

**INTERNATIONAL HUMANITARIAN LAW
HUMAN RIGHTS AND PEACE OPERATIONS**

**INTERNATIONAL INSTITUTE OF HUMANITARIAN LAW
INSTITUT INTERNATIONALE DE DROIT HUMANITAIRE
ISTITUTO INTERNAZIONALE DI DIRITTO UMANITARIO**



In collaboration with the International Committee of the Red Cross

**INTERNATIONAL HUMANITARIAN LAW
HUMAN RIGHTS AND PEACE OPERATIONS**

Edited by
Dr. Gian Luca Beruto

31st Round Table on
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- PROCEEDINGS -

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PREFACE

For thirty-one years now, the International Institute of Humanitarian Law has devoted its annual Round Table to current problems of international humanitarian law.

The subject chosen this year, "International Humanitarian Law, Human Rights and Peace Operations", is a topic of particular relevance and importance on the international agenda.

The rule of law is a key element of modern "peace operations". This term encompasses a broad range of different missions, (peace enforcement, peacekeeping, peacebuilding, peace support, etc), in which a plurality of actors are involved such as States, international organisations, "coalitions of the willing", and non-governmental organisations. It is, therefore, crucial to re-affirm the complementarity of international humanitarian law and human rights, the better to clarify the modalities of the interaction of different legal regimes and to reach an understanding on the applicability of new concepts, such as the doctrine of "the responsibility to protect".

Over the years, the Sanremo September Round Tables have evolved from a small academic gathering into a large international forum where government leaders, military commanders, scholars and members of civil society can exchange ideas, in an informal framework and constructive atmosphere, on new challenges concerning international humanitarian law and human rights.

In 2008 more than 400 people attended the meeting. The debate contributed to highlighting a number of sensitive issues, including the problems of preventing and reporting violations, of accountability, detention policies and the role and responsibilities of non-state actors.

I am confident that the publication of the complete proceedings will help to underscore the increasing importance of the promotion and enforcement of international humanitarian law and human rights in a rapidly changing security environment.

The President of the International Institute of Humanitarian Law
Maurizio Moreno

OPENING SESSION

OPENING ADDRESS

Maurizio MORENO
Presidente, Istituto Internazionale di Diritto Umanitario

E' per me un onore e un privilegio dare un caldo benvenuto, a nome dell'Istituto Internazionale di Diritto Umanitario (IIDU), a tutti i partecipanti a questa Tavola Rotonda, giunta alla sua 31a edizione. I lavori - secondo il programma messo a punto con tanta competenza e cura dai due Coordinatori, Michel Veuthey e Tristan Ferraro - affronteranno un tema di grande rilevanza e attualità: quello dell'applicazione e del rispetto del diritto internazionale umanitario e dei diritti dell'uomo nelle operazioni di pace, che ha fatto di recente oggetto di approfondimento nel corso di un seminario promosso a Roma dallo stesso Istituto, con la collaborazione di due prestigiosi centri di studio e di ricerca, il CASD e la SIOI.

Oltre 400 sono le personalità e gli esperti che hanno aderito al nostro invito.

Attraverso gli anni la Tavola Rotonda di Sanremo è andata trasformandosi da occasione di riflessione tra un ristretto numero di giuristi ed addetti ai lavori, in un ampio foro di dibattito delle principali tematiche concernenti il diritto umanitario e i diritti dell'uomo, con la partecipazione di autorità politiche, rappresentanti di istituzioni internazionali, di organizzazioni non governative e del mondo accademico provenienti da tutto il mondo.

In questa occasione il compito di introdurre le discussioni è stato affidato non soltanto ad esperti di chiara fama, ma anche ad esponenti del mondo diplomatico e militare, nonché della società civile, aventi una diretta esperienza degli interventi che la comunità internazionale è chiamata con crescente frequenza a porre in essere in situazioni di conflittualità e di crisi per molti versi inedite ed atipiche.

L'Istituto è vivamente grato al Presidente della Repubblica, l'Onorevole Giorgio Napolitano per il suo caloroso messaggio augurale.

Come di consueto l'organizzazione della Tavola Rotonda è stata resa possibile dal tradizionale sostegno del Comitato Internazionale della Croce Rossa, il cui Presidente Dr. Jakob Kellenberger terrà a momenti l'allocuzione introduttiva della sostanza dei lavori.

Sono lieto di segnalare altresì il contributo di altre Organizzazioni internazionali, a cominciare dall'Unione Europea e dalla NATO, che si aggiunge a quello di diversi Governi che da tempo non fanno mancare il loro appoggio alle nostre attività.

Un particolare ringraziamento vorrei rivolgere a tutti gli oratori che intervengono stamane: l'On. Stefania Craxi, Sottosegretario di Stato agli

Esteri; l' Avv. Marco Andracco, Vice Sindaco di Sanremo; il Generale Vincenzo Camporini, Capo di Stato Maggiore della Difesa; l'Ambasciatore Claudio Bisogniero, Segretario Generale Delegato della NATO; l'Ambasciatore Raimund Kunz, Capo della Direzione per la Politica di Sicurezza e della Confederazione Elvetica; l'On. Pier Virgilio Dastoli, Direttore della Rappresentanza in Italia della Commissione Europea; il Dr. Christopher Lamb, Consigliere speciale per le Relazioni Internazionali, Federazione Internazionale delle Società di Croce Rossa e Mezzaluna Rossa; il Dr. Massimo Barra, Presidente della CRI. E naturalmente ai moderatori, ai relatori e a tutti coloro che apporteranno al dibattito il loro contributo di idee.

La più viva gratitudine dell'Istituto va al Comune di Sanremo, il cui generoso appoggio si rivela essenziale per la sua stessa sussistenza. Sanremo, crocevia nei secoli di incontri e di scambi internazionali, attraverso il sostegno all'Istituto ben interpreta la propria vocazione di "Città della Pace".

Tra i numerosi messaggi ricevuti desidero citare quelli del Segretario del Pontificio Consiglio della Giustizia e della Pace, S.E. Mons. Crepaldi, del Principe Alberto di Monaco, del Gran Cancelliere dello SMOM, S.E. Mazery.

I corsi, i seminari, i convegni promossi dall'Istituto forniscono ogni anno l'occasione a migliaia di persone di diversa origine e provenienza per dialogare in quello che è ormai noto come lo "spirito di Sanremo" su tematiche che toccano il rispetto della dignità dell'uomo, la protezione delle vittime dei conflitti, la riaffermazione dei valori essenziali della pace.

Le monde change à un rythme, à une rapidité sans précédent. L'environnement dans lequel nous avons évolué pendant des siècles est brutalement remis en cause par la mondialisation.

La fin de la guerre froide, le démantèlement des blocs, ont modifié les équilibres de force, sans pour autant apaiser les tensions.

La société se transforme, dans un cadre dont les contours sont délimités tour à tour par des nouveaux défis redoutables: la démographie, les changements climatiques, les affrontements ethniques et religieux, les migrations de masse, la crise des valeurs et des idéologies, voire le terrorisme international.

La guerre - un mal connu, mais qui répondait à des règles et des principes universels codifiés, qui trouvait sa raison et son but ultime dans l'acquisition de la paix «*si vis pacem para bellum*», disaient les Latins - se manifeste aujourd'hui sous de nouvelles formes cruelles et effarées, dont les conséquences tragiques sont de plus en plus supportées par des

populations innocentes.

Nous assistons aujourd'hui au bouleversement à la fois des raisons, des stratégies et objectifs de la guerre. La lutte contre le terrorisme, l'emploi de nouvelles armes, la multiplication des acteurs, ont contribué à modifier profondément les caractéristiques conventionnelles des hostilités. De la guerre froide - qui n'a pas été une vraie guerre - nous nous trouvons projetés vers de nouvelles méthodes de lutte, non seulement physiques, aux effets dramatiques et sanglants.

Dans ce contexte largement inédit et aux facettes multiples, il est impératif de préserver les acquis du droit international humanitaire, de réagir contre ses violations, de mieux percevoir l'étroite relation qui existe entre le droit des conflits armés et les droits de l'homme, d'établir d'une façon claire et convaincante comment des règles conçues à l'origine pour les guerres entre États sont appelées à opérer dans des circonstances où nécessités militaires et humanitaires se confondent, dans des situations qui ne sont plus de guerre, mais pas encore de paix.

Voilà le thème de la Table Ronde d'aujourd'hui, qui essayera de répondre à un certain nombre d'interrogations pressantes ayant trait au respect du droit international humanitaire et des droits de l'homme - droits civils et politiques, mais aussi économiques, sociaux et culturels - dans des opérations qui ont de plus en plus un caractère intégré. Parmi les questions abordées: celle de l'interaction des différents cadres juridiques, celle des relations sur le terrain entre forces militaires et organisations humanitaires, celle de la pertinence du droit d'occupation, de la mise en œuvre du concept de «responsabilité de protéger», celle des sanctions.

Mais l'agenda de la Table Ronde n'entend exclure à priori aucun sujet. D'autres thèmes pourront être soulevés : je pense, par exemple, à la question de la protection des biens culturels, à laquelle l'Institut a l'intention de réserver un séminaire spécifique très prochainement.

Les destructions de Mostar, de Sarajevo, de Bagdad, de Bamiyan ne sauraient être oubliées. Les biens et les sites culturels, qui appartiennent au patrimoine universel de l'humanité font l'objet d'un protocole ad hoc, le Protocole de 1999 dont il est urgent d'assurer la pleine application.

The main objective of Sanremo's annual Round Table is to promote a better understanding and a more effective enforcement of the fundamental principles and norms of international humanitarian law. By definition, international law cannot be considered perfect and should not be taken as static. The main problems do not originate from alleged deficiencies, ambiguities, or grey areas of the current legal framework: more often problems come from the lack of political will, ignorance of obligations and deliberate violations by States, armed groups or

individuals involved in military operations.

The treacherous attacks on civilians, campaigns of ethnic cleansing, indiscriminate destruction, sexual abuse and other atrocities we have been witnessing recently in different areas of the world cannot be considered the result of gaps or shortcomings of existing law. They are serious breaches of binding rules that demand far more effective mechanisms of monitoring and sanctioning.

Our mission is not a watchdog mission. The Institute's core business is education, training and research. But our widely-acknowledged expertise allows us to address new challenges on neutral and objective grounds, to contribute constructively to the international debate, to raise questions and concerns, to offer a major contribution to education and research.

In two year's time, the Sanremo Institute, an independent, non-profit organisation, with a solid international reputation, will celebrate its 40th anniversary, forty years of intensive work, of dynamic commitment to the cause of the promotion of international humanitarian law and related disciplines.

It was a great honour for me to be called – just one year ago – to the presidency of this unique Institution. I feel it is my duty to pay tribute to the vision of its founders: one of them, Ugo Genesio, former Secretary-General, is here with us today, and to the leadership of the past Presidents, my predecessors, the last one being Professor Patrignic, who passed away last year

The new Council, benefiting from the skills of a number of highly-qualified experts and personalities from different countries, is actively engaged in the reform of the activities of the Institute. The Institute is fully conscious of its role, its responsibilities, its potential and its limits.

In a rapidly-changing world dominated by information technology we should not be afraid of innovation and change. An Advisory Board, chaired by Brigadier General Erwin Dahinden, has almost finalised the guidelines for the review of the programmes of military courses.

The increasing interaction in crisis areas of different legal frameworks has led us to pay more attention to refugee law and migration law. In December we hope to be able to organize a major round table on current problems of migration law.

So far, ten thousands people from different parts of the world have benefited from our courses and have taken home lessons learnt in Sanremo.

Our vision encompasses a commitment to developing partnerships with relevant international institutions and to promoting dialogue with governments and non-governmental organisations in order to move the

issue of the respect of international humanitarian law higher up on the international agenda. In reviewing its objectives and its capacities, the Institute remains strongly attached to its independence and is increasing its efforts to be financially viable and results-oriented.

In welcoming you all to Sanremo I am confident that the Round Table will bring an important added value to the debate on current issues of international humanitarian law and to its enforcement in international peace operations.

WELCOME ADDRESSES

Stefania CRAXI
Sottosegretario di Stato agli Affari Esteri, Italia

Sono lieta di porgere i saluti del Governo italiano a coloro che prendono parte, animandola con le proprie riflessioni, all'annuale Tavola Rotonda dell'Istituto Internazionale di Diritto Umanitario di Sanremo; agli organizzatori di questo importante incontro; a quanti in platea ne seguono con interesse i lavori.

Il Ministero degli Affari Esteri non ha mai mancato di testimoniare l'importanza che il nostro paese attribuisce al diritto internazionale umanitario, per la sua rilevanza nell'agenda internazionale.

La lieta partecipazione della Farnesina alle attività dell'Istituto di Sanremo è sinonimo di un importante riconoscimento nei confronti di un Ente da decenni impegnato in un lavoro encomiabile: quello di contribuire alla salvaguardia e alla diffusione dei diritti fondamentali dell'uomo mediante la promozione, lo sviluppo e l'applicazione del Diritto Internazionale Umanitario, dei Diritti Umani e dei Diritti dei Rifugiati.

Il tradizionale appuntamento sanremese assume quest'anno un significato particolare, essendo il primo organizzato sotto la guida dell'Ambasciatore Maurizio Moreno, cui vanno tutto l'apprezzamento e i migliori auguri del Ministero degli Affari Esteri, nella convinzione che egli saprà rilanciare l'Istituto Internazionale di Diritto Umanitario incrementandone al contempo il prestigio, attraverso un'opera di costante modernizzazione e con la realizzazione di iniziative di rilievo, come del resto testimonia il calibro dei relatori presenti alla stessa Tavola Rotonda.

Il Ministero degli Esteri sostiene da sempre le attività e le iniziative dell'Istituto di Sanremo: esso è infatti per il nostro Paese un punto di riferimento scientifico ed accademico di fondamentale importanza, in un momento in cui le tematiche sulle quali rivolgere la propria riflessione sono di sempre maggiore attualità e complessità. Basti pensare alle nuove forme che prendono oggi i conflitti e le minacce alla pace, ed alle conseguenti relazioni con diritto internazionale umanitario e diritto internazionale dei diritti umani.

Gli argomenti su cui si discuterà in questa Tavola Rotonda (il mantenimento della sicurezza internazionale, la condotta delle operazioni di pace, nel pieno rispetto del diritto umanitario e dei diritti umani) costituiscono una linea fondamentale della politica estera italiana.

Ancora oggi, purtroppo, le popolazioni civili sono le principali vittime dei conflitti, nonostante l'impegno crescente profuso dalla comunità internazionale per garantirne la protezione, sia negli organi politici che a livello operativo, sul terreno. Ban Ki-Moon, Segretario

Generale dell' ONU, richiamando l'attenzione su quella che egli ha definito la "*protection agenda*", ha segnalato quali elementi critici: l'erosione della distinzione fra combattenti e popolazione civile; il criterio della proporzionalità nelle azioni militari; la difficoltà di accesso degli operatori umanitari. Ed ancora, le violenze a carattere sessuale; l'utilizzo di armi come le munizioni a grappolo, che saranno messe al bando dalla Convenzione internazionale che sarà firmata ad Oslo all'inizio di dicembre.

L'Italia è sempre stata sensibile a questo appello: l'aumento e la crescente complessità delle operazioni di pace ripropongono l'esigenza della migliore tutela per le popolazioni civili.

Esigenza del tutto prioritaria, soprattutto dopo l'impotenza di cui ha sofferto la comunità internazionale nel corso degli anni Novanta, con le tragedie verificatesi nella ex Jugoslavia, in Ruanda, in Somalia.

Il nostro Paese si giova di proficui rapporti con le Società del Movimento della Croce Rossa e della Mezzaluna Rossa. L'autorevole presenza del presidente Kellenberger mi consente di sottolineare, in particolare, il legame e la completa sintonia con il Comitato Internazionale della Croce Rossa, alle cui riflessioni l'Italia partecipa con spirito di costruttiva collaborazione sui vari aspetti di applicazione del diritto internazionale umanitario. Il nostro paese ha recentemente destinato un considerevole numero di risorse al settore umanitario, incrementando in modo sensibile i contributi alle organizzazioni competenti.

D'altra parte, nelle decisioni che il Governo italiano ha preso negli ultimi anni, di partecipare, e spesso guidare, operazioni di pace, la tutela e l'attenzione per le popolazioni civili, ha sempre occupato una posizione centrale.

Ritengo dunque doveroso sottolineare le implicazioni umanitarie delle nostre operazioni militari. Nell'espletamento del proprio mandato di sicurezza e stabilizzazione, le diverse missioni NATO - dal teatro afgano a quello balcanico - agiscono nel pieno rispetto delle convenzioni internazionali sui conflitti armati. L'utilizzo della forza nell'espletamento del mandato, nonché le politiche in materia di detenzione cui la NATO si attiene soprattutto in Afghanistan, sono tutti aspetti di estrema importanza per le nostre discussioni: sono certa che gli autorevoli relatori di oggi potranno esaminare dettagliatamente le caratteristiche e le principali implicazioni.

Le stesse fondamentali preoccupazioni umanitarie informano altresì il mandato delle missioni alle quali partecipiamo nel quadro della Politica Europea di Sicurezza e di Difesa. A cominciare da quella in Bosnia, che contribuisce ad assicurare un quadro di stabilità necessario per la progressiva integrazione europea di quel Paese, e quella in Ciad e

Repubblica Centrafricana, che ha l'obiettivo di garantire la sicurezza dei rifugiati giunti in quelle zone a seguito della crisi del Darfur.

La pace è un investimento di lungo termine e richiede uno sforzo, un senso di responsabilità, un impegno ad ampio raggio da parte della comunità internazionale.

L'Italia cerca di farsi interprete, sullo scenario internazionale, di una tendenza che mira al consolidamento della pace piuttosto che al solo suo preservamento, come avvenuto diverse volte in passato. L'obiettivo è quello di assicurare lo sviluppo di Stati democratici, rispettosi dello stato di diritto e dei diritti umani, espressione questi ultimi della più alta civiltà immaginata dall'uomo moderno.

In questo contesto, è da segnalare la crescita nel settore del peacekeeping registrata in ambito ONU negli ultimi anni. Attualmente, sono in corso venti missioni di pace con oltre 80.000 unità dispiegate: il nostro è uno dei primi paesi fornitori di truppe, il primo fra quelli occidentali.

Le missioni di pace che si svolgono sotto l'egida dell'ONU sono mutate anche qualitativamente: sempre più i Caschi Blu sono chiamati a svolgere attività che vanno al di là della sola interposizione tra le parti; essi contribuiscono alla stabilizzazione dei paesi che escono dai conflitti, fornendo ad esempio assistenza nella riforma del settore della sicurezza, garantendo la regolarità delle consultazioni elettorali, collaborando al monitoraggio dei diritti umani. La dimensione umanitaria delle operazioni di pace ne esce significativamente rafforzata.

Anche in ambito G8 non mancano le novità importanti. Nel 2004 è stato sottoscritto un Piano d'Azione per l'espansione delle capacità globali delle forze di pace, cui l'Italia ha tutta l'intenzione di dare particolare rilevanza in vista dell'assunzione nel 2009, della stessa presidenza del G8.

Sempre in tale contesto, è nostra intenzione valorizzare il ruolo del Centro di Eccellenza per le Stability Police Units di Vicenza, un complesso gestito dai Carabinieri con contributo statunitense, che di qui al 2010 mira a formare 7.500 unità di polizia rafforzata da dislocare in zone post-conflitto, tra cui il Darfur.

Il mantenimento della pace e della sicurezza internazionale è l'obiettivo primario di ogni Paese democratico. Obiettivo inestricabilmente legato all'applicazione del diritto internazionale umanitario e del diritto internazionale dei diritti umani.

Con questo spirito, e partendo da una simile consapevolezza, ascolterò con grande interesse gli interventi odierni, sicura che essi costituiranno una fonte preziosa di approfondimento ed uno strumento utilissimo per i policy-maker chiamati ad affrontare realtà sempre più complesse.

Formulo a Voi tutti i migliori auguri per un proficuo svolgimento dei lavori.

Marco ANDRACCO
Vice Sindaco, Sanremo

Sono particolarmente onorato di portare il saluto del Sindaco Claudio Borea - attualmente in missione all'estero - di tutta l'Amministrazione Comunale e della cittadinanza di Sanremo in occasione della Tavola Rotonda organizzata dall'Istituto Internazionale di Diritto Umanitario in collaborazione con il Comitato Internazionale della Croce Rossa.

Il mio saluto all'onorevole Stefania CRAXI (Sottosegretario di Stato per gli Affari Esteri, rappresentante del governo italiano), al Dr. Jakob KELLENBERGER (Presidente del Comitato Internazionale della Croce Rossa), al generale Vincenzo CAMPORINI (Capo di Stato Maggiore della Difesa), all'Ambasciatore Claudio BISOGNIERO (Segretario Generale Delegato della Nato), all'Ambasciatore Raimund KUNZ, (Capo della Direzione per la Politica di Sicurezza del Dipartimento Federale della Difesa Svizzera), a S.E. Monsignore Giampaolo CREPALDI (Segretario del Pontificio Consiglio della Giustizia e della Pace), all'Onorevole Pier Virgilio DASTOLI (Direttore dell'Agenzia Italiana dell'Commissione Europea), al Dr. Christopher LAMB (rappresentante del Segretario Generale della Federazione Internazionale delle Società di Croce Rossa e Mezzaluna Rossa), al Dr. Massimo BARRA (Presidente della Croce Rossa Italiana) ai signori ambasciatori ed ai rappresentanti dei governi, delle organizzazioni internazionali e non governative a tutte le altre personalità che interverranno nel pomeriggio e nelle sedute dei prossimi giorni

La Conferenza di questi giorni, realizzata sotto l'alto patronato del Presidente della Repubblica Italiana, affronterà l'importante tema della relazione tra diritto internazionale umanitario, diritti umani e operazioni di pace.

Nello specifico, si cercherà di focalizzare l'attenzione sull'importanza che riveste il rispetto del diritto internazionale umanitario e dei diritti umani nelle operazioni di pace. Operazioni che assumono sempre più il carattere di missioni integrate, dirette ad assicurare la sicurezza ed al tempo stesso a costruire la democrazia, dove cruciale è il rapporto tra organizzazioni umanitarie e forze militari.

Ho il piacere quindi di aprire un Convegno che affronterà un dibattito di grande valore e decisamente attuale, tenuto da giuristi, alti ufficiali e diplomatici di chiara fama.

Un Convegno che permetterà di rendere il giusto omaggio all'Istituto Internazionale di Diritto Umanitario - di cui il Comune di Sanremo ha il piacere di essere cofondatore - che, giorno dopo giorno, si

pone quale centro di eccellenza nel campo della diffusione del diritto umanitario in tutti i suoi aspetti.

I temi affrontati oggi assumono un rilievo particolare nell'attuale panorama internazionale a causa della partecipazione delle nostre Forze Armate e delle organizzazioni di volontariato italiane in operazioni di pace nei Balcani, in Afghanistan, in Libano e in Darfur.

I principi del diritto umanitario devono divenire parte integrante della formazione e della cultura di quanti sono coinvolti sul terreno in situazioni conflittuali o post-conflittuali dove tali operazioni si sviluppano.

Ma la conferenza di oggi è anche un significativo esempio di quanto la nostra città si stia impegnando nella promozione dei valori della pace e del diritto umanitario, in armonia con le sue tradizioni di crocevia di scambi culturali ed umanitari.

Mi piace ricordare il contributo di Alfred Nobel, chimico svedese scomparso a Sanremo nel dicembre del 1896 al cui nome è appunto legato il Nobel per la Pace.

Con il "*Concerto per la Pace*" offerto questa sera alla Villa Ormond, sede dell'Istituto Internazionale di Diritto Umanitario, Sanremo, città della musica, intende inaugurare un ciclo di eventi musicali che verranno ripetuti annualmente in concomitanza con la Tavola Rotonda dell'Istituto. Il mese di ottobre, come già avviene da anni, è da Sanremo dedicato - con un fitto programma di attività - alla pace.

L'Istituto svolge a Sanremo, in Italia, come testimonia l'autorevole presenza del rappresentante del Governo, ed a livello internazionale - e le personalità presenti in questa sala ne sono eloquente conferma - un ruolo di spicco altamente apprezzato.

Il comune di Sanremo, che ha il privilegio di accogliere tale prestigiosa istituzione sul suo territorio è attivamente impegnato nel sostenere le attività ed il programma di rilancio messo a punto dal Consiglio direttivo dell'Istituto e dal suo nuovo Presidente Ambasciatore Maurizio Moreno.

Per tutti questi motivi sono particolarmente orgoglioso di aprire quest'oggi una conferenza che contribuisce pienamente alla pace e alla stabilità.

Nel rinnovare i miei saluti, auguro a tutti i convegnisti un buon lavoro.

KEYNOTE ADDRESS

Jakob KELLENBERGER
President, International Committee of the Red Cross

Thank you for the opportunity to address this distinguished audience. I am grateful for the San Remo Institute's interest in engaging with the International Committee of the Red Cross (ICRC) in discussion of this year's topic "International humanitarian law, human rights and peace operations".

Over the years, the spectrum of peace operations has grown increasingly broad and has come to include various dimensions such as conflict prevention, peacekeeping, peace-making, peace-enforcement and peace-building. Indeed, the responsibilities and tasks assigned to peace operations have transcended the traditional monitoring of ceasefires and observation of fragile peace settlements. Contemporary peace operations are more ambitious than their predecessors in that they are supposed to achieve more than simply preventing the resumption or spread of an armed conflict. Today, the international community conceives of these operations as a means of addressing the root causes of the crisis to which they are responding. They take a proactive approach intended to compel those engaging in violence to step back from conflict and embrace peace and security.

Today, the multifaceted nature of these operations, the concept of integrated missions and the ever more difficult and violent environments in which their personnel operate highlight how important it is for the international community to develop a coherent framework that embraces the complexity of peace operations. The topic chosen for this Round Table will certainly help clarify certain aspects of this framework, in particular its legal component.

For forces engaged in peace operations (I will hereafter refer to them as peace forces), the dangerous and volatile contexts in which they operate makes it more likely that they will become involved in the use of force. In such an environment, the question of the applicability of international humanitarian law (IHL) and human rights law becomes acute. This is particularly the case when these forces are involved in peace-enforcement operations. The issue of the circumstances in which IHL applies to peace operations has been discussed extensively for some time and there is a large body of legal literature on the subject. However, a number of matters relating to the legal framework applicable to peace operations are still unsettled and, in light of their importance and consequences, deserve to be closely examined. In addition, the development of peace operations has brought to the fore new issues such

as the detention and transfer of individuals and accountability for breaches of IHL and human rights law. The ICRC therefore warmly welcomes and supports the San Remo Institute's decision to resume discussions on this important and very timely topic.

Interaction between peace forces and the ICRC has developed considerably both at headquarters level and in the field, in particular regarding assistance and protection work in the field and promoting IHL training. Cooperation is all the more essential since peace operation personnel have frequently been deployed in countries still plagued by armed conflict where the ICRC is also working. Since peace forces have often been involved in hostilities and law-enforcement operations, the ICRC considers it extremely important that those forces be fully acquainted with, and adhere scrupulously to the rules of IHL, and other relevant bodies of law such as human rights law.

The ICRC has on various occasions shared its observations regarding the applicability of IHL to peace forces. It has always been the ICRC's view that peace forces must observe this body of law when the conditions for its applicability are met. Such a position is also reflected in the United Nations (UN) Secretary-General's Bulletin on "Observance by United Nations forces of international humanitarian law" of 6 August 1999; the developments that led to its adoption were also inspired by the ICRC.

However, within the framework of its dialogue with international organisations and with States contributing to peace operations, the ICRC has frequently been confronted with arguments that deny IHL's applicability. Indeed, practice shows that States and international organisations engaged in peace operations tend not to acknowledge that they are involved in an armed conflict and that IHL applies to their own actions or those of their agents. They sometimes erect sophisticated legal constructions to put across this view. Their denial is in line with their general reluctance to be perceived as a party to an armed conflict, especially when they are part of a peace operation. It also has to do with their political desire to consider their operation as neutral and impartial for as long as possible.

It has always been the ICRC's position that the nature of the situation and the correlative assessment of IHL applicability must be determined solely on the basis of the facts on the ground, irrespective of the formal mandate assigned to the peace operations by the Security Council and irrespective of the label given to the parties potentially opposed to peace forces. The mandate and the legitimacy of the mission entrusted to the peace forces are issues of *jus ad bellum* and have no bearing on the applicability of IHL to those operations. On this very point, I would like to quote the preamble to Additional Protocol I of 1977, which reads as

follows: “Reaffirming further that the provisions of the Geneva Conventions and of this Protocol must be fully applied in all circumstances to all persons who are protected by those instruments, without any distinction based on the nature and the origin of the armed conflict or on the causes espoused by or attributed to the parties to the conflict”¹.

Strict separation between IHL and *jus ad bellum* is also crucial for preserving the aims of IHL in ensuring effective protection of all victims of armed conflicts. Therefore, whether a resort to force was legitimate or illegitimate, cannot absolve anyone from his obligations under IHL, nor deprive anyone of the protections afforded by this body of law. In the ICRC's view, no legal construction can change the reality of the facts on the ground; one cannot simply decide that there is no armed conflict if an objective assessment of the situation proves otherwise.

As I have already pointed out, peace forces are more often than not deployed in troubled environments. Therefore, it is a vital issue to determine which situations constitute armed conflict for the purposes of IHL and to identify the laws governing the operations of the peace forces present or participating in hostilities. This afternoon and tomorrow, the Round Table participants will discuss important themes regarding the threshold of IHL applicability and the material field of application of this body of law. Given the features of today's peace operations, the question of the applicability of IHL is of much more than academic interest. It is directly relevant to troop-contributing States and to the international organisations using those troops, even if the latter are not formally party to the relevant international treaties.

Concerning the threshold of IHL applicability, I would like to stress that the criteria used to determine the existence of an armed conflict involving multinational peace forces should not differ from those applied to more 'classic' forms of armed conflict. This is particularly important in light of the recurrent attempts to raise the bar in terms of IHL's threshold of applicability when the use of armed violence involves multinational forces deployed within the framework of a peace operation.

