

Protecting Human Rights in UN Peacekeeping: Operationalising Due Diligence and Accountability

Nigel D. White

To cite this article: Nigel D. White (2023) Protecting Human Rights in UN Peacekeeping: Operationalising Due Diligence and Accountability, King's Law Journal, 34:3, 463-487, DOI: 10.1080/09615768.2023.2283231

To link to this article: <https://doi.org/10.1080/09615768.2023.2283231>



© 2023 The Author(s). Published by Informa UK Limited, trading as Taylor & Francis Group



Published online: 27 Dec 2023.



Submit your article to this journal [↗](#)



Article views: 248



View related articles [↗](#)



View Crossmark data [↗](#)

Protecting Human Rights in UN Peacekeeping: Operationalising Due Diligence and Accountability

Nigel D. White*

1. INTRODUCTION

The international legal framework governing UN peacekeeping operations is opaque due in part to the nature of such forces operating in the twilight zone between war and peace, and consisting of individuals who are both soldiers of their sending state and peacekeepers of the UN.¹ Debates about applicable international laws have largely been instrumental and have followed the functional evolution of peacekeeping forces from being benign keepers of the peace, towards being coercive protectors of the peace process. That evolution has brought with it greater potential for peacekeepers both to do harm and to prevent harm to individuals within the host state. This in turn has led to increased scrutiny of the actions of UN peacekeepers from human rights and humanitarian law perspectives, potentially providing rules which could regulate the conduct of peacekeepers, for example when using force or detaining individuals. But are the rules of human rights and humanitarian law, which are traditionally concerned with the relationship between individuals and states or between states rather than international organisations and their personnel, binding on the UN, its organs, and subsidiary organs such as UN peacekeeping forces? If the answer to this question is positive then human rights and humanitarian law not only provide appropriate standards to be incorporated into UN peacekeeping operations at the discretion of the UN but are obligatory for the UN and any failure to comply would give rise to the

* Professor of Public International Law, University of Nottingham, UK. Email: nigel.white@nottingham.ac.uk

¹ TD Gill and others, *Leuven Manual on the International Law Applicable to Peace Operations* (Cambridge University Press 2017) 77.

international legal responsibility of the UN. This in turn should necessitate the development of accountability for victims of any harmful failures or actions attributable to the UN.

This article revisits the argument made by the author that due diligence is an external standard derived from positive obligations under customary international laws protecting human rights, which is applicable to the UN in its operational activities, in particular its peacekeeping function.² Due diligence is not simply a standard against which to gauge the performance of UN peacekeeping forces, but is grounded on binding duties under international law, the breach of which gives rise to organisational responsibility for the failure to prevent human rights violations. This article then builds on previous work by more systematically considering whether the UN's policies and practice in peacekeeping meet its obligations under international law and, moreover, whether it is developing due diligence standards by adopting adequate, reasonable and appropriate measures to protect the human rights of vulnerable groups and individuals in the host state as part of its internal law. In so doing, the article advances the contention that to be effective in protecting the human rights of vulnerable groups and individuals four types of such measures need to be developed and directed towards: those states sending troops to UN peacekeeping operations; non-UN security actors the UN works with; UN peacekeepers themselves; and armed groups and criminal gangs operating within the host state. In addition to the development of a range of due diligence standards at a policy level, the UN needs to adopt accountability mechanisms in order to ensure that the measures it takes to uphold due diligence standards and fulfil its human rights obligations are critically reviewed and improvements made where necessary. Such mechanisms should include provision for victims to be able to hold the organisation to account for failure to prevent human rights violations whether by peacekeepers, or by third parties when peacekeepers had the power to prevent such.

A requirement that the UN act diligently to prevent human rights violations would not prevent the UN from fulfilling its functions through fear of liability due to breach of its legal obligations. To be legally responsible for any injury incurred the UN must have clearly failed to take adequate, reasonable and appropriate measures that were within its power to take to prevent a variety of actors: sending states, non-state security actors the UN works with, and individual peacekeepers, from harming the population of the host state or from preventing such harm at the hands of armed groups or criminal gangs when peacekeepers had the power to prevent such. Due diligence is contended to be an appropriate standard to enable the fulfilment of the UN's obligations under customary international law (identified in section 2). This is because the UN itself does not directly perform peacekeeping but relies on forms of 'outsourcing' to states and

2 ND White, 'In Search of Due Diligence Obligations in UN Peacekeeping Operations' (2020) 23 *Journal of International Peacekeeping* 203.

occasionally, for restricted purposes, to private security contractors.³ Indeed, given that characteristic of peacekeeping, which in practice means that the UN's control over peacekeepers is not necessarily fully effective, it can be argued that the UN's obligations under customary international laws protecting human rights 'are best operationalized in a more general fashion, though the prism of due diligence'.⁴

The seemingly endless debates about whether the conduct of peacekeepers should be attributed to their sending state or the UN⁵ becomes less relevant if a due diligence standard is adopted: when undertaking a peacekeeping operation the UN is responsible for taking reasonable steps to prevent the violation of the rights of vulnerable individuals or groups in the host state by any third party irrespective of whether the conduct of those third parties is attributable to the UN or not. Third parties in this context would include criminal gangs and armed groups who threaten and use violence against civilians, but also those actors inimical to the peacekeeping operation itself—Troop Contributing Nations (TCNs), peacekeepers and other security actors working with the UN. The malleability of the due diligence standard means that the nature and type of adequate, reasonable and appropriate measures required will vary with the context and take account of factors such as the area of deployment, the levels of violence encountered and the levels of UN control. However, in general it has to be accepted that even a well-equipped force of 20,000 peacekeeping troops cannot possibly be expected to protect all civilians within the host state all of the time. Even a well-prepared and effective peacekeeping force, which has taken adequate, reasonable and appropriate measures to protect civilians, will not be able to prevent some civilian deaths at the hands of criminal gangs and armed groups.

The specific aims of this article are to identify whether the UN has duties under customary international law, including those customary laws that provide for human rights protections, as it will be argued that this is the most appropriate external legal framework applicable to UN peacekeeping. That discussion will consider both negative and

³ M Sossai, 'The Privatisation of the Core Business of UN Peacekeeping Operations: Any Legal Limit?' (2014) 16 *International Community Law Review* 405.

⁴ E Campbell and others, 'Due Diligence Obligations of International Organizations under International Law' (2018) 50 *New York University Journal of International Law and Politics* 558, citing A Clapham, *Human Rights Obligations of Non-State Actors* (Oxford University Press 2006) 151.

⁵ See the debates over the application of Articles 6 and 7 of the ILC's Articles on the Responsibility of International Organisations 2011 (ARIO 2011): A Sari, 'UN Peacekeeping Operations and Article 7 ARIO: The Missing Link' (2012) 9 *International Organizations Law Review* 77; C Leck, 'International Responsibility in United Nations Peacekeeping Operations: Command and Control Arrangements and the Attribution of Conduct' (2009) 10 *Melbourne Journal of International Law* 1; KM Larsen, 'Attribution of Conduct in Peace Operations: The "Ultimate Authority and Control" Test' (2008) 19 *European Journal of International Law* 509; T Dannenbaum, 'Translating the Standard of Effective Control into a System of Effective Accountability: How Liability Should be Apportioned for Violations of Human Rights by Member State Troops Contingents Serving as United Nations Peacekeepers' (2010) 51 *Harvard Journal of International Law* 113; Y Okada, 'Effective Control Test at the Interface between the Law of International Responsibility and the Law of International Organizations: Managing Concerns over the Attribution of UN Peacekeepers' Conduct to Troop-Contributing Nations' (2019) 32 *Leiden Journal of International Law* 275.

positive obligations, and the connection between the latter and due diligence standards and measures. Due diligence is argued to supply appropriate standards against which to judge UN action and inaction in performing its peacekeeping function. The discussion will then consider whether the UN's policies and practice in peacekeeping meet these obligations by developing due diligence standards through the adoption of adequate, reasonable and appropriate measures to protect the human rights of vulnerable groups and individuals in the host state. Finally, there will be an inquiry into whether there are any accountability mechanisms to ensure UN compliance and provide access to justice for victims who have been harmed as a result of the acts or omissions of UN peacekeepers. It will be seen that positive obligations require the adoption of appropriate measures to protect the human rights of vulnerable groups and individuals in the host state. It will also be seen that to be effective in protecting the human rights of vulnerable groups and individuals four types of such measures need to be developed and directed towards: those states sending troops to UN peacekeeping operations (TCNs); non-UN security actors the UN works with; UN peacekeepers themselves; and armed groups and criminal gangs operating within the host state. Those measures that have been adopted are judged by a due diligence standard, namely are they adequate, reasonable and appropriate, given the resources available to peacekeeping forces and the uneven levels of control exerted by them, to prevent human rights violations of vulnerable groups and individuals. A review of UN policies, practices and accountability processes shows some uneven movement towards a due diligence standard but concludes that, taken as a whole, these measures fall short of fulfilling the UN's positive obligations under human rights law.

