions because the Security Council itself does not possess this power and is therefore unable to delegate it to him or her.

Regional organizations and group of states are also important actors in the field of peacekeeping. Both may also establish peacekeeping operations based on the consent of the parties but, if they become engaged in enforcement action, the authorization of the Security Council is necessary. With regard to regional organizations, White reminds us that:

... [any] enforcement action, whether fully fledged inter-state action or belligerent peacekeeping within a state, does require authorization for legal and practical reason. To accept the practice that seems to have developed in some cases – that this form of peacekeeping falls outside the requirements of Article 53 because it carries the label ‘peacekeeping’ – would be dangerous, allowing considerable coercive freedom for regional, defence and security organizations, which are, as practice has shown, subject to even greater domination and abuse (p. 103).

Principles of International Peacekeeping

The Consent of Parties

The legal doctrine of consensual peacekeeping operations is based on three principles. First, the presence of a peacekeeping force requires the consent of the host state. Second, the force should be impartial. Third, the use of force is permitted only in the case of self-defence. These key legal principles have been derived from the establishment and operation of UNEF I in 1956, which became a precedent for consensual peacekeeping operations.

Unless the Security Council establishes a peacekeeping mission under Chapter VII, the consent of the parties to a conflict, or at least of the states concerned, is a necessary prerequisite. This follows from Article 2(7) of the UN Charter, which provides that nothing shall authorize the UN ‘to intervene in matters which are essentially within the domestic jurisdiction of any state’. Two essays, ‘Military Intervention, Regional Organizations, and Host-State Consent’ by David Wippman (Chapter 5) and ‘Host-State Consent and United Nations Peacekeeping in Yugoslavia’ by Christine Gray (Chapter 6) in this volume deal with the question of consent in peacekeeping operations. As a general rule, the continued consent of the governments concerned is required in interstate conflicts. If the consent is withdrawn, the peacekeeping operation can no longer stay in the host state. In civil war situations, although only the consent

⁷ An exceptional case was the Secretary-General’s provisional establishment of the United Nations Good Offices Mission to Afghanistan and Pakistan (UNGOMAP) in 1988, which also comprised 50 military officers. However, the Security Council agreed to the establishment of the mission by Security Council Resolution 622 of 31 October 1988.

of the government is required from a legal point of view, the UN will also try to receive the factual consent of the other parties to the conflict as a matter of practical necessity.

However, these rules are not easily applied in practice. What legal implication does the collapse of internal authority or the loss of control by government have on the requirement of consent? Does the change of the initial mandate require further consent? Which implication does the invocation of Chapter VII have on the consent of the parties? Wippman and Gray discuss these questions by looking at the cases of ECOWAS intervention in Liberia and the deployment of UNPROFOR during the conflict in the former Yugoslavia.

Another important requirement is the principle of impartiality, which means that peacekeepers should not advance the interest of one party over another. Dag Hammarskjöld referred to this principle in the final report on the plan for the establishment of UNEF I of 6 November 1956, by stating that there was no intent 'to influence the military balance in the present conflict and, thereby, the political balance affecting efforts to settle the conflict' (Final Report UNEF I, 1956, para. 8).

Peacekeeping and the Use of Force

The third cornerstone of peacekeeping is the defensive use of force. If not otherwise mandated under Chapter VII, peacekeepers can only use force in self-defence. However, over time, the concept of self-defence has evolved and the UN has occasionally become involved in operations that went beyond self-defence and included robust action. The development and the concept of the use of force is examined by Katherine Fox in her essay 'Beyond Self-Defence: United Nations Peacekeeping Operations and the Use of Force' (Chapter 7). This concept was described by Dag Hammarskjöld as:

... [the] rule ... 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 which they occupy under orders from the Commander, acting under the authority of the Assembly and within the scope of its resolutions. The basic element involved is clearly the prohibition against any initiative in the use of armed force (Report of the Secretary-General, 1958, para. 179).

In 1964 new elements to this definition were added in respect of UNFICYP, which allowed the use of force 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' (*Aide Mémoire*, 1964, paras. 17c–18c).

