

including several children.¹⁷ The bullet holes have since been repaired with patches of scrap metal but are still clearly visible.¹⁸ Witnesses also state that MINUSTAH fired from heavy machine guns mounted on armored personnel vehicles, destroyed scores of houses, and killed several families.¹⁹ No one in Haiti other than the UN mission has helicopters. No one in Haiti other than the UN mission has heavy machine guns mounted on armored vehicles. The doctors we interviewed said that they received phone calls from people injured but they were unable to reach them for twenty-four hours because the UN would not allow anyone in or out.²⁰

Everyone that we interviewed said that no one from the UN or from the state had visited them after the raids to inquire as to whether there were any casualties. One woman, Evelyne, said “it makes you feel worthless.”²¹ Another person, Sorel, said: “A massacre happens and no one comes to find out how many people were killed, how many people were lost, how many cases there are. It stays with you, you know what you know.”²²

RECOMMENDATIONS

The UN Department of Peacekeeping has not responded to my requests for information regarding its investigations into these operations, nor to my request on behalf of the participants in the film, that it authorize an independent and transparent investigation into what happened.

In addition to authorizing an independent investigation into peacekeepers’ use of force in Haiti, the United Nations should put in place policies and procedures to ensure that they do not happen again. The United Nations should explicitly affirm its commitment to comply with international human rights law standards on the right to life in all circumstances in which troops use deadly force against persons that are not parties to an armed conflict or civilians participating in one. This would require troops to assess so-called “collateral damage” with much greater care and ensure that any operations in which deadly force is likely to be used are planned so as to ensure that any use of deadly force is proportionate to the aim of protecting life.

ROBUST PEACEKEEPING—NOT AGGRESSIVE PEACEKEEPING

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*By Mona A. Khalil**

Since 1999, in the aftermath of the tragic failures in Rwanda and Srebrenica, the UN Security Council (UNSC) has readily and consistently entrusted UN peacekeeping operations (UNPKOs) with robust mandates and the authority to use force beyond self-defense for the protection of civilians. In the ensuing decades, it has also sought to provide more robust resources including vehicles, weapons, equipment, and technologies to enable UNPKOs to implement and fulfill their mandates. What is only now being addressed, however, is the need for more robust performance. This presentation describes the mindset, understanding, and attitudes that are required to achieve an effective level of performance.

¹⁷ See *It Stays with You*, *supra* note 1.

¹⁸ Viewed by author, November 2016.

¹⁹ See *It Stays with You*, *supra* note 1.

²⁰ *Id.*

²¹ *Id.*

²² *Id.*

* MAK LAW.

In the minds of too many troop contributing countries (TCCs), a peacekeeping troop’s fundamental role is to stand guard to protect UN personnel and UN premises and to stand watch over ceasefire lines and international borders. Such a role is far removed from the expectations of the UNSC. To fulfill the vision and expectations of the UNSC, peacekeeping troops are required to conduct military operations; to venture into the local communities to gather intelligence and to project a robust posture; to proactively engage in preventive action against hostile parties; in short, to become actual and active players in the operating environments in which they are deployed. The acknowledgement, much less the acceptance of that role, is only now beginning to be understood.

While the UN, with the support of TCCs and others, has done much to improve the operational readiness of UN peacekeepers to deliver on their mandates, the UN has more work to do to ensure their willingness to do so.

In the first instance, the UN needs to do a better job incentivizing troops to be more proactive and less risk-averse. The UN should consider financial incentives. For instance, the current pay-out for a soldier who is killed in the line of duty is far less than the pay-out for a staff member who dies while on official duty. Second, the UN can also consider cultural incentives. The UN calls upon troops of one country to fight and possibly die for the cause of peace in another country. The willingness to make the ultimate sacrifice under such circumstances is much harder to achieve. It would be easier to generate new forces if pride in such service was stronger. Part of that is restoring the UN’s credibility and prestige—to ensure the appreciation that the UN is worth serving generally and that the UN mission is worth dying for specifically. Third, the UNSC and the UN Secretariat must do a more tangible job of rewarding good performance and addressing bad performance. The UNSC must do more than adopt resolutions and review reports; the UNSC must measure progress toward achieving mandated goals; adjust mandates as necessary to ensure success in achieving mandated goals and hold those who impede the achievement of the mandated goals accountable.