2. UN OBLIGATIONS UNDER CUSTOMARY HUMAN RIGHTS LAW

In considering the question of whether UN peace forces are subject to obligations under international human rights and humanitarian law, Marten Zwanenburg argues that such obligations may be sought in both the 'internal law' of the UN and the 'external law' applicable to the UN.⁶ The 'internal law' of the UN 'is the law made by the organization or its founders, the subject of which is in the first place the UN itself', and consists of 'its constitution—the UN Charter—and decisions taken by competent organs', specifically those binding aspects of Chapter VII resolutions of the UN Security Council. According to Zwanenburg, there is scant evidence of the internal law containing any human rights obligations since the 'Charter of the UN refers only in general terms to the promotion of respect for human rights, while International Humanitarian Law is not mentioned at all', and Security Council resolutions 'have not addressed the applicability of human rights or International Humanitarian Law to peace forces'.⁷

⁶ M Zwanenburg, 'Compromise or Commitment: Human Rights and International Humanitarian Law Obligations for UN Peace Forces' (1998) 11 *Leiden Journal of International Law* 229.

⁷ *Ibid.*, 232.

It may be argued that Zwanenburg's understanding of internal law is too narrow, considering the definition of the 'rules of the organisation' found in the Articles on the Responsibility of Organisations 2011: "rules of the organization" means, in particular, the constituent instruments, decisions, resolutions and other acts of the international organization adopted in accordance with those instruments, and established practice of the organization'.⁸ This might be seen as collapsing the distinction between binding external and internal laws that apply to the UN on the one hand and its practice on the other. However, the real question for this article is whether the UN's policies and practice in the area of peacekeeping, particularly on issues which potentially affect the human rights of those within the host state, are in accordance with the requirements of customary international law, including those customary laws that provide for human rights protections. In other words, the article applies external law to the UN, and reviews its internal practice in that light, although it may be that 'established practice of the organization' has also given rise to relevant binding internal laws.

According to Zwanenburg: '[e]xternal law is the law which is not necessarily made by the UN or its founders and the subject of which is not primarily the UN. However, this law may also apply to the organization as an international legal person.'⁹ Given that the UN is not party to the international lawmaking treaties on human rights (principally the two International Covenants on Civil and Political, and Economic Social and Cultural Rights of 1966) or humanitarian law (the Geneva Conventions of 1949 and the two Additional Protocols of 1977), the main form of external law potentially applicable to the UN is customary international law, including those customary laws that provide for human rights and humanitarian protections.

The focus of this article is on those customary laws that provide for human rights protections. For reasons detailed by the author elsewhere,¹⁰ the engagement of peacekeepers in an armed conflict is still the exception, although it is increasing as modern peacekeeping mandates authorise peacekeeping forces to take 'necessary measures' to protect civilians and, more broadly, the peace process.¹¹ However, even under these mandates the UN's use of force by a peacekeeping force and the force used against it by armed actors does not normally cross the threshold of 'protracted armed violence' involving engagement with organised armed groups nor does it reach the level of inter-state armed force,¹² and so is not an armed conflict that will trigger the application

⁸ ARIO 2011, Article 2(b). See also Vienna Convention on the Law of Treaties Between States and International Organizations or Between Organizations 1986, Article 2(1)(j).

⁹ Zwanenburg (n 6) 232.

¹⁰ ND White, 'Security Council Mandates and the Use of Lethal Force by Peacekeepers: What Place for the Laws of War?' in C Harvey, J Summers and ND White (eds), *Contemporary Challenges to the Laws of War: Essays in Honour of Peter Rowe* (Cambridge University Press 2014) 95.

¹¹ L Muller, 'The Force Intervention Brigade—United Nations Forces beyond the Fine Line Between Peacekeeping and Peace Enforcement' (2015) 20 *Journal of Conflict and Security Law* 359; A Gilder, 'The Effect of "Stabilization" in the Mandates and Practice of UN Operations' (2019) 66 *Netherlands International Law Review* 47.

¹² *Prosecutor v Tadic* (1996) 105 *International Law Reports* 488.

of international humanitarian law.¹³ The fact is that UN peacekeeping still operates with the consent of the state, is impartial, and normally the use of force by peacekeepers is restricted to self-defence and defence of civilians under imminent threat of violence. Although the UN has expressly recognised that, if engaged as combatants in an armed conflict, peacekeepers should comply with basic principles of international humanitarian law,¹⁴ the normal position is that peacekeepers are protected persons who should not be attacked,¹⁵ in other words they are not military targets under international humanitarian law. Furthermore, the expanded functions of modern UN peacekeeping forces mean that they more often engage in conduct that can violate the human rights of the host population in a number of ways, for example: by the use of force against criminal gangs in the slums of Haiti, which resulted in the deaths of a number of innocent bystanders;¹⁶ by the detention of suspected criminals and of individuals deemed to be threats to security;¹⁷ and by the sexual exploitation and abuse of women and children.¹⁸

The jurisprudence on the nature and extent of international human rights obligations is inevitably dominated by discussion of the duties of states under human rights treaties. Shelton explains that the scope of a state's human rights obligations:

is both negative and positive in nature, imposing not only a state duty to abstain from interfering with the exercise of the right, but also to protect the right from infringement by third parties. *Positive* obligations are therefore generally considered to be obligations requiring ... states to ... take action.¹⁹

The omission or failure to take action to protect human rights may constitute a violation of those positive obligations. 'Human rights bodies have long deemed both acts and omissions to be sources of state liability for breach of human rights obligations', with the number of cases before human rights bodies involving omissions by state authorities often exceeding those brought for acts attributable to states.²⁰ Positive obligations, as developed in the jurisprudence of human rights bodies, include the requirement that states take adequate, reasonable and appropriate measures to prevent human rights violations, as well as to investigate and punish violations of

¹³ White, 'Security Council Mandates' (n 10) 104–5.

¹⁴ UN Secretary-General's Bulletin, 'Observance by United Nations Forces of International Humanitarian Law' UN Doc St/SGB/1999/13 (1999); M. Zwanenburg, 'The Secretary General's Bulletin on Observance by United Nations Forces of International Humanitarian Law: A Pyrrhic Victory' (2000) 39 *Military Law and the Laws of War Review* 13.

¹⁵ Convention on the Safety of United Nations and Associated Personnel 1994, Article 7.

¹⁶ R Freedman, N Lemay-Hebert and S Wills, *The Law and Practice of Peacekeeping: Foregrounding Human Rights* (Cambridge University Press 2021) 128–33.

¹⁷ B Oswald, 'Detention by United Nations Peacekeepers: Searching for Definition and Categorisation' (2011) 15 *Journal of International Peacekeeping* 119.

¹⁸ Freedman, Lemay-Hebert and Wills (n 16) 109–15.

¹⁹ D Shelton and A Gould, 'Positive and Negative Obligations' in D Shelton (ed), *The Oxford Handbook on Human Rights Law* (Oxford University Press 2013) 562.