In December 2003, the ICRC organised an expert meeting on multinational peace operations. Some of the discussions among the experts focused on issues relating to IHL's material field of application. The meeting failed to produce clear answers to certain important legal questions such as: what is the legal framework of reference when peace forces are involved in an armed conflict? In which circumstances does IHL applicable to international armed conflict constitute the frame of reference? In which circumstances does the IHL applicable to non-international

¹ Emphasis added.

armed conflict constitute the frame of reference? And related to the latter question – does the involvement of peace forces necessarily internationalise the conflict and trigger the applicability of the law of international armed conflict, even in the event of hostilities against non-State armed groups?

This last question probably does not make a real difference in practice with regard to the rules regulating the conduct of hostilities, since many of the treaty-based rules governing international armed conflicts are generally accepted as also applying in non international armed conflicts as a matter of customary law. However, the issue is indeed important when it comes, for instance, to the status of persons deprived of their liberty or the legal basis for the ICRC's activities. I am confident that the forthcoming discussions will be fruitful and will lead to practical answers.

I would also like to draw attention to the applicability of the law of occupation to peace operations, in particular to those operations conducted under United Nations auspices. While such applicability may appear to be a kind of taboo for the international organisations involved as well as for some troop-contributing States, one should ensure that occupation law is not discarded outright and that the rights, obligations and protections derived from it are applied when the conditions for their applicability are met. This body of law, which has proved useful in the past, would provide some practical guidance, in particular for situations in which the peace forces are using extensive administrative and/or legislative powers or may have to perform tasks normally carried out by national authorities. I should point out that the ICRC in 2007 initiated a study on occupation and other forms of administration over foreign territory. This study, aimed at clarifying the related legal questions, will also embrace the challenges raised by the applicability of occupation law to peace forces and to the United Nations administration of foreign territory.

We all know that armed conflicts have taken a heavy toll on the personnel of peace operations. The recent tragic attack against UN peace forces in Darfur is a painful reminder of how risky their mission can be. As evidenced by the corresponding war crime under the 1998 Rome Statute of the International Criminal Court, IHL contains a clear prohibition of attacks against personnel and objects involved in a peacekeeping mission in accordance with the Charter of the United Nations, as long as those objects and personnel are entitled to the protection given to civilians and civilian objects under IHL. This prohibition is considered to be customary law and thus binding on all parties to an armed conflict. Therefore, it cannot be said that the protection for peace-operation personnel in armed conflicts suffers from a legal vacuum within IHL. In addition, some

practical and legal solutions have been sought and reached outside IHL, an example being the 1994 Convention on the Safety of United Nations and Associated Personnel, and its Optional Protocol of 2005. The ICRC perfectly understands the necessity for effective protection for peace operations personnel. It has nevertheless expressed its concern regarding certain provisions of these instruments that overlap rules of IHL. This overlap could lead to situations in which attacks against members of United Nations operations or against associated personnel engaged in hostilities with a combat function, though not prohibited by IHL, would still constitute a crime under the regime of the 1994 Convention. The ICRC believes that development of the legal protection conferred on peace-operation personnel – in particular in situations of armed conflicts, be they international or non-international – must not be engaged in to the detriment of one of IHL's basic principles, which is equality between belligerents, in other words that both sides of an armed conflict have equal rights and duties under IHL.

Peace operations today are characterised by the recurrent involvement of the armed forces in the detention of individuals. One of the main challenges faced by peace forces dealing with detention is to ensure that they meet their international obligations – stemming in particular from IHL and human rights law – when handling detainees. These obligations include rules applying to the transfer of detainees to local authorities or to other troop-contributing States. In relation to these issues, the ICRC is closely following the intergovernmental initiative developed recently by Denmark on “*handling of detainees in international military operations*”, aimed at drafting common legal and operational standards that would govern detention in multilateral operations. This is an important and difficult task, as one of the main challenges is how to develop common standards that will adequately reflect the detailed legal obligations set out in IHL and human rights law. These include, in particular, an important set of procedural safeguards for administrative detention as well as the principle of *non-refoulement*, which prohibits a State from transferring a person to another State if there are substantial grounds for believing that he or she runs a risk of being subjected to violations of his or her fundamental rights – notably torture, other forms of ill-treatment, persecution or arbitrary deprivation of life.

Transfer agreements are an increasingly common feature of multinational peace operations. Under these agreements, the receiving State generally gives assurances that the transferred person will be treated in accordance with international law. If, from a legal point of view, such agreements are not prohibited under international law, they do not, *per se*, relieve the transferring State of its obligations under the *non-refoulement*

principle. Moreover, from a protection point of view, the ICRC is concerned about their actual effectiveness as well as about their ability to remove the risk of torture and other forms of ill-treatment. In practice, it might appear very difficult to monitor compliance with an undertaking not to mistreat individuals in detention since ill-treatment mostly occurs behind closed doors and is denied.

There is a range of other topics of equal importance that will be discussed at the Round Table which I simply do not have time to mention. In closing, I wish to raise two final points.

The mandates defined for peace operations by recent Security Council resolutions tend to incorporate the protection of the civilian population as a standard element. It is definitely of central importance that peace forces ensure respect for IHL and for the dignity and rights of individuals, particularly by means of and in the framework of their operations in the field, in territories under their control, *vis-à-vis* individuals in their power, and when able to positively influence the relevant State authorities or armed groups. The role of peace operations, particularly that of their military and police components, in providing protection and security is often both paramount and unique. The ICRC acknowledges that role but considers that when peace forces provide protection and carry out other activities relating to the military and security sphere, this should be done in a manner that makes it clearly distinct from humanitarian action.

Participants in this Round Table will deal with civil-military relations tomorrow afternoon. This item has for many years now been a focus of ICRC interest, since it can have an impact on the ICRC's ability to do its humanitarian work. If confusion arises, this can affect the perception of the ICRC as an independent, neutral and impartial humanitarian actor.

Today, political and military actors sometimes consider armed intervention, in particular within the framework of a peace operation, as an opportunity to test new integrated approaches to conflict management. Humanitarian organisations such as the ICRC that fail to fall into line with these integrated approaches may be perceived as being entrenched behind the inflexibility of their mandates, or simply out of step with the times.

While humanitarian agencies will continue to act impartially to meet the protection and assistance needs of people affected by armed conflict, peace operations are increasingly characterised by their use of humanitarian aid as one of the tools for achieving a strategic or tactical military goal. Peace forces might engage in a kind of barter, giving aid to the civilian population in exchange for intelligence, or to help protect their own forces, or as a means of winning the 'hearts and minds' of the local population. The deployment of the Provincial Reconstruction Teams in

Afghanistan that incorporate humanitarian action as part of an overall political and security concept is a particularly good illustration of this. The ICRC is also concerned that civil-military activities with a humanitarian component can increase the risks for neutral and independent humanitarian actors. For example, when military forces themselves deliver humanitarian assistance, they take on a more ambiguous role that is likely to create confusion with other actors engaged in a purely humanitarian mission, and suspicions about those other actors as well. Such confusion undermines respect for and protection of humanitarian personnel, which is contrary to the letter and the spirit of IHL.

On this fundamental question, the ICRC will continue striving to ensure a neutral and independent humanitarian approach that maintains a clear distinction between humanitarian action and political-military action. Not because the ICRC shies away from the military or because it thinks there are not circumstances in which peace forces might be a last resort for the provision of humanitarian assistance, for instance when the security situation prevents humanitarian organizations from carrying out their activities. Rather, it is because the ICRC wishes to avoid the current blurring of lines that results from the involvement of peace forces in roles typically filled by civilians, in particular humanitarian work, and the related lack of security for humanitarian actors.

You are now embarking on three days of what I am sure will prove to be substantial and comprehensive discussion. I look forward to contributing to those discussions, but more importantly to listening to your views and comments, both on the legal framework applicable to peace operations in general and on the points raised in this address. I thank you for your attention and wish you a very successful Round Table.

Thank you.

ADDRESSES

Vincenzo CAMPORINI
Capo di Stato Maggiore della Difesa, Italia

Sono grato all'Ambasciatore Moreno per avermi offerto l'opportunità di intervenire in un consesso così autorevole e per certi versi inconsueto per un Capo di Stato Maggiore della Difesa.

L'occasione è preziosa e particolarmente propizia perché mi consente di mettere a confronto i compiti e le esigenze delle Forze Armate con gli scopi che si prefigge la politica.

Prendo spunto, al riguardo, dai principi fondamentali di diritto internazionale enunciati dal Dott. Kellenberger nella sua relazione, che ho molto apprezzato, soffermandomi in particolare sui quesiti che ogni giorno si pone sul campo un Comandante, il quale, ancorché bisognoso di risposte chiare ed univoche, che lo guidino nella sua azione, non sempre ha il tempo di soffermarsi a scambiare opinioni con un esperto.

Con la caduta del muro di Berlino la storia non è finita, nonostante qualche voce contraria; tutt'altro, la storia ha subito una forte accelerazione lasciando da parte lo stato di torpore e stagnazione determinato dalla guerra fredda, nel corso della quale i ruoli si erano andati definendo in maniera abbastanza netta: o bianco o nero.

Anche le Forze Armate, benché vivessero in un mondo tutto loro, avevano compiti ben precisi e piani predeterminati; svolgevano esercitazioni che si ripetevano anno dopo anno con scenari tutto sommato ben definiti, del tipo: muore Tito, la Jugoslavia si disintegra, il Kosovo esplose (noi eravamo tra i pochi all'epoca a sapere dove fosse) e l'Armata Rossa irrompe attraverso la soglia di Gorizia e il varco di Fulda. Questo era il tipico scenario a cui eravamo esposti periodicamente e ognuno sapeva cosa doveva fare.

Non c'era bisogno di nessuna interazione con gli altri attori del mondo politico.

Ricordo che all'epoca i rapporti fra la Difesa e la Farnesina erano praticamente inesistenti; ognuno svolgeva il proprio compito in modo, tutto sommato, autonomo ed indipendente.

Dopo la caduta del muro di Berlino, invece, ci si è trovati innanzi a tutta una serie di situazioni in cui le tonalità del grigio sono apparse predominanti, i compiti sono risultati meno chiari e definiti, molti degli attori della scena internazionale si sono dovuti costruire un ruolo nuovo, in un contesto in cui tutto era divenuto improvvisamente imprevedibile.

Oggigiorno le cose sono cambiate radicalmente, non solo nei rapporti tra la Difesa e la Farnesina, ormai improntati ad una costante collaborazione e ad uno scambio quotidiano di vedute, ma soprattutto per

quanto concerne gli attori presenti negli scacchieri internazionali e gli obiettivi dell'operazione militare, una volta erroneamente rappresentati dalla mera necessità di sconfiggere il nemico.

Infatti, il concetto, apparentemente nuovo delle c.d. *fight based operations*, secondo il quale le forze militari, insieme agli altri attori sul terreno, contribuiscono per il conseguimento dello scopo definito dall'autorità politica, era noto fin dai tempi di Sun Tzu, in cui qualsiasi capo militare aveva obiettivi ben chiari da perseguire che andavano ben al di là della vittoria sul campo di battaglia.

Questa riflessione ci consente di mettere a confronto i modi di essere e di agire dei diversi interlocutori internazionali, civili e militari, presenti nei vari teatri operativi, mantenendo una chiara e netta distinzione fra i compiti e gli obiettivi di ognuno.

Tutto ciò ha comportato delle conseguenze rivoluzionarie, anche per la qualità delle forze armate.

Nel 1965, anno in cui sono entrato in Accademia Aeronautica, si studiava ingegneria, mentre oggi gli allievi Ufficiali si laureano in Scienze Politiche. Questo è sintomatico del fatto che al militare sul campo oggi si richiede una competenza che va ben al di là della mera conoscenza dello strumento bellico.

Al riguardo, un ruolo estremamente rilevante riveste il diritto internazionale, il diritto umanitario, o più in generale il diritto da applicare nel corso delle operazioni militari, il rispetto del quale se per un verso rappresenta un passo avanti compiuto dal mondo occidentale, consentendo ai militari di non essere visti come invasori bensì come operatori di pace, per l'altro ne costituisce la debolezza, poiché spesso ci si misura con realtà in cui questi principi sono sconosciuti o volutamente ignorati.

Da ciò ne discende che il nostro personale è sottoposto ad una preparazione sempre più accurata ogniqualvolta deve essere immesso nei teatri operativi, nella consapevolezza che il successo di un intervento non è rappresentato unicamente dalla quantità di *talebans* resi inoffensivi, quanto piuttosto dal ripristino dell'ordine e della sicurezza pubblica, nonché dal contributo reso per l'avvio di uno sviluppo economico e sociale sostenibile che garantisca condizioni di vita più decorose per le popolazioni coinvolte.

Tuttavia, due aspetti interni minacciano ancor oggi fortemente la riuscita stessa di una missione:

- la diversa formazione dei contingenti militari, sempre più multinazionali, il che può far sorgere talvolta la sindrome del buono e del cattivo;

- la crescita smisurata e disarmonica del corpo normativo e la sua errata interpretazione, spesso a causa di un approccio politico incongruente.

Se molto è stato fatto e si continua a fare per riuscire ad uniformare la formazione e l'impiego degli assetti multinazionali, solo di recente si è cominciato a riflettere ed a confrontarsi sul secondo problema, non soltanto nel mondo militare.

Oggi, ad esempio, buona parte dei vari contingenti internazionali sono sottoposti alle rispettive regole del tempo di pace. Per i soldati italiani vale ormai tradizionalmente l'impiego del codice militare di pace, atteso che spaventa l'idea che si possa anche solo parlare di guerra.

In realtà questo indebolisce la capacità operativa, ma non perchè il codice penale militare di guerra consenta di fare cose peggiori di quello di pace, come erroneamente si crede nell'immaginario collettivo. Al contrario: il codice penale militare di guerra sancisce di fatto una protezione dei diritti delle popolazioni interessate ben maggiore di quello di pace.

Concludo citando un brano tratto da un volume pubblicato dal Ministero della Difesa francese, *"Prospectives géostratégiques"*, dell'aprile 2008, in cui, l'autore, riferendosi al contesto giuridico delle operazioni, pone dei quesiti a cui dovremo forse non oggi, non domani ma certamente in un futuro ormai prossimo, rispondere.

«Le recours à la force sera de plus en plus encadré juridiquement. La judiciarisation toujours plus prégnante deviendra une arme exploitée par les adversaires, moins inclinée à respecter le droit et comportera un risque d'inhibition pour ceux qui le respectent. A titre individuel le combattant des Etats respectant le droit sera de manière accrue astreint à un impératif comportement vertueux, ce qui constituera pour lui un surcroît de pression. La protection de l'environnement sera également à l'origine de contraintes supplémentaires pour l'action armée dont le respect ne sera pas partagé par tous les belligérants. L'excès de droit international pourrait conduire au non respect de ses prescriptions par les Etats pour le règlement des crises».

Credo che questo rappresenti un pericolo reale non trascurabile.

Ribadisco, pertanto, che la forza dei nostri interventi di stabilizzazione sta nel rispetto delle norme, nel rispetto delle popolazioni e dei loro diritti, nella volontà di rendere la loro vita più facile ed il loro futuro sostenibile.

Qualora rinunciassimo a questi principi bene faremmo a ripiegare.

Grazie

Claudio BISOGNIERO
NATO Deputy Secretary-General

Let me first of all express my sincere gratitude to the International Institute of Humanitarian Law and its President, my good friend Ambassador Moreno, to the International Committee of the Red Cross, and to the Republic of Italy, for organising this important event and inviting NATO to be involved.

The challenge of paying due respect to humanitarian law and human rights in peace operations is a pertinent one, not least for NATO. Throughout the Cold War, such issues may have been distant, as NATO's core business was – of course – to deter a major military conflict in Europe. And the key legal challenge in such a conflict would have been to ensure that the traditional tenets of *jus in bello* were adhered to.

Today, we live in a different world. Our security environment is characterised by an ever-increasing demand for peacekeeping. This has changed the political and military context of the use of force, and of course, it has also changed the legal context. As NATO has established itself as one of the world's most effective peacekeepers, it is very much affected by the law that guides this specific type of military operations, and since humanitarian law is in a constant state of evolution, NATO must constantly seek to adapt the way it operates.

What are the key legal challenges in peacekeeping as we see them? And how is NATO addressing them? Allow me to answer these questions by way of five brief points.

My first point is about the importance of humanitarian law and human rights for NATO-led operations. Let me be very clear: for NATO, such considerations are of paramount importance. The force commander in the field may sometimes feel that fully respecting humanitarian law and human rights limits his flexibility; but at the end of the day, the most fundamental requirement for any effective peacekeeping operation is legitimacy, and this legitimacy rests on the respect of the proper legal framework. NATO's military authorities fully understand this. The old saying that "all is fair in love and war" has long ceased to apply – at least as far as the "war" part is concerned.

This brings me to my second point. During peacekeeping operations, the conduct of NATO forces is circumscribed by international law, including the applicable principles of international humanitarian law and human rights law. This means that, by definition, NATO Rules of Engagement never permit the use of force in ways that would violate this set of laws. These Rules of Engagement are always agreed by our highest

political body, the North Atlantic Council. They define the circumstances, conditions, degree and manner in which force may be applied. Needless to say, great care is always used in their formulation and, later, in monitoring their implementation.

Third, NATO nations have a responsibility to educate and train their forces to respect and abide by international humanitarian law when it is applicable, and by other international conventions and treaties which may affect military operations. Of course, this presents challenges in itself. NATO is an alliance of 26 member States, each of which retains its full sovereignty, including on choosing to adhere or not to adhere to conventions or treaties. As a result, the picture is uneven: some NATO nations have ratified virtually all relevant conventions and treaties, others have been more selective.

What does this mean? It means that, for any given operation, we have to develop a common approach that is consistent with the obligations assumed by those who have ratified, while at the same time respecting the rights of those who have not ratified. While this is not easy, we have demonstrated that it is possible.

Fourth, the logic of NATO as an alliance of sovereign States also means that the forces of those nations that commit troops to a NATO-led operation must adhere to their national laws. This means that they are not obliged to perform tasks or operations that would violate their own national legal framework. Consequently, nations may issue national restrictions, limitations or clarifying instructions in order to ensure compliance with national law. Again, this can impede the flexibility of our force commanders. But on the other hand, allowing nations a degree of national leeway is a precondition for garnering their support in the first place. And it generally strengthens, not weakens, the degree to which NATO operations comply with international humanitarian law.

Fifth, and finally, it goes without saying that the personnel of NATO troop contributing nations should respect the law and the culture of the state in which they are deployed. This is easier said than done, all the more so when the culture, tradition and laws of a country where we deploy may be at odds with our own and with the specific UN mandate under which our forces operate. Let me underline here, very clearly, that NATO operations both in Afghanistan and in Kosovo are carried out on behalf of the whole international community, under the mandate of UN Security Council resolutions. Afghanistan is an obvious example of a country with a significantly different background, and where we constantly need to look for common ground – not only between our legal frameworks but also, I might add, our value systems.

In closing, let me emphasise once again that NATO takes its

responsibilities *vis-à-vis* civilian populations very seriously – and this applies to the formulation of general policy guidelines just as much as to actual, ongoing operations. For example, in 2004, as a result of perceived failings during our Balkans operations, NATO agreed on a policy to combat trafficking in human beings, and a military action plan for the implementation of this policy. Work is already going on at the moment to develop new guidelines for operations, taking into account United Nations Security Council Resolution 1325 on Women, Peace and Security.

The obvious challenges of respecting international humanitarian law and human rights in actual peacekeeping operations are no excuse to ignore them. On the contrary, it must lead to an even greater effort to factor these considerations into our operational reality – and that is certainly what we are doing at NATO. Avoiding civilian casualties has been and will remain a key concern for the alliance: as I often say, one civilian death is one too many in our eyes. This quite clearly differentiates NATO from its Taliban opponents, who are not ashamed of deliberately attacking civilian targets or using civilian dwellings to hide, plan and launch operations against the International Security Assistance Force (ISAF), putting innocent people at risk. ISAF's detention policy has also been developed on advice from the ICRC, and by agreement with the Afghan Government. Furthermore it goes without saying that the ICRC can visit – and does visit – detainees on a regular basis.

Since the Geneva Conventions of 1949, the evolution of international humanitarian law has made great strides ahead. States have an obligation to respect it, and to teach its rules to their armed forces.

NATO, too, is playing its part. We realise that nothing would be more corrosive than to pit legal norms against military effectiveness. We also realise that one must resist the temptation of subordinating legal requirements to military considerations.

At the same time, those who seek to develop international law must keep in mind that the deployment of force is always an extraordinary measure, with considerable room for things to go wrong. In other words, there will always be a gap between the law as it is written and its implementation in practice.

To narrow the gap between theory and practice – this is what we must constantly aim for. NATO's ever closer relationship with the International Committee of the Red Cross is one way of achieving this goal; conferences like this one are another. I wish you all a successful meeting.

Thank you.

Raimund KUNZ
Head of the Directorate for Security Policy of the Federal Ministry of
Defence, Protection of the Population and Sports, Switzerland

The objectives of the forthcoming Round Table are ambitious and address a topic that is very high on the international agenda; let me therefore congratulate the organisers for this selection. Switzerland is firmly committed to the respect of international humanitarian law (IHL) and human rights; it supports all efforts aiming at strengthening both of them. Switzerland is also committed to the promotion of peace. It focuses its contributions to the civilian efforts and it also supports international peace operations with military personnel.

Peace and Law

Peace is linked to law. We all share the view that national and international order based on democratic principles held together by laws and conventions is the best guarantee for peace. We also know that this order is not perfect, and that the rule of law is not applied or not respected everywhere and all the time.

On an international level, the order of the United Nations and its security system is often not observed in the way conceived by the Charter. At a State level, the deficit of order, and disrespect for law and human values are major root causes of violence. Injustice, lack of equal access to vital resources and disregard of human rights remain primary sources of armed conflicts. Intolerance and religious or political extremism prepare the ground for violent actions of persons and organisations in order to achieve their objectives and goals.

Armed conflicts of various natures, international and non-international are still a reality in the twenty-first century.

Law is the tool to promote peace. The objective to bring an armed conflict to an end and to allow sustainable reconstruction and stability is very ambitious. It involves first of all the strong will of the people and their leaders concerned together with the commitment of the international community to provide support with qualified and trained personnel as well as with financial and material resources.

Since 1945, the United Nations provide a framework to secure, restore and maintain international peace and security. It is encouraging to observe how the United Nations peacekeeping has evolved from simple monitoring of cease fire agreements and the separation of military forces, to modern, integrated missions, including civilian elements in form of police, justice, election monitoring, assistance in capacity building, political

support and development assistance.

The rule of law is also the important pillar of any modern peace operations. This requires - of course - that international humanitarian law and human rights are respected not only by the local populations and authorities, but also by the international community and its representatives, both in their professional and private conduct in theatre.

Legal aspects of peace operations

This Round Table is expected to enhance clarity from a legal point of view on the rules applicable in peace operations, in particular in view of international humanitarian law and the law with regard to human rights.

This is important and deserves our attention. But it is not enough. Results and new insights must flow into doctrine and into the training programmes of international organisations and national armed forces. It is the result that is decisive for the success of our work, not the declarations.

The focus of Switzerland

Switzerland is particularly committed to the promotion and dissemination of these aspects of international humanitarian law and the law on human rights. Our armed forces have integrated such training modules into the preparation work for deployments to international peace operations.

We have also learned that the provision of theoretical knowledge must be part of the training, but it is not sufficient. Rather, theoretical lessons need to be backed up by practical exercises including live fire exercises in the field. The peacekeeper must not only know his weapons, but also their effects. In particular, he must be trained to act in a proportional manner as well as in a decisive way to be able to achieve the missions conveyed to him. In other words, being "fit for the mission" does not only imply the knowledge of the respective Rules of Engagements. It also implies the soldier's capability to act immediately, instinctively and in accordance with those rules, especially under difficult circumstances and under stress.

As a military, you are expected to find solutions in difficult environments, with lots of restrictions resulting from the various reasons. It is therefore crucial that the commanding officer, his staff and the legal experts are in a position to find solutions. However, legal restrictions should never prevent soldiers from operating, nor challenging their missions or safety in a significant way.

This is the reason why we believe that in-depth discussions between legal experts from academia, legal advisors from the military and commanding officers are so important. I hope that this Round Table,

which provides such an opportunity, is used for such discussions, and I encourage you to take an active part in them.

Please allow me to address another topic that is of importance to me: we all know that rules are not always applied correctly. However, full application must remain our objective. That implies sufficient information and training, exemplary conduct by leaders and sanctions for those who break the rules. In peace operations, Status of Forces Agreements exempt peacekeepers from prosecution under local jurisdiction.

This does, however, not imply that misconduct by peacekeepers is exempt from punishment or sanction. The contrary is true: any misconduct by a peacekeeper is intolerable as it undermines the purpose and credibility of the international presence. Efforts undertaken by the United Nations Department of Peacekeeping Operations to counter sexual abuse of women and children by UN personnel are needed and should be supported by every troop-contributing country.

Switzerland supports international efforts to strengthen international law applicable to military operations. For this reason, Switzerland and its armed forces offer a number of IHL workshops for military commanders and legal advisors, military medical personnel and chaplains as well as an IHL competition for middle-ranked officers.

We also support the International Institute of Humanitarian Law with our expertise in training and dissemination of humanitarian law and human rights. We are convinced that military personnel attending courses at this Institute shall receive modern and up-to-date training at staff level. We support the relevant endeavours of this Institute to reform the military courses, and I am happy that a group of experts from ten countries is currently working on this project.

Last but not least, we are working, in close co-operation with the Geneva Centre for Security Policy, on training modules for flag officers and high ranking civilian officials on legal aspects of complex emergency operations.

In this modern, globalized world no single nation is able to act on its own. Our efforts must be linked, and I am convinced that the implementation of existing legal norms to operations conducted by military and civilian international personnel can be improved.

I wish you fruitful discussions and I hope that the results of this Round Table will have positive impacts on current and future peace operations.

Thank you for your attention.

Grazie Ambasciatore, grazie per questo invito e per questo segno significativo d'interesse che l'Istituto Internazionale di Diritto Umanitario ha indirizzato alla Commissione Europea. Noi speriamo in futuro di collaborare con l'Istituto di più e meglio perché effettivamente molte cose ci legano e molti impegni ci vedono insieme. È importante che anche questo sia avvenuto quest'anno che voi sapete è dedicato al dialogo interculturale. Noi ci prepariamo alla fine dell'anno a celebrare il sessantesimo anniversario della Dichiarazione dei Diritti Fondamentali e poi, in una prospettiva più lontana, come voi sapete la Commissione Europea ha deciso di dedicare il 2010 all'anno europeo contro la povertà ed il 2011 all'anno Europeo del Volontariato ed è questa una delle tematiche sulle quali l'Unione Europea intende impegnarsi perché attraverso anche i volontari può essere portata avanti l'opera di cui si discute qui in questi giorni.

Come voi sapete al centro dell'azione dell'Unione Europea noi abbiamo posto come una delle priorità il concetto della sicurezza umanitaria, un'idea di sicurezza che colloca i cittadini al centro delle nostre politiche, che significa un concetto globale di sicurezza dei popoli, non la sicurezza degli stati che non è nostra competenza, ma lo è la sicurezza dei popoli e dei cittadini, a cominciare dalla libertà dalla paura.

Un mondo in cui i popoli dovrebbero e potrebbero vivere in pace, sicurezza e nella dignità, liberi dalla povertà e dalla indigenza, è ancora un sogno per molti proprio in un anno in cui noi ci accingiamo a celebrare il sessantesimo anniversario della Dichiarazione del 1948 delle Nazioni Unite e già una certa distanza di tempo da quel solenne impegno adottato dai governi negli Obiettivi del Millennio, che purtroppo sono ancora lontani dall'essere realizzati.

Lo dimostra il calo dell'impegno che si riscontra nei dati che abbiamo pubblicato recentemente relativi all'aiuto allo sviluppo da parte dei governi nazionali. Soltanto un mondo basato sulle regole del diritto e sulla libertà dalla paura può consentire ai popoli di sviluppare le loro potenzialità individuali e collettive.

Vorrei, da questo punto di vista, sottolineare questi due aggettivi: individuali e collettive. Perché noi dobbiamo impegnarci per il mantenimento, la protezione e lo sviluppo dei diritti umani individuali e delle libertà fondamentali ma anche per lo sviluppo dei diritti collettivi e dei beni comuni, utilizzando strumenti internazionali che possano assicurarli. Pensate per esempio al diritto all'acqua. Il concetto di diritti

fondamentali, come voi dite spesso, è un concetto molto ampio che unisce insieme aspetti civili, politici, sociali, culturali ed economici ed il rispetto dei diritti fondamentali è uno dei valori più importanti ed universali del nostro mondo.

Noi tutti abbiamo la responsabilità di promuovere e proteggere i diritti fondamentali dei membri della famiglia umana, nel quadro di un'unica razza.

Come sapete il mondo non è diviso in diverse razze distinte fra di loro, ma esiste una sola razza: la razza umana.

Quindi noi dobbiamo lavorare perché questi diritti siano garantiti a tutti i membri della razza umana.

Per quanto riguarda l'Unione Europea, i cittadini dell'Unione che vivono sul nostro territorio, così come le persone che lavorano e vivono con noi e che sono emigrate da paesi terzi, e le persone che vivono in tutto il mondo.

L'Unione Europea ha preso seriamente quest'obbligo. Noi da anni lavoriamo per una politica di protezione dei diritti dell'Uomo con i nostri partner attraverso una politica di dialogo, attraverso la clausola dei diritti umani, nei molti accordi che firmiamo con paesi partner e nei fori internazionali, così come attraverso lo sviluppo dei programmi di aiuto umanitario, di aiuto allo sviluppo, in particolare attraverso lo strumento della iniziativa europea per i diritti fondamentali umani e la democrazia.

In questo quadro vorrei ricordare che quando la Comunità Europea è nata ha posto fin dall'inizio al centro dei suoi obiettivi quello della lotta contro ogni forma di discriminazione.

