
The Legal Basis for Peacekeeping/Peace Operations

The starting point for any discussion of the legal framework of UN peace operations is that the power to undertake or create such operations is not written anywhere in the UN Charter. Instead, the legal basis for peacekeeping is most commonly considered to be located in the implied powers of the organization.¹ One scholar argues that it can be construed as a provisional measure under Article 40,² whereas Christine Gray argues that ‘the debate seems to be without practical significance’.³ Nonetheless, it does mean that the specific rules on peace operations are not set down in the Charter; rather, they have evolved through peacekeeping doctrine over the past six decades.⁴ Most UN peacekeeping operations are established via a Security Council resolution – sometimes under Chapter VII (or in

¹ On implied powers of the UN, see *Reparations for Injuries Suffered in the Service of the United Nations* (Advisory Opinion) [1949] ICJ Rep 174; on the acceptance of peacekeeping as a proper exercise of such implied powers, see *Certain Expenses of the United Nations* (Advisory Opinion) [1962] ICJ Rep 151. See also A. Orakhelashvili, ‘The Legal Basis for Peacekeeping’ (2003) 43 *Vanderbilt JIL* 485; on peacekeeping as an implied power or an inherent power, Hilaire McCoubrey and Nigel White, *The Blue Helmets: Legal Regulation of United Nations Military Operations* (Aldershot: Dartmouth, 1996), pp. 39–59.

² Hitoshi Nasu, *International Law on Peacekeeping: A Study of Article 40 of the UN Charter* (Martinus Nijhoff, 2009).

³ Christine Gray, *International Law and the Use of Force*, 3rd edn (Oxford: Oxford University Press, 2008), p. 262.

⁴ See UN Secretary General, ‘Summary Study of the Experience Derived from the Establishment and Operation of the Force’, UN Doc A/3943 (9 October 1958) (UNSG ‘Summary Study’); UN Secretary General, ‘An Agenda for Peace: Preventive Diplomacy, Peacemaking and Peace-keeping’ (17 June 1992), UN Docs S/24111 – A/47/277; UN Secretary-General, ‘Supplement to An Agenda for Peace: Position Paper of the Secretary-General on the Occasion of the 50th Anniversary of the United Nations’ (3 January 1995), UN Doc A/50/60–S/1995/1; ‘Report of the Panel on United Nations Peace Operations’, UN Doc A/55/305–S/2000/809 (21 August 2000) (hereafter Brahimi Report). See also the follow-up report by the Secretary-General on the implementation of the Brahimi Report: UN Doc A/55/502 (20 October 2000); United Nations Department of Peacekeeping Operations and Department of Field Support, ‘United Nations Peacekeeping Operations: Principles and Guidelines’ (18 January 2008) (hereafter Capstone Doctrine).

part), but often no chapter or article is specified. The General Assembly can also establish peace operations using the Uniting for Peace Resolution, but has rarely done so.⁵ In contrast to these, the enforcement actions the UN was supposed to undertake using forces under Article 43 of the Charter have instead been conducted by states, regional organizations or coalitions of states under an authorization by the UN Security Council.⁶

There is, thus, no single treaty provision against which to measure the possibility to use PMSCs as a troop contingent and in other roles in UN peace operations. On one hand, the principles of peacekeeping – consent, impartiality and a ‘restricted’ use of force – play an integral role in ensuring the legality of any peace operation that is not established under Chapter VII of the UN Charter. On the other hand, the mandate itself, the Status of Forces Agreement between the UN and the host state and the agreements between the UN and troop- and police-contributing states may contribute to the technical legal basis for the presence of the force in a state.

It is also important to understand the legal basis for police deployments considering that the one context in which PMSCs are contracted by a state to recruit, deploy and manage peacekeepers is in relation to UN Civilian Police.⁷ By and large, police deployments within UN peace operations occur according to the same framework that governs military and civilian deployment for the rest of the operation.⁸ The specific rules governing the

⁵ Uniting for Peace, UNGA Res 377(V) (3 November 1950). Although the very first peace operation (UNEF) was established using the mechanisms set up in this resolution, it has not been used since then to establish a peace operation. It is not within the powers of the General Assembly to establish an enforcement operation, however. See *Certain Expenses of the United Nations* (Advisory Opinion) [1962] ICJ Rep 151 at 166 and 170–172. One other peace operation besides UNEF was established on the basis of a UN General Assembly resolution: the United Nations Security Force in West New Guinea in 1962; see UNGA Res 1752(XVII) (21 September 1962). That resolution was based on an agreement between Indonesia and the Netherlands and was not adopted using the Uniting for Peace procedure. In Congo in 1960, the UN General Assembly adopted a resolution under Uniting for Peace in support of the existing peace operation that had been set up by the Security Council. See UNGA Res 1474 (ES-IV) (19 September 1960). The resolution requested states to comply with the Security Council resolution in financing and supporting the mission with forces.