²⁰ *Ibid.*, 565.

human rights and provide access to justice for victims.²¹ In human rights law, it has been the Inter-American Court of Human Rights that has taken a leading role in applying a 'due diligence standard to judge whether a state has lived up to its positive obligations in human rights cases'.²² In particular, 'the case of *Velasquez Rodriguez v Honduras* largely propelled the discussion and set forth the framework', which 'in general requires a state to take "reasonable steps" necessary to prevent or address potential rights violations'.²³ Subsequent jurisprudence demonstrates that 'due diligence has emerged as the prevalent standard to measure positive obligations'.²⁴

Due diligence standards are found in various areas of international law,²⁵ but are particularly developed in international human rights law as a result of the positive obligations placed on states to ensure the protection of human rights of individuals within their jurisdiction. Under international human rights law a state's 'obligations in relation to the actions of third parties are often expressed in terms of due diligence', meaning that the state can be 'held liable for human rights violations caused by a third party where the state has failed to exercise due diligence to prevent the violation or to respond as required'.²⁶ Applying the due diligence standard to the UN, as flowing from positive obligations under customary international law, entails accepting the premise that the UN is bound by customary international law and that positive obligations to protect human rights are customary norms.

There is scepticism about whether the UN has significant obligations under customary international law.²⁷ Furthermore, the issue of the UN's legal obligation to act to protect human rights remains contested.²⁸ It is argued here that it does have such obligations under customary international law. There is the general recognition that the UN has both rights and duties under international law as a consequence of it being an international legal person. As an international legal person, a status implied from the provisions of the UN Charter indicating the organisation's autonomy from member states, the UN possesses separate rights and duties on the international plane.²⁹ The International Court of Justice (ICJ) has declared that the UN is a subject of international law and as 'as such' is 'bound by any obligations incumbent

21 *Ibid*, 567–68.

22 *Ibid*, 579.

23 *Ibid*. *Velasquez Rodriguez Case*, Judgment of July 29, 1988, Inter-Am.Ct.H.R. (Ser. C) No. 4 (1988).

24 Shelton and Gould (n 19) 582.

25 J Kulesza, *Due Diligence in International Law* (Nijhoff 2016) 11 for the further argument that due diligence is 'a principle of international law'.

26 ILA Study Group on Due Diligence in International Law, 'Second Report', 12 July 2016, 32, citing *Velasquez Rodriguez Case* (n 23) para 172.

27 J Klabbers, 'Reflections on Role Responsibility: The Responsibility of International Organizations for Failing to Act' (2017) 28 *European Journal of International Law* 1136. See also J Crawford, *State Responsibility: The General Part* (Cambridge University Press 2013) 218.

28 F Mégret and F Hoffman, 'The UN as a Human Rights Violator? Some Reflections on the UN's Changing Human Rights Responsibility' (2013) 25 *Human Rights Quarterly* 314.

29 *Reparations for Injuries Suffered in the Service of the United Nations* (1949) ICJ Rep 179.

upon' it 'under general rules of international law, under their constitutions or under international agreements to which' it is a party.³⁰

In analysing the ICJ's statement, Verdirame concludes that 'the most plausible interpretation' of the phrase 'general rules of international law' is that it is shorthand 'for customary international law of universal or quasi-universal applicability and for general principles of law'.³¹ Nevertheless, while international legal personality gives the UN the capacity to hold duties and rights, the actual possession of specific positive obligations remains uncertain. However, it would undermine the legitimacy of the UN for it to deny that it is bound by the external rules of the international order it has helped to create. To further cite Verdirame, it would:

be extremely disruptive for the international system to tolerate the presence of actors that are endowed with legal personality, and thus with the legal capacity to operate upon the international plane, but are exempt from a body of universally or almost universally accepted rules.³²

As to the specific rules of customary international law that are binding on the UN, it has to be recognised that while states are bound by all customary rules unless they are persistent objectors, the UN's duties are tailored to the functions and attributed powers of the organisation, which are at the same time different and more limited when compared to the functions and sovereign powers of states. Quenivet states that the UN, unlike states, does 'not possess a general competence',³³ meaning that 'the precise catalogue of rights and duties is ... impossible to list in advance'.³⁴ This proposition applies to customary international law, specifically those customary laws that provide for human rights protections. According to Quenivet, 'customary human rights only applies to those UN activities that are related to its purposes and functions and have an impact on human rights'.³⁵ Following this line of analysis, it is the case that the UN exercises certain public powers (of arrest, detention, and the use of force) alongside host government forces, and its peacekeepers have varying degrees of control over parts of the country and over individuals within it.³⁶ Furthermore, the UN has a significant degree of authority over peacekeepers.³⁷ In these circumstances positive obligations and due diligence standards are an appropriate way of understanding the application of

³⁰ *Interpretation of the Agreement of March 1951 between the WHO and Egypt* (1980) ICJ Rep 90.

³¹ G Verdirame, *The UN and Human Rights: Who Guards the Guardians?* (Cambridge University Press 2011) 71.

³² *Ibid.*

³³ N Quenivet, 'Binding the United Nations to Customary (Human Rights) Law' (2020) 17 *International Organizations Law Review* 399.

³⁴ M Shaw, *International Law* (Cambridge University Press, 7th edn 2014) 192.

³⁵ Quenivet (n 33) 400.

³⁶ Gill and others (n 1) 267–8.

³⁷ 'Operational authority' has been defined by the UN as '[t]he authority transferred by the member states to the United Nations to use the operational capabilities of their national military contingents ... to undertake mandated missions and tasks', which in peacekeeping operations 'is vested in the Secretary-General, under the authority of the Security Council' involving 'the full authority to issue

human rights law to UN peacekeeping operations, particularly those arising from the right to life, to freedom from arbitrary detention, freedom from torture or inhuman treatment, and due process guarantees. The duties to protect these rights may be said to be the core human rights duties applicable to the UN given the powers exercised by peacekeepers to use force, to detain and arrest, and to exercise other forms of control over individuals. However, as Quenivet makes clear, it would be unwise to restrict the types of duties applicable to the UN in that it depends on which human rights are impacted by peacekeeping.

In identifying the applicability of human rights to peacekeeping operations 'regardless of the character of the situation' to which the operation is deployed, the authors of the *Leuven Manual* identify that the primary source of obligation on the UN when performing its peacekeeping function is found in human rights norms that have become part of customary international law.³⁸ Nevertheless, there remains uncertainty regarding the existence of positive human rights obligations under customary international law. Cerone captures the problem in stating that it is unclear whether the positive treaty obligations in Article 2(1) of the International Covenant on Civil and Political Rights (ICCPR) have counterparts in customary international law. However, having said that, he accepts the application of such obligations to the UN at least when it is exercising sovereign powers over a territory as it did in Kosovo.³⁹ Although the UN does not generally exercise a full range of sovereign powers as it temporarily did in Kosovo, it does empower peacekeeping forces to regularly use a lesser range of public powers (using force to protect civilians and to tackle spoilers, powers of arrest and detention, as well as a fuller range of public order powers).⁴⁰ It is argued here that when performing these functions peacekeeping forces are bound by positive obligations under customary international law including those customary laws that provide for human rights protections, requiring such forces to exercise due diligence in protecting the human rights of civilians under their authority or within their power. In support of this contention, the authors of the authoritative *Leuven Manual* state that 'demands for accountability will ... be high in situations where Peace Operations directly affect the rights of individuals', and they identify that the principle of due diligence operates 'to guarantee the lawfulness' of the activities of peacekeeping forces.⁴¹

It remains the case that extending due diligence standards to the UN as a way of implementing its positive legal obligations depends upon whether the UN exerts sufficient authority and control in the host state (or parts of it), or over individuals within

operational directives'—UNDPKO and DFS, 'Authority, Command and Control in United Nations Peacekeeping Operations', 15 February 2008, para. 7.

³⁸ Gill and others (n 1) 76–8, 83.

³⁹ J Cerone, 'Reasonable Measures in Unreasonable Circumstances: A Legal Responsibility Framework for Human Rights Violations in Post-Conflict Territories under UN Administration' in ND White and D Klaasen (eds), *The UN, Human Rights and Post-Conflict Situations* (Manchester University Press 2005) 77.

