

The Role of the UN Peacekeeping in the Promotion and Protection of Human Rights

El papel del mantenimiento de la paz de las Naciones Unidas en la promoción y protección de los derechos humanos

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ABSTRACT: The objective of this essay is to explore the UN peacekeeping approach to human rights issues in light of the legal and political connection between promotion and protection of human rights and maintenance of international peace and security. To begin with, the evolution of peacekeeping vis-à-vis human rights will be examined from the first experiences of the UN missions in this field, mainly focused on the promotion of human rights, to the most recent ones where the protection of human rights is a fundamental component of their mandate. Then, the study will dwell on three aspects of human rights protection in UN peacekeeping that have become important in recent years, namely the cooperation with international justice to prosecute those having committed the most serious violations of human rights; the protection of civilian during crises; and the duty for peacekeeping itself to respect human rights during the accomplishment of its mission.

KEYWORDS: Promotion and Protection of Human Rights; International Criminal Court; Violations of Human Rights; UN Peacekeeping; international peace.

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RESUMEN: El objetivo de este ensayo es explorar el enfoque de las Naciones Unidas para el mantenimiento de la paz en cuestiones de derechos humanos a la luz de la conexión jurídica y política entre la promoción y protección de los derechos humanos y el mantenimiento de la paz y la seguridad internacionales. Para empezar, la evolución del mantenimiento de la paz en relación con los derechos humanos se examinará desde las primeras experiencias de las misiones de las Naciones Unidas en este campo, centradas principalmente en la promoción de los derechos humanos, a las más recientes donde se encuentra la protección de los derechos humanos. Después, el estudio se centrará en tres aspectos de la protección de los derechos humanos en el mantenimiento de la paz de las Naciones Unidas que se han vuelto importantes en los últimos años, a saber, la cooperación con la justicia internacional para procesar a quienes hayan cometido las violaciones más graves de los derechos humanos; la protección de los civiles durante las crisis; y el deber del mantenimiento de la paz en sí mismo de respetar los derechos humanos durante el cumplimiento de su misión.

PALABRAS CLAVE: promoción y protección de los derechos humanos; Corte Criminal Internacional; violaciones de los derechos humanos; mantenimiento de la paz de la ONU; paz internacional.

I. INTRODUCTION

Even though peacekeeping is not a new topic after seventy-one UN peacekeeping operations from 1948 to date,¹ it continues to stimulate reflections and analysis, focused on its capacity to react to crises of a complexity likely to threaten international peace and security. Reflections and analysis that often lead to operational modifications and adjustments of the peacekeeping's structure and organization.

The continuous interest on peacekeeping depends on a number of factors. It is worth mentioning just two of them. First, the fact that peacekeeping, despite its limitations, is still one of the most effective instrument for assisting States hosting peace missions in “navigating” the difficult path that leads from war to peace and stabilisation. Secondly, the necessity for peacekeeping to be dynamic; since its success is connected to the capacity by peace operations to reach the goals because of which they have been deployed in a certain crisis area; changes in the nature of crisis impose changes in peacekeeping.

Actually, contemporary crises are particularly complex albeit less numerous as in the past. The outbreaks of these crises are the result of a number of various factors such as incapacity to govern, the presence of various ethnic groups, corruption, poverty, humanitarian crises, organized criminality and terrorism. In some cases, crises are long lasting and characterized by subsequent phases of armed fights. In other cases, conflicts

¹ The first peacekeeping operation was decided by the UN Security Council with Resolution 50 (1948) to assist the mediator and the truce Commission for Palestine (UN Truce Supervision Organization – UNTSO). The mission is still on the field even if its goals have been modified. It nowadays complements, on the Golan Heights and at the borders between Israel and Lebanon, two more recent UN missions: the UN Disengagement Observer Force (UNDOF) and the UN Force in Lebanon (UNIFIL).

merely internal later on become regionalised or internationalised.

In all cases, the crises last several years and tend to cause a large number of victims especially among civilians. In particular, most conflicts broken out after the end of the bipolar world have been at the basis of humanitarian crises so that they not only have constituted a danger for international peace but have also provided the unfortunate context for the commission of massive and systematic violations of human rights.

The objective of this essay is to explore the UN peacekeeping approach to human rights issues in light of the legal and political connection between promotion and protection of human rights and maintenance of international peace and security. To begin with, the evolution of peacekeeping vis-à-vis human rights will be examined from the first experiences of the UN missions in this field, mainly focused on the promotion of human rights, to the most recent ones where the protection of human rights is a fundamental component of their mandate. Then, the study will dwell on three aspects of human rights protection in UN peacekeeping that have become important in recent years, namely the cooperation with international justice to prosecute those having committed the most serious violations of human rights; the protection of civilian during crises; and the duty for peacekeeping itself to respect human rights during the accomplishment of its mission.

II. EARLY UN PEACEKEEPING'S APPROACH TO HUMAN RIGHTS ISSUES

During the Cold War, the first-generation of UN peacekeeping –whose main function was that of freezing the conflict between two or more States typically in order not to prejudice a possible solution on the merits of the problems at the basis of the crisis–

had already mandates connected with human rights. However, the goal was not that of protecting human rights but rather that of promoting human rights following the overall UN approach aimed at bolstering legally and culturally human rights worldwide whose best example is given by the effort of codifying human rights starting from the Universal Declaration of Human Rights of 1948. Besides the first *considerandum* of the Declaration traces a clear link between recognition of human rights and international peace.²

In particular, reading the mandates of the first UN observers' missions and of the first UN peacekeeping operations, it emerges that their function was namely that of settling the conflict between the parties in order to establish fertile ground for the protection of human rights. However, the operations were devoid of any mean, which could permit their active intervention for the protection of human rights.³

At the beginning of the Nineties new models of peacekeeping were conceived, specifically the so-called multi-functional peacekeeping, which marks *inter alia* the passage from the promotion to the protection of human rights.