The next development was the approach chosen in the case of UNEF II, which was established in 1973. Self-defence also included 'resistance to attempts by forceful means to prevent it from discharging its duties under the mandate of the Security Council' (Report of the Secretary-General, 1973, para. 4a). This formula became applicable to all subsequent missions. But it was only reluctantly and very rarely applied in practice, because it is difficult to reconcile with the principles of consent and impartiality. Fox also considers peacekeeping missions with a robust mandate from the early example of ONUC to certain missions like those established after the end of the Cold War. Peacekeepers were, for example authorized to use force to secure freedom of movement for the delivery of food or to use self-defence in

the protection of safe areas and the civilian population. These missions have been criticized for blurring the distinction between peace-enforcement and peacekeeping. She is also critical of the expanded use of force by peacekeepers, but one may wonder whether there are better alternatives or whether the core principles of peacekeeping should be reconsidered as proposed by the *Report of the Panel on United Nations Peace Operations* (the so-called Brahimi Report).

The Legal Principles of Peacekeeping and Brahimi Report

The Brahimi Report is analysed and summarized by Heike Spieker in her essay ‘Changing “Peacekeeping” in the New Millenium? – The Recommendations of the Panel on United Nations Peace Operations of August 2000’ (Chapter 8). She considers that the Brahimi Report is ‘the most incisive and comprehensive analysis of peace operations ever undertaken by the United Nations’ (p. 214). The Panel’s task was ‘to undertake a thorough review of the United Nations peace and security activities, and to present a clear set of specific, concrete and practical recommendations to assist the United Nations in conducting such activities better in the future’.⁸ The recommendations focus, to a large degree, on structural and management problems, but the Panel also commented on the doctrine on which peace operations should be conducted. Although the Panel states that the ‘consent of the local parties, impartiality and the use of force only in self-defence should remain the bedrock principles of peacekeeping’ (Brahimi Report, para. 48), the Report calls for more robust mandates that are also clear, credible and achievable, and does not only question, but also modifies, the traditional approach to peacekeeping concerning the consent of the parties, the principle of impartiality and the non-use of force.

With regard to the use of force, the Panel recommended that:

... rules of engagement should not limit contingents to stroke-for-stroke responses but should allow ripostes sufficient to silence a source of deadly fire that is directed at United Nations troops or the people they are charged to protect and in particularly dangerous situations, should not force United Nations contingents to cede the initiatives to the attackers. ... [However,] mandates should specify an operation’s authority to use force (Brahimi Report, paras 49 and 51).

This is a clear departure from previous practice where robust mandates were the exception. The rationale for the traditional concept of peacekeeping was explained by UN Secretary-General Boutros Boutros-Ghali in the Supplement to the Agenda for Peace (1995), when he argued that:

... the logic of peacekeeping flows from political and military premises that are quite distinct from those of enforcement; and the dynamics of the latter are incompatible with the political process that peace-keeping is intended to facilitate. To blur the distinction between the two can undermine the viability of the peace-keeping operation and endanger its personnel’ (Boutros-Ghali, 1995, para. 35).

⁸ See Identical Letters, dated August 2000, from the Secretary-General to the President of the General Assembly and the President of the Security Council in the Brahimi Report (2000).

However, the calls for robust peacekeeping in order to stop and prevent future massacres and genocides, as in Srebrenica and Rwanda, are not new. Therefore, UN Secretary-General Kofi Annan came to different conclusions than his predecessor and stated that ‘we learned, the hard way that lightly armed troops in white vehicles and blue helmets are not the solution to every conflict. Sometimes peace has to be made – or enforced – before it can be kept’ (Annan, 1998).

Impartiality is no longer understood as the equal treatment of the parties to a conflict under all circumstances but as ‘adherence to the principles of the Charter and to the objectives of a mandate that is rooted in those Charter principles’ (Brahimi Report, para. 50). Such an understanding of impartiality allows peacekeepers to distinguish between aggressors and victims. Less clear are the recommendations concerning another important requirement: the consent of the parties to a conflict. The Panel observed that ‘consent may be manipulated in many ways by the local parties’ (para. 48), but draws no conclusion regarding what should happen if consent, once given, authorizes the Security Council to decide upon extensions or enlargements of the initial mandate under certain circumstances or if, in the case of denial of consent, it may be replaced by a decision of another institution. The Panel also fails to address the question of whose consent is necessary in the case of conflicts with many groups of belligerents or where there is a situation of a failed state with no effective government.

It remains to be seen whether the call for more robust peacekeeping and the doctrinal approach proposed by the Brahimi Report will be implemented. As Gray has correctly commented:

... it is not clear that the Brahimi Report support for ‘robust peacekeeping’ will be acceptable to those who support a more limited concept of peacekeeping ... The call for bigger forces, better equipped and more costly, able to pose a credible deterrent, contrasts with the symbolic, non-threatening presence that characterised traditional peacekeeping. (Gray, 2001, p. 270).