⁴⁰ For discussion of these functions see Gill and others (n 1) 150–3, 159, 176.

⁴¹ *Ibid*, 268, 273.

that state through its peacekeeping force in order for human rights obligations to attach to it. On the latter point, the Human Rights Committee felt that the obligations of TCNs to ensure the human rights of individuals within their power or control applied extraterritorially when their troops formed part of a peacekeeping mission.⁴² These are treaty obligations of TCNs under the ICCPR. However, it is argued here that their customary equivalents apply to the UN as an international legal person having rights and duties under international law and exercising authority and control over areas of the host state and over some individuals in the host state through its peacekeepers.⁴³

A requirement that the UN act diligently to prevent human rights violations would not prevent the UN from fulfilling its functions through fear of liability due to breach of its legal obligations. For legal responsibility under international law to be incurred, it must be shown that the UN had 'manifestly failed to take all measures' that were 'within its power' to take.⁴⁴ As a leading international human rights norm creator and promotor for states and other actors (such as businesses), the UN should internalise these norms in its peacekeeping function as part of a process towards empowering victims to hold the organisation to account if it manifestly fails to take adequate, reasonable and appropriate steps, which were within its power to take, to protect them from human rights violations.⁴⁵

3. DUE DILIGENCE MEASURES AND DIFFERENT ACTORS

Due diligence is argued to supply appropriate standards against which to judge UN action and inaction in performing its peacekeeping function. The discussion in the following sections is aimed at evaluating whether the UN's policies and practice in peacekeeping meet its positive obligations under customary international laws providing for human rights protection, through applying due diligence standards to put in place adequate, reasonable and appropriate measures to protect the human rights of vulnerable groups and individuals in the host state. The analysis then moves on to consider whether there are any accountability mechanisms to ensure UN compliance and provide access to justice for victims who have been harmed through rights violation as a result of the acts or omissions of UN peacekeepers.

There is plenty of jurisprudence from human rights bodies and courts expanding on the meaning of due diligence.⁴⁶ The Human Rights Committee, for example, in

42 Human Rights Committee General Comment 31, 'Nature of the General Legal Obligation on State Parties to the Covenant', UN Doc CCPR/C/21/Rev.1/Add.13 (2004) para 10.

43 Gill and others (n 1) 76, 78.

44 ILA Study Group (n 26) 8, citing, inter alia, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)* (2007) ICJ Rep, para 430.

45 White, 'In Search of Due Diligence Obligations' (n 2) 206.

46 Shelton and Gould (n 19).

its most recent General Comment on the right to life, confirmed that state parties to the ICCPR should not only refrain from conduct which might deprive life but must also 'ensure the right to life and exercise due diligence to protect the lives of individuals against deprivations caused by persons or entities whose conduct is not attributable to the State'.⁴⁷ Of relevance to peacekeepers tasked with protecting civilians is the Committee's statement that the:

obligation of states parties to respect and ensure the right to life extends to reasonably foreseeable threats and life-threatening situations that can result in loss of life. States parties may be in violation of article 6 even if such threats and situations do not result in loss of life.⁴⁸

States parties are thus under a positive obligation to undertake adequate, reasonable and appropriate measures that do not impose disproportionate burdens on them, in response to reasonably foreseeable threats to life originating from private persons and entities, whose conduct is not attributable to the state. Hence, states parties are obliged to take adequate preventive measures in order to protect individuals against reasonably foreseen threats of being killed by criminals and organised criminal, militia, terrorist or other armed groups.⁴⁹

Given the fact that UN peacekeepers now regularly operate alongside government forces to tackle armed groups, criminal gangs and militias, it is argued here that the UN is under a similar duty to take adequate preventive measures to protect civilians against threats to their lives, although the source of that obligation is customary international laws protecting human rights rather than a treaty obligation under the ICCPR.

Joseph points out that the Human Rights Committee refrains from imposing an impossible or disproportionate burden on states with regards to non-state threats to life,⁵⁰ citing the judgment of the Inter-American Court of Human Rights in *Sawhoyamaxa Indigenous Community v Paraguay*, which recognised that a 'state cannot be responsible for all situations in which the right to life is at risk'. The Court went on to say:

[t]aking into account the difficulties involved in the planning and adoption of public policies and the operative choices that have to be made in view of the priorities and the resources available, the positive obligations of the state must be interpreted so that an impossible or disproportionate burden is not imposed upon the authorities.⁵¹

⁴⁷ Human Rights Committee, 'General Comment No 36, Article 6: Right to Life', UN Doc CCPR/C/GC/36 (2019) para 7.

⁴⁸ *Ibid.*

⁴⁹ *Ibid.*, para 21.

⁵⁰ S Joseph, 'Extending the Right to Life Under the International Covenant on Civil and Political Rights: General Comment 36' (2019) 19 *Human Rights Law Review* 347.

⁵¹ IACtHR Series C No 146 (2006) para 155.

Taylor highlights those aspects of the Committee's General Comment on the right to life that make it clear that states must take measures to protect individuals against the risks to life from non-state actors, including private security forces and private individuals. States must take appropriate preventative measures and 'a response is demanded to threats to life which are foreseeable, particularly where an effective one is reasonably available and accessible'.⁵² Threats to civilians from armed groups and criminal gangs in the host state where a UN peacekeeping force is deployed are generally well-known and foreseeable, meaning that the UN must take measures to prevent the risk to the lives of civilians, for example by proactive patrolling and by the use of potentially lethal force only where absolutely necessary in self-defence and defence of others.

More generally, in its General Comment on Article 2 of the ICCPR, the Human Rights Committee makes it clear that positive obligations on state parties to ensure Covenant rights are only fully discharged if individuals are protected from violations by state agents, and by private persons or entities:

[t]here may be circumstances in which a failure to ensure Covenant rights as required by article 2 would give rise to violations by States Parties of those rights, as a result of States Parties' permitting or failing to take appropriate measures or to exercise due diligence to prevent, punish, investigate or redress the harm caused by such acts by private persons or entities.⁵³

Again, this jurisprudence relates to the positive obligation of state parties to the ICCPR. In theory, sovereign states exercise control over their territories while, with one or two exceptions, the UN does not. However, this does not signify that the UN is incapable of both possessing and fulfilling its positive obligations under customary international laws protecting human rights. In a number of host states, where UN peacekeeping forces operate, the UN exerts control alongside the host state in order to establish state authority,⁵⁴ sometimes taking the lead role due to the weaknesses of the post-conflict state. However, in applying due diligence standards to UN peacekeeping, there must be a recognition of its limitations and the fact that it does not exercise sovereignty although it does often exercise public powers (of arrest, detention, use of force and, more generally, over public order).

It has been argued in this article that positive obligations under customary international laws protecting human rights require the adoption of adequate, reasonable and appropriate measures to protect the human rights of vulnerable groups and individuals in the host state. It is argued that to be effective in protecting the human rights of such vulnerable groups and individuals, measures need to be developed and directed

52 P Taylor, 'Article 6: The Right to Life' in P Taylor (ed), *A Commentary on the International Covenant on Civil and Political Rights: The UN Human Rights Committee's Monitoring of ICCPR Rights* (Cambridge University Press 2020) 138, 145.

53 Human Rights Committee, General Comment No. 31, 'The Nature of the General Legal Obligation Imposed on State Parties to the Covenant', UN Doc CCPR/C/21/Rev.1/Add.13 (2004) para 8.

54 Gilder (n 11).

towards the following actors: those states sending troops to UN peacekeeping operations (TCNs); non-UN security actors the UN works with; UN peacekeepers themselves; and armed groups and criminal gangs operating in the host state. Any relevant peacekeeping measures adopted by the UN are to be judged against a due diligence standard, namely whether they are adequate, reasonable and appropriate, given the resources available to the UN and peacekeeping forces and the uneven levels of control exerted by such forces, to prevent human rights violations of vulnerable groups and individuals. A review of UN policies and practice concerning the four actors outlined above shows some uneven movement towards meeting a due diligence standard but concludes that, taken as a whole, these measures fall short of fulfilling the UN's positive obligations under customary international laws protecting human rights.