It is worth mentioning the mandate of ONUSAL, since the peacekeeping mission in El Salvador has been the first case where the protection of human rights has been included among the other more typical tasks of a peacekeeping mission.⁴ Specifically, Onusal, accordingly with UN Security Council Resolution 693(1991), was competent to verify the respect by both parties in conflict – the Govern-

² Preamble of the Declaration "Whereas recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world [...]"

³ CASOLARI, F., *Le operazioni di peacekeeping tra protezione e rispetto dei diritti umani*, 2009, at <<https://storicamente.org/casolari>>.

⁴ The mission completed its mandate in 1995.

ment and the FMLN (the opposition group *Frente Farabundo Martí para la Liberación Nacional*) – of the Agreement of San José on human rights of 1990. The latter calls the parties to protect several human rights (such as the right to life, right to integrity, freedom of expression freedom of association, freedom of movement, right to a fair trial, prohibition of torture and other cruel, inhuman or degrading treatment or punishment, labour rights, etc.) and provides for the establishment of a UN peacekeeping mission in El Salvador to investigate and verify human rights violations.⁵ To that end ONUSAL could carry on systematic investigatory procedure to gather objective evidence to corroborate the commission of human rights violations (the so-called active investigation).⁶ And

⁵ For the text of the Agreement see UNGA and UNSC Document A/44/971, 16 August 1990.

⁶ UNGA and UNSC Document A/47/912, 5 April 1993, para. 41. This process had to be “[...] carried out through a process comprising various phases: first, the receipt of complaints or the reporting of a violation on the Mission’s own initiative; second, the investigation or inquiry proper, which comprises a detailed follow-up of the facts, police and judicial investigations and the exercise of the Mission’s fact-finding powers; third, if the facts are corroborated and it is found that there was no violation of human rights, the case is closed, but if verification reveals the opposite, recommendations are made either for compensating the injury done or for rectifying the situation which gave rise to or facilitated the violation; fourth, throughout the process, active verification involves using the Mission’s good offices to contribute to the transparency and efficiency of police investigations, due process, safety of witnesses, etc., and its power of initiative to assist in overcoming existing situations of human rights violations” (para. 41). On ONUSAL see O’NEIL, S., *Rethinking the United Nation’s Role in Peacekeeping: Lessons from El Salvador*, in *Journal of Public and International Affairs*, 1999, 10, p. 144 *et seq.*; WHITFIELD, T., *The UN’s Role in Peace-building in El Salvador*, in STUDEMESTER, M.S. (ed.), *El Salvador. Implementation of the Peace Accords*, United States Institute for Peace, Washington, 2001, p. 33 *et seq.*; MARCHESI, A., *La protezione internazionale dei*

this active investigation was deemed to be an essential component of peace and democracy.⁷

Therefore, the core structure of the mission was the Human Rights Division, which verified the implementation of the Agreement of San José. In particular, it recorded facts, but also exercised good offices to assist Salvadorians to find a remedy to violations as well as cooperated with Salvadorian institutions to strengthen their ability to work in promoting human rights.

It is interesting to underline two characteristics of this first UN peacekeeping aimed at protecting human rights in a global process towards peace and national reconciliation. The first concerns the perspective of the UN intervention in protection of human rights. Most space is devoted to the active participation of the UN peacekeepers to cooperate in investigating human rights violations. The fight against impunity for massive violations of human rights was considered the core issue for an effective and long-lasting peace. In other terms for the first time in UN peacekeeping the idea has begun to mature that peace and reconciliation could not be reached by sacrificing the prosecution of human rights violations. For that reason, the Agreement of San José created also two bodies to fight against impunity for atrocities committed during the civil war.⁸

That approach is still followed by the UN peacekeeping even if through more refined means of cooperation and of repression of massive human rights violations.⁹

diritti umani. Nazioni Unite e organizzazioni regionali, Franco Angeli, Milan, 2011, at p. 159 *et seq.*; HOWARD, L.M., *United Nations Mission in El Salvador (ONUSAL)*, in KOOPS, J.A., THARDY, T., MACQUEEN, N., WILLIAMS, P.D. (eds.), *The Oxford Handbook of the United Nations Peacekeeping Operations*, Oxford University Press, Oxford, 2015, p. 294 *et seq.*

⁷ UNGA and UNSC Document A/47/912, cit., para. 9.

⁸ The Ad Hoc Commission on the Purification of Armed Forces and the Commission on the Truth.

⁹ See *infra*, para. 4.

The second characteristic concerns the role of Onusal in investigating on human rights violations. The mission's mandate did not contemplate the possibility for the Human Rights Division to substitute the internal authorities in investigation and verification of the commission of human rights violations but on the contrary, it was limited to assistance to the local authorities in accomplishing these activities. The mandate therefore was fully respectful of the principle of domestic jurisdiction enshrined in Article 2(7) of the UN Charter. In contemporary crisis, on the contrary, the threshold of the respect of domestic jurisdiction is often overcome because of the concerned State's inability to protect human rights effectively.¹⁰

Also the Comprehensive Cambodia Peace Agreement, signed in Paris in 1991, which ended the conflict in that country, provided for a UN mission (UNTAC – UN Transitional Authority in Cambodia)¹¹ wherein having, *inter alia*, the functions – during the transitional period – of “[...] fostering an environment in which respect for human rights shall be ensured, based on the provisions of annex 1, section E”.¹² In particular, accordingly with Annex 1, Section E, UNTAC was attributed the task of developing and implementing a programme of human rights education to promote respect for and understanding of human rights; to generally oversee human rights; to investigate on human rights complaints; and, where appropriate, to adopt corrective action.

With reference to UNTAC, it is possible to find most of the characteristics which were already present in ONUSAL; that is to say the combination between promotion of human rights and their protection, where the promotion looks to the future in or-

¹⁰ See *infra*, para. 3.

¹¹ UNTAC was established by UNSC Resolution 745 (1992) and it left Cambodia in 1993. On UNTAC see FINDLAY, T., *Cambodia. The Legacy and Lessons of UNTAC*, SIPRI Research Report No. 9, Oxford University Press, Oxford, 1995.