⁶ In general, for example, the UNSC authorizations to use force against Iraq in 1991 and against Korea in 1950 are excluded from what can be considered ‘peace operations’ as they amount to ‘enforcement action or war’. For Libya in 2011, some consider UNSC Res 1973 (2011) to have authorized a use of force; others considered that the force used to enforce the no-fly zone went far beyond the terms of the resolution.

⁷ See, in particular, Marjorie Ann Browne, ‘United Nations Peacekeeping: Issues for Congress’, CRS Report (updated 13 November 2008) 18; Marjorie Ann Browne, ‘United Nations Peacekeeping: Issues for Congress’, CRS Report (13 August 2010) 18.

⁸ Edmund Primosch argues that the common tasks carried out by UN CIVPOL – monitoring local police, supervising IDP and refugee voluntary return, investigating complaints against

force itself will flow from a combination of the UN Security Council resolution setting the mandate of the operation, international law, the law of the police contributing state and the host state's laws.⁹

While there is no black letter rule prohibiting the use of PMSCs in peace operations – in particular as the troop contingent itself – the use of PMSCs must be able to conform to all aspects of this framework if their use is to be contemplated. All of these principles, policies and internal directives must also be set against the backdrop of general international law, including international human rights law, and in particular international humanitarian law when it applies in UN peace operations. This rather nebulous framework thus sets the stage for the method that will be used in this part to test the possibility to use PMSCs as the military or police contingent in peace operations.

3.1 Agreements Governing Troop and Police Contributions

This brief overview outlining how UN peacekeeping operations are established and staffed provides context for the ways in which private military and security personnel may be engaged in an operation.

local police when necessary, training local police, assisting humanitarian aid agencies and helping to ensure safe and neutral elections – ‘can be regarded as appropriate action in order to attain the common ends of UN members’ and therefore is a lawful action under the UN Charter. See his ‘The Roles of United Nations Civilian Police (UNCIVPOL) Within United Nations Peace-Keeping Operations’ (1994) 43 *ICLQ* 425–431 at 429.

⁹ See James Watson, Mark Fitzpatrick and James Ellis, ‘The Legal Basis for Bilateral and Multilateral Police Deployments’ (2011) 15 *Journal of International Peacekeeping* 7–38, *passim*. One issue that may raise specific questions in terms of the laws that govern deployed CIVPOL is the emergence of ‘executive’ policing, wherein CIVPOL are mandated to carry out policing functions such as arrest, detention and investigation, including the use of force in law enforcement in peace operations. Renata Dwan argues that although CIVPOL have been mandated to carry out such tasks in international territorial administrations, this function is unlikely to be commonly used because it is highly invasive of sovereignty, it is complex (i.e., not always feasible), and simply because it is qualitatively so vastly different from the usual way in which UN CIVPOL are used. See Renata Dwan, ‘Introduction’, in Renata Dwan (ed.), *Executive Policing: Enforcing the Law in Peace Operations* (SIPRI Research Report No. 16, Oxford University Press, 2002), pp. 1–4. The DPKO does not seem to view it as impossible that CIVPOL will be mandated to conduct interim law enforcement, stating only that such powers ‘have historically been given’ in the context of territorial administration missions. See UN DPKO, ‘What the UN Police Do in the Field’, on the DPKO website: www.un.org/en/peacekeeping/sites/police/work.shtml (accessed 14 November 2011). The legal framework governing their use of force in any case is set out in UN DPKO/DFS, ‘Policy (Revised): Formed Police Units in United Nations Peacekeeping Operations’ (1 March 2010) 7–10. See also Bruce Oswald, Helen Durham and Adrian Bates, *Documents on the Law of UN Peace Operations* (Oxford: Oxford University Press, 2010), pp. 8–11.