Law Applicable to UN Peacekeeping Operations

In general, the legal status of personnel serving in peacekeeping operations refers to their rights and duties under the applicable law, and their terms of service and civil and criminal jurisdiction which are applicable. The legal status is derived from four different bodies of law: a) the national law of the receiving or host state; b) the law of the intergovernmental organization, if the peacekeeping operation is not established by a group of states; c) the law of the sending or participating state; and d) rules of general international law – in particular, international humanitarian law, human rights law and international criminal law.

Part III considers the legal framework applicable to UN peacekeeping operations. UN peacekeepers are generally directed and bound by mission-specific legal sources and internal rules of the organization, such as the mandate, which is laid down in an enabling resolution. These include UN regulations, as used in Kosovo and East Timor, force regulations, which were applied, for example, in regard to UNEF I and ONUC, and status of forces agreements, as well as participation agreements.

It is the mandate, formulated by the Security Council and – exceptionally – by the General Assembly, which provides the legal basis of a UN peace operation. But the mandate can be

vague as a result of political compromises. As Peter Rowe writes in ‘Maintaining Discipline in United Nations Peace Support Operations: The Legal Quagmire for Military Contingents’ (Chapter 11), the mandate ‘is likely to be expressed in rather general terms, telling states, where the pitch is, who the players are and the objective of the operation, but providing no clear rules to when a yellow or red card should be shown to the players’ (p. 279). Hence it is important that the mandate and the legal duties are implemented into the national structure of the sending states. The mandate can be open to interpretation and there can be a thin line denoting whether the peacekeeper on the ground operates within the UN mandate, as shown by Robert Siekmann in ‘The Fall of Srebrenica and the Attitude of Dutchbat from an International Legal Perspective’ (Chapter 12).

Status of Forces Agreements (SOFAs) or Status of Mission Agreements (SOMAs), which are concluded between the UN and the host state, regulate the status of the peacekeeping force. They contain provisions on the status of the national contingents, provisions on the freedom of movement within the area of operations, privileges and immunities and jurisdiction, as well as claims and disputes. Participation agreements, which are based on an agreement between the participating states and the UN, contain the specific rights and responsibilities of the force.

General international law is an important source of rights and obligations. International humanitarian law, human rights law and international criminal law are of great relevance in this regard. Furthermore, international law dealing with the protection of peacekeepers and the privileges and immunities, as well as the responsibilities and liabilities, needs to be considered. The UN is not a party to international humanitarian law or human rights conventions, but it does nevertheless possess legal personality and can be bound by customary international law *mutatis mutandis*. In the Reparations Opinion the International Court of Justice stated that the duties of the UN in regard to international law depend on the ‘purposes and functions as specified or implied in its constituent documents and developed in practice’ (Reparations Opinion, 1949, p. 179). UN peacekeepers may therefore be bound by customary rules of international humanitarian law, human rights law or international criminal law. If the Security Council establishes a peace operation under Chapter VII, it is questionable whether customary international law is applicable. However, one may argue that at least norms regarded as *jus cogens* apply, and Articles 1 and 2 of the UN Charter provide legal limitations (see Chapter 20).

International Humanitarian Law

One of the oldest legal disputes concerning peacekeeping operations is whether international humanitarian law is applicable and to what extent. The question may, for example, arise when peacekeepers become involved in combat-like situations or when they are taken as hostages. Ray Murphy addresses these problems in his essay ‘United Military Operations and International Humanitarian Law: What Rules Apply to Peacekeepers?’ (Chapter 9). For a long time, the UN argued that UN peacekeepers were under no legal obligations arising from international humanitarian law and that they were only bound by its principles and the spirit. The UN argued that ‘United Nations forces act on behalf of the international community, and therefore they cannot be considered a “party” to the conflict, nor a “Power” within the meaning of the Geneva Conventions’ (p. 228). Another argument was that only states were parties to the conventions and capable of carrying out certain obligations. The International Committee

of the Red Cross (ICRC) maintained that all provisions of international humanitarian law were applicable. From the perspective of the ICRC, it was irrelevant who was holding the gun and for what purpose (p. 254).

According to Murphy, it makes little sense not to apply international humanitarian law to UN forces, since '[a]dherence to these principles will also assist in facilitating a restoration of the peace, a matter that is ultimately the goal of all United Nations forces' (p. 255). In 1999 the Secretary-General promulgated the Bulletin *Observance by United Nations Forces of International Humanitarian Law* (Secretary-General's Bulletin, 1999) and, for the first time, the UN declared itself to be bound by the fundamental principles and rules of international humanitarian law. However, there are several problems in regard to the Bulletin as pointed out by Marten Zwanenburg in his essay 'The Secretary General's Bulletin on Observance by United Nations Forces of International Humanitarian Law: Some Preliminary Observations' (Chapter 10). The Bulletin is based on, and inspired by, the four Geneva Conventions of 1949 and the Additional Protocols of 1977, but the Bulletin contains far fewer provisions and provides less protection than these instruments.

