1 Introduction and overview

Can a peacekeeper use lethal force to accomplish a mission objective? How must a peacekeeper treat detainees? What are the obligations of a peacekeeper towards civilians who are in danger? Which measures can a peacekeeper use to prevent, or respond to, demonstrations and riots? In contemporary peace operations, anyone who attempts to respond to questions such as these will need to consider the possible application of human rights law. But a peacekeeper quickly encounters the problem that the applicability of human rights law in peace operations is a highly complex and controversial issue.

Military forces in peace operations operate outside of their home states, so the question of extraterritorial effect of human rights treaties arises. The forces operate in the territory of a host state, which gives rise to questions concerning the relationship between the responsibility of troop contibuting states and that of the host state. The forces are agents of their home states, but they may (or may not) be placed at the disposal of an international organisation, which gives rise to the question of the human rights obligations of international organisations, and the relationship between the responsibilities of the state and those of the organisation. The state ordinarily retains a certain authority over the forces, and this complicates the issues further. The forces operate in a complex environment, which may or may not be characterised as an armed conflict, so the question arises about how to apply human rights law in such a situation. The forces may operate under a UN mandate, so the question arises about the effect of this mandate on the application of human rights norms. And the military forces are deployed in order to protect, enforce or keep the peace, which may or may not be a different objective from that of protecting human rights. When all these problems are combined, it becomes

clear that the seemingly simple question, 'what are the human rights treaty obligations of a peacekeeper?', in reality is very complex.

The main purpose of this book is to examine the de jure applicability of the European Convention on Human Rights (ECHR)[1] and, mainly for comparative purposes, the International Covenant on Civil and Political Rights (ICCPR)[2] in international peace operations with a mandate from the United Nations Security Council.[3] The issue is limited to an analysis of the treaties as a legally binding normative framework for the conduct of military forces in their relations with the civilian population in their area of operation.

The main research question

The main research question can be expressed as follows: do troop contributing states, through the participation of their military forces, have legal obligations under the ECHR or the ICCPR to respect, to protect, or to secure, the human rights of the local civilian population during participation in UN-mandated peace operations? In responding to this question, the book aims to place the two treaties in a wider legal and societal context, which allows for an analysis that will explain – and subsequently justify or criticise – the current legal position as expressed by the supervisory bodies to the treaties, namely the European Court of Human Rights (ECtHR) and the UN Human Rights Committee (HRC).

It is now an established fact that contemporary peace operations perform important functions for the protection of human rights, and that international human rights norms provide a relevant normative framework for the conduct of the involved actors. This is expressly acknowledged in a wide range of official documents and statements from the UN, for example in the Capstone Doctrine:

> International human rights law is an integral part of the normative framework for United Nations peacekeeping operations. The Universal Declaration of Human Rights, which sets the cornerstone of international human rights standards, emphasizes that human rights and fundamental freedoms are universal and guaranteed to everybody. United Nations peacekeeping operations should be

[1] Convention for the Protection of Human Rights and Fundamental Freedoms, 4.11.1950 with later amendments, entry into force 3.9.1953.
[2] Adopted and opened for signature, ratification and accession by UN General Assembly resolution 2200A (XXI) 16.12.1966, entry into force 23.3.1976.
[3] The terminology used in this study is 'UN-mandated peace operations'. The United Nations is hereinafter generally referred to as 'UN'.

conducted in full respect of human rights and should seek to advance human rights through the implementation of their mandates . . .

United Nations peacekeeping personnel – whether military, police or civilian – should act in accordance with international human rights law and understand how the implementation of their tasks intersects with human rights.[4]

The Capstone Doctrine thus refers to human rights law as an 'integral part of the normative framework' of the operations. In doing so, it touches – intentionally or not – upon a controversial issue that underlies the research question presented above: although it is established that UN-mandated peace operations should respect international human rights norms, it is not clear to what extent this entails legal obligations or only political, moral, or other non-legal forms of obligations, or, in other words, whether international human rights norms are applicable as a matter of *law* or as a matter of *policy*. Further, even if the obligations are considered to be legal in character, it remains a matter of controversy precisely what the scope of the obligations is, and how to achieve accountability for violations of the obligations. The applicability of human rights law in peace operations has received noteworthy attention only in recent years, and the issue raises complex legal questions, to which clear and coherent answers have not yet emerged.