¹² Text at <<https://peacemaker.un.org/cambodiaparisagreement91>>.

der to build a democratic State respectful of the rule of law while the protection looks to the past, namely to guarantee accountability for the human rights violations committed during the civil war. Moreover, the monitoring and investigating on human rights violations were, also in the Cambodian case, intended as strictly connected with the final objective to reach a long-lasting national reconciliation.¹³

However a significant difference between ONUSAL and UNTAC –apart from the latter’s wider mandate (military matters, maintenance of the public order, organisation of free elections, infrastructure rehabilitation in the whole country and return and reintegration of refugees)– concerns the powers assigned to UNTAC. Because the civil war in Cambodia led to a complete breakdown of the State organisation, including the police and the judiciary, UNTAC was competent to exercise some sovereign functions temporary, pending the re-establishing of definitive public structures and that notwithstanding the fact that under the Paris Agreement, the Supreme National Council of Cambodia (SNC) was “the unique legitimate body and source of authority in which, throughout the transitional period, the sovereignty, independence and unity of Cambodia are enshrined”. The weaknesses of SNC determined at last the substitution of UNTAC in some of SNC’s functions and not a mere assistance with the subsequent going beyond the principle of domestic jurisdiction.

From these experiences the combination between peace and national reconciliation, on the one hand, and respect of human rights, on the other, has become a key element of UN peacekeeping so far. UN peacekeeping has also been reformed, starting from the analysis and recommendations reached in the UN Secretary-general Report “An Agenda for Peace” of 1992,¹⁴

¹³ Part. III of the Agreement.

¹⁴ *An Agenda for Peace: Preventive Diplomacy, Peace-making and Peace-keeping: Report of the Secretary-General*, United Nations, New York, Geneva, 1992.

to enable UN peacekeepers to play a much more active role in the protection of human rights. An example is given by the participation of human rights officers to the peacekeeping missions with the functions of “looking at the root causes of conflict and social inequalities; helping bridge between peace and security, development and humanitarian action; and ultimately, contributing to lasting peace and greater security for everyone.”¹⁵

Later on the well-known Brahimi Report, namely the Report of the Panel on United Nations Peace Operations of 2000 stresses again the need to protect human rights in order to achieve peace and reconciliation through peace-building missions. In particular it concludes that: “[...] peace-building includes [...] improving respect for human rights through the monitoring, education and investigation of past and existing abuses; providing technical assistance for democratic development (including electoral assistance and support for free media); and promoting conflict resolution and reconciliation techniques”¹⁶

In the Brahimi Report the binomial human rights and national reconciliation is fully developed and it is also linked to the implementation of the rule of law. As the UN Security Council commented on this point: “the biggest deterrent to violent conflict is addressing the root causes of conflict, including through the promotion of sustainable development and a democratic society based on a strong rule of law and civic institutions, including adherence to all human rights – civil, political, economic, social and cultural”¹⁷

In the same vein, the World Summit Outcome in 2005 elaborated in analogous terms that: “[...] development, peace, security and human rights are mutually reinforcing, that no State can best

¹⁵ UN HUMAN RIGHTS OFFICE OF THE HIGH COMMISSIONER, *Seventy Years of Peacekeeping and Human Rights*, at <https://www.ohchr.org/EN/NewsEvents/Pages/PeacekeepersDay.aspx>.

¹⁶ UNGA and UNSC Document A/55/305, 21 August 2000, para. 13.

¹⁷ UNSC Resolution 1327 (2000).

protect itself by acting entirely alone and that all States need an effective and efficient collective security system pursuant to the purposes and principles of the Charter”¹⁸

III. CONTEMPORARY UN PEACEKEEPING’S APPROACH TO HUMAN RIGHTS ISSUES

The protection of human rights has become the common denominator of any kind of peacekeeping operation and of all the various phases it involves. This is unfortunately due to the peculiar nature of modern crisis requiring the UN intervention. These are crises that develop in States in which the institutions are weak and/or there have been years of bad government and divisions within the population, minorities and ethnic groups. Such a context tends to foster violent radicalism, terrorism and organised crime, in a complex weave between combatants, terrorists and common criminals.

At the same time, the violence affects the civilian population often as victim of aggressive acts on the part of both rebel groups and government authorities. These crises grow over the course of the years, usually under the radar or on occasion, to then become radicalised in short times and in acute ways. For this reason, multi-national peacekeeping forces very often find themselves having to intervene when hostilities are still in progress, in the absence of a political agreement for their cessation or pacification, with the consequence that their actions are made more difficult, if not obstructed, by the parties in conflict, whether these be State or other forces.¹⁹ This is even truer for the fulfilment of the missions’ tasks in the field of human rights.

¹⁸ UNGA Resolution 60/1 (2005) (World Summit Outcome), para. 71.

¹⁹ *Report of the High-level Independent Panel on Peace Operation on uniting our strengths for peace: politics, partnership and people*, UNGA and UNSC Document A/70/95-S/2015/446, 17 June 2015.

Peace operations are thus called upon to promote and protect human rights, assist in the ascertainment of violations and develop protection programs. In effect, the long-term protection of human rights does not depend on the success of the peacekeeping operations in themselves, but above all on the subsequent actions to rebuild or create the administrative infrastructures and the judicial system, as well as to reach national reconciliation.²⁰

However, in performing their tasks in the field of human rights, peacekeeping role can be weakened, hampered or even impeded by the lack of a clear consent by the actors involved in the conflict. In particular, the consent could either extend or retract over time; or the consent expressed with full awareness on a specific plan might not subsequently encounter effective cooperation in the field to support the deployment or conduction of activities by the mission.²¹ Or even, it could happen that consent expressed in good faith and full knowledge of the facts by the central political and/or military authorities is not shared by the local authorities, above all if the Government is internally divided and has little control and direction at peripheral level. This happens in practice when crises develop in so-called 'failed States', where power has been seized by various different factions, most of which unreliable and perhaps made up of or sided by extremists and rooted organised crime. Generally, in such situations, a peacekeeping operation must be ready to deal with the partial absence of consent (in temporal and spatial terms) which makes extremely difficult if not dangerous the accomplishment of its function and therefore often requires military protection.