Da allora molti passi in avanti sono stati fatti: vorrei ricordare in particolare il Trattato di Maastricht nel quale fu stabilito un legame stretto fra la nostra politica estera di sicurezza e rispetto dei diritti fondamentali e poi il Trattato di Amsterdam, e infine la Carta dei Diritti Fondamentali che è stata firmata nel 2000, a sessanta chilometri da Sanremo.

Così come vorrei ricordare come nel 2003 la strategia europea per la sicurezza ha messo al suo centro la lotta al terrorismo, alla proliferazione delle armi di distruzione di massa, contro i conflitti regionali, contro la bad governance e contro la criminalità organizzata.

Il nostro approccio è basato su due elementi: il primo è quello di inserire i diritti fondamentali in tutte le nostre politiche e nei nostri programmi, il secondo è quello attraverso il finanziamento di progetti specifici. Noi abbiamo attualmente dieci strumenti finanziari e cinque programmi che ci permettono di agire nel rispetto di questi obiettivi e siamo condotti nella nostra azione da linee di orientamento fondamentali che hanno indicato alcune priorità essenziali, di cui ricordo: la lotta contro la pena di morte (abbiamo raggiunto un risultato significativo l'anno

scorso anche grazie al lavoro fatto dal governo italiano nella decisione dell'Assemblea delle Nazioni Unite), la lotta contro ogni forma di oppressione delle differenze culturali, il dialogo con paesi terzi ma soprattutto e anche la protezione dei bambini e delle donne colpite da conflitti armati e *last but not the least* la difesa dei difensori dei diritti fondamentali, così come la partecipazione dell'Unione Europea alle Convenzioni Internazionali.

L'Unione Europea ha l'ambizione - e gradualmente lo è diventata - di essere un attore globale nel quadro del diritto umanitario internazionale e lo ha fatto in tutta una serie di quadri regionali, di occasioni, di eventi nel mondo.

L'Unione Europea è stata presente anche attraverso i suoi paesi membri che svolgono, da questo punto di vista, un ruolo fondamentale come quello svolto dall'Italia in molte missioni umanitarie e ringraziare qui in particolare il Generale Camporini. Le missioni che l'Italia svolge nel mondo sono realizzate non soltanto con grande responsabilità ed impegno ma anche con quello spirito di solidarietà umana che contraddistingue il lavoro che viene fatto dai nostri militari all'estero, a cui dobbiamo essere grati per il loro coraggio.

L'Unione Europea è stata in grado in questi anni di svolgere il ruolo di attore globale, non soltanto per il diritto internazionale umanitario ma anche quando si è negoziato a Roma il Trattato per dare vita al Tribunale contro i Crimini di Guerra e la lotta contro ogni forma di impunità.

In questo quadro l'Unione Europea si è posta come obiettivo non soltanto quello di lavorare per il *peacekeeping* ma anche per il *peacemaking*, il che è molto importante in un mondo in cui, purtroppo - voi conoscete i dati degli anni novanta - ci sono stati ben centoundici conflitti militari nel mondo, in settantaquattro paesi, con molti milioni di morti, di popoli che hanno dovuto emigrare, soprattutto vittime fra bambini e donne.

Da questo punto di vista ci sarebbe da chiedersi, quando si dice che l'Europa è una storia di successo, perché noi abbiamo fatto vincere la pace all'interno del nostro continente, ma non siamo stati in grado di contribuire efficacemente affinché la pace fosse vinta anche nel resto del mondo. Dobbiamo lavorare insieme perché l'Unione Europea si doti di quegli strumenti affinché essa possa contribuire più di quanto sia avvenuto in passato, affinché la pace vinca in tutto il mondo.

Da questo punto di vista il Trattato di Lisbona rappresenta un passo in avanti ed io, come rappresentante della Commissione Europea, auspico che questo trattato, che è stato il frutto di un negoziato abbastanza difficile, di un compromesso tra i ventisette stati membri, possa entrare in vigore il più rapidamente possibile in modo tale da dare all'Unione Europea gli strumenti di politica di governo che le consentano di essere

realmente un attore globale a livello mondiale nella difesa di questi principi che vi ho esposto nel mio intervento.

Grazie e buon lavoro.

Christopher LAMB
Special Advisor, International Relations,
International Federation of the Red Cross and Red Crescent Societies

It gives me great pleasure to have the opportunity to speak at the opening of this 31st Round Table of the International Institute of Humanitarian Law (IIHL), on behalf of the Secretary General of the International Federation of Red Cross and Red Crescent Societies (IFRC). It is also an honour to speak in such distinguished company, and at a session inspired by the keynote address delivered by Dr. Kellenberger.

The Secretary General, Mr. Bekele Geleta, was unfortunately unable to be here in person, but he has asked me to transmit his best wishes for the future of the Institute and the leadership of President Maurizio Moreno. He has also expressed the hope that your deliberations this year, on the vital subject of international humanitarian law (IHL) and human rights in peace operations will take account of the role of National Red Cross and Red Crescent Societies. National societies, with their volunteer base spread throughout the country, are always involved in the pursuit of prosperity and harmony, which is such an important ingredient in the maintenance of peace and security. They are also involved in the pursuit of a wide variety of human rights, perhaps especially (for our purposes at this Round Table) those associated with health, food, shelter and development.

We in the IFRC also have experience of this in our contacts with other agencies, especially through the United Nations, and I am sure your deliberations will help us a lot in our future work.

I underline, though, that the work of National Societies, especially at the community level, must be recognised and welcomed for its neutral and impartial character by all those concerned with the promotion and maintenance of peace.

The IIHL formats are also, of course, of wide interest to the IFRC and it is our expectation that some issues in which the IFRC has principal responsibility will be of interest to the IIHL now and in the future. Now is not the time to explore them, but it is worth assuring the IIHL and its members that we remain at your disposal should you wish any elaboration on their handling. Two in particular stand out – the issue of the status and role of National Societies as auxiliaries to the public authorities in the humanitarian field in their countries, and the Guidelines for the Domestic Facilitation and Regulation of International Disaster Relief and Initial Recovery Assistance.

Both were the subject of resolutions adopted last year at the 30th

International Conference of the Red Cross and Red Crescent, and both are being given specialised attention by the IFRC in close consultation with National Societies, the ICRC, governments and other organisations.

The resolutions were adopted under the theme “Together for Humanity”, which itself underlines the importance of partnerships and effective networks. It is, therefore, a great pleasure to see Dr. Mohamed Al-Hadid and some other members of the Standing Commission of the Red Cross and Red Crescent with us at this Round Table.

It is our hope that your deliberations this year will take us forward on several matters of crucial importance affecting the vulnerability of civilians and the application of IHL. The discussions on humanitarian space and responsibility to protect will be deeply interesting to National Societies, and it is a great pleasure to see so many representatives of National Societies present at the Round Table this year.

With that in mind, it is the IFRC’s hope that all participants will share their experiences openly and freely, and that although there are no formal outcomes, everyone will be able to take away an enriched understanding of the real issues which confront vulnerable people at times of conflict and disaster, and during the reconstruction and rehabilitation periods which follow the emergency response phase.

Thank you.

Massimo BARRA
Presidente, Croce Rossa Italiana

Grazie, Presidente, per darmi la parola, in un momento, ovviamente, di leggero calo di tensione e di attenzione.

Tre giorni fa ero in Islanda per la riunione annuale del *Donor Forum* di Croce Rossa. In Islanda c'è una norma che proibisce di stare seduti più di un'ora e mezzo, per cui il Presidente della sessione ci invitò tutti a fare dello *stretching*. Ora, io non oso in un auditorio così importante chiedere a voi di fare lo stesso, ma il mio contributo può essere quello di essere molto breve.

Innanzitutto, vorrei esprimere la mia soddisfazione per essere qui di persona perché io ho assistito alla Tavola Rotonda dalla seconda edizione, da quando era un piccolo club di appassionati del Diritto Internazionale Umanitario, riuniti intorno ad un tavolo. Il fatto di vedere oggi così tanta gente, così qualificata, è per me un motivo di particolare soddisfazione, e devo dire che la Presidenza dell'Ambasciatore Moreno comincia a dare i suoi frutti e che questi frutti sono otticamente visibili.

Grazie, quindi, all'Ambasciatore Moreno e grazie anche a questa collaborazione forte, intima, che c'è tra l'Istituto di Diritto Umanitario e la Croce Rossa, a livello internazionale e a livello della Croce Rossa Italiana. A questo proposito, vi posso annunciare che la Croce Rossa Italiana, nonostante i tempi di vacche magre, ha deciso di aumentare il proprio contributo all'Istituto di Diritto Umanitario. Consideratelo un atto non più che simbolico, ma che comunque attesta la nostra volontà politica di essere pienamente coinvolti nelle attività dell'Istituto.

L'altra soddisfazione è di vedere tanta gente di Croce Rossa. E' stato citato il Dottor Al Hadid, uno dei tre Presidenti della Croce Rossa internazionale, anzi il *primus inter pares*, quale Presidente della *Standing Commission*. Vicino a lui vedo Helena Korhonen, segretaria della *Standing Commission*; vedo - e saluto - il Presidente della Mezzaluna Rossa Somala, un frequentatore abituale di Sanremo; vedo dei dirigenti e molti attivisti della Croce Rossa Italiana, a dimostrazione dell'importanza che la nostra organizzazione attribuisce alla diffusione del Diritto Internazionale Umanitario.

Questo incontro rappresenta un'occasione troppo ghiotta per non parlare e per non chiarire qual è il ruolo della Croce Rossa Italiana nella società contemporanea.

Voglio quindi parlarvi della teoria dei Tre Pilastri della Società: la Croce Rossa non è parte del primo pilastro, rappresentato dai governi e - a livello internazionale - dal sistema e dalle agenzie delle Nazioni Unite. La

Croce Rossa non è neanche solo parte del secondo pilastro, ovvero la società civile, rappresentata da centinaia di migliaia di onlus e di ONG, espressione del desiderio e del contributo di volontariato dei cittadini. La Croce Rossa è il terzo pilastro, cioè sta in mezzo, *bridging the gap* tra il sistema dei governi e il sistema delle onlus e delle ONG

Questo non è chiaro a tutti. Forse, in passato, non è stato chiaro neanche al Governo Italiano.

Noi chiediamo invece che sia chiarificato, noi non siamo una onlus, come molti assessori in giro per la Liguria ritengono. Noi non siamo neanche una parte del sistema del governo. Perché stiamo in mezzo? Perché ci sono almeno due differenze tra il sistema dei governi, le onlus e la Croce Rossa.

La prima differenza è che i governi fanno politica. Anche le onlus fanno politica: in un sistema democratico, esse sono autorizzate a fare politica. Basti pensare a quello che fa Emergency, o che fanno altre organizzazioni della società civile che - legittimamente - prendono delle posizioni politiche.

La Croce Rossa, ispirata dai 7 Principi Fondamentali, fra cui ricordo quello di Neutralità e quello di Imparzialità, non può fare politica. La seconda differenza è importante, e vorrei che voi tutti foste dei diffusori di questo ruolo particolare del Movimento, il ruolo ausiliario dei governi e dei poteri pubblici, che differenzia la Croce Rossa e la Mezzaluna Rossa dalle altre espressioni della società civile.

Il concetto di ausiliarità è nato sui campi di battaglia, nella battaglia di Solferino, quando Henry Dunant vide le sofferenze dei colpiti, dei feriti e di coloro che sarebbero morti, ma vide anche le donne di Castiglione delle Stiviere mentre aiutavano indistintamente i feriti e i servizi di sanità militare dei diversi eserciti in lotta.

L'ausiliarità è quindi nata sui campi di battaglia, ma poi è diventata una caratteristica della Croce Rossa in tutte le attività che essa svolge, sia nei confronti dei governi nazionali, sia nei confronti dei governi locali. La Croce Rossa Italiana è ausiliaria del Governo Italiano, il Comitato della Croce Rossa di Sanremo è ausiliario del Comune di Sanremo. C'è quindi un rapporto intimo tra Croce Rossa ed istituzioni, che ha però come contraltare il Principio Fondamentale di Indipendenza.

E' interesse di tutti i governi - a tutti i livelli - rispettare l'indipendenza della Croce Rossa, perché questo consente ai governi di fare cose che in prima persona non potrebbero fare: avventurarsi ai confini della convivenza civile, non solo in tempo di guerra, ma anche in tempo cosiddetto di pace.

La Croce Rossa esplica questo suo ruolo ausiliario in due modi: con attività pratiche, ma anche con attività che chiamiamo di "diplomazia

umanitaria”, un nuovo termine che forse farà storcere un po’ la bocca agli ortodossi della diplomazia, ma che sta prendendo piede nel nostro mondo; la diplomazia umanitaria va intesa come l’insieme dei contatti formali e informali che il Movimento prende con i governi a tutti i livelli per orientare l’azione dei governi stessi in senso umanitario e rispettoso dei diritti umani.

Advocacy, è una parola non facilmente traducibile in nessuna lingua. E’ una parola che i Francesi traducono con “*plédoyer*” e gli Italiani con “*perorare*”, entrambi termini arcaici, ebbene, l’*advocacy*, cioè parlare a nome dei più vulnerabili, fa parte della diplomazia umanitaria.

Mi preme poi sottolineare un ultimo concetto. Noi viviamo in tempi di globalizzazione e quindi di mediatizzazione, per cui chi non appare non esiste. Abbiamo un nuovo potere che è l’opinione pubblica. L’opinione pubblica oggi ha accesso in tempo reale alle informazioni che prima gli ambasciatori mandavano in maniera cifrata e che oggi i governi apprendono probabilmente prima da *Al Jazeera* o dalla *CNN*.

L’opinione pubblica è un potere che ha a disposizione un altro mezzo estremamente potente che è internet, che è un mezzo potentissimo - direi diabolico - di partecipazione non democratica, perché ognuno può dire la sua verità deridendo gli altri, prendendo in giro tutte le persone serie di questo mondo, che cercano di migliorare le condizioni di vita della gente, in nome della propria verità, senza avere la necessità di confrontarsi con gli altri e di avere un consenso, senza fare elezioni.

Attraverso internet rischiamo una deriva demagogica, populista, disfattista., E allora, le persone di buona volontà, come voi siete, come noi siamo, si devono chiedere che potere abbiamo di far conoscere quello che facciamo, di dirlo, di farlo diventare sexy. Il diritto umanitario non è sexy, rischia di diventare un argomento di una conventicola di ispirati che non riescono a far sapere all’opinione pubblica l’importanza di quello che stanno facendo. Dobbiamo quindi studiare nuovi mezzi di comunicazione, dobbiamo rendere attraente il diritto umanitario e per fare questo c’è un solo mezzo, penso, quello di ricorrere all’inventiva dei giovani.

E’ questa la nuova sfida alla quale siamo tutti chiamati: coinvolgere i giovani nelle nostre deliberazioni e nelle nostre priorità, nel rispetto dei diritti umani; e mi piacerebbe che il governo, oltre a riportare il grembiolino, il voto in condotta e il maestro unico, tutte cose di assoluto buonsenso, studiasse anche il sistema perché fin dalle elementari i bambini abbiano confidenza col rispetto dei diritti umani e del diritto umanitario.

Grazie.

**THE APPLICABILITY OF INTERNATIONAL HUMANITARIAN LAW TO PEACE
OPERATIONS**

**De l'applicabilité du droit international humanitaire
aux opérations de paix : pour des approches juridiques, militaires et
éthiques**

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The question of the applicability of international humanitarian law (IHL) is of fundamental importance. Three different approaches may be taken when considering the applicability of international humanitarian law in peacekeeping operations. These approaches should be complementary and, indeed, may serve to strengthen each other: a legal approach, a military approach, and an ethical approach.

The first approach, being the legal approach, will be the principal - although hopefully not exclusive - focus of our discussions. This approach is based primarily on conventional and customary international humanitarian law. Nevertheless, we must not forget the importance of the various human rights instruments, both universal and regional, nor the domestic laws of the peacekeepers' countries of origin and of the territory in which they are operating. This question of applicability is not a new one: at least since Korea in 1950 and the operation in the Congo in 1960, this issue has been the subject of discussions between the ICRC and the Secretariat of the United Nations. Additionally, while the Bulletin of the Secretary General of August 12, 1999 attempted to answer the question, the debate surrounding the applicability of IHL by the UN is not a settled issue.

The question of the applicability of law is never simple. What type of conflict are we facing? International? Non-international? It often happens that we must ask whether we are dealing with one distinct type of conflict, or a combination thereof. And often we are confronted with different phases of conflicts or even simultaneous armed conflicts. The next question that must be asked is which rules of humanitarian law from within the Conventions of 1949 or the two Additional Protocols and customary law, are applicable in the material, temporal, territorial or personal scope of the conflict. One particular provision must not escape our attention: Article 3 common to the four Geneva Conventions of 1949 as the minimum applicable norms in all circumstances. Common Article 3 contains the essential minimum guarantees that must be afforded to those who are not or are no longer taking an active part in hostilities. This provision was recognised in 1986 as reflecting the "elementary

considerations of humanity” applicable in all armed conflicts, by the International Court of Justice in the Nicaragua case of 1986 and is generally recognized as reflecting customary international law.

In all circumstances, both in times of peace and times of armed conflict, the minimum guarantees enshrined within Article 3 are also reflected in the non-derogable provisions of human rights instruments.

The second approach is military. The military forces in an action must have clear rules on the treatment to be afforded to wounded and captured persons and to civilians. The application of the principles of international humanitarian law is a fundamental aspect of military discipline and must form the basis of the rules of engagement (ROE) that are applicable independently of precise legal analysis.

The third and final approach is the ethical approach. Ethics in peacekeeping operations can take several forms and build upon individual and collective morals:

1. The military honor of an army or indeed of any military unit;
2. The principles enshrined within the Martens Clause, which applies “in cases not covered by the law in force” and appeals to the demands of the public conscience; and
3. The violation of humanitarian law can ruin the legitimacy of a military unit or an operation as a whole. These violations will be all received even more negatively if they go against the cultural or religious values of the local population.

Allow me to finish this introduction with a quote from Albert Camus for you, to consider in relation to the applicability of humanitarian law: “*To fight for a truth without destroying it by the very means used to defend it*”.²

Comme le Président du CICR l’a souligné ce matin, la question de l’applicabilité du droit international humanitaire est d’importance fondamentale : l’application effective du droit humanitaire peut faire la différence entre la vie et la mort pour un prisonnier comme pour des populations entières.³ Elle fera l’objet de ce premier panel, qui sera partagé

² English translation by Amy IBERG, Assistant to the Vice-President, IIHL Geneva Office.

³Le fondement du droit international humanitaire est en effet la survie de personnes, de populations, de civilisations, et, en fin de compte, du genre humain. Voir Henri MEYROWITZ, “Réflexions sur le fondement du droit de la guerre”, in Christophe SWINARSKI (Ed.). *Etudes et essais sur le droit international humanitaire et sur les principes de la Croix-Rouge en l’honneur de Jean Pictet*. Genève, CICR, 1984, pp. 419-431. Et aussi Michel VEUTHEY, “Le droit à la survie, fondement du droit humanitaire” in *Essais sur le concept de “droit de vivre” : en mémoire de Yougindra*

en deux sessions, la première sur la notion des opérations de paix, tant sur le plan opérationnel que juridique, la seconde sur la question de l'applicabilité du droit humanitaire aux opérations de paix,⁴ question, qui, comme on le verra, reste ouverte à discussion.

Dans la première session, Madame Corinna KUHL, Chef de la Section des meilleures pratiques au Département des Opérations de maintien de la paix des Nations Unies, commencera par parler de « L'évolution des opérations de paix : de l'interposition aux missions intégrées ». Nous aurons ensuite un fidèle ami de l'Institut, le Professeur Louis BALMOND, de l'Université de Nice, qui nous présentera « Le cadre juridique des opérations de paix, du Chapitre VI au Chapitre VIII de la Charte des Nations Unies ». Au terme de cette première session, nous aurons quarante minutes pour répondre à des questions.

A ce sujet, vous avez tous reçu des formulaires pour présenter par écrit des questions. Merci de les remplir et de les remettre aux personnes du Secrétariat de l'Institut présentes dans la salle. Les orateurs répondront en premier aux questions écrites. Nous donnerons ensuite la parole aux personnes qui souhaiteraient poser des questions orales, si le temps le permet.

Dans la seconde session, nous entendrons trois orateurs. Madame Daphna SHRAGA, Conseillère juridique supérieure à la Division des Affaires Juridiques du Secrétariat Général des Nations Unies, sur « *Le cadre juridique des opérations de paix* »⁵ ; ensuite, le Professeur Marco SASSOLI, de l'Université de Genève, sur « *Droit international humanitaire et opérations de paix, champ d'application matériel* » et enfin M. Gert-Jan VAN HEGELSOM, Conseiller juridique au Conseil de l'Union Européenne, sur « *Le droit international humanitaire et les opérations menées par l'Union Européenne* ».

Au terme de cette seconde session, nous aurons une heure pour répondre à vos questions. Avant de donner la parole à ces personnalités, dont plusieurs sont des amis, permettez-moi d'ajouter une brève introduction à titre personnel.

L'applicabilité du droit international humanitaire dans les opérations de paix peut faire l'objet de trois approches différentes, qui, je le crois, devraient être complémentaires : une approche juridique, une approche militaire, une approche éthique. La première approche, juridique, sera l'objet principal - mais je l'espère pas exclusif - de nos

Khushalani. Bruxelles, 1988, pp. 233-249.

⁴ Plus généralement, voir Luigi CONDORELLI, *Les Nations Unies et le droit humanitaire*, Paris, Pedone, 1996, 506 p.

⁵ Voir Daphna SHRAGA, "UN Peacekeeping Operations: Applicability of International Humanitarian Law and Responsibility for Operations-Related Damage" *AJIL*, Vol. 94, No. 2, April 2000, pp. 406-412.

délibérations. Elle portera essentiellement sur le droit international humanitaire conventionnel et coutumier⁶ sans oublier les instruments des Droits de l'Homme, universels et régionaux, ni non plus le droit national des pays d'où viennent les contingents et du pays sur le territoire duquel ils accomplissent leur mission. Cette question de l'applicabilité n'est pas nouvelle ni entièrement résolue : depuis au moins la Corée en 1950⁷ et l'Opération au Congo en 1960,⁸ elle fait l'objet de discussions entre le CICR et le Secrétariat des Nations Unies⁹; et la Circulaire (« Bulletin ») du Secrétaire Général du 12 août 1999¹⁰ a tenté d'apporter une réponse certes

⁶ En plus de l'étude du CICR sur le droit international coutumier (voir note plus loin), voir le recueil publié sous la direction de Paul TAVERNIER et Jean-Marie HENCKAERTS, *Droit international humanitaire coutumier: enjeux et défis contemporains*, Bruxelles, Bruylant, 2008, p. 289.

⁷ Voir CICR, *Le Comité International de la Croix-Rouge et le conflit de Corée. Recueil de documents*. Genève, CICR, 1952, 2 volumes, et plus particulièrement les aide-mémoire soumis au Secrétaire général des Nations Unies les 12 janvier et 8 février 1951, reproduits au vol. I, pp. 82-85 cités par François BUGNION, *Le Comité International de la Croix-Rouge et la protection des victimes de la guerre*, Genève, CICR, 1986, p. 1438, et notamment pp. 737-738, 501, note 60, 738; Catherine REYSCHYRR, *De Yalta à Dien Bien Phu - Histoire du Comité international de la Croix-Rouge 1945-1955*, Genève, Georg, 2007, p. 745, ad pp. 540-544.

⁸ Voir sur cette opération des Nations Unies dont toutes les leçons n'ont certainement pas encore été tirées: - Georges ABI-SAAB, *The United Nations Operation in the Congo: 1960-1964*, Oxford, Oxford University Press, 1978, p. 206; Paul-Henry GENDEBIEN, *L'intervention des Nations Unies au Congo, 1960-194*, Paris, Mouton, 1967, p. 292; Claude LECLERCQ, *L'ONU et l'affaire du Congo*, Paris, Payot, 1967, p. 367; Rosalyn HIGGINS, *The United Nations Operation in the Congo (ONUC) 1960-1962*, London, Royal Institute of International Affairs, 1980.

⁹ Voir Finn SEYERSTED, *United Nations Forces in the Law of Peace and War*, Leyden, Sijthoff, 1966, p. 447, et particulièrement le Chapitre VIII "The Conventions on Warfare", pp. 314 ss. Voir aussi Daphna SHRAGA, "UN Peacekeeping Operations: Applicability of International Humanitarian Law and Responsibility for Operations-Related Damage", *AJIL*, Vol. 94, No. 2, April 2000, pp. 406-412; William SHAWCROSS, *Deliver Us From Evil. Peacekeepers, Warlords and a World of Endless Conflict*, New York, Simon & Schuster, 2000, p. 447.

¹⁰ ST/SGB/1999/13, 6 août 1999, entré en vigueur le 12 août 1999. Le texte français a été reproduit dans la *Revue internationale de la Croix-Rouge*, No. 836, avec "Quelques commentaires à propos de la Circulaire du Secrétaire général des Nations Unies du 6 août 1999", par Anne RYNIKER, pp. 795-805, disponible en ligne: <http://www.icrc.org/web/fre/sitefre0.nsf/html/5FZG69>. Voir encore Paolo BENVENUTI, "Le respect du droit international humanitaire par les forces des Nations Unies. La circulaire du Secrétaire Général.", *RGDIP*, 2001, pp. 355 ss; et Luigi CONDORELLI, "Les progrès du droit international humanitaire et la circulaire du Secrétaire Général des Nations Unies du 6 août 1999", in *L'ordre juridique*

intéressante mais qui n'a pas clos le débat. Le « Rapport Brahimi », un an après la Circulaire du Secrétaire Général, souligne à son tour l'importance essentielle pour le système des Nations Unies de promouvoir et de respecter les droits de l'homme et le droit international humanitaire dans toutes les activités liées à la paix et à la sécurité.¹¹ Une des recommandations de ce Rapport, qui fait une référence positive à la Circulaire,¹² est la formation du personnel militaire, de police et civil au droit humanitaire.

La question du droit applicable n'est jamais simple. De quel type de conflit s'agit-il ? International ? Non international ?¹³ Dans plusieurs situations, la question se pose de savoir si on a affaire à un seul type de conflit ou à une combinaison de conflits. Et, souvent, on assiste à des phases différentes de conflits ou même à des conflits parallèles simultanés.¹⁴ La question se pose ensuite de savoir quelles dispositions du

international, un système en quête d'équité et d'universalité: liber amicorum Georges Abi-Saab, La Haye, Nijhoff, 2001, pp. 495-505.

¹¹ *Report of the Panel on United Nations Peace Operations*. New York, 21 August 2000, A/55/305-S/2000/809, par. 6(e) : "The essential importance of the United Nations system adhering to and promoting international human rights instruments and standards and international humanitarian law in all aspects of its peace and security activities"

¹² *Ibidem* para. 41. Voir aussi le paragraphe 58 demandant que les accords de cessez-le-feu ou de paix soient en conformité avec le droit international humanitaire.

¹³ Voir notamment Sihyun CHO, "International Humanitarian Law and United Nations Operations in An Internal Armed Conflict", 26 *Korean J. Int'l & Comp. L.* 1998, pp. 85-112; et Tathiana FLORES ACUNA, *Le conflit armé en El Salvador : le statut des forces rebelles et le rôle de la Mission d'observation des Nations Unies en El Salvador à la lumière du droit international humanitaire*, Genève, Institut universitaire européen, 1994, p. 310. Le comportement des acteurs non-étatiques, au delà de considérations juridiques, fait souvent l'objet de négociations, d'une diplomatie souvent conduite par le CICR. Voir ainsi Michel VEUTHEY, "Learning from History: Accession to the Conventions, Special Agreements, and Unilateral Declarations" in *College of Europe: Proceedings of the Bruges Colloquium. Relevance of International Humanitarian Law to Non-State Actors. 25-26 October 2002*. Collegium, Bruges (Belgium), No. 27, Spring 2003, pp. 139-151.

¹⁴ Voir Henri MEYROWITZ, "The Law of War in the Vietnamese Conflict" in FALK, Richard (Ed.) *The Vietnam War and International Law*, Princeton, N.J., Princeton University Press, 1969, Vol. 2, pp. 516-571, publié en français "Le droit de la guerre et le conflit vietnamien", *Annuaire français de droit international*, 13 AFDI, 1967. Et aussi Dietrich SCHINDLER, "The Different Types of Armed Conflicts according to the Geneva Conventions and Protocols", *Recueil des Cours*, La Haye, 1979, II, pp. 117-164.

droit humanitaire sont applicables, des Conventions de 1949,¹⁵ des deux Protocoles additionnels ainsi que du droit coutumier¹⁶ sur le plan matériel, temporel, territorial et personnel. Sans avoir le temps d'entrer dans les détails, une disposition doit retenir notre attention, c'est l'Article 3 commun aux quatre Conventions de Genève de 1949 comme minimum applicable en toutes circonstances. L'Article 3 contient en effet des garanties minimales essentielles pour les personnes ne prenant pas ou plus une part active aux hostilités et interdit notamment la torture et les traitements inhumains ou dégradants. Une disposition reconnue par la Cour Internationale de Justice en 1986, dans l'Affaire Nicaragua, comme reflétant des « considérations essentielles d'humanité »,¹⁷ applicables dans tous les conflits armés et considérée comme de droit coutumier.¹⁸

¹⁵ Conventions de Genève de 1949 qui, soixante ans après leur signature, gardent leur pertinence. Voir l'étude de l'auteur "Disregarding the Geneva Conventions on the Protection of War Victims" in Kevin M. CAHILL (Editor), *Traditions, Values, and Humanitarian Action*, New York, A joint publication of Fordham University Press and The Center for International Health and Cooperation, New York, 2003, pp. 276- 304.