First, the UN Secretary-General usually presents a report to the Security Council outlining the proposed mandate, functions, composition and deployment of the mission. The Security Council then adopts a resolution establishing the operation on the basis of that report. The Secretary-General sets about staffing and equipping the mission, from the troop and police contingents to the civilians. In early peace operations, some states eagerly offered their national armed forces for the Secretary-General to include in the peacekeeping force.¹⁰ As a general rule, however, the Secretary-General approaches states to request contributions of troop or police contingents. They are integrated into the force as follows:

Armed military peacekeepers that are contributed by their States are deployed as a contingent and commanded by a contingent commander usually from their State. Consequently, military members serving as part of national contingents are under operational control of the [UN Force Commander], but remain part of their respective national armed forces and under national command. Thus, there is no direct contractual relationship between contingent members and the UN.¹¹

This description helps to illustrate the usual relationship between states and the UN during a UN peace operation and provides a backdrop against which to consider the potential role or place of contractors in such missions.

Military personnel are also provided to missions by states on an individual basis. These tend to be military observers, who are seconded to the UN by their sending state. In this capacity, they are 'experts on mission'¹² and they must sign 'an undertaking which requires them to comply with all relevant UN rules, regulations, and directives'.¹³

Individual civilian police are likewise seconded by their sending states to the operation. As Oswald et al. indicate, 'they are under the operational control of the [Police Commander]' rather than under national command, but 'it is usual for police personnel to also have to report back to their national Governments'.¹⁴ They also sign individual undertakings requiring compliance with the rules as outlined above.

Recruiting civilian police to serve in UN peace operations has long been a challenge. As Schmid points out, states do not keep extra units of law

¹⁰ Robert Siekmann, *National Contingents in United Nations Peace-Keeping Forces* (Dordrecht: Martinus Nijhoff, 1991), pp. 21–23.

¹¹ Oswald et al., *Documents*, p. 6.

¹² UN Model SOFA, 'Draft Model Status-of-Forces Agreement Between the United Nations and Host Countries', Annex to the Report of the Secretary-General, UN Doc A/45/594 (9 October 1990), para. 26.

¹³ Oswald et al., *Documents*, p. 6. ¹⁴ *Ibid.*

enforcement personnel for extra-territorial deployment, unlike military forces.¹⁵ Consequently, it was rare that an entire unit could be sent. In the late 1990s, Schmidl observed that ‘police officers, even from one country, usually are drawn from a wide array of police forces and have highly diverse backgrounds.’¹⁶ The UN DPKO has worked to change this tendency, developing a policy on Formed Police Units, the deployment of which has grown drastically.¹⁷ Formed Police Units are ‘cohesive mobile police units, providing support to United Nations operations and ensuring the safety and security of United Nations personnel and missions, primarily in public order management.’¹⁸ Thus, police may also be provided to a mission as a Formed Police Unit, in which case they are deployed on a similar basis as troop contingents, with a national commander being responsible for discipline.¹⁹ However, they are subject to a memorandum of understanding (MOU) between their sending state and the UN and they also sign individual undertakings.²⁰ The DPKO also created the ‘Standing Police Capacity’, a pool of twenty-five professional police officers based at the UN logistics base in Italy who can be deployed rapidly at the start-up phase of a new mission.²¹

As Part I illustrated, in addition to these contributions from state forces, the UN relies on contractors in order to staff peace operations.

3.2 Status of Forces Agreements

Status of forces agreements between the United Nations and the host state in which the peace operation is operating also form part of the legal framework. In addition to the policies described above, the work of

¹⁵ Erwin Schmidl, ‘Police Functions in Peace Operations: An Historical Overview’, in Robert Oakley, Michael Dziedzic and Eliot Goldberg (eds.), *Policing the New World Disorder: Peace Operations and Public Security* (University Press of the Pacific, 1998), pp. 19–40.

¹⁶ *Ibid.*

¹⁷ UN DPKO/DFS, ‘Policy (Revised): Formed Police Units in United Nations Peacekeeping Operations’ (1 March 2010, revised 1 March 2013) 3, para. 6.

¹⁸ *Ibid.*, para. 8. ¹⁹ *Ibid.*

²⁰ *Ibid.* at 4, para. 9, and the ‘Manual on Policies and Procedures Concerning the Reimbursement and Control of Contingent-Owned Equipment of Troop/Police Contributors Participating in Peacekeeping Missions’ (hereafter COE Manual).