Human Rights

Peacekeepers should also be aware of human rights standards. The different components in a UN peacekeeping mission may play various roles in the promotion and protection of human rights. Human rights components or units may, for example, monitor and investigate human rights violations, report on human rights violations, assist the host government in developing laws complying with international human rights norms, and train military, police and other government officials. They may also address problems related to vulnerable groups, such as women, refugees, internally displaced people and children. Soldiers may observe and monitor the actions of the armed forces and the civilian population. By their mere presence they can deter human rights violations. The civilian police may monitor and investigate human rights violations as guardians of the law, train and help to establish the local police and prevent criminal activities. Until the 1990s peacekeepers had no specific mandate related to human rights. The common understanding that 'human rights violations are often a cause of conflict and addressing them is a pre-condition for peace' (Kenny, 1996, p. 2) led to the assignment of various human rights functions to second-generation peacekeeping operations and other types of human rights operation.

Human rights played an important role in the performance of the UN administrations in Kosovo and East Timor. Human rights standards were embedded in the same way in all activities of both administrations. According to UNTAET and UNMIK Regulations everybody undertaking public duties or holding public office in East Timor and Kosovo shall recognize international human rights standards as reflected, *inter alia*, in the Universal Declaration on Human Rights of 10 December 1948 and the International Covenants of 1966. By promulgating these regulations human rights became the primary consideration in all activities of both administrations. Even if human rights are not incorporated in the mandate or in UN regulations, peacekeepers serving in consensual peacekeeping operations are bound

by human rights rules, which form part of customary international law.⁹ In the case of peace operations established under Chapter VII, legal obligations flow at least from those human rights that are regarded as *jus cogens*.

One way of protecting human rights during peacekeeping operations is to establish and control safe havens and humanitarian protected zones. This topic is addressed by Bruce Oswald in 'The Creation and Control of Places of Protection during United Nations Peace Operations' (Chapter 13). The UN established security zones and safe corridors for the protection of civilians in Rwanda and in Bosnia-Herzegovina. From a legal point of view, the creation of such places is unproblematic, if the consent of the parties is given, or in the case of an explicit mandate by the Security Council pursuant to Chapter VII. Oswald argues that authorization might also be implied if 'a Chapter VII enforcement operation that mandates a UN Force "to provide security and protection to civilians at risk" implies that the Force may take necessary and reasonable steps, such as the creation of a place of protection, to discharge that mandate' (p. 317). According to Oswald, places of protection may also be established by UN forces in the absence of consent and without Chapter VII authorization. He argues that legal justification may be derived from several sources: a) the exercise of right of individual and collective self-defence; b) Article 1 of the Convention and Punishment of the Crime of Genocide; and c) the prohibition to target or attack civilian (pp. 318–19). Whether international law has reached the point that would allow the intervention of UN forces to create places of protection in these circumstances, despite Article 2(7) of the UN Charter, is at best unclear.

International Criminal Law

International criminal law plays an increasing role in respect to peacekeeping operations. One may consider the following questions. Which obligations do arise for peacekeepers from international criminal law? What are the obligations of peacekeepers in respect of the prosecution of international crimes? Should there be exceptions for peacekeepers to the principle of individual criminal responsibility? Should the UN develop a transitional criminal code? If yes, under what circumstances would the application of an interim criminal code be lawful? If the UN or any other international organization takes over the administration of a territory, is there a duty to prosecute persons who have been accused of genocide, crimes against humanity or war crimes? Robert Siekmann, in Chapter 12, raises the interesting question as to whether peacekeepers who witness war crimes but do not intervene can be held guilty of war crimes on account of their passive behaviour. However, for this to be possible would require a duty for the individual peacekeeper to assist victims of gross human rights violations, and international law has certainly not developed to that stage.