¹⁶ Voir Jean-Marie HENCKAERTS, "Study on customary international humanitarian law: a contribution to the understanding and respect for the rule of law in armed conflict", *International Review of the Red Cross*, Vol. 87, No 857, March 2005, pp. 175-212 (original anglais), et la version française parue dans la Sélection française 2005 (Volume 87), pp. 289-330, de la *Revue internationale de la Croix-Rouge* sous le titre "Etude sur le droit international humanitaire coutumier. Une contribution à la compréhension et au respect du droit des conflits armés". Document PDF disponible en ligne sur le site du CICR : [http://www.cicr.org/Web/fre/sitefre0.nsf/htmlall/p0860/\\$File/ICRC_001_0860.PDF!Open](http://www.cicr.org/Web/fre/sitefre0.nsf/htmlall/p0860/$File/ICRC_001_0860.PDF!Open). Voir aussi les ouvrages publiés sous la direction de Jean-Marie HENCKAERTS et Louise DOSWALD-BECK, *Customary International Humanitarian Law. Volume I: Rules*. Cambridge, Cambridge University Press, 2005, p. 621; *Volume II: Practice. Part 1*, 1982 p; *Part 2*, pp. 1983-4410; *Droit international coutumier. Volume I : Règles*. Bruxelles, Bruylant, 2006, p. 878. Ces règles coutumières sont disponibles en format PDF en 36 langues sur le site du CICR : <http://www.icrc.org/web/eng/siteeng0.nsf/html/customary-law-translations?opendocument>.

¹⁷ Affaire des *Activités militaires et paramilitaires au Nicaragua et contre celui-ci (Nicaragua c. Etats-Unis d'Amérique)*, fond, arrêt du 27 juin 1986, CIJ Recueil 1986, para. 219.

¹⁸ Voir la "Décision Relative à l'Exception Préjudicielle Conjointe aux Fins de Rejet de l'Acte d'Accusation Modifié en Raion de la Porte Juridictionnelle Limitée des Articles 2 et 3 du Statut" par la Chambre de Première Instance III du TPIY dans l'Affaire Dario Kordic et Mario Cerkez (Affaire no IT-95-14/2-PT): "La Chambre de première instance rappelle que la CIJ a confirmé l'appartenance de l'article 3 commun au droit coutumier dans l'affaire *Nicaragua* et dans son *Avis consultatif*

Nous ne devons pas oublier non plus, en concluant cette brève introduction juridique, qu'en toutes circonstances, de conflit armé ou non, les garanties minimales de l'Article 3 sont aussi reflétées dans les dispositions non dérogeables des instruments des Droits de l'Homme.¹⁹

La deuxième approche est militaire : le militaire en action a besoin de règles claires sur le traitement à réserver sur le terrain aux blessés, aux personnes capturées, aux civils. L'application des principes du droit international humanitaire est partie intégrante de la discipline militaire²⁰ et doit faire l'objet de « Règles opérationnelles d'engagement » (ROE), applicables indépendamment d'analyses juridiques précises de la qualification des personnes.

Et la troisième et dernière approche est éthique. L'éthique dans les opérations de paix peut prendre plusieurs formes, qui pourront s'appuyer sur des valeurs morales individuelles et collectives :

- la première serait l'honneur militaire d'une armée voire d'une unité ;²¹

relatif à la licéité de la menace ou de l'emploi d'armes nucléaires du 8 juillet 1996. Elle a également cité des éléments explicites en faveur de sa thèse dans le *Jugement Celebici* et dans le Jugement rendu le 10 décembre 1998 dans l'affaire *Furundzija* (IT-95-17/1)". <http://www.un.org/icty/Supplement/supp3-f/kordic-f.htm>.

¹⁹ Voir la XXVIIe Table Ronde de San Remo de 2003 et particulièrement le Rapport présenté par le CICR à la Conférence internationale de la Croix-Rouge et du Croissant-Rouge, pp. 5, 8 et 9, disponible en ligne: [http://www.icrc.org/Web/eng/siteeng0.nsf/htmlall/5UBCVX/\\$File/Interplay_other_regimes_Nov_2003.pdf](http://www.icrc.org/Web/eng/siteeng0.nsf/htmlall/5UBCVX/$File/Interplay_other_regimes_Nov_2003.pdf).

Et aussi Stelios PERRAKIS, "Le droit international humanitaire et ses relations avec les Droits de l'Homme. Quelques considérations" in Paul TAVERNIER et Jean-Marie HENCKAERTS (Eds). *Droit international humanitaire coutumier: enjeux et défis contemporains*, Bruxelles, Bruylant, 2008, p. 289, ad pp. 115-137.

²⁰ Donna WINSLOW, "Misplaced Loyalties: The Role of Military Culture in the Breakdown of Discipline in Two Peace Operations", *Journal of Military and Strategic Studies*, Spring 2004, Volume 6, Issue 3, Spring 2004, discute sur le plan sociologique l'excessive loyauté à une unité comme facteur pouvant nuire à l'accomplissement de la mission d'ensemble.

²¹ Voir notamment au sujet du lien entre honneur militaire et respect du droit humanitaire: Michael IGNATIEFF, *The Warrior's Honor: Ethnic War and the Modern Conscience*, New York, Holt-Metropolitan, 1998, p. 224; Theodore MERON, *Bloody Constraint. War and Chivalry in Shakespeare*, Oxford, O.U.P., 1999, p. 244; Alison BRYSK and Gershon SHAFIR (Editors), *National Insecurity and Human Rights. Democracies Debate Counterterrorism*, Berkeley, University of California Press, 2007, p 245 Voir notamment pp. 45, 46, 47, 54 et 55 (David P. FORSYTHE, "The United States. Protecting Human Dignity in an Era of Insecurity").

- la deuxième nous ramène au droit international humanitaire avec la « Clause de Martens »,²² qui s'applique « dans les cas non prévus » par le droit écrit et fait appel aux « exigences de la conscience publique » ;²³
- la troisième est que la violation du droit humanitaire peut ruiner la légitimité²⁴ d'une unité militaire²⁵ voire d'une opération entière,

²² Sur la Clause de Martens, voir notamment : Paolo BENVENUTI, "La clausola Martens e la tradizione classica del diritto naturale nella codificazione del diritto dei conflitti armati", in *Scritti degli allievi in memoria di Giuseppe Barile*, Padova, CEDAM, 1995, pp. 173-224; Antonio CASSESE, "The Martens Clause: Half a Loaf or Simply Pie in the Sky?" *EJIL* (2000), Vol. 11 No 1, pp. 187-216. Dieter FLECK, "Friedrich von Martens: A Great International Lawyer from Pärnu", *Baltic Defence Review*, No. 10 Vol. 2/2003, pp. 19-26.

²³ Voir Michel VEUTHEY, "Public Conscience in International Humanitarian Law Today", in FISCHER, Horst, FROISSART, Ulrike, HEINTSCHELL von HEINEGG, Wolff, RAAP (Eds.) *Krisensicherung und Humanitärer Schutz. Crisis Management and Humanitarian Protection*, Festschrift für Dieter Fleck, Berlin, Berliner Wissenschafts-Verlag (BWV), 2004, pp. 611-642.

²⁴ Pour le Dictionnaire de la langue française Robert, "Légitime évoque l'idée d'un droit fondé sur la justice et l'équité droit supérieur que le droit positif peut contredire. Dans ce cas, *légitime*, synonyme de « juste », s'oppose à *légal*." (Paul ROBERT, *Dictionnaire alphabétique et analogique de la langue française*, Paris, Le Robert, 1966, Tome Quatrième, p. 68).

²⁵ Voir notamment l'article du Colonel Michael D. CAPSTICK, "L'esprit militaire. Déterminer quelle sera la culture de l'armée de terre du Canada au XXI^e siècle", *Revue militaire canadienne*. Disponible en ligne <http://www.journal.forces.gc.ca/vo4/no1/military-militair-fra.asp#n2>: "Dans la nuit du 16 mars 1993, Shidane Abukar Arone, un jeune Somalien détenu par des soldats canadiens, a été assassiné. Cet " incident grave " a eu à lui seul un impact plus grand que personne n'aurait pu imaginer. Presque tout au long des années 1990, il a donné le ton aux débats publics sur les questions de défense au Canada. Il a suscité une importante commission d'enquête, d'innombrables études sur tous les aspects de la profession militaire au Canada et un processus de réforme institutionnelle qui marquera les Forces canadiennes pendant de nombreuses années.". Voir aussi David BERCUSON, *Significant Incident: Canada's Army, the Airborne, and the Murder in Somalia*, Toronto, McClelland and Stewart, 1996, p. 256. A la suite de ces incidents, le Gouvernement canadien décida de dissoudre ce Régiment aéroporté (" Airborne Regiment"), comme sanction. Voir le rapport officiel du Gouvernement canadien *Dishonoured Legaci: Report of the Commission of Enquiry into the Deployment of Canadian Forces to Somalia*, Ottawa, Canadian Government Publishing, 1997 (cité par Ray MURPHY, *UN Peacekeeping in Lebanon, Somalia and Kosovo. Operational and Legal Issues in Practice*, Cambridge, Cambridge University Press, 2007, p. 375, ad p. 220 note. Voir aussi AFRICAN RIGHTS (London), *Somalia: human rights abuses by the United Nations forces*, London, African

particulièrement d'une opération de paix.²⁶ Ces violations seront d'autant plus mal perçues si elles heurtent des valeurs culturelles ou religieuses,²⁷ en particulier locales.²⁸

Une opération de paix devrait, selon les termes de Mohamed Sahnoun, « œuvrer avec la population locale dans le respect de la culture locale ».²⁹ Le « Code de conduite personnelle des Casques bleus », qui reprend les principes essentiels du droit humanitaire et des droits de l'homme, conclut que le fait de ne pas les observer peut avoir pour conséquences de :

- Miner la confiance à l'égard des Nations Unies ;
- Mettre en péril la réalisation de la mission ;
- Mettre en péril notre statut et notre sécurité en tant que personnel de maintien de la paix. ³⁰

Permettez-moi de terminer cette introduction par une citation d'Albert Camus, écrite il y a cinquante ans, pendant la guerre d'Algérie, à

Rights, 1993, p. 35 (cité dans la bibliographie sur les opérations de maintien de la paix de la Bibliothèque des Nations Unies Dag Hammarskjöld (DHL/USS/ECRD/BIB/1/Pt.4), disponible en ligne : <http://www.un.org/depts/dhl/pkeep.htm> (English) et <http://www.un.org/depts/dhl/unbibf.htm> (Français). Plus généralement, voir Stephen SMITH, *Somalie : la guerre perdue de l'humanitaire*, Paris, Calmann-Lévy, 1993, p. 243.

²⁶ Ray MURPHY, *op. cit.* écrit ainsi p. 220: "[...]nothing can be more contradictory than a UN force transgressing international humanitarian law or human rights standards that have gradually and painstakingly agreed upon during the last sixty years."

²⁷ Voir les Actes du Colloque organisé par l'UFR Institut du Droit de la Paix et du Développement (I.D.P.D.) et l'Institut International de Droit Humanitaire à Nice les 18 et 19 juin 2007, publiés sous la direction d'Anne-Sophie MILLET-DEVALLE, *Religions et Droit International Humanitaire*, Paris, Pedone, 2008, p. 218.

²⁸ Cage BANSEKA, "The new Era of African Union Peacekeeping and the Culture Question" [2005], en ligne: <http://www.hollerafrica.com/showArticle.php?artId=122&catId=1>.

²⁹ Mohamed SAHNOUN, "Les interventions de type mixte en Somalie et dans la région des Grands Lacs", in Jonathan MOORE (Ed.), *Des choix difficiles. Les dilemmes moraux de l'humanitaire. Traduit de l'anglais par Dominique Leveillé*, Paris, Gallimard, 1999, p. 457, *ad pp.* 147-162 et plus particulièrement pp. 148-152. L'édition originale de ce recueil publié à l'initiative du CICR a paru sous le titre *Hard Choices. Moral Dilemmas in Humanitarian Intervention*, Lanham, MD, Rowman & Littlefield, 1999, p. 340.

³⁰ Publié en 1997 par DPKO

http://www.genderandpeacekeeping.org/resources/5_Code_de_conduite_personnelle_des_casques_bleus.pdf.

méditer en relation avec l'applicabilité du droit humanitaire : « *Se battre pour une vérité en veillant à ne pas la tuer des armes mêmes dont on la défend* »³¹.

³¹ Albert CAMUS, *Actuelles III. Chroniques algériennes (1939-1958)*, Paris, Gallimard, 1958, p. 212 *ad* p. 24.

Peace operations, an operational and legal concept

The evolution of peace operations, from interposition to integrated missions

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First, I wish to thank the International Institute of Humanitarian Law (IIHL) and the International Committee of the Red Cross (ICRC) for inviting the Department of Peace Keeping Operations (DPKO) to participate in this important discussion. I was asked to speak about the evolution of peace operations. While my remarks will naturally focus on UN-commanded peacekeeping, I would like to touch briefly on the larger universe of peace operations outlined this morning in the excellent keynote address by Dr. Kellenberger.

The term 'peace operations' obviously describes a very broad range of peace and security interventions in international conflict management. Many different actors are involved such as the United Nations, the African Union, the European Union, NATO and other regional and sub-regional organizations, as well as multi-national forces and 'coalitions of the willing', which lack an institutional structure but are held together by usually one designated lead nation. In many conflict situations, there will be a combination of actors involved and operations take place either in succession, in parallel with separate mandates, or in some form of joint deployment under one mandate.

There are two points I would like to highlight. First, the legitimacy of any peace operation is obviously based on its authorization by the UN Security Council. However, while the Council has the authority to intervene on issues of international peace and security under the UN Charter (and the legal basis will be discussed next), there is currently no global system of inter-locking capacities in place. Rather, we are engaged in a patchwork of activities. We do not yet have - and may never have - a comprehensive international peace and security architecture that can task and implement the full range of intervention options from conflict prevention to peacemaking, peacekeeping, peace enforcement and peacebuilding. All types of current peace operations have to work around that gap.

Secondly, although you all know this well, I would like to emphasize the distinction between UN-authorized and UN-commanded operations, because they are often treated as the same. The difference is critical to questions of capability and accountability, and it plays a role in the various subjects covered by this Round Table. Since the UN entity I

work for, the Department of Peacekeeping Operations (DPKO), is responsible only for UN-commanded deployments, the so-called blue helmets, I will use the term 'UN peacekeeping' in this way for the remainder of my remarks.

Let me then turn specifically to the evolution of UN peacekeeping operations. While there has not been a steady and irreversible progression of models and ideas towards the current state of UN peacekeeping, political realities have created an increasing variety of mandates over time, reflecting not only conditions on the ground but equally the global strategic context. Since 1948, the UN has launched 63 peacekeeping operations. Most of these closed because they had completed their mandates, but several were terminated for other reasons.

As mentioned this morning, the majority of the 15 peacekeeping operations established before 1989 – the end of the Cold War – were based on an unarmed or lightly armed military observer presence to monitor ceasefires between countries, mostly in the Middle East. This is what is usually referred to as the traditional interposition model. With the end of the Cold War, this model gave way to more complex interventions with a mobile military force and a strong civilian component. The two superpowers were looking for ways to disengage from a series of proxy wars around the world, and it is for this reason that UN peacekeeping experienced a massive surge in the number, size and tasking of operations, from Guatemala and El Salvador to Namibia, Mozambique and Cambodia. These were based on wide-ranging peace agreements, adding new elements such as elections support to peacekeeping mandates.

With the early success of several of these operations came a perception that peacekeeping operations could be usefully deployed into a wide array of conflicts, including those where there was no peace to keep, such as Somalia, or where peace was extremely tenuous. The outcomes were often tragic. By the mid-1990s, the UN was coping with the aftermath of horrendous failures in Somalia, Rwanda and Bosnia. The instrument of peacekeeping was widely discredited, and a period of retrenchment followed. However, the horrors of Somalia, Rwanda and Bosnia also made clear that inaction was not an option. Together with the lessons from the successes and failures of that decade, new thinking started to emerge around issues of international responsibility and the elements of an effective conflict intervention. In the absence of any other organization with the ability and reach to operate anywhere in the world, member States turned their attention back to UN peacekeeping. Within a year, between June 1999 and July 2000, DPKO was mandated to launch five large-scale operations in Kosovo, Sierra Leone, East Timor, Congo, and Ethiopia/Eritrea.

Since then, UN peacekeeping has experienced an almost perpetual surge in activity. By 2006, there had been a 600 percent increase in the number of blue helmets. Today, DPKO leads 19 missions with almost 110,000 personnel and an annual budget of US\$7 billion. The number of mandated tasks has grown equally in size and complexity. The majority of today's operations share three main features.

First and most striking is the shift towards "robust peacekeeping". The turning point came with the mission in Sierra Leone, which started as a small observer mission in 1998. When armed groups mounted a major offensive in violation of the peace agreement, the Security Council agreed to reinforce the mission, and not to withdraw as had happened in Rwanda. Not only did the mission grow from 50 unarmed observers to a force of over 17,000 troops, it was also given provisions in its mandate that it could act against hostile elements in defence of the mandate and, '*within the limits of its capacity*', protect civilians under imminent threat of attack. That was a real turning point in UN peacekeeping, and the majority of operations since 2000 have included similar elements in their mandates. With these provisions came changes in the rules of engagement and force structure of our missions. Obviously, the consequences are part of the discussion at this Round Table, and I will return to this issue shortly.

Second is the multidimensional nature of missions. As mentioned this morning, peacekeeping has taken on an ever increasing number of peacebuilding and State-building functions, in the areas of governance, extension of State authority, rule of law, human rights, and policing all the way to exercising full executive, judicial and legislative authority in situations where we are asked to run transitional administrations. While multidimensional mandates were common already among the missions of the early 1990s, the range of activities has expanded considerably in the past few years. Since no single actor has the capability to deliver on so many different activities, peacekeeping missions are meant to work closely with humanitarian and development partners. Within the UN system, the thinking moved from a coordinated to an integrated approach in the course of this decade, meaning all UN partners work towards a common strategic objective or desired end state in the conflict area. Under that vision, the early catalyst role of a peacekeeping mission would be naturally linked to long-term peacebuilding and development efforts. The structure merging these different strands of activity is the combining of the development and humanitarian coordination function in the person of the Deputy Special Representative of an integrated mission.

The third main feature is the interaction between UN peacekeeping and the other actors in peace operations. According to the Center on International Cooperation, about 40 out of 54 recent missions consisted of

some form of joint, coordinated or sequenced operation by more than one institution. A good example for UN peacekeeping is the provision of short-term military support. Given the time it takes for the UN to generate troops, the Security Council will at times authorize one State or a multinational force to deploy quickly for an interim period while the UN mission builds up its strength. In other cases, a member State, regional organization or multinational force will take on the military component of a Security Council mandate while DPKO deploys the civilian and police components.

These features reflect in a significant way the shift from the use of peacekeeping primarily in inter-State conflicts to its primary deployment into intra-State conflict where stabilization is no longer a matter of skillful diplomacy to control international aggression. Rather, stabilization requires transforming multiple political, economic, social and ethnic drivers of conflict so that all groups have a long-term stake in the peaceful settlement of disputes. In the earlier multidimensional mandates, the exit strategy was often the holding of elections and the swearing in of a new government. What we now have goes way beyond the conclusion of an electoral process. Now there is a continued focus on the viability of institutions to guarantee peace, based on respect for human rights, the rule of law and public participation.

The evolution I just described shows the flexibility of peacekeeping as a conflict management tool. However, this also brings us to the question of its limitations. The UN is easily seen as a ready provider of last resort – when no-one else is willing or able to go – and it is assigned problem-solving roles that it is ill equipped to handle. So the high number of mandates is not always an expression of popularity. Sometimes it simply means that UN peacekeeping is the lowest common denominator on which all Security Council members can agree when a crisis hits and countries want to be seen as doing ‘something’. But peacekeeping is not an effective tool in every situation.

UN peacekeeping works primarily when it adheres to the three basic principles that have characterized it from the beginning: consent of the parties, impartiality, and the non-use of force except in self defence and defence of the mandate.

Consent of the main parties to the conflict is key. It requires a commitment by the parties to a political process and their acceptance of the peacekeeping operation mandated to support that process. The principle of consent ultimately recognizes the fact that peacekeeping is a political exercise and not simply a military or technocratic effort. However, the understanding of that concept has evolved significantly from the early days. For one, we had to learn that consent is not given once and then

taken for granted. It is something we have to work constantly to maintain and move the peace process forward. Of course, the impartiality and perceived legitimacy of the mission play an important role in maintaining consent. Another aspect is that consent may have been given grudgingly under international pressure, and may be withdrawn in a variety of ways, including by restricting the mission's freedom of movement or impounding its equipment. A third element is that in many conflicts, the parties are internally divided and have weak command structures, meaning that consent can break down at the local level or through the appearance of spoilers, even if the leadership in the capital is committed.

This discussion is, of course, closely linked to questions around the use of force by peacekeepers. I referred earlier to 'robust peacekeeping'. It is widely agreed now that UN peacekeepers may use force at the tactical level if acting in self-defence or in defence of the mandate. Tactical level means force is used in support of a peace process, not in the absence of it; it seeks to protect civilians and deter spoilers, not to inflict military defeat; and it requires the consent of the host country and/or the main parties to the conflict. This is clearly distinct from peace enforcement, which is not based on the consent of the main parties to the conflict and may involve the use of force at the strategic level.

In several of our missions with so-called robust mandates and capabilities, such as in the Democratic Republic of Congo and Haiti, peacekeepers have mounted operations to deter armed groups or to restore public order. These UN peacekeepers have inflicted casualties. And we wrestle with the political, moral and operational dilemmas that arise in these situations, whether it involves curbing criminal violence in urban slums, controlling riots, deterring armed groups in remote, inaccessible locations, detaining and disarming suspects, and complying with international humanitarian law (IHL) and human rights law in all manner of settings. We still lack a clear policy framework for 'robust peacekeeping' that accommodates the necessity to use force on occasion, but is supposed to do so without harming civilians, without using disproportionate force, and without turning our backs on people in need of protection.

In conclusion, I would like to make five general points on the evolution of peacekeeping:

One, while the integrated mission model is now applied to most multi-dimensional mandates, it is not without challenges. The absence of a comprehensive peace and security architecture leaves peacekeeping operations as the main post-conflict vehicle to which a broad range of peacebuilding tasks can be attached. But the UN governance structure does not allow for a direct tasking by the Security Council of the specialized agencies, funds and programmes which play the key role in

these longer-term activities. This, of course, affects implementation. Another challenge is the protection of humanitarian space which is inherently more difficult in an integrated model and remains a subject of debate.

Secondly, we should not assume that broad-based interventions are always the ideal. Some conflict situations are not ready for it. At times, even in internal conflict, it is better simply to maintain a buffer zone between adversaries and provide breathing space for the political process to unfold. We, the international community, lack patience and expect solutions within a year or two. The diversity of peacekeeping models should not be seen as one being superior to another but it should rather provide us with more tailored solutions to different situations.

Third, and closely related, is the need to be mindful always about the structures we build under multidimensional mandates. We tend to work within one particular definition of the state and tailor State-building interventions accordingly. This is often associated with a Western model, and it has led to criticism of neo-colonialism, occupation and regime change taking place in the guise of peacekeeping.

Fourth, UN peacekeeping again faces a real watershed challenge with the deployment to Darfur and the planning for deployment in Somalia. Neither situation meets the basic criteria for effective UN peacekeeping. This is a dilemma no one has an answer for. The enormous suffering of people in these areas demands action but at the same time an ineffectual deployment will help no one. This discussion has taken on additional connotations in the context of the 'responsibility to protect' (R2P). The backlash against R2P has affected international consensus on the more modest concept of protection of civilians in a peacekeeping context, and it remains to be seen how this debate will play out in future deployments.

And finally, we are facing very serious overstretch, because of the rapid expansion of UN peacekeeping. The UN has not been able to generate the full force that was authorized for Darfur. Out of 30,000 uniformed personnel, only 9,000 have arrived since the establishment of the mission last year. Similar shortages exist among civilians, especially when it comes to State-building expertise. Headquarters support is equally inadequate. According to CIC, the United States ratio of headquarters staff to military personnel in the field is roughly 3:1, the NATO ratio is 1:4 and the UN ratio is 1:100. Among other consequences, this also means an inadequate management capacity. While it is not the sole cause, it certainly contributes to problems with conduct and discipline, even criminal behaviour, in some of our missions. With the complexity of mandates and the extremely volatile deployment areas, our

capacity to mount and sustain operations is simply inadequate and could jeopardize the progress made in rendering peacekeeping more effective.

In the process of mandate expansion - in being the only available or politically palatable or most affordable instrument - UN peacekeeping is being asked to operate well beyond its traditional comfort zones. UN peacekeeping has transformed itself - several times over - in its sixty-year lifespan, and no doubt it will continue to change. Our challenge is to ensure that further evolution in peace operations generally builds on learning our lessons about what has worked and what has not, and why. The tool we select to address an international peace and security problem needs to be the right one, or we run the risk of discrediting all international interventions.

Thank you.

À propos du cadre juridique des opérations de maintien de la paix

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S'interroger sur le cadre juridique des Opérations de Maintien de la Paix (OMP) n'est pas exempt de difficultés car les OMP sont assurément des objets juridiques non identifiés. Les incertitudes sur leur nature et leur fonction proviennent pour une bonne part de l'ambiguïté des rapports entre la Charte des Nations Unies et le droit international.

Certes, la Charte est un acte juridique, au moins le traité constitutif d'une organisation internationale, au plus la Constitution d'une Communauté internationale en voie d'édification. Elle produit par ailleurs, par les organes qu'elle institue, un droit dérivé qui contribue, avec l'acte constitutif, à déterminer le périmètre juridique du droit de la Charte. Il y a là un ordre juridique soumis aux principes et aux procédures qu'elle établit. Toutefois, ce droit est plus que tout autre politique d'autant que le premier objectif que s'assigne la Charte est l'établissement de la paix internationale. Le respect du droit n'est dès lors qu'un des modes de réalisation de l'objectif fondamental du maintien de la paix. Le droit mais quel droit ? La Charte ne constitue qu'un ordre juridique partiel lequel, s'il entretient des relations étroites avec le droit international général, ne peut y être assimilé. Cette interrogation est lourde de contradictions et de tensions, notamment pour le Conseil de sécurité. Celui-ci est en effet l'organe politique par excellence, auquel la mission pacificatrice de la Charte a été assignée en priorité. Institué par la Charte et donc producteur d'actes dérivés, il est doté d'un pouvoir discrétionnaire pour atteindre les objectifs qui lui sont fixés. Dès lors, la position du Conseil par rapport au droit sera une position intermédiaire : ni soumission complète ; ni total affranchissement. Il se trouve, selon l'heureuse formule de la présidente de la Cour Internationale de Justice, « *within the law rather than according to the law* ».

Les OMP révèlent bien cette dialectique d'opérations fondées en droit mais également régies par le droit, avec une différence fondamentale cependant : alors que, quant à la base juridique, le Conseil de sécurité façonne le rapport de son action au droit, si l'on considère le cadre juridique dans lequel se déroule les OMP, la contrainte juridique lui est largement extérieure et donc le cas échéant imposée.

I La base juridique des OMP, une construction maîtrisée par le Conseil de Sécurité

La notion de base juridique est fréquemment utilisée par les spécialistes de droit européen communautaire qui recherchent dans les traités les dispositions susceptibles de fonder la compétence communautaire. Exigence de légalité, il s'agit de trouver dans l'acte constitutif, le fondement de l'action des organes de l'organisation.

L'originalité, bien connue des OMP, est, sur ce point, que la base juridique ne résulte pas d'une disposition expresse de la Charte mais qu'elle a été construite par le Conseil de sécurité. Cette construction n'est pas pour autant dépourvue de toute relation avec la Charte. Dans le cadre de cette allégeance globale à l'acte constitutif, à l'esprit de la Charte, le Conseil use de son pouvoir discrétionnaire pour façonner la catégorie juridique des OMP au gré des besoins de la sécurité internationale.

A. Les OMP, expression du pouvoir discrétionnaire du Conseil de sécurité

Les OMP ne sont pas elles un constat d'échec ? Le Conseil de sécurité, faute de pouvoir garantir la sécurité internationale par les moyens prévus par la Charte, invente un nouvel instrument en s'appuyant sur la responsabilité particulière que lui reconnaît la Charte dans le maintien de la paix.

1. La motivation : la responsabilité principale du maintien de la paix et de la sécurité internationale

L'organisation constitutionnelle de la Charte fait du Conseil, en vertu de l'article 24, le responsable principal du maintien de la paix et de la sécurité internationale. Cette responsabilité particulière se traduit par l'exercice d'un pouvoir discrétionnaire de qualification et d'un pouvoir discrétionnaire d'action.

En vertu de l'article 39, selon la tautologie volontairement affichée par Jean Combacau, une menace pour la paix au sens de l'article 39 est une situation dont l'organe compétent déclare qu'elle menace effectivement la paix. Le constat opéré par le Conseil de sécurité en vertu de cet article est bien connu. L'interprétation qu'il va en donner sera, paradoxalement, à la fois restrictive et extensive Elle sera restrictive dans la mesure où il se refusera à fonder son action sur le constat d'une agression, faute d'une définition incontestée en droit positif et désireux d'éviter la stigmatisation d'un Etat, membre malgré tout, de la Communauté internationale. Elle sera restrictive également dans la mesure ou la notion de « rupture de la paix », à vrai dire peu opérante, ne sera que très rarement utilisée. Il reste alors, la menace à la paix et à la sécurité internationale devenue la référence unique du Conseil d'autant qu'elle trouve à s'appliquer aussi

bien dans le cadre du chapitre VII que dans le cadre du chapitre VI (différend susceptible de menacer le maintien de la paix et de la sécurité internationale, article 33§1). L'interprétation devient alors extensive dans la mesure où, que la menace soit de type militaire ou non militaire, qu'elle émane d'acteurs individualisés, Etats, groupes ou personnes physiques, ou qu'elle soit anonyme, le Conseil de sécurité pourra discrétionnairement se saisir de la situation. Cette interprétation a fait l'objet d'une approbation générale au moins tacite de la part de la grande majorité des Etats, la menace à la paix et à la sécurité internationale étant perçue comme devant viser également les « nouvelles menaces ».