²⁰ *United Nations Peacekeeping Operations, Principles and Guidelines*, cit., p. 27.

²¹ *Workshop on the Fundamental Principles of UN Peacekeeping*, Stockholm, 26-28 September 2006, p. 2 ss. at <<http://www.challengesforum.org/Global/Reports/Seminar%20Reports/Saltsjobaden%202006/Summary%20o.f/420Seminar%20Draft%20Saltsjobaden%202006.pdf>>

In particularly violent crises, or crises characterised by recourse to military force, peacekeeping operations must always be characterized by impartiality even more that it is required in less troubled situations. Possible suspicions on the impartiality of peacekeeping could undermine the human rights related mandate and discouraging the victims to submit their claims as it has happened in the case of the UN peacekeeping operations in the Democratic Republic of Congo.²²

It is worth reminding that impartiality must not be confused with neutrality or with the need to treat all the parties in conflict equally when they consist of an aggressor and a victim. Impartiality instead means compliance with and observance of the principles of the UN Charter and international law.²³ As the Report of the High-Level Independent Panel on Peace of 2015 has pointed out, impartiality is measured in terms of the capacity of the peacekeepers to react to the actions of the various actors not in terms of who acted, but considering the nature of their actions. Impartiality also requires protection, always and in any case, of the civilian population, and promoting respect of human rights by all the actors. It also means that the search for political solutions must be respectful of the interests both of all social components and of the entire population.²⁴ However, the peacekeeping mandate must not be exercised with favouritism or to the detriment of either party. Nevertheless, impartiality cannot be used as a shield when one of the parties in conflict has violated international law, because in this way impartiality guarantees impunity and even the risk it could transform into complicity.

²² SERRENTINO, R., *The Role of Human Rights Officers in the Field*, in CARACCILO, I., MONTUORO, U. (eds.), *New Models of Peacekeeping: Security and Protection of Human Rights. The Role of the UN and Regional Organizations*, Giappichelli, Turin, 2018, p. 99 *et seq.*

²³ See the Brahimi Report, para 50.

²⁴ UNGA and UNSC Document A/70/95-S/2015/446, 17 June 2015, p. 46.

Human rights related mandates for UN peace operations have become more and more frequent in contemporary peacekeeping following three main lines of action: create a legal, political and social environment where human rights would be promoted and respected in the short and long term; to permit the population to claim their human rights; and to allow State to implement its human rights obligations while upholding the rule of law.

Human rights teams participate to peacekeeping, *inter alia*, in the Democratic Republic of Congo (MONUSCO) in Central African Republic (MINUSCA) in Mali (MINUSMA) in Darfur /UNAMID), in South Sudan (UNMISS), in Kosovo (UNMIK). Letting aside the different scenarios where these peace operations are deployed, what seems to be common in all of them is the strong focus on the fight against impunity and on consequent efforts to bring to justice perpetrators of grave violations of human rights. In other terms, if, on the one hand, the promotion and the protection of human rights appears to be the long-term and generic objective, on the other, to put an end to impunity appears to be a short-term necessity, as an unavoidable step in establishing the foundations for a new peaceful coexistence in the concerned State or area interested by the conflict.

Among the above mentioned peace operations, the protection of human rights has assumed particular relevance for MONUSCO because of the extremely difficult local environment characterised by widespread violations of human rights, and especially violence against children and women. Therefore, the mission's functions related to human rights have reached a wide articulation along the years.

Concerning the operative structure, it is worth recalling that the actual UN Joint Human Rights Office (UNJHRO) was created in 2008 by integrating the MONUSCO Human Rights Division (HRD) and the former Office of the UN High Commissioner for Human Rights in the Democratic Republic of Congo. Also the two respective mandates have been joined since they were not identical but rather complementary since one was focused on the fight

against impunity for human rights and humanitarian law violations and on the implementation of a transnational justice strategy while the other was more concerned on reinforcing national institutions engaged in human rights issues to ensure the respect of applicable international and regional treaties.²⁵

Concerning the objectives, the functions assigned to the UN Joint Human Rights Office are broad because of the widespread and systematic violations of human rights in the Democratic Republic of Congo. This is the reason why the UNJHRO has identified five categories of human rights violations and thus has created five Task Forces (TFs), each one focused on one of each priority areas, namely sexual and gender based violence; summary and arbitrary executions; arbitrary arrests and illegal detentions/disappearances; torture and deaths in detentions; violation of economic rights/illegal mining. At the same time programmes and funding to support victims and witnesses of human rights violations have been created. The gathering of evidence and the protection of witnesses are very difficult tasks, which are usually accomplished by NGOs and prosecutorial authorities while the UNJHRO intervenes in cases beyond the capacity of these organs.²⁶

Also in the mandates of MINUSCA and MINUSMA the fight against impunity for grave violations of human rights is considered as a core part of the peace processes along with a general promotion of human rights, international justice and the rule of law. Accordingly with the relevant UN Security Council Resolutions,²⁷ MINUSCA is competent to investigate and report on violations of international humanitarian law and on abuses and violations of

²⁵ UNSC Resolutions 1756 (2007), 1794 (2007), 1856 (2008) and 1906 (2009).