4. MEASURES DIRECTED AT TCNS

In order to fulfil its positive obligations under human rights norms, which form part of customary international law, the UN is obliged to take measures to ensure that TCNs train their troops adequately in human rights protection, have adequate safeguards to prevent abuse, and have effective systems for the prosecution and punishment of peacekeepers for criminal behaviour, through the TCN's criminal justice or military justice system. In peacekeeping law, the TCN retains exclusive criminal jurisdiction over its soldiers in UN peacekeeping operations,⁵⁵ meaning that while the UN currently has no means of prosecuting those soldiers, it still has positive obligations to take measures to ensure that TCNs prosecute and punish peacekeepers for criminal behaviour involving human rights abuse committed whilst on deployment as part of a UN peacekeeping force.

In general, the UN supports TCNs to train soldiers they send to UN missions as peacekeepers by providing an impressive range of pre-deployment and in mission-training materials.⁵⁶ A General Assembly Resolution of 1995 makes it clear that: 'the training of personnel for peace-keeping operations is essentially the responsibility of Member States', but it does state that the UN 'should establish basic guidelines and performance standards and provide descriptive materials'.⁵⁷ In terms of human rights training materials, the UN's Core Pre-Deployment Training Materials⁵⁸ include a module on human rights.⁵⁹ The lessons in that module identify the problem in host

⁵⁵ B Oswald, H Durham and A Bates, *Documents on the Law of UN Peace Operations* (Oxford University Press 2010) 36.

⁵⁶ See United Nations Peacekeeping Resources Hub <<https://peacekeepingresourcehub.un.org/en/>> accessed 15 March 2023.

⁵⁷ UN Doc A/RES/49/37 (1995) para 47.

⁵⁸ UN, Core Pre-Deployment Training Materials (CPTM) for United Nations Peacekeeping Operations (2017) <<https://peacekeepingresourcehub.un.org/en/training/pre-deployment/cptm/intro>> accessed 15 March 2023.

⁵⁹ *Ibid*, module 2.

states of both human rights violations by state authorities and human rights abuses by non-state actors such as militias and rebel groups. Those lessons also recognise that international human rights law forms part of the legal framework for the promotion and protection of human rights in peacekeeping operations, alongside the UN Charter, international humanitarian law and Security Council resolutions. Parts of that legal framework ‘obligate UN peacekeeping to promote and protect human rights’. The training module also states that ‘the performance of UN peace operations is largely and ultimately measured by how they contribute to protect human rights, including situations of imminent threat to physical violence, and prevent the occurrence of further violations’. It also ‘emphasizes the importance of comprehensive protection strategies which include accountability for human rights violations and abuses’.⁶⁰ Overall, this seems to expressly recognise a human rights legal framework, which implicitly includes positive obligations to take measures to protect human rights and prevent human rights violations and abuses.

This is reinforced by numerous guidelines and policies. For example, *The Protection of Civilians in United Nations Peacekeeping Handbook*, published by the UN Department of Peace Operations in 2020, contains detailed frameworks for the protection of civilians (PoC) including identification and prioritisation of PoC threats and risk, as well as ‘do’s and don’t’s’ on PoC, covering scenarios such as: civilians seeking protection at UN mission bases; securing IDP and refugee camps; securing civilians close to conflict zones; addressing the issue of children in armed groups; and tackling the commission or imminent commission of sexual violence.⁶¹ This is an example of the UN establishing clear due diligence standards for its peacekeeping operations, and also indicates that the UN is more directly accepting its responsibility to develop a due diligence framework for peacekeeping in addition to ensuring that TCNs prepare their troops for human rights protection.⁶² The question remains as to how the UN ensures that TCNs train their peacekeeping soldiers effectively in human rights protection and, more deeply, how the UN measures the performance of peacekeeping against due diligence standards.

As regards the latter, there is an increasing recognition within the UN, evidenced by Security Council Resolution 2436 of 2018, of the need for ‘the development of a comprehensive and integrated performance policy framework that identifies clear standards of performance for evaluating all United Nations civilian and uniformed personnel working in and supporting peacekeeping operations that facilitates effective and full implementation of mandates’. According to Resolution 2436, this should include:

⁶⁰ *Ibid*, module 2, lesson 2.3 <<https://resourcehub01.blob.core.windows.net/training-files/Training%20Materials/003%20CPTM-EN/003-076%20FINAL%20Lesson%202.3%20160517.pdf>> accessed 15 March 2023.

⁶¹ UN Department of Peace Operations Handbook, ‘The Protection of Civilians in United Nations Peacekeeping’ (2020) <https://peacekeeping.un.org/sites/default/files/dpo_poc_handbook_final_as_printed.pdf> accessed 16 March 2023.

⁶² *Ibid*, chapter 4 on ‘leading on PoC’, which places responsibility on the ‘mission leadership’.

defined benchmarks to ensure accountability for underperformance and incentives and recognition for outstanding performance, including, *inter alia*, innovative and effective training, exceeding operational standards, delivery of key enabling capacities, excellence in the provision of mission support functions, demonstrated progress in mandate delivery, and committed and proactive leadership.

Furthermore, the framework should specify:

measures for performance accountability that include a range of responses proportionate to the identified performance failures, including, as appropriate, transparent public reporting, withholding reimbursement, and repatriating or replacing units, including the possibility of replacement by units from another troop- or police-contributing country ... as well as revocation of delegated authorities, performance improvement plans, training, change of duties, or dismissal or non-renewal of contracts for civilian personnel.⁶³

This performance framework appears to be developing as evidenced by the highlights for key achievements under the 'Action for Peacekeeping' initiative of the UN Secretary-General, which reports on the performance of peacekeeping operations and the accompanying development of a framework of standards for peacekeepers. The key measures include statistics, for example, on the number of women in peacekeeping operations and the number of allegations of sexual exploitation and abuse (SEA) and other misconduct by peacekeepers, as well as the number of peacekeeper fatalities. There are also brief reports on the evaluation of military units and pre-deployment visits,⁶⁴ both demonstrating a significant increase in proactive and preventive measures being taken by the UN, although there is a need for greater detail as well as more sophisticated measurements.

The progress being made by the UN in fulfilling its positive obligation to ensure that TCNs prepare their peacekeeping soldiers appropriately and hold them to account when they do not is evidenced in the area of SEA, which although remaining a serious problem, is no longer seen just as a problem for TCNs. The Secretary-General's 2003 Bulletin on sexual abuse exhibited some due diligence characteristics in that it was directed at providing measures of protection for individuals from SEA by UN peacekeepers. However, it was mainly directed at taking measures to ensure that TCNs were aware of their obligations and acted accordingly.⁶⁵ Later measures by the Security Council and Secretary-General have built on this limited basis by requiring the screening of peacekeepers, and providing for the repatriation of

⁶³ UN Doc S/RES/2436 (2018) para 1. See also Policy on the Protection of Civilians in United Nations Peacekeeping 2019 <https://peacekeeping.un.org/sites/default/files/poc_policy_2019_.pdf> accessed 16 March 2023.

⁶⁴ UN DPPA-DPO, 'Action for Peacekeeping: Highlights of Key Achievements' (9 September 2019) <https://peacekeeping.un.org/sites/default/files/a4p_one_pager_-_progress_9919_1.pdf> accessed 16 March 2023.

⁶⁵ UN Secretariat, 'Special Measures for Protection from Sexual Exploitation and Sexual Abuse', UN Doc ST/SGB/2003/13 (2003) Section 4 'Duties of Heads of Department, Offices and Missions', para 4.1.

whole units where there is credible evidence of SEA by peacekeepers, and to replace all units from a TCN where appropriate steps have not been taken by it to investigate allegations.⁶⁶ This indicates that the UN recognises that it can no longer simply rely on TCNs to meet the standards set for peacekeepers but that the UN has to take adequate measures to ensure that they do, although the lack of evidence of TCN disciplinary action against individual peacekeepers for SEA, for instance, shows that the UN has not yet gone far enough in the measures it has taken in relation to TCNs. The Secretary-General makes it clear that allegations of criminal behaviour against peacekeepers are subject to the exclusive jurisdiction of their sending states, and simply points to information provided by those states on allegations, investigation and outcomes.⁶⁷ That information is collated in reports of the Secretary-General. For example in 2020 there were 41 reported allegations of SEA against military personnel on peacekeeping missions, which were investigated by the UN's Office of Internal Oversight Services (OIOS) and/or the TCN, 39 of which remained 'pending'. Apart from one unclear outcome, none seemed to have ended in criminal prosecution by the TCN concerned.⁶⁸ The UN seems to be failing to meet a due diligence standard in this regard.