Plus significative encore a été le développement du pouvoir discrétionnaire d'action du Conseil de sécurité, sa capacité à inventer de nouvelles réponses juridiques et institutionnelles aux défis représentés par les menaces à la paix. Outre les sanctions économiques prévues à l'article 41 de la Charte, préférées d'ailleurs aux mesures de contrainte armée de l'article 42, le Conseil a eu recours à différents instruments. Face à des menaces plus globales, il a répondu, par les résolutions 1373(2001) et 1540(2004) en se transformant en « législateur », utilisant les pouvoirs dont il dispose en vertu du chapitre VII pour tenter d'assurer le respect du droit international. La difficulté de mettre en cause la responsabilité de l'Etat conduira également le Conseil à rechercher la sanction des comportements individuels d'une part, avec la création des juridictions pénales internationales et d'autre part avec la mise en place d'un système de sanctions individuelles dites « ciblées » ou « intelligentes », consistant dans le gel des avoirs financiers ou l'interdiction des déplacements. Il apparaît ainsi que tous les moyens sont bons pour prévenir, maintenir ou rétablir la paix et que les OMP n'en sont qu'une des expressions.

Cette manifestation politique discrétionnaire acquière-t-elle pour autant une dimension juridique ?

2. *La forme : la résolution, acte juridique ?*

La prise de position en opportunité du Conseil de sécurité prend la forme d'une résolution destinée à créer l'OMP. Cette résolution concourt à la définition de son cadre juridique. Elle en est même l'élément le plus important. Acte politique, expression du pouvoir discrétionnaire du Conseil, elle constitue également un acte juridique international. Il s'agit d'abord d'une règle de droit dérivé qui résulte d'une qualification juridique à laquelle le Conseil de sécurité a procédé en vertu de l'article 39 de la Charte. Sur cette base, il adopte un acte unilatéral destiné à modifier le comportement des sujets de droit en leur imposant des obligations juridiques. Certes, il a la possibilité d'agir par voie de recommandations ou de décision, même dans le cadre du chapitre VII, mais les résolutions

créant des OMP sont des actes décisifs, expression de son pouvoir autoritaire. Du fait des articles 24 puisqu'il peut agir au nom des Etats et 25 dans la mesure où les Etats membres conviennent d'accepter et d'appliquer ses décisions de la Charte, il dispose de la capacité d'adopter des actes ayant valeur juridique obligatoire pour les Etats. Le pouvoir de décision que l'article 25 reconnaît au Conseil de sécurité ne se limite d'ailleurs pas à l'exercice des compétences prévues au chapitre VII, mais à toutes les mesures jugées opportunes pour le maintien de la paix. C'est le cas naturellement des OMP.

Sur la base du chapitre VII, le Conseil de sécurité a ainsi été conduit à adopter des résolutions de trois types différents. D'abord, des actes de police, acte décisif visant un destinataire particulier et dont l'objet est de le contraindre à un certain comportement. Ensuite, des actes quasi législatifs comportant des obligations générales à l'encontre de tous les Etats. Enfin, des actes d'un troisième type, les résolutions créant une OMP qui sont du point de vue de leur contenu à la fois décisifs mais également programmatoires. Adoptées sur la base du chapitre VII, elles créent des obligations mais certaines sont immédiates alors que d'autres sont médiate : le mandat assigne en effet à la mission un certain nombre d'objectifs à atteindre qui supposent la mise en place d'un appareil institutionnel et la mobilisation de moyens. L'obligation ne se concrétise alors que dans la durée, celle-ci pouvant d'ailleurs varier suivant que la résolution envisage le rétablissement de la paix, le maintien de la paix ou la consolidation de la paix. De ce point de vue, elle met ainsi à la charge de l'organisation, au moins une obligation de moyen : agir pour mettre en place les instruments nécessaires à l'exécution du mandat.

B. Les OMP, manifestation du pragmatisme du Conseil de sécurité

Le Conseil de sécurité ne tire pas la catégorie des OMP du néant. Il emprunte des caractéristiques aux différents chapitres de la Charte, dont il fait varier l'apport au gré des exigences du maintien de la paix. De ce fait, la catégorie juridique des OMP est à la fois englobante et évolutive.

1. Une catégorie juridique englobante

Les OMP retiennent une approche synthétique de différents chapitres de la Charte alors même que les rédacteurs de celle-ci les avaient distingués soigneusement dans la mesure où ils répondent à des situations différentes : le règlement pacifique du chapitre VI s'oppose à la coercition du chapitre VII et l'action du niveau universel des chapitres VI et VII ne peut ressembler à celle du niveau régional prévue au chapitre VIII. Ces distinctions sont en partie écartées par les OMP qui vont s'appuyer simultanément sur les trois textes ou au moins sur la logique qui les anime.

Au chapitre VII est empruntée l'autorité qui s'attache aux résolutions du Conseil de sécurité, créant des obligations pour les différents protagonistes et autorisant, le cas échéant, l'usage de la force. Pour autant, et l'on passe alors au chapitre VI, ce n'est pas la contrainte qui est recherchée faute de désigner une cible à cette contrainte. Les protagonistes sont placés sur le même plan et l'autorité est alors destinée à rendre effective une interposition et à imposer les mesures nécessaires au retour de la paix. Le fameux chapitre « VI et demi » apparaît alors.

Mais son émergence ne pouvait rester sans conséquence sur le chapitre VIII dont la logique interne (article 52 et 53) reprend celle des chapitres VI et VII. Au nom des impératifs du maintien de la paix, le recours aux organismes régionaux devient systématique, mais sans pour autant s'inscrire dans le schéma dessiné par le chapitre VIII. Progressivement d'ailleurs, celui-ci ne sera plus mentionné dans les résolutions du Conseil de sécurité. Ce qui est recherché, comme le remarquera le Secrétaire général des Nations Unies, c'est la construction d'une architecture internationale de sécurité intégrant tous les acteurs internationaux susceptibles de contribuer au maintien de la paix. La fin justifie les moyens, au moins juridiques.

Il est dès lors difficile de rattacher les OMP à l'un ou à l'autre des chapitres de la Charte. Une seule référence demeure essentielle, c'est celle du Chapitre VII, mais sans pour autant que l'on tire toutes les conséquences du régime juridique prévu par le texte. Elle permet en réalité au Conseil de sécurité, d'une part, sur la base de l'article 39, de répondre dans une démarche téléologique aux menaces à la paix et à la sécurité internationale, d'autre part, d'autoriser éventuellement l'usage de la force.

2. *Une catégorie juridique au contenu évolutif*

Rechercher une base juridique unique dans les chapitres de la Charte est d'autant plus malaisé que le Conseil s'attache, de plus, à faire évoluer les OMP au gré des réalités internationales mais également au gré de ses besoins. Réponse à une situation donnée, la résolution créant une OMP n'a pas vocation à figer la notion et son contenu. La notion d'OMP s'est avérée ainsi particulièrement évolutive, et le constat qui en résulte, de l'existence de générations successives d'opérations, est bien connu. Il révèle un élargissement continu du mandat autour du triptyque rétablissement de la paix-maintien de la paix-consolidation de la paix. Le Conseil de sécurité se trouve ainsi à l'origine d'opérations de *state-building* voire de *nation-building*. La sécurité internationale prend la forme désormais de la sécurité humaine et la paix n'est plus seulement l'absence de guerre. Ainsi, au nom du maintien de la paix, le champ d'application du mandat ne connaît plus de limites certaines, et le Conseil de sécurité est

même parfois conduit à aborder des contrées inexplorées et à exercer des fonctions parajudiciaires

Rien ne marque mieux cependant le caractère évolutif de la catégorie juridique des OMP que les oscillations entre le chapitre VI et le chapitre VII auxquelles la pratique donne lieu. Le chap. VI se caractérise par la recherche du consentement. Mais, plus que sur un consentement, elle débouche parfois sur une négociation (pour ne pas dire un marchandage) à propos du déclenchement de l'opération voire de sa mise en œuvre. Les attermolements qui ont caractérisé l'engagement de l'ONU au Darfour et les négociations qui en ont résulté sur la base juridique de l'action, l'origine des forces et leurs moyens, laissent à penser que dans ce cas le chapitre VI l'a emporté sur le chapitre VII. Pour autant, celui-ci retrouve toute son importance lorsque l'exécution de la mission est susceptible d'exiger le recours à la force. Il s'agit là de la caractéristique la plus tangible de l'invocation du chapitre VII. Or, le recours à la force, limité à la légitime défense des forces dans les OMP dites classiques, est étendu au respect de l'exécution du mandat dans les nouvelles opérations dites « robustes ». En égard à l'élargissement systématique des mandats, on mesure l'élargissement corrélatif de l'autorisation de recourir à la force même si celle-ci présente, dans le cadre des OMP, la caractéristique d'être toujours « tous azimuts ».

Paradoxalement, cette évolution tout à fait significative a été acceptée par la quasi unanimité des Etats. Traduisant un véritable aménagement coutumier de la Charte, elle fait l'objet d'une acceptation très générale et cela pour trois raisons au moins. D'une part, l'OMP est une solution commode permettant de montrer qu'on agit sans toujours beaucoup d'illusions. D'autre part, il s'agit d'une solution dans laquelle l'usage de la force reste accessoire. Enfin, l'OMP est désormais un processus qui associe de multiples partenaires et institutions, manifestation d'un véritable partenariat mondial.

Comme Serge SUR, il faut donc faire « l'éloge du Conseil de sécurité » qui a su trouver un mode d'action consensuel à défaut d'être toujours efficace.

C'est sans doute parce que les OMP s'efforcent d'être consensuelles, qu'elles associent de multiples acteurs, que le cadre juridique dans lequel se déroule chacune d'entre elles s'avère beaucoup plus complexe. A des données juridiques sombres toutes sombres du fait de la discrétionnarité de l'action du Conseil s'oppose un pluralisme juridique qui a des conséquences directes sur le cadre juridique des OMP.

II. Le cadre juridique des OMP : les contraintes du pluralisme juridique

Une fois la décision adoptée dans un contexte où les contraintes juridiques sont finalement peu gênantes, celles-ci réapparaissent lorsque l'on examine le cadre juridique dans lequel les OMP doivent se déployer. Il s'avère alors que les OMP sont soumises à un cadre normatif pluriel dont les caractéristiques rendent le respect aléatoire.

A. *La soumission des OMP à un cadre normatif pluriel*

Le cadre normatif dans lequel vont se dérouler les OMP est constitué d'un ensemble de règles de droit aux origines diverses, variables en fonction des différentes opérations et dont on ne donnera ici qu'un aperçu général. Ces règles de droit traduisent à la fois des contraintes qui résultent des règles systémiques propres à l'action de chacun des acteurs, mais également des contraintes provenant de règles substantielles qui traduisent la soumission des OMP à des règles de fond.

1. *Les contraintes juridiques résultant des règles systémiques*

Les OMP sont des opérations complexes faisant intervenir une pluralité d'acteurs. Chacun d'eux agit à la fois sur la base de règles qui lui sont propres en vertu de son autonomie institutionnelle mais également sur la base de règles négociées avec ses partenaires.

Les OMP sont ainsi, en premier lieu, soumises au droit interne des sujets de droit qui collaborent aux OMP. Dans l'hypothèse la plus simple (mais désormais la moins fréquente), il s'agira du droit interne de l'ONU susceptible de régir l'organisation et le fonctionnement des OMP. Ce droit peut aussi bien être du droit « dur » que du droit « mou ». Le plus souvent toutefois, le droit de l'ONU devra être complété par le droit des organisations régionales voire par le droit des Etats. Pour les organisations régionales les contraintes systémiques peuvent s'avérer particulièrement lourdes si l'on est en présence d'organisations d'intégration comme l'Union européenne dont le processus décisionnel fait intervenir plusieurs organes et qui ont la compétence pour adopter des actes obligatoires pour les Etats membres. Ce n'est qu'au terme d'un processus long et parfois aléatoire que l'Union européenne sera susceptible de s'engager dans une OMP. Pour d'autres organisations au contraire, les contraintes systémiques semblent plus limitées mais elles ne sont jamais absentes et peuvent parfois se cumuler, comme dans l'hypothèse où une OMP repose sur l'action conjointe de deux organisations régionales. Parfois, c'est un Etat qui est le partenaire des Nations Unies dans une OMP et, dès lors, son intervention sera soumise aux dispositions constitutionnelles ou législatives qui autorisent l'action de ses forces hors du territoire national

et les règles d'engagement de celles-ci. Ce rapide survol permet de mesurer la complexité de ce cadre juridique dès lors que toutes ces règles peuvent s'avérer aussi bien complémentaires que concurrentes.

Les contraintes systémiques résultent également, en second lieu, des accords passés entre les différents acteurs. Si une hiérarchie peut apparaître entre eux, elle ne remet pas en cause l'autonomie institutionnelle qui commande donc de recourir à l'accord pour organiser une action conjointe. Le cadre juridique est alors issu de la collaboration entre sujets de droit et des accords passés entre ONU et organisations internationales, ONU et Etats contributeurs ou organisations régionales et Etats contributeurs, mais également entre tous ces acteurs et l'Etat destinataire de l'OMP dont le consentement reste indispensable au déploiement de l'opération.

Ces contraintes que l'on peut considérer en réalité comme étant de nature procédurales ont des incidences directes à la fois sur le déclenchement même de l'OMP mais également sur son déroulement. Elles sont le principal facteur de retard dans la mise en œuvre de la décision de principe du Conseil de sécurité et peuvent être, de ce fait, la cause d'effets d'annonce toujours néfastes.

2. *Les contraintes juridiques substantielles*

La question se pose toutefois de savoir si, à ces contraintes procédurales, ne s'ajoutent pas des contraintes substantielles. Les OMP ne doivent-elles pas respecter des règles de fond ? Il n'y a guère de doute sur l'existence de cette exigence en droit national et en droit régional. Dans la plupart des Etats, l'action des pouvoirs publics est soumise au respect d'un certain nombre de principes fondamentaux résultant notamment des droits de l'homme et du droit international humanitaire. La violation de cette obligation sera sanctionnée par le juge constitutionnel ou le juge de droit commun. Il en va de même pour les organisations régionales dans lesquelles existe un contrôle juridictionnel et qui sont soumises, directement ou par l'intermédiaire de leurs Etats membres, à des engagements internationaux protégeant les droits de l'homme et le droit international humanitaire.

Par contre des incertitudes demeurent sur le plan universel : le Conseil de sécurité, dans le cadre d'une OMP, doit-il respecter des règles de fond ? De manière plus générale, quelle est la position du Conseil de sécurité par rapport aux règles de droit international général, voire par rapport au jus cogens ? Sur cette question très controversée, on ne peut ici que dessiner quelques pistes. Le Conseil de sécurité, organe de l'ONU est soumis à la Charte qui l'institue. Il est donc soumis aux principes qui commandent la Charte ainsi qu'aux buts des Nations Unies qu'il a

contribués par son action à formaliser et, en quelque sorte, à juridiciser. Il a complété en effet ces principes et ces buts dans des domaines aussi sensibles que les droits de l'homme ou le droit international humanitaire : le droit de New York complète désormais le droit de La Haye et le droit de Genève. Par ailleurs, sans détenir le pouvoir de créer lui-même des principes, le Conseil de sécurité se réfère à des principes qui ne figurent pas explicitement dans la Charte, tels les principes du droit humanitaire au motif que leur violation constitue une menace à la paix ou à la sécurité internationale ou y contribue.

Toutefois, qualifiant discrétionnairement les menaces à la paix et à la sécurité internationale, et créant de ce fait sa propre légalité, il est amené à concilier le but de maintenir la paix avec les autres objectifs assignés aux Nations Unies. Dans cette tentative de conciliation, il ne peut porter atteinte aux autres principes des Nations Unies que dans la mesure nécessaire au maintien de la paix.

Toute autre est la question des rapports entre les résolutions du Conseil de sécurité et les normes de jus cogens. Si la quasi-unanimité des auteurs estiment que les résolutions du Conseil de sécurité ne sauraient être contraires à une norme de jus cogens, l'incertitude qui pèse sur la notion rejaillit néanmoins sur ces rapports avec les autres actes juridiques et singulièrement avec la Charte des Nations Unies qui fonde l'action du Conseil de sécurité. Il est possible d'admettre, en effet, que le Conseil écarte une norme impérative sur la base d'une disposition de la Charte lui en donnant le pouvoir. Comme le remarque Evelyne LAGRANGE, ne faut-il pas admettre qu'un choix doit être opéré entre, d'une part, la sécurité collective telle qu'elle a été mise en place en 1945 et, d'autre part, l'existence de normes impératives de droit international ?

Le cadre juridique des OMP repose ainsi sur un grand nombre de règles juridiques. Il y a beaucoup de droit, trop disent parfois les militaires. Encore faut-il cependant que ce droit soit producteur d'ordre, que par sa cohérence il garantisse des rapports sociaux stables et paisibles. La question du respect du cadre normatif et de sa sanction doit dès lors être posée.

B. Le respect du cadre normatif dans le cadre des OMP

Si le respect du cadre normatif des OMP passe naturellement par la sanction des obligations qu'il comporte, le pluralisme qui le caractérise suppose d'abord que soit tentée une hiérarchisation des différentes règles juridiques.

1. *Respect du cadre normatif et hiérarchie des règles*

La hiérarchie des règles de droit est de nature à garantir la cohérence entre les différents éléments du cadre normatif des OMP. Cette hiérarchie n'est cependant pas dépourvue d'incertitudes, d'autant qu'elle trouve à s'appliquer à la fois entre Etats et organisations internationales et entre organisations internationales entre elles. La hiérarchie des règles de droit semble établie pour les relations entre droit national et droit régional même si elle se manifeste de manière variable suivant le degré d'intégration des organisations régionales. Le droit régional prime le droit national et les actes de droit dérivé sont supérieurs aux actes de droit interne. La question se pose toutefois des rapports entre le droit dérivé et la constitution d'un Etat membre, en particulier dans les systèmes juridiques où la garantie constitutionnelle des droits fondamentaux est assurée par le juge. Dans les rapports entre le droit des Nations Unies et le droit national, la réponse est fournie par l'article 25 de la Charte qui fait obligation aux Etats membres d'appliquer les décisions du Conseil de sécurité. La primauté des résolutions sur le droit interne n'est cependant pas garantie du fait des dispositions constitutionnelles particulières qui peuvent régir les rapports entre droit interne et droit international. Dans les relations enfin entre droit des Nations Unies et droit régional, la solution semble fournie par l'article 103 qui affirme la prééminence de la Charte (et de son droit dérivé) sur toute autre obligation de droit international. Dans le cadre d'une OMP, les résolutions du Conseil de sécurité s'imposeraient donc aux dispositions de droit régional. Toutefois, l'article 103 est considéré parfois, non comme une règle établissant une hiérarchie, mais comme une simple règle de conflit résolvant les contradictions entre normes équivalentes. Il ne serait donc pas pertinent pour établir une hiérarchie des règles de droit.

Ces incertitudes sont encore aggravées par la place incertaine attribuée aux normes impératives, susceptible de brouiller la hiérarchie des règles de droit: un risque de contradiction apparaît entre une résolution du Conseil de sécurité écartant, dans le cas d'espèce, une norme impérative, et une règle de droit régional s'estimant liée par cette même norme impérative. On comprend dès lors que la pratique des OMP tente de sortir de cette approche hiérarchique et de développer plutôt des mécanismes de collaboration et de partenariat susceptibles de permettre une application conjointe des règles de droit.

Il reste néanmoins que les contradictions sont possibles et justifient de s'interroger sur la sanction du respect du cadre juridique des OMP.

2. *Respect du cadre normatif et sanction*

Face à un cadre juridique pluriel, les possibilités de contentieux

sont multiples et se situent tout autant sur le terrain du contentieux de la légalité que sur celui du contentieux de la responsabilité.

Le contentieux de la légalité suppose l'existence d'un juge disposant du pouvoir de contrôler la conformité d'un acte adopté dans le cadre d'une OMP par rapport à une règle de droit supérieure. En droit national, ce juge verra toutefois souvent son contrôle limité voire rendu impossible par la nature de la règle en cause, déclarée insusceptible de recours. En droit régional, la présence d'un juge de la légalité est beaucoup plus rare et même dans les organisations qui l'ont institué, celui-ci ne sera pas nécessairement compétent à l'égard des actes accomplis par l'organisation dans le cadre d'une OMP. En droit international enfin, la question demeure entière s'agissant du contrôle de légalité susceptible d'être exercé sur les résolutions du Conseil de sécurité. Si ce type de contrôle semble avoir été amorcé par la Cour Internationale de Justice dans l'affaire de Lockerbie, il demeurera toujours, devant celle-ci, « aléatoire et limité ». La possibilité d'un contrôle juridictionnel existe toutefois dans les autres ordres juridiques, du fait de l'obligation de mettre en œuvre les résolutions du Conseil de sécurité résultant de l'article 25 de la Charte. Le juge national est en effet le juge de droit commun du droit international ce qui comprend également le droit dérivé. Il doit donc appliquer les résolutions du Conseil de sécurité et le cas échéant assurer leur primauté sur le droit interne. Il est, dès lors, conduit à en examiner la validité. Cette opération demeure toutefois tributaire de nombreux paramètres qui trouvent leur origine dans la position générale du juge à l'égard du droit international. La pratique ne révèle donc pas, de la part des juridictions nationales, la volonté d'un contrôle généralisé des résolutions du Conseil de sécurité. Il en va tout autant des juridictions régionales même si certaines d'entre elles ont prouvé récemment que les résolutions du Conseil de sécurité n'étaient pas intouchables, étant susceptibles d'inapplication du fait de leur contradiction avec une norme impérative de droit international. Ces vellétés, d'ailleurs contestées, ne remettent pourtant pas en cause une tendance générale, celle qui fait du contrôle juridictionnel des résolutions du Conseil de sécurité, selon la formule d'Alain PELLET, une opération aléatoire et limitée.

Le contentieux de la responsabilité ouvre une autre voie de droit dès lors que des actes dommageables accomplis dans le cadre d'une OMP engageraient la responsabilité de la personne les ayant commis. La complexité des OMP, l'intervention de plusieurs sujets de droit, la difficulté de l'imputation des faits à l'un ou l'autre d'entre eux, rend toutefois difficile la mise en jeu de la responsabilité, tout au moins si elle est poursuivie à l'encontre d'un Etat ou d'une organisation internationale. On constate inévitablement une dilution voire une opacité des

responsabilités. A qui imputer le fait dommageable lorsque interviennent, quelquefois simultanément, l'Organisation des Nations Unies qui fixe le mandat et en surveille l'exécution, l'organisation régionale mandataire agissant sur la base de ses règles constitutionnelles et l'Etat qui engage des forces ? La difficulté d'imputation est encore aggravée par la position du juge saisi qui ne peut agir que dans le cadre de l'ordre juridique qui fixe ses compétences. Il peut en résulter alors des stratégies judiciaires rendant tout à fait aléatoire l'engagement d'une responsabilité. On ne sera pas surpris, dès lors, que la recherche de l'imputation se soit déplacée des sujets de droit international vers les personnes physiques. Il s'agira dès lors de poursuivre la personne auteur, dans le cadre de l'accomplissement d'une OMP, d'actes condamnés par le droit international et (ou) par le droit national. La création de la Cour pénale internationale illustre bien ce basculement de la responsabilité vers l'individu. Elle a conduit d'ailleurs un certain nombre d'Etats à tenter de mettre en place des mécanismes destinés à protéger leurs personnels engagés dans des OMP et cela d'autant plus que ceux-ci demeurent soumis à leur droit national. Ainsi, face aux risques de contradictions entre normes nationales et internationales, le droit français (article 17§2 du statut général des militaires) dispose désormais que « n'est pas pénalement responsable le militaire qui, dans le respect des règles de droit international et dans le cadre d'une opération se déroulant à l'extérieur du territoire français, exerce des mesures de coercition ou fait usage de la force armée ou en donne l'ordre, lorsque cela est nécessaire à l'accomplissement de sa mission ».

Les limites du contrôle du respect du cadre juridique des OMP apparaissent alors clairement. Rien en droit ne semble entraver ce contrôle ; tout, en pratique, tend à en limiter la portée du fait qu'il se trouve au confluent de trois forces qui peuvent s'avérer antagonistes : le souci de respecter le droit ; la volonté de garantir la paix ; la nécessité d'assurer l'efficacité. De manière plus générale d'ailleurs, c'est l'ensemble du cadre juridique des OMP qui doit sans cesse concilier ces trois impératifs. Pour cela, le droit est un instrument, certes, mais seulement un instrument parmi d'autres.

The applicability of international humanitarian law to peace operations: a settled issue?

The applicability of international humanitarian law to peace operations, from rejection to acceptance

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I. Introduction

Any discussion of the question of the applicability of international humanitarian law (IHL) to United Nations peacekeeping forces must begin with the UN operation in Korea in 1950. At the request of the International Committee of the Red Cross (ICRC) that the parties to that conflict apply *de facto* the humanitarian principles of the Geneva Conventions – which at the time of the request were not yet in force – the United Nations Commander of the operation replied that while his instructions were to abide by the humanitarian principles of the 1949 Geneva Conventions, particularly common Article 3, as the UN Commander, he could not undertake to be bound by the detailed provisions of the four Geneva Conventions. Since then, in nearly every conflict in which UN forces have been involved the ICRC has drawn the attention of the Secretary-General to the application of the Geneva Conventions by forces put at his disposal, and to the desirability that these forces be provided by their contributing States with adequate instructions to ensure respect for the Conventions.

II. The UN-ICRC debate over the applicability of international humanitarian law to United Nations operations

The UN position on the applicability of international humanitarian law to peacekeeping operations was shaped in response to the ICRC consistent appeal that troops placed at the disposal of the United Nations abide by the Geneva Conventions and other international humanitarian law rules. The thrust of the ICRC position was that international humanitarian law principles, recognized as part of customary international law, are binding upon all States and armed forces involved in situations of armed conflict, and that what is universally binding upon all States must also be considered binding upon the universal organization established by States, albeit with the necessary modifications. Thus, whereas rules pertaining to the status of prisoners of war or the application of penal sanctions may not be applicable, rules pertaining to methods and means of combat, treatment of persons *hors de combat* and respect for recognized signs would be fully applicable.

While declaring its commitment, in principle, to the application of

international humanitarian law to its operations, the United Nations has taken the position that in discharging their mandate, peacekeeping forces act on behalf of the international community at large, and thus cannot be considered as a “party” to the conflict, nor a “power” within the meaning of the Geneva Conventions. UN peacekeeping forces, it argued, which carry with them the stamp of international legitimacy should be, and be seen to be impartial, objective and neutral, their sole interest in the conflict being the restoration and maintenance of international peace and security. The mere presence of UN peacekeeping forces in the theatre of war while performing a humanitarian or diplomatic mission, therefore, should not necessarily entail for them the applicability of international humanitarian law.

The UN Secretariat had furthermore argued that the United Nations as an international organization is not substantially in a position to become a Party to the 1949 Geneva Conventions and be bound by their detailed provisions, a great many of which do not lend themselves to implementation by the United Nations. Notwithstanding its international personality, the United Nations is not itself a State and thus, does not possess the juridical and administrative powers required to discharge many of the obligations laid down in these Conventions. And finally, it argued, the United Nations cannot become a Party to the Geneva Conventions because their final clauses do not provide for the participation of international organizations, such as the United Nations.

In the four decades that followed the Korean operation, where peacekeeping operations were, with one exception, consensual, ‘peaceful’ or so-called Chapter VI operations, the question of the applicability of international humanitarian law has not arisen. When in the 1990s, however, peacekeeping forces became increasingly involved in internal armed conflicts of extreme violence, human suffering and massive violations of international humanitarian law, and where resort has been frequently had to the use of assertive force in self-defence the distinction between peacekeeping operations and enforcement actions was considerably blurred. Traditional UN peacekeeping operations have shifted in the course of an evolving conflict from peaceful, Chapter VI operations to Chapter VII enforcement actions³²; others have been

³² The United Nations operation in Somalia (UNOSOM I) was established as a humanitarian relief effort by Security Council Resolution 751 (1992). It was later taken over by the Unified Task Force (UNITAF), authorized under Chapter VII to use all necessary means to establish a secure environment for humanitarian operations in Somalia (SC Res. 794 (1992)), and following a transition period, an expanded United Nations Operation in Somalia (UNOSOM II) was established under Chapter VII (SC Res. 814 (1993)).

transformed into hybrid operations including both peacekeeping and enforcement action elements³³; yet other peacekeeping operations of the traditional, consensual type have been paralleled by Chapter VII operations authorized by the Security Council under national command and control³⁴. By the mid 1990s there was no avoiding the question of the application of IHL to peacekeeping operations. By then as well, there was a growing realization that the traditional UN position was no longer tenable, that it was no longer possible seriously to argue that UN forces were mere observers in the theatre of war, or that the UN was not a Party to the Geneva Conventions once their customary international law nature had been universally recognized³⁵.

III. The United Nations undertaking to respect the principles and spirit of the Geneva Conventions and other international humanitarian law conventions

While declining to recognize formally the applicability of international humanitarian law to peacekeeping forces, the United Nations has sought to reinforce its applicability in practice and strengthen the

³³ In the Yugoslav context, resort has been had to Chapter VII resolution in order, *inter alia*, to ensure delivery of humanitarian assistance (SC Res. 770 (1992)), to ban flights in the air-space of the Republic of Bosnia and Herzegovina, and ensure compliance with such ban (SC Res. 816 (1993)), to declare 'safe areas' free from armed attacks and from any other hostile acts (SC Res. 824 (1993)), and to authorize UNPROFOR, in carrying out its mandate and acting in self-defence, to take all necessary measures, including the use of force, in reply to bombardments against safe areas (SC Res. 836 (1993) and 958 (1994)).