²⁶ J.N. CLARK, *UN Peacekeeping in the Democratic Republic of Congo: Reflections on MONUSCO and Its Contradictory Mandate*, in *Journal of International Peacekeeping*, 2001, 15, 3-4, p. 363 *et seq.*

²⁷ UNSC Resolutions 2149 (2014), para. 30 and 2217 (2015), paras. 32 and 33.

human rights with a specific focus on violations and abuses committed against children as well as violations committed against women throughout the Central African Republic, and to contribute to efforts to identify and prosecute perpetrators, and to prevent such violations and abuses, including through the deployment of human rights observers. At the same time the UN mission is called to support the International Commission of Inquiry and the implementation of its recommendations as well as to support and work with the Transitional Authorities to arrest and bring to justice those responsible for war crimes and crimes against humanity in the country, including through cooperation with States of the region and the International Criminal Court. The establishment in 2017 of a Special Criminal Court added another task to the UN mission, that of supporting the judicial activity of this new hybrid criminal tribunal. However, it remains to be seen if the creation of a new judicial authority in Central African Republic, which joins the International Criminal Court and the domestic ordinary courts, could allow a clear and effective investigative strategy or will weaken the prosecution of most graves crimes against human rights and consequently the monitoring and reporting activities by MINUSCO.²⁸

Concerning MINUSMA, its approach to the fight against impunity is multi-layered since it has established joint mechanisms with the Ministry of Justice and the Army Chief of staff to periodically review and respond to human rights violations; it has sustained the creation of the national Truth, Justice and Reconciliation Commission (TJRC) and has encouraged the development of associations and NGOs to defend victims' rights and to promote access to justice for survivors of conflict-related sexual violence.²⁹

²⁸ On this new Court, see P. LABUDA, *The Special Criminal Court in the Central African Republic*, in *Insights*, 2018, 22, at <<https://www.asil.org/insights/volume/22/issue/2/special-criminal-court-central-african-republic>>.

²⁹ UNSC Resolution 2100 (2013).

The experience from these three UN peacekeeping missions underlines how arduous can be the protection of human rights when hostilities are still on the way or in the absence of an ongoing peace process. Moreover, it is also not easy to respect the principles of human rights monitoring and investigation in missions engaged in political and military activities which require to adopt a whatever position vis-à-vis the parties in conflict. Evidently, the independence of the human rights related mandate should comply with the overall integrated approach of the mission.³⁰

IV. PEACEKEEPING AND THE FIGHT AGAINST MASSIVE VIOLATIONS OF HUMAN RIGHTS: THE COOPERATION WITH THE INTERNATIONAL CRIMINAL COURT

An important contribution to the fighting against impunity for human rights violations is given by the cooperation of the peacekeeping missions in the Democratic Republic of Congo, Ivory Coast, Mali and Central African Republic with the International Criminal Court in the field of collection of evidence and of bringing to justice those accused of having committed serious and widespread violations of human rights and international humanitarian law. The cooperation is established in four memorandum of understanding. The first is the Memorandum of Understanding with MONUSCO of 2005,³¹ followed by the Memorandum of

³⁰ GUIDOTTI, A., *Challenges for Human Rights Sections of UN Peacekeeping*, *Global Peace Operations Review*, 2016 at

<<https://peaceoperationsreview.org/thematic-essays/challenges-for-human-rights-sections-of-un-peace-operations/>>.

³¹ Memorandum of Understanding between the United Nations and the International Criminal Court concerning cooperation between the United Nations Organization Mission in the Democratic Republic of the Congo

Understanding with UNOCI of 2013. The third Memorandum of Understanding is concluded in 2014 with the UN Multidimensional Integrated Stabilization Mission in Mali (MINUSMA).³² Finally, the fourth Memorandum of Understanding is concluded with MINUSCA, and it is inspired on MINUSMA.³³

The legal basis of these Memoranda of Understanding is given, on the one hand, by the Negotiated Relationship Agreement (NRA) of 2004 between the United Nations and the International Criminal Court³⁴ and, on the other, by specific UN Security Council resolutions. To establish assistance and cooperation between UN peacekeeping and the International Criminal Court, simple recourse to the NRA is not sufficient being also necessary that the UN Security Council assigns this function to the peace operation. Indeed, the UN Security Council has never authorised direct, let alone exclusive, cooperation between peacekeeping operations and the International Criminal Court. The mandate for judicial assistance until now attributed to UN peace operations was never conceived to support directly the Court but the State or States involved in the crisis, and their commitments, *inter alia*, to assure to justice the perpetrators of serious and massive violations of human rights.

This approach, although open to criticism because it puts the role of the Court somewhat in the shade because conditional to States commitments to cooperate, is deemed to comply with the principle of consent of the territorial State typical of peacekee-

(MONUC) and the International Criminal Court, 1 UNTS 331, signed on 8 November 2005.

³² See *Best Practices Manual for United Nations – International Criminal Court Cooperation*, cit., p. 12.

³³ *Ibidem*, p. 12. Among these agreements, only that with Monusco has been published at <<https://treaties.un.org/doc/publication/unts/volume%202363/ii-1292.pdf>>.

³⁴ Text at <http://legal.un.org/ola/media/UN-ICC_Cooperation/UN-ICC%20Relationship%20Agreement.pdf>.

ping. It also corresponds to the merely subsidiary nature of the cooperation of international organisations with the Court.

In certain cases, in determining the mandate the Security Council has ambiguously avoided any reference to cooperation with the International Criminal Court. This is, for example, the case of Resolution 1565/2004, which requires MONUC only to: “[...] continue to cooperate with efforts to ensure that those responsible for serious violations of human rights and international humanitarian law are brought to justice, while working closely with the relevant agencies of the United Nations” (para. 5(g)). In more or less similar terms, this is also stated in UN Security Council Resolution 2000/2011, in which the UNOCI is called upon: “[...] to support national and international efforts to bring to justice perpetrators of grave violations of human rights and international humanitarian law in Côte d’Ivoire” (para. 12). Lastly, also in Resolution 2100/2013, the mandate of the MINUSMA is again conceived to support the transitional authorities of Mali in bringing to justice those responsible for war crimes and serious violation of international humanitarian law. In both these resolutions, the reference to the International Criminal Court can be inferred by the operational context, namely by the ICC pending investigations on the situations respectively in Côte d’Ivoire and Mali.³⁵ In other cases, the UN Security Council has explicitly mentioned the