It is also necessary for the UNSC to promote greater understanding of all dimensions of the UNPKO’s multidimensional mandate while at the same time addressing the dependencies and contradictions in the mandated tasks. While all aspects of a PKO mandate may ultimately contribute to peace, justice, and security, in the short term the various tasks may not necessarily be mutually reinforcing. By way of example, today’s PKOs are at one and at the same time called upon to convene peace talks as an impartial peacemaker; assist the host government in restoring or maintaining its sovereignty over the country; report on any international humanitarian law (IHL) or international human rights law (IHRL) violations by the government and other parties; protect civilians against all hostile actors whether they be elements of government forces, insurgents, terrorists, or criminal gangs; and assist in the delivery of humanitarian assistance.

To achieve operational robustness and effectiveness, the UNSC must stop its one-size-fits-all approach to UNPKO mandates and design mission-specific mandates that understand and respond to the particular circumstances of each country or conflict.

- At the policy level, the UNSC, and in turn the UNPKO, will need a better understanding of the root causes of the underlying conflict and greater situational awareness of the operating environment. The UNSC and UNPKO alike should welcome more inclusive and proactive engagement with local actors and affected populations.
- At the operational level, the UN Secretariat and its partners should design country-specific table top and other simulated exercise to train UNPKOs to ensure greater familiarity with the UN mission-specific mandate and rules of engagement as well as enhanced awareness the main state and non-state actors and their aspirations.
- At the legal level, this will require an honest and transparent understanding of what impact the evolution of peacekeeping has had on the traditional peacekeeping principles: consent,

impartiality, and use of force in self-defense under the legal framework—including, where applicable, IHL. It will also require a more diligent application of the human rights screening and human rights due diligence policy. Finally, a robust mindset also requires a clear grasp of the heightened risk of becoming a party to the conflict and, a clear appreciation that when IHL becomes applicable, the UN troops lose their protected status and become legitimate military targets.

While the UN Secretariat has acknowledged the fact that MONUSCO, United Nations peacekeeping mission in the Democratic Republic of Congo (DRC), has become a party to the conflict in the armed conflict in the DRC, the UNSC continues to penalize such attacks in its Chapter VII DRC sanctions regime. While this is within the prerogatives of the UNSC, it is nonetheless important to make it clearly explicitly clear to TCCs and their troops that such attacks are lawful under IHL. This is particularly necessary in light of the fact that the very resolutions imposing such sanctions explicitly call upon all the parties to respect IHL.

Again, there is nothing new in these eventualities since they are theoretically possible even in the context of sustained or intense hostilities in any and every peacekeeping mission with a military component. This can even arise in self-defense as may be the case with the efforts of MINUSMA, the UN peacekeeping mission in Mali, to prevent and respond to further attacks by terrorist and other armed groups in northern Mali. It may be said that certain terrorist or other armed groups will not hesitate to attack MINUSMA or civilians regardless of their protected status under IHL. It is nonetheless worth noting that, once MINUSMA engages these groups, even in self-defense, at a certain level of intensity or scale, it will likely be deemed to be a party to the conflict and therefore a lawful target not only in northern Mali but ostensibly throughout the territory of Mali. The IHL implications for MINUSMA and its mandate should be discussed and understood by all of its components.

Yet another issue arises from the operational perspective. If and when a UNPKO becomes a party to the conflict, the presence of UN peacekeepers could itself pose a clear and present threat to the very civilians they are meant to protect. The UN's military presence, while intended to deter, prevent, and protect civilians against imminent threats of physical violence would instead not only pose an inherent threat to civilians but would also potentially impede a UNPKO's ability to efficiently and effectively carry out other aspects of its mandate, including facilitating humanitarian assistance.