5. MEASURES DIRECTED AT NON-UN SECURITY ACTORS

In meeting the due diligence standard to ensure that it fulfils its positive obligation to protect the human rights of vulnerable groups and individuals in the host state, the UN is also obliged to take measures to ensure that any non-UN security actors it operates alongside or in cooperation with do not commit human rights abuses. A breakthrough in this regard, as it constitutes an express recognition of the applicability not only of human rights law but also of due diligence standards to the UN, is the UN's Due Diligence Policy of 2013,⁶⁹ in which the organisation undertakes to implement measures to ensure that non-UN forces it supports are not committing war crimes or other serious abuses. The Policy expressly accepts the applicability of due diligence standards in relation to non-UN forces such as host government forces,⁷⁰ but it also potentially opens the door to the recognition of more general positive obligations

⁶⁶ UN Doc S/RES/2272 (2016). See also Reports by UN Secretary-General on special measures for protection from SEA (UN Doc A/69/779) (2015), which contains over 40 measures aimed at strengthening the response of the UN to allegations of SEA. See also the creation of a Victims' Rights Advocate <www.un.org/preventing-sexual-exploitation-and-abuse/content/victims-rights-advocate> accessed 16 March 2023.

⁶⁷ UN Secretary-General Report, 'Special Measures for Protection from Sexual Exploitation and Abuse' UN Doc A/75/754 (2021) para 44.

⁶⁸ Supplementary information to the report of the Secretary-General on special measures for protection from sexual exploitation and abuse, UN Doc A/75/754 (2021) section III B.

⁶⁹ 'Human Rights due Diligence Policy on United Nations Support to Non-United Nations Security Forces', UN Doc. A/67/775-S/2013/110 (2013).

⁷⁰ *Ibid*, para 1.

and due diligence standards to prevent and respond to violations by third parties such as security contractors working for the UN. The wider import of the Policy is found in the statement that: '[a]dherence to the human rights due diligence policy is important to maintain the legitimacy, credibility and public image of the United Nations and to ensure compliance with the Charter and with the Organization's obligations under international law'.⁷¹

The Due Diligence Policy directs the UN to take precautions to assess the risk of violation and respond to violations by non-UN forces it supports. This includes intercession with the entity in question and, if necessary, the removal of support. Specifically, when the UN is contemplating involvement with non-UN security forces, it 'must ... pursue a policy of due diligence' consisting of: an assessment of 'the risk of the recipient entity committing grave violations of international humanitarian law, human rights law or refugee law'; 'transparency with receiving entities about the legal obligations binding the Organization and the core principles governing provision of support'; and an 'effective implementation framework' including procedures for monitoring compliance and interceding.⁷²

The Due Diligence Policy constitutes the implementation of the UN's positive human rights obligations under international law to act diligently by taking a range of precautionary, preventive and responsive measures to ensure that state or non-state security actors working alongside UN peacekeepers do not commit grave violations of human rights or other international laws. The Policy establishes that the UN has positive obligations in its relationships with non-UN security actors. However, its adoption by the UN raises the question of the UN's wider due diligence obligations to protect vulnerable individuals and groups in the host state by taking adequate, reasonable and appropriate measures through its peacekeepers to address potential or actual abusive actions committed by any violent or potentially violent non-UN actor who operates in areas of the host state where peacekeepers are deployed (discussed in section 7 below).

6. MEASURES DIRECTED AT PEACEKEEPERS

The establishment of Conduct and Discipline Units within most peacekeeping operations shows that the UN recognises the need to take measures to improve the conduct of peacekeepers and ensure that human rights violations allegedly committed by peacekeepers are subject to investigation and, where appropriate, punishment by their sending states.⁷³ Furthermore, the UN Secretary-General has produced reports

⁷¹ *Ibid*, para 3.

⁷² *Ibid*, para 2.

⁷³ UN Conduct and Discipline Service (CDS), 'CDS Liaises with Member States on Allegations of Misconduct involving their Uniformed Personnel' <<https://conduct.unmissions.org/who-is-involved>> accessed 17 March 2023.

detailing ‘special measures for protection from sexual exploitation and abuse’ in an effort to implement a zero-tolerance policy.⁷⁴ Examples of measures include: ‘consistency of training, implementation and enforcement of risk mitigation measures, including curfew restriction/off-limits locations in peacekeeping and non-peacekeeping settings, reporting mechanisms and addressing a fear of retaliation when reports’ are made.⁷⁵

However, the evidence suggests that, in the main, the UN’s due diligence measures are directed at TCNs rather than directly at military peacekeepers (as discussed in section 4 above). This is evidenced by the fact that the UN is not prepared to accept responsibility for its failure to prevent SEA by its military peacekeepers. Indeed, as Ferstman relates:

the UN does not see itself as having any obligation to entertain claims concerning its own liability for sexual exploitation and abuse allegations which occur under its watch; instead, it has carved out a much more limited role for itself—supporting efforts of troop contributing countries to investigate and prosecute criminal allegations and encouraging states to address paternity and child support claims, and to explore the possible use of *ex gratia* payments to victims.⁷⁶

In other words, the UN has taken some steps which seem to recognise that it has positive obligations and due diligence standards in its relations with TCNs, but not in its relations with those wearing the blue helmets. It is true that the UN promotes human rights protection by its peacekeepers, for example in the ‘Ten Rules of Personal Conduct for Blue Helmets’, which contain very general statements on behaviour such as: ‘[d]o not indulge in immoral acts of sexual, physical or psychological abuse or exploitation of the local population or United Nations staff, especially women and children’; and ‘[r]espect and regard the human rights of all. Support and aid the infirm, sick and weak. Do not act in revenge or with malice, in particular when dealing with prisoners, detainees or people in your custody’.⁷⁷ These rules leave a great deal to be desired in terms of implementing a clear legal framework for peacekeepers within which they are required not only to respect specified human rights (such as the right to life, freedom from torture or inhuman treatment, and freedom from arbitrary detention) but also to protect such rights.

Due diligence requires much more in the way of preventive measures so that the UN has to ensure that its peacekeepers when acting under UN command and control, for example in carrying out search and seizure operations, do not violate human rights. There is evidence to suggest that the UN is not taking adequate measures

⁷⁴ UN Doc A/75/754 (2021).

⁷⁵ UN Doc A/74/705 (2020) para 16.

⁷⁶ C. Ferstman, ‘Reparations for Mass Torts Involving the United Nations: Misguided Exceptionalism in Peacekeeping Operations’ (2019) 16 *International Organizations Law Review* 57 at 58–9.

⁷⁷ Rules 4 and 5 <chrome-extension://efaidnbmninnibpcajpcglclefindmkaj/https://www.un.org/en/ethics/assets/pdfs/ten_rules.pdf> accessed 7 December 2023.

to ensure that its peacekeepers comply with its obligations under human rights norms which form part of customary international law. For example, in Haiti UN peacekeepers operating under UN orders used indiscriminate force against criminal gangs in the densely populated Cite Soleil leading to loss of innocent life. This was explained by the UN as 'collateral civilian loss' demonstrating a failure by the UN to grasp that the situation was not one of armed conflict, meaning that peacekeepers' use of force was restricted to a human rights standard of self-defence, not the more permissive standard under the law of armed conflict where collateral losses may be acceptable.⁷⁸

More generally when peacekeepers exercise public powers (using force, arrest, detention, and in relation to public order) the UN must take measures to ensure that peacekeepers do so in accordance with the standards of international human rights law. In the case of use of force, there is a lack of clarity over the standards to be used,⁷⁹ and similarly in detention there is confusion as to whether the standards against which to judge the practice are those of the international humanitarian law or international human rights law, evidenced by the fact that the UN regularly detains individuals on security grounds,⁸⁰ a practice that should be confined to situations of armed conflict, and even then should still be subject to due process guarantees.