³⁵ UNSC Resolutions 1565 (2004), para. 5(g) and 2100 (2013), para. 16(g). For comments on the cooperation between MONUSCO and the ICC see SWAAK-GOLDMAN, O., *Peacekeeping Operations and the International Criminal Court*, in G.L. BERUTO (ed.), *International Humanitarian Law, Human Rights and Peace Operations*, 31st Round Table on Current Problems of International Humanitarian Law, Sanremo, 4-6 September 2008 (International Institute of Humanitarian Law, 2009), p. 266; MELILLO, M., *Peace-keeping, Peace-building, Peace-Justice: The Contribution of UN PKOs to International Criminal Justice*, in *The ITPCM, International Commentary*, 2014, 36, p. 33 et seq. <http://www.itpcm.dirpolis.sssup.it/files/2014/07/COMMENTARY_PK_ISSUE_JULY_2014.pdf>; MILLS, K., *International Responses to Mass Atrocities in Africa. Respon-*

International Criminal Court; the MONUSCO and the MINUS-CA are assigned with a mandate aimed exclusively at supporting the territorial State, that is to say the Democratic Republic of Congo and the transitional authorities of the Central African Republic, and cooperation with the Court is considered as instrumental in achieving the objective of arresting and bringing to justice those responsible for war crimes and crimes against humanity in the countries.³⁶

Reading the Memorandum stipulated with the MONUSCO,³⁷ which is the only one accessible, it emerges first that the cooperation and assistance to the Court can only be enabled upon explicit request of the ICC Prosecutor, in the absence of which, evidently, peacekeeping forces cannot take any initiative, or if they carry on investigations which are somehow associated with their mandate, these activities will not have any juridical relevance for any subsequent judicial proceedings.

Secondly, in all cases in which the cooperation is not foreseen entirely internal to the MONUSCO (access to documents in possession of the mission, interrogation of its components, etc.) since it requires assistance in identifying witnesses and victims (art. 13), or interrogation of witnesses who are not part of the mission (art. 14), or assistance in safeguarding evidence (assistance in preservation of physical evidence) (art. 15), or, military support to the investigations (art. 9), it is always and without exception conditioned by the consent of the territorial State, and this consent must be in written form. From this it follows that the effectiveness of these activities depends on the will of the Democratic Republic of Congo to cooperate with the Court.

sibility to Protect, Prosecute, and Palliate, University of Pennsylvania Press, Philadelphia, 2015, pp. 125-127.

³⁶ UNSC Resolutions 2098/2013, para. 12(d) and 2149/2014, para. 30(f) (i).

³⁷ Text at <<https://treaties.un.org/doc/publication/unts/volume%202363/ii-1292.pdf>>.

This central role of the State hosting the peacekeeping forces is further strengthened in the event of measures, such as arrests, seizures and securing the crime scenes. In this event, the request for assistance must come from the Government and must be aimed at supporting the Government in its commitment to bringing perpetrators of war crimes and crime against humanitarian law to justice (art. 16).

Lastly, the Memorandum does not contain any stringent obligation of cooperation for MONUSCO; with reference to the various forms of cooperation, the agreement always uses the conditional verb “may” (articles 11-15) and when dealing with enforcement measures, article 16 contains a particularly singular provision according to which MONUSCO confirms its availability to “[...] give consideration, on a case-by-case basis, to requests from the Government to assist the Government [...]”. In other words, the mission enjoys a broad degree of discretion to comply with State requests, considering, *inter alia*, the need for security, operational priorities and the conformity of the request with the mandate assigned.³⁸

³⁸ See MELILLO, M., *Cooperation between the UN Peacekeeping Operation and the ICC in the Democratic Republic of the Congo*, in *Journal of International Criminal Justice*, 2013, 11, p. 763 *et seq.*, p. 768-769; BEKOU, O., *International Criminal Justice and Security*, in FOOTER, M.E., SCHMIDT, J., WHITE, N.D., DAVIES-BRIGHT, L. (eds.), *Security and International Law*, Hart Publishing, Oxford and Portland (Oregon), 2016, p. 93 *et seq.*, p. 112; CARACCILO, I., *Light and Shade of the Legal Framework on Cooperation between the ICC and Peacekeeping*, in CARACCILO, I., MONTUORO, U. (eds.), *New Models of Peacekeeping, Security and Protection of Human Rights. The Role of the UN and Regional Organizations*, Giappichelli, Turin, 2018, p. 147 *et seq.*

V. PEACEKEEPING AND THE PROTECTION OF CIVILIANS

The protection of human rights must also be defined, in the context of peacekeeping operations, in terms of international humanitarian law, namely as protection of the civil population from the violence of war. The very nature of internal armed conflict and the manner in which hostilities are conducted, often in the urban context, render the civilian population, and especially children, hard to distinguish and separable from the combatants. In contemporary conflicts, the scale of the phenomenon is particularly grave because frequently the civilian population is indistinctly victim of the same military violence used against the combatants or is subject to abuse of every kind, being considered as an instrument to defeat the moral of the enemy. Very often, the eradication of an ethnic or religious group is the ultimate aim of the conflict itself.

Unfortunately, the traumatic experiences, especially in Rwanda, in the former Yugoslavia, in Darfur and in the Democratic Republic of Congo, has demonstrated that often peacekeeping was unable to protect vulnerable civilians. This is due mainly to the fact that contemporary international crises requiring the UN intervention have become particularly changeable and develop in an International Community, which can be described as “degraded”.