Peacekeepers may have a responsibility to search for and arrest persons suspected of war crimes. Diane Orentlicher in 'Responsibilities of States Participating in Multilateral Operations with Respect to Persons Indicted for War Crimes' (Chapter 14), discusses these obligations in respect to the Implementation Force (IFOR) and the Stabilization Force (SFOR), which were in charge of security in Bosnia-Herzegovina but were criticized for not arresting indictees

⁹ For a detailed analysis of how human rights law becomes applicable to UN peace operations, see Kondocho (2005).

charged by the International Criminal Tribunal for the former Yugoslavia. In general, the legal authority to search for and arrest suspected war criminals can stem from a Security Council resolution under Chapter VII or from the consent of the host state. In addition, as pointed out by Orentlicher, peacekeepers have a legal obligation under international humanitarian law because the Geneva Conventions of 1949 and Additional Protocol I establish such a duty upon the high contracting parties in respect of grave breaches of the conventions (see Geneva Conventions, Arts 49/50/129/146, Additional Protocol I, Article 85). NATO legal advisers and military lawyers of the US government denied this legal obligation. They argued that the Conventions did not apply extraterritorially and that states could only exercise police functions within their own territory (pp. 338–39). Furthermore, NATO and SFOR could not be bound by Geneva Conventions and the Additional Protocols because only states could become parties to the conventions. Orentlicher rejects these arguments with good reasons, since ‘both the Dayton Peace Agreement and various U.N. Security Council resolutions make clear that NATO forces may lawfully exercise police powers in Bosnia’ (p. 340). Legal obligations arise from Security Council Resolution 827, which requires states to cooperate with the ICTY, the Genocide Convention and international humanitarian law. In her opinion, ‘the issue is not whether NATO and SFOR themselves are bound by the conventions’ (p. 343); every member state that is party to the Conventions is still bound by its individual obligations when joining a multinational force. It would lead to bizarre results, if ‘any state could violate the Geneva Conventions with impunity merely by joining other countries in a military alliance’ (p. 343). Taking into account the object and purpose of the grave breaches provisions, she comes to the conclusion that the Geneva Conventions are extraterritorially applicable, because:

[t]he core aim of the grave breaches provisions ... is to foreclose impunity for such breaches. This aim would be ill served if Contracting Parties’ obligations were inapplicable in territories where those states exercise lawful power to arrest persons allegedly responsible for grave breaches (pp. 341–42).

Carsten Stahn in ‘The Ambiguities of Security Council Resolution 1422 (2002)’ (Chapter 15) addresses the issue of criminal immunities of the peacekeeper by analysing Security Council Resolution 1422. This controversial resolution was adopted on 12 July 2002 and renewed as Security Council Resolution 1483 in 2003. It granted immunity to personnel from ICC non-state parties involved in UN-established or UN-authorized operations for a renewable 12-month period. The resolution raises questions not only about its compatibility with the ICC statute, but also in regard to the constitutional powers of the Council under the UN Charter to treat the immunity of peacekeepers as a matter of international peace and security. Since Resolution 1422 was adopted under Chapter VII, it requires the existence of a threat to the peace, breach of the peace or act of aggression. Stahn points out that ‘the threat to the peace seems to be based less on the existence of a specific conflict situation than on the potential inability of the United Nations to address future threats without US military personnel’ (p. 351). However, this hardly seems to be a convincing argument for viewing a situation as a threat to the peace. The important question is ‘to what extent the exemption of peacekeeping personnel from criminal jurisdiction lies in the interests of the maintenance of peace and security’ (p. 351).

Responsibilities and Liabilities of Peacekeeper

During any peace operation, whether conducted by the UN or by an international organization, damages, such as personal injury or property loss, may be encountered. Who bears responsibility and who can be held liable? Is it the international organization, the individual peacekeeper, the host state or the sending state? Borhan Amrallah, in 'The International Responsibility of the United Nations for Activities Carried out by U.N. Peacekeeping Forces' (Chapter 16), addresses these questions in regard to the UN and also considers the organization's claims practice. In general, the UN bears responsibility for its internationally wrongful acts in the same way as states. There must be the breach of an international obligation either in the form of an unlawful act or by an omission. The unlawful act of the peacekeeper must be imputable to the UN. These principles have also been reaffirmed by the ILC's draft on the responsibility of international organizations.¹⁰ Harmful conduct can be attributed if the peacekeeper was under the UN's military command and control. The UN bears responsibility for two reasons. First, the UN is a legal entity that possesses international rights and duties and, second, the force is considered as a subsidiary organ of the organization. The acts must be undertaken in the performance of the individual's official function. although responsibility may also arise when the official has acted *ultra vires* or *bona fide*. If the unlawful act has been performed outside of the individual's official function, the state of which the individual is a national is responsible. Where the UN has had no control over the forces, as was the case in the Korean War and the Gulf War of 1991, the organization has denied responsibility. Since the early days of peacekeeping, the UN has accepted responsibility for UN peace operations and has, in exceptional cases, also paid compensation for damage that could not clearly be imputed to the organization. In the past, the UN has also settled third-party claims, made by local claims review boards, for personal injury, property loss or damage occurring during peacekeeping operations. As described by Daphna Sharga in 'UN Peacekeeping Operations: Applicability of International Humanitarian Law and Responsibilities for Operations-Related Damage' (Chapter 17), the issue of compensation was reviewed due to the increasing number of claims. Based on two reports by the Secretary-General, the General Assembly decided to impose temporal and financial limitations on third-party liability. In addition, there is no liability in cases of operational necessity.