³⁴ In parallel to the United Nations Assistance Mission for Rwanda (UNAMIR) established under SC Res. 872 (1992), the Council, acting under Chapter VII of the Charter, authorized member States to establish a temporary operation under national command and control ('Operation Turquoise'), aimed at contributing to the security and protection of displaced persons, refugees and civilians at risk (SC Res. 929 (1994)). Similarly, in parallel to the United Nations Mission in Haiti (UNMIH) established pursuant to SC Res. 867(1993), the Security Council, in its Res. 940 (1994), authorized under Chapter VII member States to form a multinational force under unified command and control, and to use all necessary means to facilitate the departure from Haiti of the military leadership, the prompt return of the legitimately elected President and the restoration of the legitimate authority of the Government of Haiti.

³⁵ On the customary international law nature of the Geneva Conventions as a whole, see Th. MERON, "The Geneva Conventions as Customary Law", *American Journal of International Law (AJIL)*, Vol. 81, 1987, p. 348; Report of the Secretary-General pursuant to paragraph 2 of SC Res. 808 (1993), UN Doc. S/25704, para. 35 (1993), reprinted in *International Legal Materials (ILM)*, Vol. 32, 1993, p. 1159.

procedure for its implementation. For the first time in 1993, a provision was inserted in the Status of Forces Agreement (SOFA) between the United Nations and the Republic of Rwanda whereby the United Nations undertook that the operations of the United Nations Assistance Mission for Rwanda (UNAMIR) would be conducted with full respect for the principles and spirit of the general international conventions applicable to the conduct of military personnel, i.e., the four Geneva Conventions of 1949, their two Additional Protocols of 1977, and the 1954 Convention on the Protection of Cultural Property in the Event of Armed Conflict. The Government, in turn, undertook the correlative obligation to treat UN military personnel at all times with full respect for the principles and spirit of the general international conventions applicable to the treatment of military personnel³⁶.

No sooner had it been introduced in the Status of Forces Agreements, than the “principles and spirit” formula proved inadequate and too abstract to guide members of peacekeeping operations on questions of practical application. In the UN operations in Somalia and Bosnia and Herzegovina, where UN peacekeepers were constrained to use force pursuant to a Chapter VII mandate or in self-defence, questions concerning the status of the force and its members taken hostage, that of combatants or other detainees, the lawful use of certain weapons and the feigning of UN distinctive emblem, demanded clear answers. The need to concretize the broad formula of “principles and spirit” and re-affirm its applicability to UN peacekeeping operations became all the more acute when allegations of excess and other violations of international humanitarian law by peacekeepers in Somalia and elsewhere, became known.

IV. The Secretary-General’s Bulletin on the Observance by United Nations Forces of International Humanitarian Law

It was against this background that in 1995 the ICRC convened a group of experts tasked with identifying the core IHL provisions applicable in UN peacekeeping operations. Its proposed core principles formed the basis of what, four years later, would become the “Secretary-General’s Bulletin on the Observance by United Nations Forces of

³⁶ Art. 7 of the Agreement between the United Nations and the Government of the Republic of Rwanda on the Status of the United Nations Assistance Mission for Rwanda, signed on 5 November 1993, *UNTS*, Vol. 1748, p. 17, at p. 18. An identical clause was included in all subsequent SOFAs concluded between the United Nations and States in whose territories UN peacekeeping operations were deployed.

International Humanitarian Law"³⁷. The ten-section Bulletin includes the principles of distinction between civilians and combatants and between civilian objects and military objectives, means and methods of warfare, treatment of civilians and persons *hors de combat*, treatment of detainees, and protection of the wounded, the sick and medical and relief personnel.

The instructions contained in the Secretary-General's Bulletin are applicable to UN peacekeeping forces under UN command and control, when in situations of armed conflict they are actively engaged therein as combatants. They apply in Chapter VII operations or in so-called Chapter VI operations in self-defence, to the extent and for the duration of their engagement. Two cumulative conditions are thus required for IHL to apply to a UN operation: the existence of an armed conflict (of whatever nature) in the area of its deployment, and the active engagement of the force in the conflict (in support of either or neither side) as combatant (a so-called "double-key test").

Designed to train peacekeepers in the basic principles of IHL, the Secretary-General's Bulletin has become a matter of great debate. It was criticized by States for including provisions which were not of a customary international law nature and thus, in fact, legislating for States; for failing to distinguish between an international and internal armed conflict, and for accepting, however theoretically, the notion that peacekeepers could be considered 'combatants', and thus, in the view of some, permitting attacks against them. It was the Secretariat's view that the incorporation of some of Additional Protocol I provisions in fine disregard of their less than customary international law nature was justified because of their unique importance for the survival of the local population³⁸. It was also its view that, in reality, the involvement of peacekeepers in an internal armed conflict blurs the distinction between an international and internal armed conflict, if not "internationalizes" the conflict as a whole. It finally argued that the engagement of peacekeepers as combatants is a question of fact, not of law.

But while in the realities of peacekeeping operations the question of

³⁷ Bulletin on the Observance by United Nations Forces of International Humanitarian Law, UN Doc. ST/SGB/1999/13 (1999), reprinted in *ILM*, Vol. 38, 1999, p. 1656; M. ZWANENBURG, "The Secretary-General's Bulletin on Observance by United Nations Forces of International Humanitarian Law: Some Preliminary Observations", *International Peacekeeping*, Vol. 5, 1999, p. 133.

³⁸ At issue were ss 6.3, 6.7 and 6.8 of the Bulletin which include, respectively, the prohibitions on using methods of warfare intended to cause widespread, long-term, and severe damage to the natural environment, rendering useless objects indispensable to the survival of the civilian population, and causing the release of dangerous forces with consequent severe losses among the civilian population.

the applicability of IHL has never been put to the test, it has nevertheless given rise to some debate in three different contexts: the interplay between IHL and the protective regime of the 1994 Convention on the Safety of United Nations and Associated Personnel, accountability of peacekeepers for serious violations of international humanitarian law before national and international jurisdictions, and the applicability of the laws of occupation to UN transitional administrations.

V. The Convention on the Safety of United Nations and Associated Personnel, 1994

With the growing involvement of peacekeeping operations in countries emerging from civil wars of extreme brutality, where governmental institutions collapsed and law and order completely broke down, members of UN operations, both military and civilian, were increasingly exposed to attacks against their person, official premises, private accommodation and means of transportation³⁹. Faced with an exceeding number of fatalities, the United Nations General Assembly adopted in December 1994 the Convention on the Safety of United Nations and Associated Personnel⁴⁰, with the aim of strengthening the legal protection afforded such UN and associated personnel.

The Convention criminalizes attacks against United Nations and associated personnel, in particular, murder, kidnapping or other attacks upon the person or liberty of such personnel, their premises or means of transportation. It imposes upon the Parties the obligation to make these acts punishable by law with appropriate penalties, and take the necessary measures to ensure the safety and security of UN personnel. The Convention further establishes the principle of “prosecute or extradite”, whereby, each State Party is bound either to prosecute the offender present in its territory, or extradite him to any other State Party having jurisdiction over the offender⁴¹.

In circumscribing the scope of the Convention, the question of the

³⁹ UN peacekeepers were taken hostage or used as human shields in Bosnia and Herzegovina, Croatia and Sierra Leone. In Bosnia and Herzegovina, 450 UN personnel were detained to forestall further NATO air strikes. In Croatia, Danish peacekeepers were used as human shields when Croatian forces attacked Croatian-Serb positions in Knin, and in Sierra Leone, 500 UN peacekeepers were taken hostage in May 2000 by the RUF.

⁴⁰ Convention on the Safety of United Nations and Associated Personnel, adopted by General Assembly Res. 49/59 of December 9, 1994, reprinted in *ILM*, Vol. 34, 1995, p. 482.

⁴¹ E.T. BLOOM, “Protecting Peacekeepers: The Convention on the Safety of United Nations and Associated Personnel”, *AJIL*, Vol. 89, 1995, p. 621.

relationship between international humanitarian law and the protective regime of the Convention, inevitably arose. Thus, whereas under the Convention, UN personnel cannot be made the object of attack, under international humanitarian law, when in a situation of armed conflict they are engaged therein as combatants, they are not, as such, protected from attack, but rather protected and indeed bound by the international humanitarian law rules applicable to the conduct of military operations.

The 1994 Convention implicitly recognized the mutually inclusive regimes of international humanitarian law and the protective regime of the Convention, and for a while, at least, blurred the distinction between the two. When in 1998 the Rome Statute of the International Criminal Court defined war crimes to include attacks against peacekeepers “as long as they are entitled to the protection given to civilians or civilian objects under the international law of armed conflict”⁴², the line between the protected status of peacekeepers “as civilians” and their status otherwise as combatants was finally drawn.

VI. Accountability of peacekeepers for serious violations of IHL before national and international jurisdictions

At the time when the United Nations was devising means, both legal and practical, to enhance the safety and security of UN and associated personnel, it faced the dilemma of addressing violations of international humanitarian law committed by members of peacekeeping forces in the course of their operation, and their prosecution before national or international jurisdictions.

In recognition of the principle that military personnel of peacekeeping operations remain for the duration of their service with the United Nations in their national service, and are subject in disciplinary and criminal matters to the jurisdiction of their State of nationality, the standard Status of Forces Agreement provides that members of the military component of the United Nations peacekeeping operation are subject to the exclusive jurisdiction of their contributing States in respect of any criminal offences which may be committed by them in the host country. In return for an absolute immunity from local jurisdiction in the State of operation, the State of nationality is expected to prosecute members of its national contingents before its national courts. Lacking

⁴² Art. 8 (2) (b) (iii) and (e) (iii) of the Rome Statute. In this connection, Section 1.2 of the Bulletin provides as follows: “The promulgation of this Bulletin does not affect the protected status of members of peacekeeping operations under the 1994 Convention on the Safety of United Nations and Associated Personnel or their status as non-combatants, as long as they are entitled to the protection given to civilians under the international law of armed conflict”.

criminal jurisdiction or military tribunals of its own the United Nations has almost no role to play⁴³. At the focus of the international debate, however, was the prosecution of peacekeepers before international jurisdictions; a debate triggered in 2002 by the US request to secure, through a Security Council resolution, an exemption of US members of peacekeeping operations from the jurisdiction of the International Criminal Court (ICC).

On 12 July 2002, the Security Council adopted resolution 1422, requesting, under Chapter VII of the UN Charter and consistent with Article 16 of the Rome Statute, the ICC not to commence or proceed with investigation or prosecution of any current or former member of a UN operation whose State of nationality is not a Party to the Rome Statute, in respect of acts or omissions relating to the UN operation in question. A deferral valid for a twelve-month period, it was extended a year later in Security Council resolution 1487 of 12 July 2003, for a further twelve-month period. Resolution 1487 was the second and last, so-called “omnibus” resolution which deferred all investigations and prosecutions of current or former members of UN operations from non-State Parties of the ICC Statute, as a generally applicable, future oriented measure and for crimes not yet committed. Following allegations of US treatment of detainees in the Abu-Graib and Guantanamo Bay prisons, no further attempt was made to secure the support of Council Members for a similar resolution in 2004.

VI. The Applicability of the laws of occupation to the UN transitional administrations

With the promulgation of the Secretary-General’s Bulletin the applicability to UN operations of the entire body of IHL, of which the laws of occupation are a part, was finally established. The applicability of the laws of occupation to any given UN operation, however, depends on the definition of an “occupation” and its applicability in the circumstances of any given operation.

The century-old definition of an “occupied territory” established in Article 42 of the Hague Regulations still defines the threshold for the applicability of the laws of occupation. Accordingly, a territory is considered occupied when it is “*actually placed under the authority of the hostile army*”, or, to use an oft-quoted definition, occupation is “*the effective*

⁴³ Par. 4 of the Secretary-General’s Bulletin on the Observance by UN Forces of International Humanitarian Law provides in that respect that: “*In case of violations of international humanitarian law, members of the military personnel of a United Nations force are subject to prosecution in their national courts*”.

control of a power over a territory to which that power has no sovereign title, without the volition of the sovereign of that State"⁴⁴. The 'exercise of exclusive governmental or administrative authority in the territory independently of the displaced sovereign', is an additional test of particular relevance in the context of peacekeeping operations.

In applying the test of "effective control" to UN peacekeeping operations in control of a territory, a distinction is imposed between operations which, in administering any given area, are mandated "to assist" the government or the national authorities in place - notably the UN operations in the Congo (early 1960s), Lebanon (1978), Cyprus (1964), and Somalia (early 1990s) - and those with a mandate "to administer", notably UNMIK in Kosovo and UNTAET in East Timor. Whereas in peacekeeping operations with a mandate "to assist" the national sovereign is not displaced and the legitimate authority is not passed on to the United Nations, in UN operations with a mandate "to administer" the UN Administration is the ultimate "source of authority" in the territory whose all-inclusive powers include legislative, executive, including the administration of justice.

Any analogy between military occupation and UN transitional administrations - an analogy imperfect at best - should have as its starting point the Security Council mandate which is both the legal basis for the establishment of the UN Administration and the sole and unique source of its authority in the territory under its administration. As the source of authority of the UN Administration, the Security Council mandate prevails, with few exceptions, over any legal regime which might have otherwise applied under the laws of occupation⁴⁵.

In the realities of UN operations the laws of occupation were never made applicable to any of the UN Administrations *de jure* or by analogy, including in the cases of UNMIK and UNTAET - the most obvious objects of the analogy. In two cases, however - the UN authorized operations in Somalia (UNITAF) and in East Timor (INTERFET) - the laws of occupation applied *de facto* to the conduct of the operation. Considering, and rightly so, that in the circumstances then prevailing the conditions for the

⁴⁴ E. BENVENISTI, *The International Law of Occupation*, Princeton NJ, Princeton University Press, 1993, p. 4.

⁴⁵ S.R. RATNER, "Foreign Occupation and International Territorial Administration: The Challenges of Convergence", *European Journal of International Law*, Vol. 16, 2005, p. 695; M. SASSÒLI, "Legislation and Maintenance of Public Order and Civil Life by Occupying Powers", *ibid.*, p. 661; D. SHRAGA, "Military Occupation and UN Transitional Administrations - The Analogy and its Limitations", in M.G. KOHEN (Ed.), *Promoting Justice, Human Rights and Conflict Resolution through International Law, Liber Amicorum Lucius Caflisch*, Leiden, Brill, 2007, p. 479.

application of Article 42 of the Hague Regulations had been met, the Australian contingent, in both cases, declared itself bound by the laws of occupation. Neither UNITAF nor INTERFET, however, were conducted under UN command and control.

In conclusion, sixty years after the inception of peacekeeping operations, the applicability of international humanitarian law to members of UN forces is no longer in doubt, not at least in the eyes of the United Nations Secretariat. That said, in the passage from rejection to acceptance of the applicability of international humanitarian law to UN peacekeeping forces, it is not enough that the Secretary-General recognizes it in theory or in practice, it is also necessary that troop-contributing States recognize the authority of the Secretary-General to instruct forces under his command to observe the principles and rules of international humanitarian law and, on their part, undertake to prosecute members of their national contingents for serious violations of international humanitarian law before their own jurisdictions, or, where appropriate, before international jurisdiction.

**International humanitarian law and peace operations,
scope of application *ratione materiae***

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Collective security operations and international humanitarian law: where is the problem? ⁴⁶

[...] My starting point is that this is a non-problem. Collective security is one of the more noble reasons why States and individuals make war and international humanitarian law is applicable to war. This means that "international humanitarian law and collective security operations" is as much a subject as "international humanitarian law and self-defence". I would like first to present why international humanitarian law, as a starting point, has to fully apply to collective security operations. The reason is the fundamental distinction between, on the one hand, *jus ad bellum*, that is the law on the legality of the use of force and, on the other hand, the *jus in bello*, that is the humanitarian rules to be respected when force is used.

In a second part I shall nonetheless admit that there are some problems applying international humanitarian law to some collective security operations, in particular, if international organisations are involved.

[...]

Jus ad bellum: the prohibition of the use of force, collective security and peacekeeping.

[...] [T]he use of force in international relations is prohibited. There are some exceptions but the exceptions always only concern one side. Therefore, in every international armed conflict at least one side has clearly violated a fundamental rule of international law. The exceptions are individual and collective self-defence, a decision or an authorization of the UN Security Council and, most people would add, national liberation wars in which a people is fighting in the exercise of its right to self-determination – in this case as well, once a people is fighting, it obviously has to respect international humanitarian law. We have to add the case of the consent by the territorial State, because then it is formally not a use of

⁴⁶ Extracts from Marco SASSOLI, "Collective Security Operations and International Humanitarian Law", Collegium 27 (Spring 2003), *Proceedings of the Bruges Colloquium, Relevance of International Humanitarian Law to Non-State Actors*, 24th-25th October 2002; pp. 77-100 (footnotes omitted).

force in international relations.

[...]

Let us shortly look at the rules of the United Nations (UN) Charter on collective security. We have to distinguish Chapter VI on the peaceful settlement of disputes and Chapter VII on coercive measures. The peaceful settlement of disputes must always be based on consent and impartiality. The traditional forms are good offices, enquiry, mediation, arbitration, adjudication, etc. In the course of time another form has been added by UN practice - some call it chapter "six and a half". These are traditional peacekeeping operations of interposition between former belligerents, which have concluded a cease-fire. Such traditional peacekeeping is also based on consent and impartiality. A completely different situation, from a conceptual point of view, is Chapter VII of the UN Charter that permits coercive measures in case of threats to or breach of international peace and security. In theory these measures include military sanctions by the UN. In practice, however, there is either an authorization given to a State or a group of States to use force or the Security Council sends hybrid so-called peace operations. The latter are not clearly a kind of peace enforcement neither are they traditional peace keeping operations. Besides, they are normally based on consent and impartiality, but the mandate authorizes also the use of force against one of the parties to defend not only the individual life of the peacekeepers but also the mandate or a protected zone or civilians. If such force is actually used, this means war and international humanitarian law is applicable to war.

[...]

Jus in bello: difficulties to apply international humanitarian law to some collective security operations.

The first problem is to determine which rules are binding. At least the United Nations (UN) are not a party to the Geneva Conventions, they could not become party to the Geneva Conventions, and there are a good number of rules of the Geneva Conventions which could not be respected by an international organization but only by a State having a territory and a jurisdiction. Therefore, the UN from the very beginning of its existence said that it will respect simply the "principles and spirit" of international humanitarian law. As always, the difficulty is to define what belongs to the "principles and spirit" of international humanitarian law. I remember a negotiation with the UN about "guidelines on international humanitarian law for UN forces", during which I suggested to include the very old rule of international humanitarian law according to which the wounded and sick have to be collected and cared for, "*to whatever nation they belong*". My interlocutors from the UN objected saying that, having a limited peace keeping force with limited medical services, they had to give priority to

their own force. They added that if they had additional capacity then they would look after the local civilian population and perhaps even after the local combatants. That may be a reasonable argument as long as they are not involved in a conflict. If, however, they are involved, including if the enemy involves them in the conflict, then it is a war crime not to care for wounded and sick enemy soldiers.

This leads us to the "Guidelines of the United Nations (UN) Secretary General" that were adopted on 12 August 1999. As I mentioned, I was involved in the negotiations of these guidelines, but I must say that, after careful reflection, I am not so proud of these guidelines.

They are a good instrument of dissemination for UN forces and they are important because they admit that many rules of international humanitarian law undoubtedly apply. However, at least in the case of UN enforcement action they are too short. The guidelines cover only six pages of rules, while the Geneva Conventions and Additional Protocol I comprise hundreds of pages. Therefore, the lawyers will necessarily argue that what is written in the guidelines applies, while those parts of the Geneva Conventions which were not taken over explicitly in the guidelines *a contrario* do not apply even to UN enforcement action.

Finally, we have a problem with the 1994 "Convention on the Safety of United Nations (UN) and Associated Personnel". This convention basically prohibits attacks on UN personnel, makes such attacks crimes and obliges all States to prosecute these crimes. This convention is incompatible with international humanitarian law as far as an international armed conflict against such UN forces is concerned because, under international humanitarian law, a combatant cannot be punished for having attacked another combatant. Article 2 of that convention says that it "*will not apply to an UN operation authorized by the Security Council as an enforcement action under Chapter VII (of the UN Charter) in which any of the personnel are engaged as combatants against organized armed forces and to which the law of international armed conflicts applies*". This can mean two things, and I would favour the first interpretation. It can mean that the law of international armed conflicts fully applies to United Nations (UN) enforcement actions in which any of the personnel are engaged as combatants against organized armed forces. This can be either because they have the mandate to do that or because the enemy attacks them. The aforementioned Article 2 can, however, also mean that the convention will not apply when these conditions are fulfilled and, in addition, the law of international armed conflicts applies. Many in the UN would claim that, even in hostilities against organized armed forces most of the time it does not apply.

Now you probably wonder why I am concerned about the United

Nations (UN). Today, it is practically never the UN that engages in armed conflict. The problem is that the debate on the applicability to the UN has a certain spill over or contaminating effect on the debate over the applicability of international humanitarian law to actions by other international organizations, be they regional organizations or even the North Atlantic Treaty Organization (NATO). Some people would claim that NATO action is also a collective security operation.

And whether it is authorized or not by the UN Security Council is a question of *jus ad bellum* which, as I told you, cannot change the applicability of *jus in bello*. Therefore, as soon as you admit that, as far as the UN is concerned, international humanitarian law will not necessarily apply, even if there are armed hostilities with armed forces of a State, why should then international humanitarian law always apply when another international organization is engaged? That is the reason why I insist so much on the applicability of the Geneva Conventions even to the UN. The Geneva Conventions apply according to the facts, namely when there are armed hostilities, and not according to the legal status of those using force and to whether they have an authorization or what their mandate is and so on.

Obviously, for the Geneva Conventions to apply, we need an armed conflict. For that, a certain threshold of violence is necessary. There must be hostilities with organized armed forces belonging to the *de facto* government of an existing State. Besides, it must be a military operation and not a police operation. Police operations are not directed at combatants but against civilians. They are subject to human rights law and many more restrictions than hostilities. To mention but one example, the use of force against civilians is only the last measure after non-violent means were not successful in maintaining law and order, while you may immediately fire against combatants without having first tried to convince them to surrender. When dealing with a civilian, you have first to try the latter.

If there are hostilities, however, then the legal basis of the use of force and the mandate of the international forces are irrelevant. Even if they have the mandate not to use force or to use force only in individual self-defence, if they are attacked by the enemy they have to decide whether to run away or to use force and then the law of international armed conflicts applies. It is like the case of a Swiss soldier who defends Switzerland against – let us take an unrealistic example – a French attack. The Swiss soldier has no will and no mandate to make war. He only wants to protect Switzerland but, once the French attack, then, independently of the fact that the Swiss soldier does not want that, the law of international armed conflicts applies and he becomes, under that law, a lawful target.

An additional difficulty appears to define who are the parties to the conflict. Is it the international organization itself or is it the member States of the organization contributing troops? In the case of the North Atlantic Treaty Organization (NATO) I think that it is clear, but there were nonetheless some controversies about the question of whether it is the member States which are engaged in an international armed conflict, for instance in the Kosovo war. In the case of the United Nations (UN), it is more difficult to accept such theory for those countries contributing to peacekeeping forces. For instance, Canada would be reluctant to admit that it was engaged in an international armed conflict against the Federal Republic of Yugoslavia in Bosnia once its troops would have, for instance, defended a protected area against Bosnian Serbs, who were defined by the Tadic Judgement of the International Criminal Tribunal for the former Yugoslavia as *de facto* agents of the Federal Republic of Yugoslavia.

The next difficulty is to determine whether the conflict is international or non-international. As you know many rules of international humanitarian law apply only to international armed conflicts. Formally the answer is that if the United Nations (UN) or another international organization intervenes with the consent of the *de facto* government of the State concerned against insurgents, then the law of non-international armed conflicts applies. On the contrary, if the intervention is directed against the forces of a *de facto* government of an existing State, then the law of international armed conflicts applies. I think that we should not apply this distinction and personally I fully agree with the theory of Professor David who points out that the law of non-international armed conflicts is much more rudimentary than that of international armed conflicts, because the former has to respect the sovereignty of a State and the right of a government to act on its own sovereign territory with less restrictions than in international relations. The UN is, however, never fighting on its sovereign territory.

Therefore, one should say that it is always the law of international armed conflicts that applies when the UN is involved in an armed conflict against organized armed forces.

The next question, and it is a very delicate one, is whether the members of the international force are combatants. You know that, under international humanitarian law, it is very important to know who is a combatant and who is a civilian. Despite some new or renewed American theories, I maintain that it is essential that everyone in an international armed conflict is either a civilian or a combatant and no one can fall between these two categories. Anyway, even President Bush would not say that a peacekeeper is an "unlawful combatant".

Since they have uniforms and weapons, and they are driving

around in armoured personnel carriers, I would submit that they look like combatants and must be combatants. The contributing States, however, do not like to recognize that their forces are combatants. Why? Because under international humanitarian law to be a combatant means that it is lawful for the enemy to attack you and this fact obviously is not appreciated by contributing States.

Here again I would say that Switzerland does not either appreciate that, as a Swiss soldier, I am a combatant and therefore, as soon as – to take again the same unrealistic example – France attacks Switzerland I, as a Swiss soldier, become a lawful target and the French soldiers may kill me. Nevertheless that is what international humanitarian law says. Let me add that all other solutions are unrealistic. I remember an instance in the conflict in Bosnia when the North Atlantic Treaty Organization (NATO) was authorized by the Security Council to bomb Bosnian Serb positions. Here some NATO member States - the United States of America was not one of them - claimed that the NATO pilots in the fighter planes were not combatants but United Nations (UN) experts on mission. Some of these pilots even had identity cards as UN experts on mission. Imagine the situation where these UN experts on mission bombed Bosnian Serb positions, but the Bosnian Serbs would not have had the right to fire back and possibly shoot them down, because that would have been an attack on a UN expert on mission. Besides, once they were shot down, the Bosnian Serbs would have been obliged to immediately release the NATO pilots as UN experts on mission. Does anyone believe that this could function? Indeed, as soon as two French pilots were shot down by the Bosnian Serbs, at least France changed its position and said that the third Geneva Convention applied and that these pilots were prisoners of war. Certainly if I were one of those pilots, I would prefer to argue with the Bosnian Serbs that I am a prisoner of war and that, whoever is right or wrong in this conflict, I am protected by the third Geneva Convention, that they may intern me but must treat me humanely, the International Committee of the Red Cross (ICRC) may visit me and I may contact my family and so on and so forth. I would clearly prefer to make that argument rather than to tell them: "I am right and you are wrong, you are criminals by the sole fact that you shot me down, and now release me immediately so that I can join again my forces and tomorrow I shall bomb you again".

That will never work.

If the members of the international force are combatants, as soon as there are armed hostilities, then this must obviously also be true for their enemies. They are combatants as well and, once captured, they become prisoners of war and have to be treated in accordance with the third Geneva Convention. They may, therefore, not be punished for having

attacked UN forces during armed hostilities.

The final question that arises, and it is perhaps the most delicate one, is whether the fourth Geneva Convention binds an international military force administering a territory or an international civil administration. The two examples we could think about, Kosovo and East Timor, are not really relevant because the international forces are present with the agreement of the former territorial State or administering State, namely the Federal Republic of Yugoslavia and Indonesia. One could, however, well imagine an international civil administration without the agreement of the former government. In that case, legally the fourth Geneva Convention would apply. I would also say that, even in Kosovo or East Timor, the fourth Geneva Convention would have provided useful and practical solutions for everyday problems faced by such a foreign military administration over a territory.

The main difficulty is that the law of belligerent occupation prohibits an occupying power to change the institutions of the occupied territory, while international forces in a peace-building effort will always try to constitute democratic institutions. [...]

International humanitarian law and operations conducted by the European Union

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I. Introduction

The presentation by Louis Balmond about the European Union (EU) being a non identified legal object made me think about another anecdote, from 1999, when the French Permanent Representative to the EU – the top ambassadorial post – was appointed Deputy Secretary-General of the Council of Ministers. In his time as the Permanent Representative, he had always professed a perfect disregard for the Secretariat, and he used to say that the Secretariat is ‘the void’. When he was appointed to the Secretariat as Deputy Secretary-General, the chair of that meeting didn’t know whether to congratulate him – after all, he was entering a ‘void’. I come from that ‘void’ – I work in the Secretariat. I would like to present some views on international humanitarian law (IHL) in operations conducted by the EU.

The gist of my presentation is that if IHL applies, quite simply we have no problems. After all, the EU has committed itself to applying IHL in its conduct of operations. Obviously, a number of IHL rules need to be seen in light of the fact that we conduct unified operations and, therefore, it may be difficult to apply them all; but, in essence, we apply IHL in operations in which we would be engaged as combatants.

The second point that I will briefly make, is when IHL does not apply. The European Court of Human Rights has recently told us: this is easy, get a Chapter VII Security Council resolution and then we can blame the UN. I wish life was so simple, unfortunately, it is not.

I am going to cover a few topics this afternoon if I am able: some words about the internal legal framework of the EU; the external legal basis for our operations; how we go about planning our operations; the consequences of our operations’ planning for their subsequent conduct, in terms of the applicable law; and then I will offer some conclusions.

II. Internal legal framework

In 2003, the EU drew up the European Security Strategy, which was approved by our Heads of State and Government. That Security Strategy states that we want international organizations, regimes, and treaties to be effective in confronting threats to international peace and security. They must, therefore, be ready to act when the rules are being broken. One of

the important questions for the EU in this respect, is how we perceive ourselves and our role; what we should do. The political guidance represented by the Security Strategy has set the tone for the way in which Javier Solana, our Secretary-General's High Representative for Common Foreign and Security Policy (CFSP), explains his mandate. As a union based on the rule of law, we the EU carry a particular responsibility to ensure a rule-based international order, the cornerstone of which is the UN Charter.

These political statements, for us as officials of the EU, set the description for the internal legal order which is contained within the Treaty of the EU. According to Article 6, which is discussed extensively these days - including the judgment of the European Court of Justice in the Yusuf and Kadi case - the Union is based on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law. These principles form part of an important tradition, which is common to the EU and its member States, and we hope reflects a basic understanding also at the national level of all our member States.