In this kind of crises, the protection of civilians must be an inescapable commitment for the United Nations.³⁹ Over recent years the UN has concentrated much of its effort on bolstering the legal framework for the protection of human rights and civilian populations, in peacekeeping as well, through resolutions of the General Assembly, initiatives of the Secretary-general and the

³⁹ Report of the High-level independent Panel on Peace Operations, *cit.*, p. 48

organs delegated to develop and safeguard human rights, as well as through policies and guidelines, just as through the training of its military and civil personnel.⁴⁰ In particular, the UN Security Council has provided UN peacekeeping forces with a more robust mandate to protect civilians, which however not always has avoided their killings and wounding.⁴¹

Since there is a certain gap between the expectations of peacekeeping in terms of the protection of civilians and its effective capacity to meet said expectations, it would be productive to develop and further improve the capacities of the peacekeepers to this regard. On this question, the Report of the High-Level Independent Panel of 2015 offered a number of proposals, one of which appears particularly interesting being the inclusion of a clause in the agreement with the host State that establishes its primary responsibility in the protection of civilians and its obligation to respond to violations.

This clause does not intend to reduce the commitments of the UN, but rather to build awareness that the presence of peacekeepers does not exonerate the host State from its duty to respect humanitarian standards and that violations of these standards will result in legal consequences. At the same time, in practical terms without the effective involvement of the host State it is unlikely that the peace mission would be able, in total isolation, to assure the effective protection of the population.

Another suggestion of the Panel worthy of comment regards recourse to “weapon less” strategies to safeguard civilians, without undermine the peacekeepers capacity of responding, with any

⁴⁰ Report of the High-level independent Panel on Peace Operations, *cit.*, p. 36.

⁴¹ This was the case of UNMISS in South Sudan which was authorised by the UN Security Council to protect civilians under imminent threat of physical violence but failed to guarantee an effective protection for civilians (UNSC Resolution 1996, 2011, para. 3(b)).

available means, to any imminent threat to the population during a crisis.⁴²

Considering the fact that peacekeeping operations must be guided by a broad-reaching political strategy, this strategy should include the spreading of a culture of human rights and humanitarian law within the host State, and to assist it in creating an environment favourable to this purpose, through the appropriate and well-coordinated involvement of humanitarian organisations.

More recently, thirty-two States adopted the Kigali Principles, consisting in several pledges for reaching an effective protection of civilian in peace operations.⁴³ Among these pledges, it is worth mentioning the need to take action to protect civilians in the absence of an effective host government response or demonstrated willingness to carry out its responsibilities to protect civilians (pledge No. 9). This pledge reiterates the primary responsibility of the territorial State to protect civilian but also refers to a substitutive obligation for the United Nations in case of unwillingness or incapability to guarantee an effective protection. Interesting is also the pledge to take disciplinary action against the personnel if and when they fail to act to protect civilians when circumstances warrant such action (pledge No. 13). The same States eventually asked in 2018 the UN Secretary-general to continue to address the failures of UN peacekeeping in protecting civilians, in particular from the perspective of the peacekeepers' accountability.⁴⁴

⁴² *Ibidem*, p. 37.

⁴³ Joint Statement of 2 September 2015, text at <<http://www.globalr2p.org/media/files/kp-principles-1.pdf>>.

⁴⁴ WILLIMOTT, H., SHEERAN, S., *The Protection of Civilians Mandate in UN Peacekeeping Operations: Reconciling Protection Concepts and Practices*, in *International Review of the Red Cross*, 2012, 95, p. 517 *et seq.*; H. BOURGEOIS, *Failure to Protect Civilians in the Context of UN Peace Operations: A Question of Accountability?*, in *EJIL Talk!*, September 5, 2018, at <<https://www.ejiltalk.org/failure-to-protect-civilians-in-the-context-of-un-peace-operations-a-question-of-accountability/>>.

The reiterate insistence on this issue underlines that it is not easy to find the legal basis in international law to oblige the UN peacekeeping operations to protect civilians. The issue raises difficulty also because it is strictly linked with that of the use of armed force in peacekeeping.

On this point there is often little clarity as to which circumstances and at what level the peacekeepers can make use of armed force. This in addition to the legal premise that the use of force above and beyond the legitimate defence of the peacekeepers must be provided for in the operations' mandate conferred by the UN Security Council, which if possible, also indicates the purposes for which force may be used. Consequently, the UN Security Council silence on this point gives rise to doubts about whether the use of force is lawful or not.⁴⁵

The question of the use of force by the peacekeepers is often made more complex by its connection with the concept of the peacekeepers' self-defence. The confusion between the two matters is caused by the fact that the notion of use of force is open to flexible interpretation, as including not only the protection of the peacekeepers but also that of their mandate. It is evident that the determination of the level of force necessary to protect the mandate is particularly variable. In spite of all this, the contemporary concept of the defence of the peacekeepers cannot exclude defence of the mandate itself and of the civilian population, The United Nations has no enemies, hence the force it deploys is by nature always defensive and "protective", and never used as an instrument of retaliation.

When recourse to force is necessary to protect the peacekeepers and their mandate or to defend the civilian population, this must be calibrated and conform to the rules of engagement,

⁴⁵ University Of Essex, School Of Law, United Nations Peacekeeping Law Reform Project. *Briefing paper 1, Contemporary issues in UN Peacekeeping and International Law*, September 2010, p. 4 *et seq.*

human rights law and international humanitarian law.⁴⁶ In other words, it is always necessary to apply the minimum force necessary to achieve the desired effect. The objective is not that of defeating the opposition to the mission, but of containing it effectively such that the contingents involved in the peacekeeping operations are never forced to yield to the actions by their attackers.⁴⁷ If the peace-enforcement operations are exceptional, limited in time and have a specific, well-detailed mission defined in the founding declarations, in the rules of engagement and in the specific guidelines for both the military forces and the police officers of the participating States, there is no intrinsic or insurmountable incompatibility between recourse to force to neutralise certain risks, on one hand, and the impartiality of the mission and principles of consent, on the other.

VI. THE PEACEKEEPERS' RESPECT OF HUMAN RIGHTS

However, the protection of human rights lies also on the circumstance that in performing their missions, peacekeepers adhere to the mandate and to the rules of engagement, and not commit any offence or crime. They must above all act according to binding humanitarian standards in their interactions with the civilian population. They should always be capable of demonstrating their leadership while working to preserve the legitimation and trust the victims of conflicts show toward them.