Protection of Peacekeeping Forces

Another important legal area is related to the protection of the UN personnel. In recent years peacekeepers have become victims of crimes such as killing, kidnapping, hostage-taking and armed robbery, and one of the urgent problems on the UN's agenda is to improve the protection of personnel serving in peace operations. The legal framework analysed by Ola Engdahl in 'Protection of Personnel in Peace Operations' (Chapter 18) can be found in Security Council resolutions, human rights law, international humanitarian law, international criminal law, status of forces agreements, privileges and immunities provided by international law, as well as national law. Engdahl closely examines the Convention on the Safety of UN and Associated Personnel of 1994 (Safety Convention, 1994), which was adopted as a result of assaults on

¹⁰ See Draft Articles 1, 2 and 3 (2003), UN doc. A/CN.4/L.632 of 4 June.

peacekeepers in Somalia, Rwanda and the former Yugoslavia. The Convention, which entered into force in 1999, criminalizes certain acts, such as murder, kidnapping or other attacks against UN and associated personnel (see Article 9).¹¹ States parties are required to make attacks or threats against UN and associated personnel punishable under their national law and either to prosecute or to extradite alleged offenders. The Convention met with much criticism because of its narrow scope of application. According to Article 2, the Convention applies to UN and associated personnel and UN operations. Article 1(c) defines a UN operation as:

... an operation established by the competent organ of the United Nations in accordance with Charter of the United Nations and conducted under United Nations authority and control: where the operation is for the purpose of maintaining or restoring international peace and security, or where the Security Council or the General Assembly has declared for the purposes of this Convention, that there exists an exceptional risk to the safety of the personnel participating in the operation.

The Convention does not apply to a UN operation authorized by the Security Council as an enforcement action under Chapter VII of the UN in which any personnel are engaged as combatants and to which the law of international armed conflict applies. Walter Gary Sharp criticizes the approach chosen by the Convention because it excludes most Chapter VII operations and it blurs the line of demarcation between the law of armed conflict and the Safety Convention. He proposes to apply the Safety Convention to all operations authorized by the UN even if they are not under UN control (Sharp, 1996). The condition that the protection of operations not established for the purpose of maintaining or restoring international peace and security requires a declaration of exceptional risk by the Security Council or the General Assembly has also received much criticism. The scope of the Safety Convention was discussed by the Ad Hoc Committee on the Scope of Legal Protection under the Convention on the Safety of United Nations and Associated Personnel.¹² Consequently, on 8 December 2005, the Optional Protocol to the Convention on the Safety of United Nations and Associated Personnel was adopted. The new protocol expands the legal protection from emergency humanitarian assistance to peacebuilding and the delivery of humanitarian, political and development assistance.¹³

International Administrations

The UN administrations of East Timor and Kosovo raised new questions from the perspective of international law, and they intensified some old legal debates in regard to peacekeeping operations. For this reason, Part V considers the legal issues arising from international administrations. The administration of territories is not a new phenomenon. Territories have been administered by a single state, a group of states or an international organization. International territorial administration as a means of conflict management has been used

¹¹ The statutes of the ICC and the Special Court for Sierra Leone have also incorporated provisions on crimes committed against peacekeepers. See Article 8(b)(iii) and Article 8, para. 2(e)(iii) of the Rome Statute of the International Criminal Court and Article 4 of the Statute of the Special Court of Sierra Leone.

¹² Documents and reports can be found at www.un.org/law/UNsafetyconvention.