The CFSP has a specific chapter that deals with the EU's objectives in formulating this policy. These objectives include the preservation of peace and the strengthening of international peace and security. The core provision of this chapter, for our purposes, is contained in the last sentence of the next paragraph, which says that the Council should ensure that these objectives are complied with. Thus, it is up to the EU's top decision-making body - the body comprised of Heads of State and Government - to ensure that EU policies conform to the legal obligations of the Union. It implies, by definition, that when planning and conducting operations we must take special care to determine the specific legal obligations in the area where we intend to operate. For that purpose, the Council adopts a variety of political and legal instruments, which regulate the conduct of personnel and forces involved in any given operation.

III. External basis for operations

In EU operations - I am talking about mixed civilian and military operations - the primary consideration is that the operation should be conducted in accordance with the particular provisions of the Charter. In addition, the operation's legal framework or justification can include the following possibilities: first, an invitation by the host country; secondly, a United Nations (UN) given mandate; and thirdly, a justification laid down in general international law or as otherwise authorised or permitted by international law.

A lot of people will immediately ask me whether I believe in humanitarian intervention. All I will say is that humanitarian intervention

could be – but I’m not saying it is – “*otherwise permitted or authorized under international law*”.

There is within the EU strong political preference for any military operations to be governed by a combination of, on the one hand, an invitation by the host country, and, on the other hand, a UN Security Council resolution under Chapter VII of the Charter, authorizing enforcement action regardless of the consent of the host State. I say it is a political preference, because we don’t see it as a legal requirement. A number of our member States have, however, within their national legal systems an obligation to act solely under a UN Security Council resolution in the conduct of military operations. Nonetheless, this requirement is not applicable to the EU as such.

For our civilian operations, on the other hand, we are normally ready to operate solely at the invitation of the government of the host State. If, for some reason or other, a UN Security Council resolution was given, regardless of the chapter under which it was given, for the same political reasons we would not want to conduct an operation without the consent of the host State.

To characterize our operations to date, we conducted a short military operation in the Former Yugoslav Republic of Macedonia; we are currently still conducting an operation in Bosnia – the successor to SFOR and BFOR; we are currently conducting an operation in Chad, which is under the mandate of a Chapter VII resolution; and we are currently engaged in a non-military operation in Georgia. In addition to that, the Council is looking at a potential maritime operation off the coast of Somalia in order to be able to suppress piracy, in accordance with Resolution 1816 of the UN Security Council, which authorizes actions against persons operating in territorial waters and conducting hijackings.

IV. Planning operations

Our system of planning operations is rather unique, because it involves drafting a wide variety of documents. All of these documents have to be approved at the highest decision-making level – the Council of Ministers of the EU. Hence, in various stages of our planning process for an operation, we will get top political approval of the way we intend to go forward. Documents are created in two parallel streams – political documents, and documents that create the internal legal basis for the conduct of the operation. This process is called a ‘joint action’, pursuant to Article 14 of the Treaty on European Union.

The first step in the process is that a member State with a particular interest in the region in question asks the EU to discuss the situation in that region. They would normally request a paper by the Secretary-

General's High Representative on CFSP, saying what the crisis is, what we are already doing to potentially assist in resolving the crisis, and what could be an extra EU contribution to a resolution of the crisis. We call this document the 'Crisis Management Concept'. However, for political reasons, in EU practice we do not officially call the document by this name, because that would be confrontational as regards the host State, which may deny that it is facing a crisis. The Crisis Management Concept offers us the first possibility of analyzing the legal situation in the State concerned or in the States concerned, and analyzing what the relations between the parties to the crisis may be, and hence the possible consequences that our involvement might have in that situation.

The second stage, when the Council has approved the Crisis Management Concept, is a concept of operations. This will detail, in an operational planning document, what we view as being the operation, its legal basis (both external and internal), the capabilities that we require to conduct the operation, and the way in which the operational commanders will conduct their operation. This operational planning document must, again, be approved at the level of the Council. An important element of this document is the end state that we would want to pursue in the conduct of the operation.

The last phase before we decide to embark on the operation is the approval process for the operation, where we approve the Rules of Engagement, which will govern how the operation works. The authorization for these is given, again, by the Council.

In parallel to this political process, we develop a legal act – the joint action to which I referred earlier – which provides for the operational action that the Union is supposed to undertake. It is based on the products of the operational document. It lays down the objective of the action, if we can do that in unclassified form (this will usually be more extensive for civilian operations than for military); the details of command and control structures; the relations with third States; and the financial aspects. This legal act binds the member States of the Union – they are obliged to offer the resources identified to the civilian or military operational command. It also lays down the possibility of the command not having recourse to everything and every decision of the Council: it delegates the authority of the Council to the command of the operation as the ultimate authority for crisis management within the operation.

This is a wide variety of documents contained within a legal analysis. Moreover, the conduct of the operation is closely followed by the legal services within the European Union.

V. The consequences of the planning process for the applicable law

I should note that, to date, the EU has not conducted an operation in which EU forces have become engaged as combatants. This has a significant impact on the applicability of IHL rules to our operations, both legally and in practice. One example of this, in June, is when an Irish contingent stationed in Chad had to protect a refugee camp that was being threatened by an unidentified rebel group. The Irish force was fired upon, and they returned fire on the group. Within 24 hours we had a press statement by the rebel group concerned stating that they were sorry, they had made a mistake, and they had not intended to fire upon us. This shows that, although we have a very wide mandate, the way in which we are executing that mandate provides us with a very peaceful environment in which proportionality and necessity can, by definition, not be governed by international humanitarian law and so we have to look at different things.

Other examples include our operation in Bosnia, which is to date 18 years old. We haven't seen any serious resumption of hostilities between the former parties to the conflict. Therefore, applying IHL to the situation is, I think, unnecessary.

The potential piracy operation, is more interesting. Although we would be pursuing people on the high seas, would it be different to when we are operating in territorial waters?

VI. Conclusions

I would contend that, in the majority of cases, the conduct of our forces and our legal analysis of operations provide for human rights – and our obligations with respect to these rights – to be protected. However, to date, we haven't had an operation in which IHL has been relevant to the conduct of our own forces.

That doesn't mean that we don't need IHL awareness within our planning processes and our forces, and a capacity to implement it in our operations. As stated, whether IHL is applicable to the conduct of our forces is a matter of fact. The factual situation within which an operation is conducted can deteriorate massively in a short period of time, meaning that our forces may potentially one day find themselves in an unexpected conflict situation, to which IHL consequently applies. Also, we have to take into account the fact that we have to be able to provide situational awareness to the responsibilities of the parties to the crisis. Hence IHL awareness is crucial to the conduct of our operations.

Thirdly, the writing of our planning documents gives us plenty of opportunity to undertake a detailed analysis as to the implications of the conduct of our operations.

Fourthly, if the EU becomes engaged in a conflict as a combatant, it will apply IHL to the maximum extent possible, and devise whatever solutions in those areas it can.

**THE APPLICATION OF INTERNATIONAL HUMANITARIAN LAW TO PEACE
OPERATIONS: SPECIFIC ISSUES**

Interaction of the legal regimes in peace operations

Peace operations and the complementarity of human rights law and international humanitarian law

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I. Introduction

On February 3, 2000, chaos erupted in Mitrovica, Kosovo. Following the bombing of a local café, mass civil unrest erupted in the city. The UN Police and KFOR, the NATO peacekeepers deployed in Kosovo, were completely unprepared as mobs rampaged through the streets.

A number of ethnically-motivated attacks were carried out in the course of the rioting. Unidentified perpetrators threw grenades into homes and gunned down individuals attempting to flee. Many other homes and vehicles were torched. At least eight people were killed that night and dozens more were severely injured. While there was a great deal of chaos, with several unruly mobs roaming the streets, the door-to-door killings were carried out systematically, evincing a planned attack.

Where was KFOR? When the fighting broke out, those soldiers who were present at the scene withdrew to their base and provided no assistance to the UN Police who were trying to extract the wounded and vulnerable. No KFOR reinforcements arrived.

As a human rights officer working under the auspices of the UN Interim Administration Mission in Kosovo, I was confronted with a number of legal issues relating to the violence. One particularly difficult question was whether KFOR had a duty to protect individuals from violent acts committed by third parties. Underlying this question were a number of complex legal issues, including the interaction of human rights law and humanitarian law in a peacekeeping context, the question of responsibility in the context of multilateral operations, and the extent to which human rights obligations applied beyond a state's sovereign territory.

This paper focuses on the analysis of these issues in the context of obligations of troop contributing or sending states.

II. Simultaneous Application of Human Rights Law & Humanitarian Law

For much of the Twentieth Century it remained unclear whether human rights law would apply to a state's conduct during armed conflict or occupation. Despite continuing objections on the part of a handful of

states, a consensus is evolving in favor of the view that human rights law applies alongside humanitarian law in times of armed conflict or occupation.

As stated by the International Court of Justice (ICJ) in its 1996 Advisory Opinion on the “Legality of the Threat or Use of Nuclear Weapons”: “*The Court observes that the protection of the International Covenant of Civil and Political Rights does not cease in times of war, except by operation of Article 4 of the Covenant whereby certain provisions may be derogated from in a time of national emergency.*” In a subsequent opinion, the ICJ noted further: “[T]here are thus three possible situations: some rights may be exclusively matters of international humanitarian law; others may be exclusively matters of human rights law; yet others may be matters of both these branches of international law.”⁴⁷

While the jurisprudence of the ICJ and other international bodies has shed some light on this relationship, much remains to be clarified in terms of how this complementarity is to be operationalized. However, for present purposes, it suffices to note that it is now increasingly clear that human rights law does not cease to apply by reason of the inception of state of armed conflict.

III. Attribution of Conduct in the Context of Multilateral Operations

Notwithstanding the significant expansion of international law in the past century, the principal subject of international law remains the state. Human rights treaties, such as the ICCPR, place responsibility for ‘respecting and ensuring’ human rights squarely upon states parties. Thus, only conduct attributable to the state can constitute an internationally wrongful act under these treaties, and only the state can be held responsible on the international plane for such violations. While certain norms of humanitarian law are now regarded as being addressed to individuals, this remains exceptional. While the breach of any rule of humanitarian law may give rise to state responsibility, individual responsibility arises only in response to certain serious breaches.

At the same time, states are abstract entities, incapable of acting as such. The conduct of states is the conduct of individuals whose acts or omissions are attributable to the state. As such, the issue of attribution must be addressed.

As an initial matter, it is important to bear in mind that the question of whether an actor’s conduct is attributable to a state is

⁴⁷ Legal Consequences of the Construction of a Wall in Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004 [hereinafter Wall opinion], at para. 106.

analytically distinct from the question of whether that conduct is internationally wrongful. The rules of attribution form part of the law of state responsibility. These rules are of a framework nature and are thus unconcerned with the separate question of whether the conduct at issue conforms to what is required by substantive norms of international law.

The first rule of attribution is that the conduct of an organ of a state, including that of any individual who is an official part of the machinery of the state, or of an entity legally empowered by a state to exercise elements of governmental authority is considered to be an act of that state. This would also include situations in which an organ is placed at the disposal of a state by another state and the organ is acting in the exercise of elements of the governmental authority of the former state. The conduct of such actors is attributable to the state even where an actor's conduct is *ultra vires*, or beyond the scope of his or her authority, so long as he or she was acting in an official capacity.⁴⁸

Attribution in the Context of Collective Action

While the lines of responsibility are relatively clear when states act in an individual capacity, the issue of attribution becomes more complex in the context of collective action, particularly in light of the range of circumstances in which states may conduct collective operations.

States may simply deploy military forces jointly or through "coalitions of the willing", which may or may not have separate legal personality. They may also contribute troops to UN or NATO forces in which operations are under the command and control of these organizations. Or they may deploy forces together with other states acting pursuant to a UN mandate, while retaining command and control. In these situations, chains of command may or may not be unified, states may or may not retain control over their contributed troops, and the lines of attribution may be muddled as a result.

Given this complex array of possibilities, the issue of attribution must be assessed in light of the particular features of each operation. In general, the conduct of a state's military forces will be attributable to that state while those forces are acting in their national capacity. However, if troops are fully seconded to an intergovernmental organization, or another entity with separate international legal personality, such that they are acting on behalf of that organization or entity and are no longer acting on behalf of their state of nationality, then their conduct may no longer be attributable to their state of nationality.

⁴⁸ See ILC Articles on the Responsibility of States for Internationally Wrongful Acts (2001).

In reality, the sending states of troops contributed to UN or regional peacekeeping operations retain a significant degree of control over their troops. In such situations, the precise scope of the troops' national capacity versus their intergovernmental peacekeeping capacity may be difficult to delineate. Indeed, it may be possible that the troops are operating in both capacities simultaneously, in which case their conduct may be attributable to their sending state as well as to the intergovernmental organization through which they have been deployed.

This latter approach appears to be embraced by the rules of attribution set forth in the ILC's Draft Articles on the Responsibility of International Organizations. Article 5 contemplates situations in which seconded personnel are under the effective, though not necessarily exclusive, control of an international organization. In such cases their conduct is attributable to the organization. Article 5 does not contemplate full secondment, in which situation the seconded personnel would be under the exclusive control of the organization. Such situations are governed by Article 4 of the Draft Articles, dealing with agents of the organization. The ILC commentary indicates that Article 5 applies in situations where the conduct of the contributed personnel would likely remain attributable to the sending state, notwithstanding the simultaneous attribution of the same conduct to the organization. Assuming the minimum level of control is met to satisfy Article 5, the relative degrees of control, as between state and international organization, do not go to the question of attribution, but to the apportionment of responsibility (e.g. proportion of compensation to be paid by each).

Attribution of the Conduct of Non-state Actors

The conduct of non-state actors may also be attributed to a state under certain circumstances. The conduct of a non-state actor may be imputed to a state when the actor is in fact acting on the instructions of, or under the direction or control of, a state in carrying out the conduct; when the actor is exercising elements of governmental authority in the absence or default of official authorities; when the conduct is subsequently adopted by a state; or when the conduct is that of an insurrectional movement that becomes the new government of a state.

These standards establish a fairly high threshold of state involvement or, alternatively, *de facto* state action by non-state actors accompanied by state authorization or disengagement. Instances of simple complicity of state organs in the conduct of non-state actors are not sufficient to render such conduct attributable to the state under the traditional rules of attribution.

However, the law of state responsibility admits the possibility of *lex*

specialis where 'special rules of international law' may govern. Special rules may be evolving through the practice of universal and regional human rights mechanisms. These institutions have increasingly found degrees of state involvement not rising to the level established for attribution under the Articles to be sufficient to render the state responsible for the acts of non-state actors. Indeed, a growing corpus of international human rights jurisprudence and practice supports the proposition that the conduct of non-state actors may be attributable to the state where state actors are *complicit* in such conduct.

Caveat: Positive Obligations and the Attribution of Omission

As noted above, the question of attribution is in principle separate from the content of international obligations. However, this distinction may become difficult to discern in the context of a failure of a state to fulfill positive obligations in relation to the acts of non-state actors. In such situations, it is essential to distinguish between whether the conduct of non-state actors is attributable to a state and the separate question of whether a state has failed to fulfill an affirmative obligation, should one be imposed by a primary rule of international law, in relation to the conduct of non-state actors.

The attribution of conduct consisting of omissions presents conceptual difficulties in part because conduct consisting of omissions is, in a sense, always attributable. As omission is a lack of action, an actor is not required. Hence, the state is essentially in a constant state of omission. However, in order for an omission to constitute a basis of responsibility, there must be a duty to act. The question of establishing a duty to act will turn on the content of the relevant primary rule. Thus, in these circumstances, the issue of attribution collapses into the content of the primary rule.

The Behrami Judgment

The *Behrami* decision⁴⁹ of the European Court of Human Rights misapplies these rules in several ways. Most significantly, the Court concluded that because it had found the conduct at issue attributable to the UN, it could not be attributable to the sending state. It thus failed to recognize that the same conduct may be attributable both to an international organization and to a sending state. Another defect in the Court's approach is its formulation of the primary issue as one of attribution instead of addressing the antecedent question of the existence

⁴⁹ *Behrami v. France*, Admissibility Decision, European Court of Human Rights, 2 May 2007.

of a positive obligation on the part of the Respondent State operating in an extraterritorial context.

IV. Extraterritorial Application

International Humanitarian Law

Unlike human rights law, the law of armed conflict was designed to apply primarily in an inter-state context. Thus, the vast majority of its provisions would clearly apply to a state's extraterritorial conduct, specifically in the territory of the opposing state.

However, peace operations usually do not entail armed conflicts with states. Typically, where peacekeepers are engaged in armed conflict, the opposing party or parties are non-state organized, armed groups. Such conflicts are thus not governed by the law of international (i.e., interstate) armed conflict. But do they fall within the scope of the rules of humanitarian law that were developed to regulate non-international (i.e., non-interstate) armed conflict, the central case of which would be internal armed conflict?

Recently, controversy arose as to whether Common Article 3 applied only to internal conflicts. Until recently, the US Government had taken the position that Common Article 3 could not apply to its conflict with Al-Qaeda, as this conflict was transnational in nature. It focused on the phrase "*occurring in the territory of one of the High Contracting Parties,*" arguing that the plain meaning of this language would limit the application of Common Article 3 to internal conflicts.

This was, of course, contrary to the position of the International Court of Justice that the rules of Common Article 3 "*constitute a minimum yardstick, in addition to the more elaborate rules which are also to apply to international conflicts; and they are rules which, in the Court's opinion, reflect what the Court in 1949 called 'elementary considerations of humanity.'*"⁵⁰

Since the US Supreme Court ruling in *Hamdan v. Rumsfeld*,⁵¹ the US Government has accepted application of Common Article 3 in transnational conflicts. There now seems to be a general consensus supporting the proposition that the law of non-international armed conflict applies extraterritorially.

As noted above, demonstrating the applicability of humanitarian law outside of a state's territory is facilitated by the fact that the bulk of the law of armed conflict was designed to apply in an interstate context, presupposing that states would be acting on each other's territory. That

⁵⁰ *Military and Paramilitary Activities (Nicaragua v. U.S.)*, 1986 I.C.J. 14, 25 (June 27), at para. 218 (citing *Corfu Channel*, Merits, ICJ Reports 1949, at 22).

⁵¹ *Hamdan v. Rumsfeld*, 126 S.Ct. 2749 (2006).

some of these rules are now deemed to apply even in an internal setting does not lessen the presumption that they will still apply extraterritorially, at least insofar as they consist of prohibitions and do not purport to impose obligations on third states.

The situation is more complex under human rights law, which was not primarily designed to apply extraterritorially.

International Human Rights Law

Most of the jurisprudence of human rights bodies, which have greatly elaborated on the content of states' obligations under various human rights treaties, has been developed in the context of alleged violations committed on the territory of the respective state party. Can these same standards be transposed onto the state's conduct abroad?

When I first began examining this question, I was working in the UNMIK Regional Center in Mitrovica, Kosovo. Though I was fortunate to have a copy of Professor Meron's article on the subject, accessing relevant judicial decisions was extremely difficult. In any event, there was very little to be found. The few international decisions that had analysed this issue had employed an approach that was unsatisfactory on a number of levels. Since that time, a number of other decisions have been handed down, though still lacking a coherent approach.

In an effort to bring order to an otherwise chaotic array of judicial (and quasi-judicial) decisions, I developed a framework for delineating the scope of human rights obligations by examining three different parameters: the scope of beneficiaries, the range of rights applicable, and the level of obligation. Structuring an analysis of current jurisprudence around these three parameters reveals a trend toward recognizing varying levels of obligation.

The scope of beneficiaries refers to the range of individuals in relation to whom the state has any obligation under the relevant human rights treaty. States parties to the ICCPR are not bound to respect and ensure the rights of all individuals everywhere. For example, it is clear that, in the absence of special circumstances, states parties are not required to protect the rights of individuals living in other countries from violations perpetrated by the governments of those countries or by non-state actors operating there.

A common feature of the major human rights treaties is that the scope of beneficiaries is typically limited to those individuals who are subject to the state party's jurisdiction. While it was initially unclear whether this language could encompass individuals situated outside of a state's territory, the extraterritorial application of human rights treaties has now been clearly established in the jurisprudence of several international

judicial and quasi-judicial bodies.

The ICJ has held that when a state party is operating outside of its territory, “international human rights instruments are applicable ‘in respect of acts done by a State in the exercise of its jurisdiction.’”⁵² The regional human rights institutions have endorsed the position of the Human Rights Committee that a state may be responsible for violation of the rights and freedoms of persons who are in the territory of another state but who are found to be under the former state's authority and control through its agents operating in the latter state.⁵³

Under human rights treaties, the range of rights applicable within a state's territory will normally be the full range of rights set forth in each treaty. However, this may not be the case when the state is operating abroad. In such situations, the range of applicable rights may be limited by the scope of the state's authority or control in the circumstances. In general, it may be reasoned that as human rights law is generally predicated on a state's authority and presumed capacity to control individuals and territories, a state's human rights obligations while acting abroad would not be as extensive as when it acts on its own territory. Similarly, it may be the case that the application of certain rights requires a higher threshold of control. Indeed, the ICJ and the regional human rights institutions have implied as much.⁵⁴

For example, it may be argued that certain rights cannot be applied where a state is performing a very narrow function in the territory of another state. Where a state is not trying individuals, the right to a fair trial is simply not implicated.

However, another approach is to focus the inquiry not on the question of which rights the state is obliged to secure, but instead on the level of obligation upon states with respect to those rights.

Varying Levels of Obligation

As noted above, the obligation to “respect and ensure” rights set forth in the ICCPR, or, in the words of the European Convention, to “secure” rights, entails a substantial degree of positive obligation.

As with the range of rights, the level of obligation also may be limited where the state operates abroad. The level of obligation may

⁵² Case Concerning Armed Activities on the Territory of the Congo (DRC v. Uganda), 2005 I.C.J. 116, para. 216 (Dec. 19), [hereinafter DRC v. Uganda]. [hereinafter DRC v. Congo]

⁵³ See John CERONE; “Out of Bounds? Considering the Reach of International Human Rights Law”, Working Paper No. 5, p. 19 (2006), New York University School of Law Center for Human Rights and Global Justice.

⁵⁴ See, e.g., Wall opinion, at para. 112.

similarly be tied to the scope of a state's extraterritorial activities or authority to act. In particular, it is arguable that human rights obligations requiring the adoption of affirmative measures may be more limited in an extraterritorial context.

This position finds support in the international jurisprudence referred to above. Seen collectively, the bulk of international authority indicates a trend toward recognizing varying levels of obligation.

In particular, the ever-lowering threshold for "jurisdiction" in the context of negative obligations seems to indicate that these obligations apply whenever a state acts extraterritorially (at least with respect to intentional human rights violations, as opposed to indirect consequences), but that the degree of positive obligations will be dependent upon the type and degree of control (or power or authority) exercised by the state.

Positive obligations are limited by a scope of reasonableness even when applied to a state's conduct within its territory; there is no reason why application to a state's extraterritorial conduct would not similarly be bound by a scope of reasonableness, such that the adoption of affirmative measures is only required when and to the extent that the relevant party *de jure* or *de facto* enjoys a position of control that would make the adoption of such measures reasonable. This approach would preserve the integrity of the respective treaties and would vindicate the universal nature of human rights, which is proclaimed in the preambles of all of the human rights treaties considered in this analysis.

At the same time, it would not place unreasonable burdens on states parties. Even though this approach contemplates world-wide application of human rights law, it does so, in the absence of a significant degree of control, only in respect of negative obligations. Thus, a state is bound only to the extent it chooses to project its power, and, even then, is bound simply to refrain from directly perpetrating human rights violations.

It is also possible that a negative obligation can flip into a positive obligation, but this again will depend on an assertion of authority by the state. For example, the state generally has an obligation not to arbitrarily detain. Once it begins detaining people, this converts to a positive obligation to create a regulatory procedure, to ensure humane treatment of the detainee, to provide compensation if the detention is wrongful, etc.

Another example is the negative obligation not to subject someone to an unfair trial. Again, this would not be implicated unless the state is trying people.

Textual Argument Limiting Application to a State Party's "Territory"

The United States has consistently taken the position that the

ICCPR applies only within the territory of the State Party. It bases this position on the text of Article 2 of the Covenant, which reads: “*Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind...*”

The US argues that the phrase “*within its territory and subject to its jurisdiction,*” if interpreted according to the generally accepted rules of treaty interpretation, must mean that States Parties to the ICCPR do not have any obligation to respect and ensure the rights of those who are outside of their territory. This is contrary to the position taken by the Human Rights Committee and the ICJ that territory *or* jurisdiction is sufficient.

To further support its position the US points to the *travaux préparatoires* of the Covenant. During the negotiations, it was twice proposed that the phrase “*within its territory*” be deleted from the text, and both times the proposal was defeated. The US delegates consistently pointed out that it was essential to retain this phrase in order to avoid any obligation to ensure the rights of those outside of a state’s territory. This sentiment was echoed by several other delegations that supported the retention of the phrase.⁵⁵

While this argument appears persuasive on its surface, a closer read of the *travaux* reveals another possible interpretation. Every delegate that expressed concern about extraterritorial application of the Covenant limited their concern to the obligation to “ensure” rights. In other words, no delegate claimed that they were concerned about the extraterritorial application of the negative obligation to “respect” rights. This holds true even for the later negotiations, where the text already expressly included both the obligation to respect and the obligation to ensure.

Thus, the *travaux* equally support an interpretation that is consistent with the trend identified above. Indeed, a re-examination of the text demonstrates that the most reasonable interpretation of Article 2, using the customary rules of treaty interpretation, is that the phrase “*within its territory and subject to its jurisdiction*” modifies only the obligation “to ensure”.

As such, Article 2 essentially provides that each State Party undertakes to respect the rights recognized in the Covenant and also to ensure these rights to all individuals within its territory and subject to its jurisdiction. This interpretation is consistent with the *travaux* and also

⁵⁵ See M. DENNIS, “*Non-application of Civil and Political Rights Treaties Extraterritorially During Times of International Armed Conflict*”, *Israel Law Review* (2007).

with the ultimate decisions of the ICJ and regional human rights bodies, all of which have generally limited their findings of extraterritorial violations to breaches of negative obligations. The few instances where they have found violations of positive obligations were situations in which the state acting extraterritorially was occupying the territory, and thus had a large degree of authority and control over the territory, enabling the Court to assimilate that territory to the state's own.

Negative & Positive Obligations in the Context of Collective Action

In light of the trend identified above, it may be unnecessary to examine the question of jurisdiction for negative obligations. The only relevant issue would be to which subject of obligation the human rights violating conduct is attributable.

For positive obligations, it would be necessary to establish "jurisdiction," or, as this term is increasingly understood in a human rights context, control. In the context of collective action, it may be appropriate to consider whether individuals or territory are under the control of the relevant entity (*e.g.* peacekeeping mission) as a whole, and then to parse out responsibility among the participating states and member states.

The legal status of United Nations and associated personnel in peace operations and the legal regime protecting them

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First, I would like to start by thanking the Institute for inviting me as a speaker to this Round Table on “*International Humanitarian Law and Human Rights Law in Peace Operations*”. International Humanitarian Law (IHL) and Human Rights Law (HRL) in the context of peace operations are generally discussed as principles and rules restricting the use of force by military personnel engaged in peace operations. I will approach this topic from a different angle – that is, how do these rules protect personnel in peace operations? In this respect it is also of interest to note the change in legal status for such personnel if and when they are drawn into an armed conflict – depending to some extent on the type of armed conflict.

I use the term peace operation to denote activities ranging from peacekeeping to peace enforcement. In peace operations based upon a mandate from the Security Council, which I am discussing in this presentation, the personnel may be regarded as representatives of the international community and it is imperative that they enjoy a comprehensive legal protection. This legal protection consists of a mix of rules and I will briefly present a categorization of norms protecting personnel in peace operations.

I will, however, emphasize the role of IHL in this respect. The robust peace operations of today involve a risk that peace operation forces are drawn into armed conflict. What effect has this on the protection of the personnel? Special attention will be given to this issue and the 1994 Convention on the Safety of the United Nations and Associated Personnel (Safety Convention). this Convention includes a so called ‘switch clause’ stating that when peace operation forces are engaged as combatants to an international armed conflict they can no longer rely on the protection offered by the Safety Convention.

I. Introducing categories of protection

It is possible to divide the legal rules on the protection of personnel in peace operations into three different categories: a general protection, a special protection, and an evolving regime against impunity.

General protection

The category of general protection is based primarily upon

international humanitarian law and human rights law. The host state has the primary responsibility of securing the legal status of personnel in peace operations. Conventions on human rights law state that parties to these conventions are under an obligation to secure to everyone within their jurisdictions the rights and freedoms within the conventions (or words to that effect). The host state, therefore, at least, is under an obligation to secure fundamental human rights and freedoms to everyone in the operation, irrespective of their position in the operation in question, in so far as they come within the jurisdiction of the host state, in terms of human rights law.

If there is an armed conflict in the area of operation and the laws of war apply, the parties to the conflict are obliged to treat the peace operation personnel as civilians under the law of armed conflict – as long as they do not participate in the conflict. Again – this protection is offered to everyone irrespective of what task they might perform or their position in the operation – as long as they do not take part in the conflict in question.

Special protection

What I have termed ‘special protection’ includes certain privileges and immunities based upon the personnel’s differing roles in the operation. Military observers and civil police are generally awarded the status of “experts on missions” which is a protected category of personnel in the 1946 Convention of Privileges and Immunities of the United Nations. The military personnel that form part of the military component are, however, normally not covered by this convention. Their legal status is instead usually derived from a Status-of-Forces Agreement (SOFA) – a bilateral agreement between the organization leading the operation and the host nation.

A SOFA provides the military personnel with important privileges and immunities to enable them to fulfill their tasks under the mandate without interference from the host state – such as freedom of movement, the right to carry firearms, and the right to set up their own communication systems. And most important of all – they fall under the exclusive criminal jurisdictions of their sending states. Exclusive criminal jurisdiction is, strictly speaking, not immunity from local jurisdiction but rather an example of an allocation of jurisdiction between sending and receiving states where the former have been allocated exclusive jurisdiction. If one compares the practice of visiting forces where criminal jurisdiction is divided between the sending and the receiving states, the established practice in peace operations, when forces are invited to perform operational tasks, is that the sending states retain exclusive

criminal jurisdiction over their forces. The receiving state also has an obligation under the SOFA to prosecute individuals who might commit crimes against the peace operation personnel.