⁴⁶ UNITED NATIONS, *United Nations Peacekeeping Operations, Principles and Guidelines*, UN, New York, 2008, p. 31 *et seq.* at <http://www.un.org/en/peacekeeping/documents/capstone_eng.pdf>; United Nations, Department of Peacekeeping Operations, *The Protection of Civilians in the UN Peacekeeping*, 2015.07 at <http://providingforpeacekeeping.org/wp-content/uploads/2017/08/2015-07-Policy-on-PoC-in-Peacekeeping-Operations.pdf>.

⁴⁷ *Workshop on the Fundamental Principles of UN Peacekeeping*, cit., p. 5.

This demands that peacekeepers have access to high-level, specific training, whether they are military or civilian. Even in times in which recruiting the military components of the peacekeeping force is not an easy task, the benchmark for the level of their commitment and training must never be lowered. In particular, peacekeepers must be given specific training; this does not mean combat training, because participation in a peace mission requires a different psychological approach to that required in battle; the shift from an antagonistic role to a pacifying one; from confrontation to interposition between two or more belligerent parties.

If the training of peacekeepers, whether military, police or civilian, forms the basis for the credibility of a peace mission, the success of the mission must equally be assured through effective and transparent mechanisms in situations where the peacekeepers commit offences, as was unfortunately the case for a number of military components of the MINUSCA mission in the Central African Republic in 2015.

The problem presents numerous delicate points in terms of international law. First that of the attribution of responsibility to the United Nations (or the regional organisation having deployed a peace operation) for offences committed by peacekeepers. Actually, the effective control approach, clarified by the International Law Commission in the Draft Articles on the Responsibility of International Organisations in 2011,⁴⁸ does not always provide unquestionable results, and is often difficult to apply to peace missions involving different actors and structures likely to change over time.⁴⁹

Secondly, ascertaining the parallel responsibility of the States for the actions of their military personnel or police engaged in a

⁴⁸ Text in <[http.-/1/egal.un.org/ilcltextslinstruments/english/draft_articles/9_11_2011.pdf](http://1/egal.un.org/ilcltextslinstruments/english/draft_articles/9_11_2011.pdf)>.

⁴⁹ University Of Essex, School Of Law, United Nations Peacekeeping Law Reform Project, *Briefing Paper #1, Contemporary Issues in UN Peacekeeping and International Law*, cit., p. 7.

peace mission is not an easy task either.⁵⁰ This leads to the risk of situations of impunity, also because of the applicability of the regime of immunity, prejudicial to the reliability and credibility of the peacekeeping itself.

It is true that the UN Secretary-general can waive this immunity, but it is also true that this very rarely happens. It is equally true that the contributing State is fully entitled to judge its personnel, but all too often the criminal proceedings are not strictly and seriously conducted, with the consequence that convictions are rarely achieved or the sentences are extremely bland.⁵¹

The clear, decisive pages of the Report by the High-Level Independent Panel on the question demonstrate how the problem of the peacekeepers' respect of human rights is still open. However, many of the proposals of the Panel seem to be highly commendable, among which the establishment by the UN Secretary-general of sanctions and other administrative measures against the personnel responsible for offences, sexual violence in particular, which could include dismissal and repatriation of the personnel without any possibility of working for the United Nations ever again, the suspension of health care or insurance coverage, or the suspension of payments due to the contributing State for the duration of the investigations. Naturally, these are measures that cannot replace the duty of each contributing State to proceed rapidly and vigorously to investigate and prosecute – in accordance with

⁵⁰ E.g. HASANBASIC, J., *Liability in Peacekeeping Missions: A Civil Cause of Action for the Mothers of Srebrenica Against the Dutch Government and the United Nations*, in *Emory International Law Review*, 2014, 29, p. 415 *et seq.*

⁵¹ MARIGO, M., *Le futur des opérations de paix de l'ONU: les recommandations du Haut Panel Indépendant*, 2015, at <<http://www.operationspaix.net/95-dossier-du-rop-le-futur-des-operations-de-paix-de-l-onu-les-recommandations-du-haut-panel-independant.html>>. ODELLO, M., *Between Immunity and Impunity: Peacekeeping and Sexual Abuses and Violence*, in *The International Journal of Human Rights*, 2016, 20, 6, p. 839 *et seq.*

the principle of due process – every offence against human rights allegedly committed by their personnel.⁵²

VII. CONCLUSION

The incorporation of human rights in UN peacekeeping operations has become a usual component of their mandate even if under the different and variable perspectives above mentioned, which include from the promotion of human rights to the protection of civilians during crises also through the recourse of armed force by peacekeepers. The complexity of crises does not allow predetermining a model mandate or model mechanism for the protection of human rights. It is evident that in such a context, peacekeeping operations in general and vis-à-vis human rights must be constructed *ad hoc* in political, military and technical terms and not on the basis of a pre-established pattern, as has often been the case in the past.

Nevertheless, the human rights related mandate could not be anything else but defined clearly, precisely and without ambiguity. Since individual security is at the basis for national security, which is in turn necessary for international security, the strategic importance of respecting human rights is self-evident: no conflict can be prevented and no peace can be long lasting if human rights violation are not prevented or repressed.

⁵² Report of the High-level independent Panel on Peace Operations, cit., p. 85. On this topic, see, *inter alia*, MILLER, A.J., *Legal Aspects of Stopping Sexual Exploitation and Abuse in U.N. Peacekeeping Operations*, in *Cornell International Law Journal*, 2006, 39, p. 71 *et seq.*; UDDIN, M.K., *Human rights Violations by UN Peacekeepers: An End to Impunity*, in *Security and Human Rights*, 2014, 25, p. 130 *et seq.*; ANGIOI, S., *Sexual exploitation and abuse nel peace-keeping delle Nazioni Unite: analisi della strategia di contrasto tra prevenzione e repressione degli illeciti*, in *Archivio penale*, 2018, 2, p. 1 *et seq.*