²¹ See ‘Standing Police Capacity’ on the website of the UN Department of Peacekeeping Operations: www.un.org/en/peacekeeping/sites/police/capacity.shtml (accessed 14 November 2011). The High-Level Panel on Threats, Challenges and Change had advocated the creation of a capacity of 50–100 officers, which was endorsed by the UN General Assembly, but in the end UN member states have approved only 25. *Ibid.* The central role and diverse functions Civilian Police are increasingly mandated to perform is highlighted in UNSC Res 2185 (2014).

the UN Office of Legal Affairs regarding Status of Forces Agreements (SOFA) and contractors provides evidence of UN tolerance of PMSCs in peace operations and further illustrates the potential limitations on their use.

Beginning in 1995, on request by the DPKO, the UN Office of Legal Affairs began drafting clauses to include in Status of Forces/Status of Mission Agreements (SOFAs or SOMAs) with respect to contractors. The OLA took this initiative in response to some of the difficulties experienced by contractors. In fact, the Assistant Secretary-General for Peacekeeping Operations requested the views of the OLA as to whether 'privileges and immunities provided for under the [Convention on Privileges and Immunities of the United Nations] could be extended' to contractors.²² The OLA characterized the functions performed by contractors as 'commercial in nature and rang[ing] from the procurement of goods and the supply of services to construction and catering services'. As such, they did not benefit from the status of experts on mission as a group as a whole. The OLA offered no opinion as to whether more important functions could be outsourced to contractors (such that contractors entrusted with such functions could benefit from the status of experts on mission), thereby leaving open the possibility that contractors could be tasked with 'specific and important' functions.²³

The OLA then indicated to the Assistant Secretary-General for Peacekeeping Operations that it was developing a set of clauses with respect to contractors that could be proposed for inclusion in SOFAs or SOMAs. It warned, however, that 'the willingness of this Office to consider extending such facilities to the Contractors would not of itself result in their obtaining them since Governments have in the past expressed reservations on including the Contractors in the SOFAs/SOMAs.'²⁴ The contractor 'facilities' the OLA mentioned refer in particular to

freedom of movement for the proper performance of the services; prompt issuance of necessary visas; exemption from immigration restrictions and alien registration; prompt issuance of licences or permits, as necessary, for required services, including for imports and for the operation of aircraft

²² UN Office of Legal Affairs, 'Privileges and Immunities and Facilities for Contractors Supplying Goods and Services in Support of United Nations Peacekeeping Operations' (1995), UN Juridical YB (Part Two, Chapter VI) 407–408 (23 June 1995) (hereafter OLA, 'Privileges and Immunities for Contractors').

²³ One may also query the relevance of the categorization 'commercial' to distinguish 'specific and important' functions.

²⁴ OLA, 'Privileges and Immunities for Contractors', 408.

and vessels; repatriation in time of international crisis; right to import for the exclusive and official use of the United Nations, without any restriction, and free of tax or duties, supplies, equipment and other materials.²⁵

As such, the host state may set limits on what contractors may or may not do through the terms it agrees to or refuses in the SOFA. In the absence of a mission-specific SOFA, there appears to be no basis in the Model SOFA to presume a host state can be deemed to have accepted the inclusion of PMSCs in the operation.²⁶ Theoretically, a host state could insist on a clause prohibiting the use of private security contractors in a SOFA, or prohibiting PMSCs from carrying out any number of other specified activities. It may also seriously impede the use of contractors simply by denying them certain facilities or immunities, rendering the execution of their tasks virtually impossible. Dieter Fleck argues that the role of PMSCs should be provided for in the SOFA, which should also 'provide for cooperative solutions of contentious issues' that may arise in relation to them.²⁷

Nothing, thus, in the legal basis for peace operations or in the basic documents establishing them would appear, *prima facie*, to prohibit the use of PMSCs in various roles. As these provide no blanket prohibition, the possibility of using them would depend on the specific terms of the agreements.

²⁵ Ibid. For an example of a SOMA incorporating essentially all of these terms for contractors, see 'Exchange of Letters Constituting an Agreement Between the United Nations and Sierra Leone on the Status of the United Nations Observer Mission in Sierra Leone' (1998), UN Juridical YB (Part I) 46–48 (29 July 1998).

²⁶ But see below, Chapter 4, Section 4.2, on consent, in relation to this issue and to specific restrictions on which a host state may insist, with greater or lesser success.

²⁷ Dieter Fleck, 'The Legal Status of Personnel Involved in United Nations Peace Operations' (2013) 95 *International Review of the Red Cross* 613–636 at 634.