7. MEASURES DIRECTED AT ARMED GROUPS AND CRIMINAL GANGS

Although creating binding obligations for states including TCNs, it is interesting to note that the Chapter VII mandates given to modern peacekeeping operations by the UN Security Council also impose obligations on the peacekeeping force itself. For example, the mandate of the UN Mission to South Sudan (UNMISS) states, *inter alia*, that the Security Council, acting under Chapter VII of the UN Charter:

4. Decides that the mandate of UNMISS shall be as follows, and authorizes UNMISS to use all necessary means to perform the following tasks:

(a) Protection of civilians:

(i) To protect civilians under threat of physical violence, irrespective of the source of such violence, within its capacity and areas of deployment ...

(ii) To deter violence against civilians, including foreign nationals, especially through proactive deployment, active patrolling ... in particular when the Government of the Republic of South Sudan is unable or failing to provide such security;

(iii) To implement a mission-wide early warning strategy, including a coordinated approach to information gathering, monitoring, verification, early warning and

⁷⁸ Freedman, Lemay-Hebert and Wills (n 16) 128–33. See also the failure of the UN to take measures to prevent and respond to the careless introduction of cholera into the water supply—see A Cravioto, 'Final Report of the Independent Panel of Experts on the Cholera Outbreak in Haiti' (4 May 2011).

⁷⁹ ND White, 'The Use of Weapons in Peace Operations' in Stuart Casey-Maslen (ed), *Weapons under International Human Rights Law* (Cambridge University Press 2014) 228.

⁸⁰ Oswald (n 17).

dissemination, and response mechanisms, including response mechanisms to prepare for further potential attacks on United Nations personnel and facilities;

(iv) To maintain public safety and security within and of UNMISS protection of civilians sites [*sic*];

(v) To exercise good offices, confidence-building, and facilitation in support of the mission's protection strategy, especially in regard to women and children ... ;

(vi) To foster a secure environment for the eventual safe and voluntary return of internally-displaced persons (IDPs) and refugees including, where compatible and in strict compliance with the United Nations Human Rights Due Diligence Policy (HRDPP), through monitoring of, ensuring the maintenance of international human rights standards by, and specific operational coordination with the police services in relevant and protection-focused tasks, in order to strengthen protection of civilians.⁸¹

Such mandates show that the UN Security Council accepts the need to ensure that its peacekeepers protect the human rights of civilians under imminent threat of violence. However, Chapter VII, and the bindingness of 'decisions' adopted by the UN Security Council under the UN Charter, are the source of these duties rather than external international laws, although the mandate does make reference to that law.

Irrespective of the terms of the mandate, the UN's positive obligations under customary international laws protecting human rights necessitate the adoption of clear rules for peacekeepers, as well as training, education, risk assessment and mitigation, to ensure that they can fulfil the mandate including the protection of civilians. In addition, those obligations mean that the UN has to ensure a peacekeeping force has adequate resources and the capabilities to fulfil its mandate. More specifically, the ambit of the due diligence standard requires the UN puts in place adequate, reasonable and appropriate measures to ensure that peacekeepers actively protect the human rights of civilians in their areas of deployment from violation by armed groups and criminal gangs. Such measures are scattered unevenly and not always convincingly in UN doctrine (for example in Security Council Resolutions, the Brahimi Report, Capstone Doctrine, and the Report of the High Level Independent Panel on Peace Operations).⁸² They cover proactive patrolling, rapid redeployment, adequately protected safe havens, intercessions, detention of individuals on security grounds, and the use of potentially lethal force when absolutely necessary to protect the lives of civilians and peacekeepers.⁸³

Some of the uncertainty in UN doctrine and practice can be explained by the continuing equivocation about whether the UN is bound by international human rights

⁸¹ UN Doc S/RES/2155 (2014).

⁸² Report of the Panel on United Nations Peace Operations (Brahimi Report), UN Doc A/55/305-S/2000/809 (2000) paras 62–3; UNDPKO, 'Capstone Doctrine: United Nations Peacekeeping Operations: Principles and Guidelines' (2008) 23–7; Report of the High Level Independent Panel on Peace Operations on Uniting our Strengths for Peace: Politics, Partnership and People, UN Doc A/70/95-S/2015/446 (2015) paras 87, 88, 91, 95, 213, 232, 264, 265, 289.

⁸³ See Security Council Resolutions on the Protection of Civilians, starting with UN Doc S/RES/1265 (1999) and most recently UN Doc S/RES/2573 (2021).

standards by reason of their status as customary laws. Willmot and Sheeran state that the 'most important rights' for the protection of civilians in peacekeeping 'include the right to life, the prohibition against torture and ill-treatment, and the freedom from arbitrary detention'.⁸⁴ However, in terms of the duty bearer, Willmot and Sheeran point to the host state as the main actor when stating that '[t]hese are human rights that any host state will have an obligation to respect and ensure respect for (that is, a positive obligation), including by non-state actors'.⁸⁵ They recognise that the application of human rights law 'to UN peacekeeping operations is difficult to contest', although they qualify that by stating that 'the precise content of these obligations' is unclear: '[t]he UN is not party to human rights treaties and the greatest difficulty lies in understanding the scope and extent of obligations for a UN force, which has no sovereignty over a territory and has lesser powers than a state'.⁸⁶

At this stage it is important to re-emphasise the evolution of modern peacekeeping forces towards stabilisation involving the greater exercise of public powers.⁸⁷ According to Gilder, such stabilisation-type peacekeeping forces: 'are mandated to support the extension of state authority'. To do so such forces 'operate alongside state forces and actively build the capacity of those forces', and 'use varying degrees of proactive, robust force to prevent attacks on themselves and those they are mandated to protect'.⁸⁸ In performing these functions these peacekeeping forces exercise powers of arrest, detention and regularly use potentially lethal force, with the potential to cross the threshold into the sort of protracted armed violence that triggers the application of international humanitarian law. It is worth noting that while the UN has accepted the applicability of international humanitarian law to peacekeeping forces in such circumstances,⁸⁹ it has not adopted a similar approach to international human rights law when peacekeepers are in dangerous situations that fall short of armed conflict, which remains the norm for most peacekeeping forces. In such conditions of violence, Willmot and Sheeran identify a potential positive obligation on the UN 'to ensure respect' for international human rights law 'by others such as non-state actors, private individuals and even local authorities'.⁹⁰ This signifies that 'a failure to intervene may also violate' the human rights obligations 'owed by UN peacekeepers to the host state's population'.⁹¹ It is time for the UN not only to expressly recognise its positive duties under customary international laws protecting human rights, but to operationalise

84 H Willmot and S Sheeran, 'The Protection of Civilians Mandate in UN Peacekeeping Operations: Reconciling Protection Concepts and Practices' (2013) 95 *International Review of the Red Cross* 526.

85 *Ibid.*

86 *Ibid.*, 527.

87 For example: UN Organisation Stabilisation Mission in the DR Congo (MONUSCO); UN Multidimensional Integrated Stabilisation Mission in the Central African Republic (MINUSCA); UN Multidimensional Integrated Stabilisation Mission in Mali (MINUSMA).

88 Gilder (n 11) 51.

89 UN Secretary-General's Bulletin (n 14).

90 Willmot and Sheeran (n 84) 527.

91 *Ibid.*, 537.

those duties through the more systematic identification and implementations of a range of adequate, reasonable and appropriate measures that meet due diligence standards.