¹³ See Annex to the General Assembly Resolution (2006), A/RES/60/42, 6 January.

since the League of Nations; examples include the administration of the Saar Territory by the League of Nations (1920–35), the occupation of Germany by the Allied Powers after the Second World War, the mandate system of the League of Nations and the UN trusteeship system. Ralph Wilde in ‘From Danzig to East Timor and Beyond: The Role of International Territorial Administration’ (Chapter 19) provides the background to these administrations. He identifies two reasons for establishing international territorial administration: ‘In the first place, they attempt to address a perceived “sovereignty problem” regarding the identity of those local actors exercising administrative control. In the second place, they attempt to address a perceived “governance problem” regarding the conduct of governance by local actors’ (p. 427). Before the establishment of the UN Interim Administration in Kosovo (UNMIK) and the UN Transitional Administration in East Timor (UNTAET) in 1999, the UN had little experience in non-trusteeship administration. These differed from previous UN administrations in places like Cambodia or Eastern Slavonia, because the UN was now authorized to exercise all legislative and executive powers over both territories, including the administration of justice. As Boris Kondoch, who examines the legal issues arising from ‘The United Nations Administration of East Timor’ (Chapter 20), comments, ‘[t]he scope of the responsibilities and the range of the mandate were unprecedented in the history of UN peacekeeping operations’ (p. 452).

Both administrations faced great difficulties in establishing the rule of law and a functioning justice system on account of the devastating situations in East Timor and Kosovo and the lack of a coherent strategy to develop rule of law institutions. UNMIK and UNTAET were confronted with a collapsed judicial system and escalating violence and crime on the ground. At the same time, the administrations lacked qualified personnel, knowledge and financial resources. Where necessary, UNTAET and UNMIK could issue legislative acts in the form of regulations. The local law remained in force unless it conflicted with international human rights standards. However, there was a lack of review in respect of the applicable law in both territories. The administrations have been criticized for flaws in the law-making process. In general, one may ask, like Leopold von Carlowitz in ‘Crossing the Boundary from the International to the Domestic Legal Realm: UNMIK Lawmaking and Property Rights in Kosovo’ (Chapter 23), who analyses UNMIK’s efforts to regulate property rights in Kosovo ‘how far international lawmakers may intrude in the domestic legal realm for the purpose of maintaining (international) peace and security’ (p. 539).

Marcus Brand in ‘Institution-Building and Human Rights Protection in Kosovo in the Light of UNMIK Legislation’ (Chapter 21) takes a critical look at the UN’s efforts to create an administration based on the rule of law and in compliance with human rights standards. As Brand writes, ‘[r]espect for human rights for all people in Kosovo was one of the leading motifs for international efforts’ (p. 500). This was explicitly laid down in Security Council Resolution 1244, which mandated UNMIK to protect human rights in Kosovo. In addition, Regulation 1/1999 obliged all persons undertaking public duties or holding public office in Kosovo to observe internationally recognized human rights standards. Part of Brand’s criticism is directed against the absence of the separation of powers, because the Special Representative of the Secretary-General exercised the supreme and legislative executive authority in Kosovo at the same time and no court could check the legality of legislative or executive acts. Consequently, UNMIK could not provide adequate human rights protection because ‘[o]nly a state with a balance of powers and system of mutual checks and balances (i.e.

adhering to the principles of constitutionalism) can effectively provide a rule of law system that protects human rights, and correspondingly, will hold itself responsible and accountable for shortcomings' (p. 500).

John Cerone in 'Minding the Gap: Outlining KFOR Accountability in Post-Conflict Kosovo' (Chapter 22) examines how human rights law and international humanitarian law are applicable to the Kosovo force (KFOR). The international security presence was mandated under Security Council Resolution 1244, among others, to deter renewed hostilities, to establish a secure environment and to ensure public safety and order. Unlike the case of UNMIK, KFOR was not explicitly mandated to promote and protect human rights. However, KFOR was established under UN auspices and was therefore also bound by the purposes of the UN Charter, among which included the promotion of human rights. In addition, Resolution 1244 requires 'that both presences operate towards the same goals and in mutually supportive manner'. Cerone notes that human rights obligations may also be based on the principle of automatic succession for human rights obligation and the individual human rights obligations of the states participating in KFOR.

Another question is whether KFOR was bound by international humanitarian law. Cerone argues that the law of occupation laid down in the regulations annexed to the 1907 Hague Convention No. IV on the Law and Customs of War and the Fourth Geneva Convention was applicable to KFOR, because KFOR exercised public authority and the formal consent of the former Republic of Yugoslavia was possibly lacking. In general, the idea of applying the law of occupation to peacekeeping forces is not a new one (see Chapter 11). However, unlike traditional cases of occupation, the presence of peacekeeping forces is based on a legal authority – namely, on the consent of the parties or on a Chapter VII resolution, as in case of KFOR. According to Cerone, 'this does not directly affect application of the Geneva Conventions, which consciously avoid inquiries into the legality of resort to the use of force' (p. 516). However, there is almost no state practice to support his interpretation, and KFOR itself has not referred to the law of occupation.