This book addresses these issues primarily from a *lex lata* perspective, in order to determine what legal obligations and responsibilities the military forces have under the two treaties, and to explain this position. Thus, the primary purpose of this book is not to discuss actual compliance with human rights norms in peace operations; nor is the focus in the analysis to what extent human rights norms in practice are respected by the military forces, or how compliance with human rights norms can be improved and optimised. However, the book also includes a normative element, namely the issue of what role human rights law could and should play for the military forces during peace operations – i.e., the *lex ferenda* perspective. The protection of the human rights of the civilian population is accepted in this book as a central purpose of UN-mandated peace operations, but it cannot necessarily be assumed that the application of human rights law, or specific human rights treaties, is a proper means for the

[4] 'United Nations Peacekeeping Operations: Principles and Guidelines' ('Capstone Doctrine'), published by the UN Department of Peacekeeping Operations (DPKO) 18.1.2008, section 1.2 at pp. 14–15. The scope of the document is explicitly limited to peacekeeping operations, as opposed to other forms of UN-mandated peace operations, but this does not affect this general introductory point.

achievement of an optimal human rights situation. However, this book does not investigate all aspects of this assumption; instead, the main *lex ferenda* enquiry in this book concerns the role of the treaty supervisory bodies, as it is enquired how these bodies should assess the application of their respective treaties in peace operations.

Scope of analysis

Treaty law as the relevant basis of human rights obligations

Human rights obligations can apply to UN-mandated peace operations on the basis of different constructions. A useful categorisation is offered by Stahn, who describes how human rights law in a particular type of operations (namely international territorial administrations) can be applicable on the basis of (i) institutional self-commitment, (ii) the crystallisation of human rights law as customary law, (iii) the concept of 'functional duality', or (iv) the applicability of human rights treaties.[5] The present book is concerned only with the last of these bases, and the three previous bases are discussed only to the (limited) extent that they affect the applicability of the treaties. Therefore, it is important to underline that this is not a book on the applicability of human rights law in general during peace operations, but on the applicability of two specific human rights treaties.

The 'core' purpose of this book is therefore to analyse, with regard to the particular context of UN-mandated peace operations, the provisions in the ECHR and the ICCPR that determine their scope of application, namely Article 1 ECHR, which reads: 'The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention'; and Article 2.1 ICCPR, which reads: 'Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.'

While other human rights treaties could also have been included, the selection of these two treaties has been necessary to keep this book within reasonable boundaries. The treaties are not randomly chosen. It appears – although empirical data to this effect is lacking – that concrete questions

[5] C. Stahn, *The Law and Practice of International Territorial Administration* (Cambridge University Press, 2008), 480 ff.

about the application of human rights treaties in UN-mandated peace operations have arisen primarily in relation to these treaties. Further, it is common knowledge that the European human rights regime has acquired a particular position in international law in general and in international human rights law in particular, mainly because of the strong influence of the ECtHR. One consequence of this is that the ECHR is prima facie more likely to have a legal impact in peace operations than other human rights treaties, and this treaty is therefore an obvious choice for the present book. The ICCPR is included almost as a corollary to the ECHR. Both treaties concern civil and political rights, and the inclusion of both therefore allows for relevant comparisons to be drawn. Further, the ICCPR is the global 'counterpart' to the regional ECHR, and the inclusion of the former therefore allows (and is necessary for) conclusions to be drawn that have international relevance.[6] And finally, the practice of the ECtHR and HRC suggests that the two supervisory bodies have different views about the applicability of the respective treaties during peace operations,[7] and the inclusion of both treaties therefore also contributes to an emphasis on the challenges, complexities and controversies that exist.

UN-mandated peace operations: some terminology

Many attempts have been made to develop a general typology of peace operations, but none of these attempts have acquired any general consensus.

First, some commentators refer to *generations* of peace operations. Traditionally, two generations were included, where the first generation referred to traditional peacekeeping operations based on consent, neutrality and minimum use of force, while the second (or 'new'[8]) generation referred to so-called 'multidimensional' peacekeeping operations.[9] However, post-Cold War developments quickly led to references to a third generation of peace operations, namely those operations that can

[6] At the time of conclusion of this study there were 165 states parties to the ICCPR, see UN Treaty Collection, Ch. IV.4 (available via http://treaties.un.org) (all websites were last visited on 8.5.2011).