In this connection, it is important to mention the recently published Cruz report which, in accordance with its terms of reference, focuses exclusively on the safety and security of UN peacekeeping personnel. Within its limited scope, the Cruz report provides concrete and comprehensive recommendations to achieve better performing and more aggressive peacekeeping operations, including the need for more proactive and robust mindsets. In advocating for aggressive, as opposed to robust peacekeeping, however, the Cruz report may have gone too far. The Cruz report threatens to destroy whatever remains of a distinction between peacekeeping and peace enforcement. It pays insufficient attention to the implications of aggressive peacekeeping from the IHL perspective including the increasing likelihood of UN peacekeepers becoming parties to the conflict—as mentioned above in the case of MONUSCO and possibly MINUSMA. Second, while criminal accountability for attacks on UN peacekeepers is rightly addressed by the Cruz report, there is very little or no attention paid to accountability for crimes committed by the UN peacekeepers themselves.

In conclusion, we need robust peacekeeping—not aggressive peacekeeping. We have seen increasingly robust peacekeeping mandates; we have also seen more robust weapon systems and technologies being deployed. We now need more robust leaders and more robust

peacekeepers. To that end, the UNSC must adopt coherent and achievable country-specific mandates and must preserve the distinction between peacekeeping and peace enforcement entrusting the former to UNPKOs while reserving the latter to regional organizations or to individual states or coalitions thereof. The secretary-general must institute consistent and objective performance appraisal and performance accountability of UNPKO leadership. The UN and its TCCs must train and prepare their peacekeeping troops to be willing and able to exercise their full authority and to use all means necessary to fulfill their mandates in accordance with their rules of engagement and in compliance with UN policies and international law.

ROBUST PEACEKEEPING AND SELF-DEFENSE

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*By Bruce “Ossie” Oswald**

INTRODUCTION

In this Article I focus on the use of force in self-defense by United Nations peacekeepers that are members of military contingents. This is an important matter because the use of force in self-defense remains the foundation for the use of force in *all* United Nations peace operations—including aggressive or robust peacekeeping.

I need to be clear about some assumptions I am making in this Article. First, I am assuming that the Guidelines for the Development of Rules of Engagement (ROE) for United Nations Peacekeeping Operations, which was issued by the Department of Peacekeeping Operations (DPKO) on May 15, 2002, remain extant. Second, if that assumption is correct, then I assume that it remains, as stated in those Guidelines, that “[a]ny United Nations Guideline(s)/directive(s) in no way restricts an individual’s inherent right of self-defence.”¹

To put what follows into context let me outline why I think the doctrine of self-defense is relevant to so-called “robust United Nations peacekeeping operations.” When undertaking robust peacekeeping operations, the United Nations has stated that peacekeepers may use force “in self-defense and to execute their mandated tasks in appropriate situations.”² So, when undertaking robust peacekeeping operations there are two justifications for using force—the first is self-defense and the second is to execute their mandated task. I will focus only on the use of force in self-defense as it remains the foundation for the use of force in *all* United Nations peacekeeping operations.

THE PRACTICE OF UNITED NATIONS PEACEKEEPERS USING FORCE WITHIN PEACE OPERATIONS

The United Nations’ narrative of the non-use of force except in self-defense starts with the secretary-general’s report on the United Nations Emergency Force I (UNEF) in 1958 where he stated: “UNEF troops have the right to fire in self-defense. They are never to take the initiative in the use of

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¹ UN DPKO, Guidelines for the Development of Rules of Engagement (ROE) for United Nations Peacekeeping Operations, para. 8 (May 15, 2002) [hereinafter ROE Guidelines].

² Guidelines on the Use of Force by Military Components in United Nations Peacekeeping Operations, para. 6 (Feb. 1, 2017) [hereinafter Guidelines].