8. CONCLUSION: DUE DILIGENCE AND ACCOUNTABILITY

It seems that the debate about the external laws applicable to the UN remains stuck on the basic but fundamental issue of whether the organisation is bound by customary international law including positive obligations to protect human rights. The argument put forward in this article attempts to bring that debate to an end: the UN is bound by customary international laws protecting human rights as an international legal person with rights and duties under international law, moreover one that operates within host states by exercising an increasing range of public powers. Those powers impact on the host population and bring with them human rights duties including positive obligations that require that the UN adopt due diligence standards and measures aimed at protecting human rights and preventing human rights abuse. It is clear from the above typology that the UN has not fully internalised and implemented these duties and standards in relation to the most relevant actors, partly because of the obfuscation caused by doubts about its capacity to have such obligations. Continued equivocation is not sustainable when considering the ever-expanding mandates of such forces, meaning that they have a real impact on the lives of the population of the host state.

Apart from the continuing equivocation concerning the nature and extent of the UN's duties under international law, there are a number of other reasons which might explain why the UN is reluctant to embrace the full extent of its positive obligations to protect the human rights of vulnerable groups and individuals within the host state. There is of course the fear of opening the floodgates of liability, leading to unacceptable financial burdens on member states who all contribute to the UN's peacekeeping budget. However, the UN is able to control its liability by various means, including: by placing financial limits on claims it receives;⁹² by the fact that the UN is not within the reach of international courts and tribunals which mostly exercise jurisdiction over states and individuals; and, most effectively, by reason of its immunity from claims brought against it before national courts.⁹³

It might also be argued that TCNs could be deterred from contributing troops if they are subjected to increased UN scrutiny and burdens requiring increased training, better equipment as well as increased oversight of TCN prosecution of peacekeepers who violate human rights. However, this is balanced by the greater sharing of legal responsibility between the TCN and the UN that would be achieved if the UN accepted its responsibility for failure to fulfil its positive obligations to protect the host state

⁹² See UN General Assembly Resolution, 'Third Party Liability: Temporal and Financial Limitations', UN Doc A/RES/52/247 (1998).

⁹³ See, for example, R. Freedman, 'UN Immunity or Impunity? A Human Rights Based Challenge' (2014) 25 *European Journal of International Law* 239.

population from peacekeepers committing acts of SEA, or from attacks by armed groups and criminal gangs when peacekeeping forces had the power to prevent such. Besides which, the UN has accepted that it must exercise due diligence in its relations with non-UN security actors in line with international human rights and humanitarian law, meaning that it cannot deny that it is legally required to adopt such measures in its relations with TCNs and peacekeepers who wear the blue helmets of the UN.

This article has demonstrated that within the UN peacekeeping system, there is a growing number of measures that might be characterised as following a due diligence standard. However, there remains the need for the UN to recognise that it is required to adopt these measures in order to meet due diligence standards because it is legally obliged to do so as a result of its positive obligations under international law. This in turn means that a failure to fulfil its obligations should lead to legal responsibility, which, to be meaningful, must be accompanied by greater levels of accountability.

The UN's acceptance and implementation of its obligations under international law would provide a basis upon which to build responsibility and accountability. As regards the latter, there is a clear need to develop internal and external accountability mechanisms to enunciate and deepen the application of due diligence standards and measures in peacekeeping operations. Without proper accountability there is insufficient incentivisation for the UN to fully recognise and implement due diligence standards and measures. There is scattered evidence of some forms of accountability mechanisms developed around peacekeeping operations, some of which are mentioned here.

Internal mechanisms include conduct and discipline teams that have been established in each mission with a central Conduct and Discipline Unit at UN headquarters. This has been supplemented by an accountability framework on conduct and discipline, and a SEA risk management framework, to identify, manage and mitigate risks of SEA.⁹⁴ Evaluation Teams assess the ability of mission to effectively implement Security Council mandates and to manage and administer their resources in accordance with UN policies.⁹⁵ There have been isolated instances of external accountability mechanisms, principally the creation of an external Independent Review Panel on SEA by International Peacekeeping Forces (not under UN command and control) in the Central African Republic established in June 2015.⁹⁶ It is telling that latter external mechanism issued a clear statement on the UN's human rights obligations:

If the Secretary-General's zero-tolerance policy is to become a reality, the United Nations as a whole—including troop-contributing countries—must recognize that sexual abuse perpetrated by peacekeepers is not a mere disciplinary matter, but a violation of the victims' fundamental human rights and, in many cases, a violation of

⁹⁴ UN, 'Sexual Exploitation and Abuse Risk Management Framework' (2017) <<https://conduct.unmissions.org/sexual-exploitation-and-abuse-risk-management-framework>> accessed 20 March 2023.

⁹⁵ UN Peacekeeping, 'Evaluation Framework' <<https://peacekeepingresourcehub.un.org/en/evaluation>> accessed 20 March 2023.

⁹⁶ Report of an independent review on sexual exploitation and abuse by international peacekeeping forces in the Central African Republic, UN Doc A/71/99 (2016) 3.

international humanitarian and criminal law. Regardless of whether the peacekeepers were acting under direct United Nations command, victims must be made the priority. In particular, the United Nations must recognize that sexual violence by peacekeepers triggers its human rights mandate to protect victims, investigate, report and follow up on human rights violations, and take measures to hold perpetrators accountable. In the absence of concrete action to address wrongdoing by the very persons sent to protect vulnerable populations, the credibility of the United Nations and the future of peacekeeping operations are in jeopardy.⁹⁷

There are positive developments coming from the current UN Secretary-General's Action for Peacekeeping initiative.⁹⁸ For example, the Declaration of Shared Commitments on UN Peacekeeping Operations signed up to by member states on 16 August 2018, contains a collective commitment:

to ensuring the highest level of peacekeeping performance, and to hold all civilian and uniformed peacekeepers, particularly leadership, accountable for effective performance under common parameters while addressing performance shortfalls. The Secretary-General commits to develop an integrated performance policy framework based on clear standards for all actors.⁹⁹

In this regard, it is worth noting again that in its 2018 resolution on 'United Nations Peacekeeping Operations' the Security Council affirmed its support for the 'development of a comprehensive and integrated performance policy framework that identifies clear standards of performance for evaluating all United Nations civilian and uniformed personnel'; while urging that all TCNs 'meet UN performance standards for personnel, training, and equipping'.¹⁰⁰

This is part of a welcome drive by the UN to improve peacekeeping performance and management.¹⁰¹ However, the question remains as to whether this constitutes implementation of the UN's legally binding positive obligations under international law. It is questionable whether UN practice is heading towards the implementation of due diligence in a human rights law sense 'as a standard of conduct required to discharge an obligation', or whether it is developing a doctrine of due diligence in line with that used in the business community 'as a process to manage business risks'.¹⁰²

⁹⁷ *Ibid.*

⁹⁸ UN Peacekeeping, 'Action for Peacekeeping (A4P)' <<https://peacekeeping.un.org/en/action-for-peacekeeping-a4p>> accessed 20 March 2023.

⁹⁹ UN Peacekeeping, 'Action for Peacekeeping: Declaration of Shared Commitments on UN Peacekeeping Operations' <<https://peacekeeping.un.org/sites/default/files/a4p-declaration-en.pdf>> accessed 20 March 2023.

¹⁰⁰ UN Doc S/RES/2436 (2018) paras 1 and 3.

¹⁰¹ See, for example, UN Secretary-General Report, 'Shifting the Management Paradigm in the United Nations: Implementing a New Management Architecture for Improved Effectiveness and Strengthened Accountability' UN Doc A/72/492/Add.2 (2018) especially paras 5, 6, 63, 65, 66 and 105 on risk management and accountability.

¹⁰² J Bonnitca and R McCorquodale, 'The Concept of Due Diligence in the UN Guiding Principles on Human Rights' (2017) 28 *European Journal of International Law* 900.

It follows that there is a clear need for the UN to expressly accept and implement due diligence standards in fulfilment of its positive obligations under customary international laws protecting human rights, and for the UN to ensure oversight of that implementation by independent accountability processes tasked with reviewing and developing those standards and the measures adopted to meet them. A fully fledged accountability process would then lead to the development of clearer standards and more detailed measures, and eventually specific remedies in cases where peacekeeping forces have manifestly failed to respect or protect human rights.

DISCLOSURE STATEMENT

No potential conflict of interest was reported by the author(s).