[7] See Ch. 2.

[8] The *Brahimi* report (see below Ch. 2 n. 1) uses this term; see paras. 102, 128 and 140.

[9] 'Multidimensional operations' is not a clearly defined term, but the term is used to characterise operations that are 'composed of a range of components, including military, civilian police, political affairs, rule of law, human rights, humanitarian, reconstruction, public information and gender'; see the Handbook on United Nations Multidimensional Peacekeeping Operations (published by the DPKO Best Practices Unit, December 2003), 1.

be characterised as peace enforcement operations,[10] and later to the introduction of a fourth generation, namely peace operations that are delegated to regional organisations.[11] Recent academic contributions have included still more generations, Thakur and Schnabel referring to no fewer than six generations: 'traditional peacekeeping – pending peace' as the first generation, 'non-UN peacekeeping' as the second generation, 'expanded peacekeeping – peace reinforcement' as the third generation, 'peace enforcement' as the fourth generation, 'peace restoration by partnership' as the fifth generation, and 'multinational peace restoration, UN state creation' as the sixth generation.[12]

Secondly, some commentators suggest a *chronological* categorisation, where peace operations are divided into periods. Early attempts to describe three[13] or five[14] periods were later expanded to include six[15] or seven periods.[16] A temporary culmination seems to have been reached with the identification of no fewer than nine different periods, namely the nascent period (1946–56), the assertive period (1956–67), the dormant period (1967–73), the resurgent period (1973–8), the maintenance period (1978–88),[17] the transition period (1988–91), the enforcement period (1991–6), the moderation period (1996–7), and the period of ambiguity (1998–2000).[18]

Thirdly, others have proposed a categorisation according to the *functions and tasks* of the operations. Doctrinal contributions contain examples of as many as twelve such categories, referring to traditional peacekeeping,

[10] See, e.g., M. Katayanagi, *Human Rights Functions of United Nations Peacekeeping Operations* (The Hague: Kluwer Law International, 2002), 42–53 or M. W. Doyle and N. Sambanis, *Making War & Building Peace* (Princeton/Oxford: Princeton University Press, 2006), 10–18.

[11] For an overview, see Doyle and Sambanis, *Making War*, 18.

[12] R. Thakur and A. Schnabel, 'Cascading Generations of Peacekeeping: Across the Mogadishu line to Kosovo and Timor' in R. Thakur and A. Schnabel (eds.), *United Nations Peacekeeping Operations:* Ad Hoc *Missions, Permanent Engagement* (New York: United Nations University Press, 2001), 9–14.

[13] S. Morphet, 'UN Peacekeeping and Election-Monitoring' in A. Roberts and B. Kingsbury (eds.), *United Nations, Divided World: The UN's Roles in International Relations*, 2nd edn. (Oxford University Press, 1993).

[14] H. Wiseman, 'The United Nations and International Peacekeeping: A Comparative Analysis' in *The United Nations and the Maintenance of International Peace and Security* (Dordrecht: Martinus Nijhoff, 1987); D. R. Segal, 'Five Phases of United Nations Peacekeeping: An Evolutionary Typology', 23 *Journal of Political and Military Sociology* (1995).

[15] A. B. Fetherston, *Towards a Theory of United Nations Peacekeeping* (London: St Martin's Press, 1994), 16–19, 25 ff.

[16] D. C. Jett, *Why Peacekeeping Fails* (New York: St. Martin's Press, 1999), 21–34.

[17] These first five periods correspond to Wiseman's categories, above n. 14.

[18] J. A. Camilleri et al., *Reimagining the Future: Towards Democratic Governance. A Report of the Global Governance Reform Project* (La Trobe University, 2000), 78–9.

observation, collective enforcement, election supervision, humanitarian assistance during conflict, state/nation-building, pacification, preventive deployment, arms control verification, protective services, intervention in support of democracy, and sanctions enforcement.[19]

However, there is a clear tendency among commentators to justify their categories by referring to the flaws and weaknesses of other categorisations, and there exists no common typology. Instead, the categorisations are of varying value depending on their purpose, i.e., what is sought to be illustrated or clarified. For the purposes of the present book, with its aim to describe the de jure applicability of human rights treaties in contemporary peace operations, it is of little value to develop – or support – a general typology. The applicability of human rights treaties must be determined by an interpretation of the treaties and an assessment of the facts of the specific operations, not by the inclusion of an operation into an abstract, general category. The requirements for the applicability of human rights treaties may well be more easily satisfied in some 'categories' of operations than in others, but the same questions still arise for all operations. Therefore, the present book will not characterise specific operations as, for example, peacekeeping, peace enforcement, or other types of operations, nor will it distinguish between operations based on their functions. Further, the soldier in a peace operation is occasionally referred to as a 'peacekeeper', irrespective of the type of operation.