In the last decade there has been an increase in reports about human rights abuses by peacekeepers, ranging from torture, sexual violence and assault to involvement in prostitution. In regard to the sexual misconduct of peacekeepers the UN has taken vigorous measures to address this problem by implementing a zero-tolerance policy and through an increase in transparency, investigation and gender training. The human rights violations and cases of misbehaviour by peacekeepers have also led to a debate among international lawyers about the concept of immunity granted to peacekeepers and possible mechanisms to hold them accountable.¹⁴ Frederick Rawski addresses these issues in 'To Waive or Not to Waive:

¹⁴ In general, peacekeepers are granted immunity from criminal proceedings. The UN does not exercise criminal jurisdiction over peacekeepers. If the individual peacekeeper commits a crime, the individual remains under the jurisdiction of the sending state and he or she may be held accountable for their action by the courts of the sending state. Since only a few decisions of court martials and inquiries have addressed the violations of international law by members of UN peacekeeping forces (see Zwanenburg, 2005, pp. 224–34 and, for further references, Kondoch, 2005, fn. 8), academic writers and non-governmental organizations have criticized the United Nations and member states for not providing effective mechanisms of accountability. It will be one of the challenges of the future to create consistent mechanisms to ensure the identification and punishment of law violations committed by UN forces (in regard to the sexual exploitation and abuse by United Nations peacekeeping personnel, see the recommendations of Prince Zeid's Report 2005)..

Immunity and Accountability in U.N. Peacekeeping Operations' (Chapter 24) by considering the cases of East Timor and Kosovo. The purpose of granting privileges and immunities is not to benefit any particular individual but to safeguard the efficient functioning of the peacekeeping operation. Legal privileges and immunities may derive from various legal sources (Article 105 of the UN Charter, the Convention on the Privileges and Immunities of the UN of 1946, status of forces agreements, UN regulations, national law and so on). Four types of immunity need to be distinguished: immunity from criminal, civil, administrative and legal process. Special Representatives of the Secretary-General and his deputies enjoy full diplomatic immunity. Peacekeeping forces under the command and control of the UN are generally granted absolute immunity. Civilian personnel enjoy limited immunity, which can be waived. The UN itself enjoys absolute immunity, unless there is an express waiver.

What kinds of immunity were granted in Kosovo and East Timor? According to UNMIK Regulation 2000/47, KFOR enjoys absolute immunity, while UNMIK and its personnel are immune with respect to all acts performed in their official capacity. With regard to UNTAET, no such regulation was promulgated, but the Convention on the Privileges and Immunities was fully applied. The approach chosen by the UN appears to be questionable. The granting of immunities to a peacekeeping operation is based on the idea that the organizations need to be protected from interference and harassment by local authorities and the government of the host state. However, that is not a convincing argument when a UN administration is vested with executive, legislative and judicial powers and takes over the function of a state. As Rawski points out, '[b]road staff immunity in such cases may violate the principles of democratic accountability and human rights at the core of these missions' mandates' (p. 549). He suggests that 'the UN should narrow immunities to a reasonable definition of "official duty," explicitly excluding serious violations of human rights and criminal law, and only invoke immunity protections when failing to do so would truly endanger the success of the mission' (p. 572). Such a definition could be laid down in a bulletin on the scope of the privileges and immunities of UN staff, which would also regulate 'a consistent procedure for handling questions of immunity in the peacekeeping context, including a clear articulation of the role of Boards of Inquiry, Ombudsperson offices, and UN supervised courts' (p. 575).

Conclusion

Peacekeeping operations do not exist in a legal vacuum and they never did. Many peacekeeping operations nowadays acquire a 'greater legal dimension' than in their early days because of the new and growing tasks undertaken by the peacekeeper (Corell, 2000).

Any actor in the peacekeeping process should understand the conceptual differences between consensual peacekeeping operations based on the consent of the parties and missions mandated under Chapter VII and possibly allowing the use of force beyond self-defence. Every peacekeeper, whether he or she is involved in the planning, training or decision-making process or fulfils functions, such as a soldier, policeman or civilian, should have a basic understanding of his or her rights and duties under international law.

The rule of law is arguably the most important aspect in any peace operation. As shown by the essays collected in this volume, there are many legal controversies and difficulties to implement and enact in accordance with the rule of law during a peacekeeping operation. Addressing these issues will remain a challenging task.

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