Instead, this book takes a wide approach: it includes all peace operations where military forces from one or more states (i.e., troop contributing states) are deployed to another state[20] with a mandate from the UN Security Council.[21] This has certain implications.

First, it is irrelevant to the inclusion or omission of an operation in this book whether it is authorised under Chapter VII or another legal basis in the UN Charter. The legal basis may have an impact on the applicability of human rights law, but is not in itself decisive.

Secondly, the book does not include operations where there was no UN mandate. There are examples of regional peace operations without such mandates, such as the peacekeeping force of the Commonwealth of Independent States that was deployed to Georgia with its basis in a

[19] P. F. Diehl et al., 'International Peacekeeping and Conflict Resolution: A Taxonomic Analysis with Implications', *The Journal of Conflict Resolution* 42 (1998), 39–40.

[20] Hereinafter 'host state', regardless of whether the state has consented to the deployment of forces.

[21] It is unrealistic that contemporary peace operations may be authorised by the UN *General Assembly*, such as UNEF I was in 1956, hence this limitation.

ceasefire agreement between Georgian and Abkhaz authorities,[22] or the peace operations of the ECOWAS monitoring group (ECOMOG) in Liberia in 1990, Sierra Leone in 1997, and Guinea-Bissau in 1999.[23] Further, the emerging discussion of humanitarian intervention or of a 'responsibility to protect' has contributed to an increased attention for the possibility of unilateral or multilateral intervention without UN authorisation with the (real or constructed) purpose of protecting civilians against massive human rights violations. Such operations may be conducted within the framework of NATO or another regional organisation, or as a 'coalition of the willing' under the command of one or more individual states. The NATO intervention in Serbia in 1999 is a clear example, and the US-led intervention in Iraq in 2003 is a possible second example (where this justification, however, was offered only *ex post facto*). This book does not purport to discuss the human rights obligations of participating states in such non-UN-mandated operations. Nevertheless, it will be shown that these operations cannot be excluded altogether, since they provide important arguments for the assessment of the applicability of human rights treaties to the conduct of military forces in UN-mandated peace operations. If an ongoing operation should receive subsequent UN authorisation, the operation is in any case included in this book from that time onwards. Examples of this latter point include, inter alia, the authorisation of UNMIK and KFOR in Kosovo in 1999,[24] the 'blue-helmeting' of ECOMIL in Liberia to become UNMIL in 2003,[25] and the authorisation of a 'multinational force under unified command' in Iraq in 2003.[26]

Thirdly, if the operation has a UN mandate, it is covered by this book regardless of whether the operation is conducted under UN command and control ('blue helmet' operations), or under national or regional command and control.[27] KFOR and ISAF are current examples of the latter

[22] See UN doc. S/1994/583, 17.5.1994, para. 2(b) and the attached protocol.
[23] M. M. Khobe, 'The Evolution and Conduct of ECOMOG Operations in West Africa' in M. Malan (ed.), *Boundaries of Peace Support Operations* (ISS Monograph no. 44) (2000).
[24] UN Interim Administration Mission in Kosovo (UNMIK) and the Kosovo Force (KFOR), 1999 to present, authorised by SC res. 1244 (1999).
[25] See SC res. 1509 (2003), para. 1, which provided for a transfer of authority from the ECOWAS-led ECOMIL forces to the UN Mission in Liberia (UNMIL, 2003 to present).
[26] See, in particular, SC res. 1511 (2003), para. 13.
[27] This book does not specifically address the many issues that arise in relation to European Union operations. Such operations are addressed by, e.g., S. Blockmans (ed.), *The European Union and International Crisis Management: Legal and Policy Aspects* (The Hague: TMC Asser Press, 2008), or F. Naert, *International Law Aspects of the EU's Security and Defence Policy, with a Particular Focus on the Law of Armed Conflict and Human Rights* (Antwerp: Intersentia, 2010).

category, but this is not a new phenomenon – the UN operation in Korea in the 1950s was also conducted under national command and control.[28] However, the command and control structures of an operation may have a considerable impact on the assessment of the research questions in this book.

Fourthly, this book does not address operations where military forces are not included; in particular, operations that consist exclusively of civilian police forces and related civilian personnel.[29] Pure observer missions[30] are excluded for practical reasons, since it must be presumed that the personnel in these operations will not be involved in situations where the issue of possible human rights obligations arises. Many of the issues that are addressed in the following will, however, apply, *mutatis mutandis*, to the conduct of other actors, civilian police forces in particular.

This book uses the term 'UN-mandated peace operations' (or only 'peace operations') as a general term to describe the operations that are included, regardless of their classification as peacekeeping, peace enforcement or other type of operation, and regardless of whether the operation is conducted under UN operational command and control or under another command and control structure.

Preparing the stage

Whose obligations towards whom?

The obligations of states

Contemporary peace operations may involve a multitude of actors with different roles and functions. On the international level, the primary actors are the UN and the troop contributing states, but regional organisations such as NATO, the European Union, or the African Union, are also directly involved in the execution of certain operations. Human rights obligations can, in principle, exist for each of these actors, with a varying legal basis. With regard to the UN, Mégret and Hoffmann suggest that there are three different ways in which the organisation can be bound by human rights obligations: (i) an 'external' conception, whereby the UN as a

[28] See SC res. 84 (1950), para. 3, which called on member states to make 'forces and other assistance available to a unified command under the United States of America'.

[29] Examples include the UN Civilian Police Mission in Haiti (MIPONUH, 1997–2000), authorised by SC res. 1141 (1997), or the UN Civilian Police Support Group (UNPSG, Croatia, January to October 1998), authorised by SC res. 1145 (1997).

[30] Examples include the UN Mission of Observers in Prevlaka (UNMOP, 1996–2002), authorised by SC res. 1038 (1996), or the very first UN operation, the UN Truce Supervision Organization (UNTSO, 1948 to present), authorised by SC res. 50 (1948).

subject of international law is bound by international human rights standards to the extent that these have reached international customary law status; (ii) an 'internal' conception, whereby the organisation is bound by international human rights standards as a result of the obligations under the UN Charter to promote human rights; and (iii) a 'hybrid' conception, whereby the organisation is bound by human rights standards to the extent that its member states are bound.[31] A similar conceptualisation can be developed for regional organisations, where the 'external' conception applies equally; where the 'internal' conception depends on the internal law and constitutional documents of the specific organisation; and where the 'hybrid' conception can form a stronger legal basis for human rights obligations of the organisation. These issues need not be pursued at present, where the point to be made is only that the human rights obligations of military forces in peace operations can be derived from a range of international actors. The present book therefore does not purport to provide a comprehensive analysis of the human rights obligations of those military forces. Instead, this book focuses on the human rights obligations of troop contributing states only, and, as a consequence, on the role of military forces in peace operations as state agents.

This choice is related to the limitation of this book to address treaty law only. An international organisation cannot become a party to the ECHR[32] or to the ICCPR, and therefore there arises no issue of direct de jure application of these treaties to the conduct of international organisations. Even if a treaty should be considered as binding on an organisation under the 'hybrid' conception above, the organisation cannot be held responsible under the treaty's mechanisms for establishing responsibility.

However, the 'hybrid' conception means that the obligations of international organisations cannot be excluded altogether. This is explained further in Chapter 3, where it is demonstrated that the obligations of international organisations may influence the obligations of states, and vice versa. Some selected elements of the obligations of international organisations must therefore be addressed.

[31] F. Mégret and F. Hoffmann, 'The UN as a Human Rights Violator? Some Reflections on the United Nations Changing Human Rights Responsibilities', *Human Rights Quarterly*, 25 (2003), 317–18; see also A. Clapham, *Human Rights Obligations of Non-State Actors* (Oxford University Press, 2006), 124–5.

[32] With the exception that the EU may now accede to the ECHR, see Art. 17 ECHR Additional Protocol 14.