The strength of a SOFA lies in the fact that it can be tailored to suit the needs of each operation. The weakness, of course, is that each operation requires the conclusion of a new SOFA. However, there exists a UN model SOFA as well as an EU and a NATO model. These model agreements may work as a basis for negotiations for a specific SOFA.

It is, however, not uncommon that the personnel in question deploys before the conclusion of a SOFA. The question then is what applies during this period of time? I argue that more than fifty years of practice of SOFAs in peace operations, have established rules of a customary law character. It may also be argued that such fundamental norms are part and parcel of the peace operation concept, so that when a host state requests, or accepts, a peace operation within its territory it also accepts the concept of peace operations, including the fundamental rules of the UN model SOFA.

An evolving regime against impunity

The third category of legal protection may be described as an evolving legal regime against the notion of impunity for crimes committed against personnel in peace operations. The most prominent set of rules within this category are set out in the 1994 Convention on the Safety of United Nations and Associated Personnel.

In the beginning of the 1990s it became clear that personnel in peace operations were no longer protected simply because they represented the UN. The experiences of Somalia and former Yugoslavia are evidence rather of the opposite situation applying. Peace operation personnel came under direct attack, irrespective of their protected status, and what was perhaps even more disturbing was the culture of impunity in relation to such attacks. There are indeed very few examples where perpetrators of attacks have been prosecuted in a host state. The response of the international community was the Safety Convention. In brief, the Convention stipulates a number of criminalized acts and states parties are under a duty to prosecute or extradite those suspected of such crimes. It can be described as an instrument for interstate penal co-operation for crimes against personnel in peace operations. The problem of the Safety Convention was its scope of application. I will not go into detail on these issues here. However, an Optional Protocol was adopted in 2005 and it has solved some of the problems. The Protocol is not yet in force.

II. The Safety Convention and International Humanitarian Law

The drafters of the Safety Convention were well aware of the fact that while attacks on personnel involved in peace operations would constitute criminal acts, this could not be the case when such peace operation personnel were engaged as combatants in an armed conflict. Article 2(2) of the Safety Convention has been denoted a switch clause – between when the Convention is operational and when it is not. Article 2(2) of the Convention reads: *“This Convention shall not apply to a United Nations operation authorized by the Security Council as an enforcement action under Chapter VII of the Charter of the United Nations in which any of the personnel are engaged as combatants against organized armed forces and to which the law of international armed conflict applies.”*

This provision has been criticized on several grounds: only Chapter VII operations are mentioned; all personnel lose their protection, although civilians could in fact retain their protection under the Convention; it is also silent on the question as to when the Convention becomes operative again.

But as you can see, once any of the personnel are engaged as combatants to an international armed conflict all personnel lose their protection under the Convention. This solution is based upon the nature of IHL – it only draws a distinction between civilians and combatants – not between the parties to the conflict. In practice it is extremely difficult to decide at which point in time the military personnel concerned become involved as combatants. From an international criminal law point of view it is of course a disturbing fact that the same act could be illegal at one point in time but perfectly legal at another – and it is not possible to say with certainty precisely when the situation changes.

However, Article 2(2) of the Safety Convention refers to international armed conflicts. A *contrario* this means that in a non-international armed conflict it is still a crime to attack or capture UN and associated personnel. During the negotiations of the Safety Convention it was emphasized that the legal status of captured soldiers in a non-international armed conflict was very poor since they could not rely on their POW status. The experiences of Somalia were given as an example. The idea was that in non-international armed conflict the Convention should continue to operate thereby stipulating that the capture of UN and associated personnel was a criminal act.

One can also argue that it indeed mirrors the situation in non-international armed conflicts where non-state actors cannot rely on the combatant exception and, therefore, becomes subject to prosecution according to national criminal law in the state where the act was perpetrated. Even if non-state actors were to abide by the standards of

humanitarian law they might still face prosecution under national law for attacking governmental forces. The Safety Convention could be said to reflect this division on the international level. It elevates such crimes from a purely national level to an international level since not only the national state but all states parties to the Safety Convention have a duty to prosecute or extradite those suspected of criminal acts against personnel.

This is the theoretical point of view. From a practical perspective the aspect of how the law is perceived needs also to be taken into account. There is perhaps a risk that rebel groups involved in an armed conflict with peace operation forces may be discouraged from complying with international humanitarian law. If members of such groups were to be punished for acts, which, if taken in the context of an international armed conflict, would have been regarded legitimate acts of war, they might indeed lack the incentive for complying with the laws of war. An opponent involved in a non-international armed conflict would have no reason to capture soldiers of a peace operation, since the captors, according to the Convention, would be obliged to release captives as soon as they had identified themselves. In a worst-case scenario this would in fact decrease the protection of personnel in peace operations. Why bother to capture if you must immediately release? I realize, of course, that this question is part of the larger question of different sets of rules in different kinds of armed conflicts but I also believe that it is important to acknowledge that this system may not always work to the advantage of personnel in peace operations. It should also be noted that not only do current armed conflicts often involve both international and non-international elements, but the distinction between these two types of armed conflict is also becoming less clear in terms of applicable law.

Conclusions

In conclusion, a mix of rules provides the personnel in peace operations with a rather high degree of legal protection. The SOFA is the single most important instrument for the military component in a peace operation. The conclusion of a SOFA requires consent of the host nation to the operation as a whole. Even if consent strictly speaking is not needed in Chapter VII operations it is generally sought, and received, from the government of the host nation in some form. It may of course be that there also exist armed groups not controlled by the government opposing the peace operation.

It is clearly a fact that the use of force and the legal status of personnel in peace operations are connected. Whether peace operation forces are involved in international or non-international armed conflict is of importance. The same act of violence directed against such forces can in

one type of conflict be legitimate but in another illegal. However, the realization of the protection is not only a matter of law but also of how potential attackers perceive the law. These issues are all the more important considering the fact that the most common kinds of conflict today are of a non-international character and the robust mandates of current peace operations involves a risk for peace operation personnel to be drawn in to such armed conflicts.

The law of occupation: a *corpus juris* relevant for peace operations?

The applicability of the law of occupation to peace forces

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Consideration of the relationship between international humanitarian law (IHL) and the United Nations has mainly focussed on the broad issue of the general applicability of this body of law to United Nations peace-keeping forces, whether these are involved in peace-keeping operations or in more coercive action conducted on the basis of Chapter VII of the United Nations Charter. Following protracted legal debate of the matter, it is now difficult to uphold that United Nations forces involved in peace-keeping operations are precluded from applying IHL, if the conditions for its applicability have been met.

It is, therefore, not the aim or purpose of this paper to comment on a topic that has been extensively covered elsewhere⁵⁶, even though a

⁵⁶ M. BOTHE, *Le Droit de la Guerre et les Nations Unies*, Genève, 1967; G. Ch. BRAIDI, *Le DIH et les Forces de l'ONU Pour le Maintien de la Paix: Nouvelle Génération*, Berne, Thèse, 1998, p. 152; L. CONDORELLI, A.M. LA ROSA, S. SCHERRER (Eds.), *Les Nations Unies et le Droit International Humanitaire*, Actes du colloque international à l'occasion du 50^e anniversaire de l'ONU, Pédone, Paris, 1996, p. 506; C. EMANUELLI, *Les Actions Militaires de l'ONU et le DIH*, Montréal, Wilson et Lafleur Itée, 1995, p. 112; R. KOLB, *Droit Humanitaire et Opérations de Paix Internationales*, Bâle/Bruxelles, Helbing and Lichtenhahn/Bruylant, 2002, p. 125; R. KOLB, G. PORRETTO et S. VITE, *L'application du DIH et des Droits de l'Homme aux Organisations Internationales*, Bruylant 2005, p. 500; A. FAITE et J. LABBE GRENIER (Eds.), *Expert Meeting on Multinational Peace Operations, Applicability of IHL and International Human Rights Law to UN Mandated Forces*, Report, ICRC, Geneva, October 2004, p. 93; H. MCCOUBREY et N.D. WHITE, *The Blue Helmets: Legal Regulation of UN Military Operations*, Aldershot, Dartmouth, 1996, p. 218; P. BENVENUTI, "The Implementation of IHL in the Framework of UN Peace-keeping", in *Law in Humanitarian Crisis: How Can IHL be Made Effective in Armed Conflicts?*, Luxembourg, CE, 1995, pp. 13-82; M. BOTHE, "Peacekeeping and IHL: Friends or Foes?", *International Peacekeeping*, vol. 3, 1996, pp. 91-95; L. CONDORELLI, "Les Progrès du DIH et la Circulaire du Secrétaire Général des Nations Unies du 6 août 1999", in *Mélanges Abi Saab*, The Hague, Nijhoff, pp. 495-505; C. EMANUELLI, "Les Forces des Nations Unies et le DIH", in *Les Nations Unies et le Droit International Humanitaire*, Actes du colloque international à l'occasion du 50^e anniversaire de l'ONU, Pédone, Paris, 1996, pp. 345-370; R.D. GLICK, "Lip Service to the Laws of War: Humanitarian Law and United Nations Armed Forces", *Michigan Journal of International Law*, 1995-1996, pp. 53-107; C. GREENWOOD, "IHL and UN Military Operations", *YIHL*, 1998, pp. 3-34; U. PALWANKAR, "Applicabilité du DIH aux Forces des Nations Unies Pour le Maintien de la Paix", *RICR* 1993, n°801, pp. 245-259; D. SCHINDLER, "UN Forces

number of legal questions remain⁵⁷. Rather, this paper will focus on a specific part of IHL, namely the law of occupation and the legal questions arising from its applicability to peace operations.

Moreover, this paper adopts a narrow approach on the issue of occupation law applicability to peace forces since a large consensus emerges concerning the applicability of this body of law to peace forces "authorized" by the UN Security Council. Instead, this paper addresses the much more specific issue of the applicability of the law of occupation to United Nations forces (i.e. under UN command and control) involved in peace-keeping operations. While this issue is, to a certain extent, similar to that of the overall applicability of IHL to United Nations forces in general, it also involves aspects that are inherent to the law of occupation. It is one question the UN has tended to shy away from but which, the current characteristics of United Nations peace-keeping operations being what they are, it cannot continue to ignore or dismiss.

Indeed, the changing nature of peace-keeping operations - in particular the advent of "integrated" missions - together with the characteristics of the "host" States, whose structures are often weakened, on the point of collapse, or, in some cases, have been completely destroyed by the armed conflicts affecting them, makes it important and necessary to examine the applicability of and recourse to the law of occupation as the legal framework of reference for the deployment of United Nations forces on a given territory. In this respect, we shall see that the apparent contradiction between the concepts of occupation and peace-keeping

and IHL", in C. SWINARSKI (Ed.), *Mélanges Pictet*, CICR/Nijhoff, 1984, pp. 521-530; D. SHRAGA and R. ZACKLIN, "L'applicabilité du DIH aux Opérations de Maintien de la Paix des Nations Unies: Questions Conceptuelles, Juridiques et Pratiques" in U. Palwankar (Ed.), *Symposium sur l'action humanitaire et les opérations de maintien de la paix*, Genève, CICR, 1994, pp. 41-50; D. SHRAGA, "The UN as an Actor Bound by IHL" in *Les Nations Unies et le Droit International Humanitaire*, Actes du colloque international à l'occasion du 50^e anniversaire de l'ONU, Pédone, Paris, 1996, pp. 317-338; C. SWINARSKI, "On the Applicability of IHL to the UN Peace-keeping Forces, in *Liber Amicorum H. Gros Espiell*, Bruxelles, Bruylant, 1997, pp. 1519-1532; B. TITTEMORE, "Belligerents in Blue Helmets: Applying IHL to UN Peace Operations", *Stanford Journal of International Law*, vol. 3, 1997, pp. 61-117; G. J. VAN HEGELSOM, "The Law of Armed Conflict and the UN Peace-keeping and Peace-enforcing Operations", *Hague Yearbook of International Law*, vol. 6, 1993, pp. 45-58.

⁵⁷ For example, IHL scope of applicability when United Nations forces are engaged in an armed conflict, the legal qualification of a situation wherein United Nations forces are involved in military operations and the legal status of such forces in the event of capture, as well as the legal implications of the interplay between the IHL and the UN Convention on the Safety of United Nations and Associated Personnel of 9 December 1994.

operations is only relative (I), and that the law of occupation can therefore be applicable to and be a relevant regulatory framework for United Nations forces in certain circumstances (II)⁵⁸.

I. A legal issue affected by the apparent contradiction between the concepts of occupation and peace-keeping operation

The applicability of the law of occupation to peace-keeping operations has received little attention and been much less discussed than the more general applicability of international humanitarian law. This is probably largely due to the fact that for most scholars, only coercive action carried out on the basis of Chapter VII of the United Nations Charter can - hypothetically - result in a situation of occupation, given that the forces established on this legal basis generally fulfil their mandate, by definition, without the consent or explicitly against the will of the sovereign power on the territory on which they are deployed. In their view, in C. Emanuelli's words, "*cette situation [d'occupation] se présentera seulement lorsque les forces onusiennes agissent en tant que forces belligérantes, sur la base des articles 42 et suivants de la Charte, ou dans le cadre d'une opération d'imposition de la paix*"⁵⁹.

For this school of thought, the applicability of the law of occupation is not even to be considered in the case of peace-keeping operations conducted in the context of Chapter VI of the Charter, given their nature and guiding principles: the use of force only in self-defence, impartiality in

⁵⁸ It should be mentioned that this article focuses only on the question of the applicability of law of occupation addressed *stricto sensu* and does not purport to analyze the application of the substantive norms of this body of law to UN operations. On the issue of the relevance of occupation law to peace operations conducted by the UN see in particular, M. J. KELLY, *Restoring and Maintaining Order in Complex Peace Operations, the Search for a Legal Framework*, Kluwer Law International, 1999, p. 235; T. H. IRMSCHER, "The Legal Framework for the Activities of the UN Interim Administration Mission in Kosovo: The Charter, Human Rights, and the Law of Occupation", *German Yearbook of International Law*, vol. 44, 2001, pp. 353-395; C. RUEGER, "The Law of Military Occupation, Recent Developments of the Military Occupation with Regard to UN Security Council Mandated International Territorial Administration", *Revue de Droit Militaire et de Droit de la Guerre*, 2006, pp. 215-228.

⁵⁹ C. EMANUELLI, *Les Actions Militaires de l'ONU et le Droit International Humanitaire*, Wilson et Lafleur Itée, Montréal, 1995, p. 40. Voir aussi, D. SHRAGA, "The UN as an Actor Bound by IHL", in L. CONDORELLI, A.M. LA ROSA, S. SCHERRER (Eds.) *Les Nations Unies et le Droit International Humanitaire*, Actes du colloque international à l'occasion du 50^e anniversaire de l'ONU, Pédone, Paris, 1996, p. 328; et S. VITE, "L'applicabilité du Droit International de l'Occupation Militaire aux Activités des Organisations Internationales", *RICR*, mars 2004, vol. 86, n°853, p. 20.

fulfilling their mandate and, most notably, consent.

Yet, in view of events in recent peace-keeping operations (in Kosovo, Timor or Somalia, for example), the question of the applicability of the law of occupation has rightly been raised and indeed appears crucial in that it has major legal implications in terms of the rights and duties ascribed to peace-keeping forces and of the legal protection conferred on the population of the territories concerned. The matter is all the more relevant given that the applicability of the law of occupation had been ruled out *inter alia* on the grounds that peace-keeping operations are necessarily based on consent and are non-intrusive. Recent events nevertheless suggest that consent and non-intrusiveness can no longer be taken for granted in peace-keeping operations. The law of occupation can, therefore, potentially establish itself as a body of legal rules applicable to peace-keeping forces.

A. *The importance of consent*

The concept of consent is fundamental to both peace-keeping operations and occupation; it thus plays a key role in the analysis of the applicability of the law of occupation to peace-keeping forces.

In fact, the concept of consent simply does not square with the legal institution of military occupation. The need for consent in peace-keeping operations, in the traditional sense of the concept, is diametrically opposed to the concept of "hostile army" stipulated in Article 42 of the Regulations annexed to the Hague Convention IV of 1907 (the Hague Regulations), which sets out the definition of and criteria for occupation in IHL.

Indeed, use of the qualifier "hostile" precludes from occupation law's field of application situations in which foreign troops are stationed on and exercise authority over a territory with the consent of that territory's government.

This incompatibility between consent and military occupation explains the dichotomy some scholars have posited between operations conducted within the framework of Chapter VII of the Charter and peace-keeping operations conducted on the basis of Chapter VI, and why they consider that the law of occupation applies only to the former. As C. Emanuelli emphasizes, unlike peace-enforcement troops, "*les forces de maintien de la paix déployées sur le territoire d'un État avec le consentement des autorités locales ne sont pas des troupes d'occupation. En effet, si ce déploiement peut avoir pour effet de placer l'ensemble du territoire en question, ou une partie de celui-ci, sous l'autorité des forces de l'Organisation des Nations Unies, celles ne sont pas une armée ennemie. Le droit de l'occupation coutumier relatif aux*

territoires occupés ne s'appliquera pas à cette situation"⁶⁰.

On the other hand, other experts have rejected consent as the cornerstone of the applicability of the law of occupation, however, especially in the case of a transitional international civil administration, on the grounds that it does not make sense to apply two different legal systems to what is in fact an identical situation – that is, the exercise of effective control over a territory by foreign troops – on the sole basis of consent. Nevertheless, in today's international legal system, consent remains an important factor; whether it is granted or denied carries legal consequences and it must, therefore, be taken into account. As M. Sassoli rightly emphasized: "*In the Westphalian system, the consent of a State is a factor which carries significant legal consequences*"⁶¹.

In this regard, the important role that consent plays in the applicability of the law of occupation cannot be called into question merely for reasons of opportunity or necessity. Indeed, the applicability of IHL, and of the law of occupation in particular, depends on certain pre-existing conditions identified in the relevant legal instruments and legal doctrines pertaining thereto. The absence of consent is undoubtedly one of the prerequisites for determining the existence of a state of occupation. Just as IHL does not necessarily apply to all situations in which force is used, neither can the law of occupation be the reference legal framework for all situations in which armed forces exercise authority over a territory that is not their own. It may not always be easy to determine whether consent is truly given, but that determination must nevertheless be made. The presence (or absence) of consent is thus a key element to be taken into account when determining the legal status of situations in respect of IHL, particularly situations of occupation. If a State consents to the deployment of foreign troops – including peace-keeping forces – and to their exercising authority on its territory, clearly, the law of occupation cannot be applied⁶².

But consent is not obtained or maintained on a permanent or irrevocable basis; it is not set in stone in bilateral agreements that host States have no means of denouncing. Quite the contrary: the fact that a host State can withdraw the consent it has granted to United Nations forces, or even the very absence of any prior consent, cannot be ignored because of the consequences it may have on the legal qualification of the

⁶⁰ *Ibid.*

⁶¹ M. SASSOLI, "Legislation and Maintenance of Public Order and Civil Life by Occupying Powers", *European Journal of International Law*, 2005, p. 690.

⁶² *Ibid.* See also A. ROBERTS, "What is Military Occupation", *British Yearbook of International Law*, 1984, p. 291.

situation. Indeed, the withdrawal or absence of consent would turn a situation of peaceful occupation that is not subject to the law of occupation into one of military occupation that is subject to the relevant rules of IHL, as long as *all* the criteria, and not just the criterion of the absence of consent, are effectively and objectively met⁶³.

B. Changes in the nature of peace-keeping operations that are conducive to the applicability of the law of occupation

The notion of consent given *de jure* rules out the applicability of the law of occupation, but this does not necessarily mean that peace-keeping operations and the law of occupation are generally and permanently incompatible, which would imply that the latter is systematically inapplicable to the former. Indeed, practice and the changing nature of peace-keeping operations, the current operational reality of their implementation, and the operational and conceptual restructuring being undertaken today by the United Nations Department of Peace-keeping Operations (DPKO) in New York demonstrate that the applicability of the law of occupation to peace-keeping forces cannot and must not be ruled out, for various reasons.

1. The loss or absence of consent in the deployment of peace-keeping forces

When peace-keeping forces are deployed on a given territory, the consent of the host State usually materializes by signing a status-of-forces agreement (SOFA) or a status-of-mission agreement (SOMA). Agreements of this kind govern relations between the foreign forces and the host State by delimiting their respective areas of responsibility and scope of activities and by specifying the applicable law and the jurisdiction to which the United Nations troops are subject, to mention but a few elements of their field of application⁶⁴. Under the law of treaties, the host State can terminate such an agreement at any time – if there are no provisions to the contrary – and is, therefore, totally free to revoke its consent and ask the peace-keeping forces to withdraw, as occurred, for example, in Egypt in May 1967 with UNEF I (United Nations Emergency Force I).

⁶³ In this respect, M. SASSOLI expresses some doubts concerning the systematic applicability of IHL and law of occupation to foreign forces' presence when the consent of the host State disappears : "If the consent vanishes, according to some authors, IHL could subsequently become applicable. I have however some doubts whether the simple disappearance of the legal basis for a foreign military presence makes the law of armed conflicts applicable", *op. cit.*, p. 689.

⁶⁴ M. BOTHE et T. DÖRSCHEL, "The UN Peacekeeping Experience", in D. FLECK (Ed.), *The Handbook of the Law of Visiting Forces*, pp. 487-502.

It is, therefore, not unimaginable that a State will revoke the agreement unilaterally and the consent expressly given to United Nations forces vanish, changing consequently the legal qualification of the situation under IHL. The local government might also collapse, compelling even multinational forces to take on even more responsibilities and perform law-and-order, public-security or other government functions relating to the social and political order on the territory on which they operate. In the case of the latter, peace-keeping forces thus risk taking on the role of an occupying force, sometimes without the former government's having had a say in the matter. The example of the peace-keeping operation in Somalia is emblematic in this regard, as M. Zwanenburg notes: "*There are however peace operations which do not have the consent of the host State. One example is UNOSOM II in Somalia. In that case there was no government in Somalia which was capable of giving its consent*"⁶⁵. In this example, one shall lean heavily towards a presumption of the applicability of the law of occupation.

2. *Using force or the threat of using force to extort consent*

The circumstances in which the intervention of the multinational forces in Kosovo took place force us to consider the issue of valid consent. Whether Article 52 of the Vienna Convention on the Law of Treaties cannot be invoked in certain situations to call into question the reality and legal value of consent for the deployment of peace-keeping forces⁶⁶, thereby affecting the applicability of the law, is a legitimate question. In this context, J. Cerone, in light of the criteria constituting a state of occupation, asserted the following with regard to the concept of consent in the case of Kosovo: "*As for the second criterion [for a situation of occupation], while the FRY did consent to the KFOR presence in signing the MTA [Military Technical Agreement concluded on 9 June 1999], whether that consent was anything more than formal consent is doubtful. In light of the emphasis of the Geneva Conventions on factual circumstances, as opposed to labels, formal consent would probably be insufficient to overcome the presumption of occupation that arises from the circumstances leading up to the signing of the MTA. Further, formal consent may itself be lacking in this case. Although the FRY did express its consent in signing an international agreement, that consent may be vitiated if the agreement is found to be invalid. While duress does not usually constitute grounds for holding a treaty invalid, Article 52 of the Vienna Convention provides*

⁶⁵ M. ZWANENBURG, "Pieces of the Puzzle: Peace Operations, Occupation and the Use of Force", *Revue de Droit Militaire et de Droit de la Guerre*, 2006, pp. 241-242.

⁶⁶ Such a position has been notably expressed by E. MILANO, "Security Council Action in the Balkans: Reviewing the Legality of Kosovo's Territorial Status", *EJIL* 2003, pp. 999 and sq.

*that 'a treaty is void if its conclusion has been procured by the threat or use of force in violation of the principles of international law embodied in the Charter of the United Nations'*⁶⁷.

3. *The structural and normative changes in peace-keeping operations*

The limited scope of this paper precludes an in-depth analysis of the structural and legal changes in peace-keeping operations. The subject at hand nevertheless warrants mention of recent changes that have affected the nature, structure and legal basis of peace-keeping operations in that those changes might influence the legal discussion of the applicability of the law of occupation to peace-keeping forces.

The criterion of consent, for example - which is key to our analysis - is currently the subject of intense scrutiny and, particularly in the framework of the United Nations General Assembly Peace-keeping Committee (C-34), is being eroded in a way that calls into question its status as a precondition for the implementation of a peace-keeping operation. As far back as 1992, the United Nations Secretary-General suggested in *An Agenda for Peace* that some liberties might be taken with some of the cardinal principles underpinning peace-keeping operations. This document, which sets out the terms and conditions for such operations, defines peace-keeping as *"the deployment of a United Nations presence in the field, hitherto with the consent of all parties concerned, normally involving United Nations military and/or police personnel and frequently civilians as well"*⁶⁸. More recently, the Capstone Doctrine - an internal DPKO document meant to serve as a frame of reference for all future peace-keeping operations conducted under the responsibility of the United Nations⁶⁹ - has been a bone of contention between States, with some maintaining that peace-keeping operations have changed and that the conditions on which they were previously deployed may be nuanced⁷⁰. The concept of consent is further affected in cases where the operation's mandate encompasses protection of the civilian population and United Nations forces are deployed in the absence of any political process or hint thereof between the parties to the conflict.

⁶⁷ J. CERONE, "Minding the Gap: Outlining KFOR Accountability in Post Conflict Kosovo", *European Journal of International Law*, 2001, vol. 12, n°3, p. 484.

⁶⁸ "An Agenda for Peace: Preventive Diplomacy, Peacemaking and Peace-keeping", Rapport du Secrétaire Général, 17 juin 1992, UN Doc. A/47/277 and UN Doc. S/24111, § 20.

⁶⁹ This document, today entitled "UN Peacekeeping Operations: Principles and Guidelines", was approved by the Under Secretary General for Peace-keeping Operations on 18th January 2008.

⁷⁰ See C-34 report, 2007, AGNU, doc. A/61/19 partie II, chapitre III, B, ss 32-38.

Moreover, the concept of consent is also eroded by the fact that the strict dichotomy previously posited between coercive action undertaken in the context of Chapter VII of the Charter and peace-keeping operations based on Chapter VI is now frequently called into question. Indeed, recent practice demonstrates that current peace-keeping operations are no longer necessarily established or conducted solely on the basis of Chapter VI of the Charter⁷¹. D. Shraga and R. Zacklin are clear on this point: "*Recent practice has, however, blurred the distinction between peace keeping and peace enforcement with the result that the question of the applicability of international humanitarian law to peace-keeping operations now cuts across the peace-keeping/peace-enforcement divide. Traditional UN peace-keeping operations have shifted in the course of an evolving conflict from Chapter VI to Chapter VII; others have been transformed into hybrid operations including both peace-keeping and peace-enforcement elements [...]*"⁷².

The growing frequency with which Chapter VII is invoked in order to optimize implementation of the mandate entrusted to a peace-keeping force is a good illustration of the changes in peace-keeping operations and the fact that they may become increasingly intrusive *vis-à-vis* host States and, at times, the civilian population. As some scholars have asserted, recourse to Chapter VII in the context of peace-keeping operations would seem to indicate implicit recognition by the Security Council that the parties concerned have probably not given their explicit consent⁷³.

References to Chapter VII can also be explained by the fact that United Nations peace-keeping forces are being deployed in ever more volatile and dangerous situations in which they are being asked to perform an increasingly broad and varying range of duties. In this respect, the Capstone Doctrine promotes "integrated" peace-keeping operations, whose military, civilian and humanitarian components can take on tasks as diverse and complex as the protection of civilians, operational support for local police or armed forces and for disarmament, humanitarian assistance,

⁷¹ For instance, since 2000, the UN has established 8 new peace-keeping operations. Six of them refer explicitly to Chapter VII of the UN Charter: S.C. Res. 1590, at 6, U.N. Doc. S/RES/1590 (Mar. 24, 2005) (Sudan); S.C. Res. 1545, at 3, U.N. Doc. S/RES/1545 (May 21, 2004) (Burundi); S.C. Res. 1410, at 3, U.N. Doc. S/RES/1410 (May 17, 2004) (Timor); S.C. Res. 1542, at 2, U.N. Doc. S/RES/1542 (Apr. 30, 2004) (Haiti); S.C. Res. 1528, at 2, U.N. Doc. S/RES/1528 (Feb. 27, 2004) (Ivory Coast); S.C. Res. 1509, at 3, U.N. Doc. S/RES/1509 (Sept. 19, 2003) (Liberia).

⁷² D. SHARAGA and R. ZACKLIN, "L'applicabilité du DIH aux Opérations de Maintien de la Paix des Nations Unies: Questions Conceptuelles et Pratiques", in *Symposium sur l'action humanitaire et les opérations de maintien de la paix, Rapport*, CICR Genève, 1995, p. 43.

⁷³ E. MILANO, *op.cit.*, p. 999.

election supervision, judicial reform, post-conflict rehabilitation, the promotion of legitimate political institutions and even direct administration of territories. These “new generation” peace-keeping operations thus literally supersede the now practically outdated missions in which peace-keeping troops acted as a buffer between the belligerents, and confer on the United Nations responsibilities that are similar in many respects to those devolving under IHL on an occupying power.

As the Capstone Doctrine shows, these “integrated” peace-keeping operations have gained acceptance, as has their underlying philosophy: that the only means of satisfying the requirements of international peace and security set out in the Charter is to rebuild a secure, viable State on clear and sound foundations. References to Chapter VII are no longer the exception, becoming instead the legal grounds – exclusive or secondary – for facilitating the implementation of these “integrated” operations.

As a result of the wide range of tasks currently devolving on peace-keeping forces, the operations they carry out have become increasingly offensive and intrusive *vis-à-vis* the sovereignty of the host State. This makes it more probable than it might initially have seemed that a host State will withdraw its consent, if said consent was legitimately given beforehand.

Given the characteristics of current peace-keeping operations – such as the presence of foreign troops on a given territory, the exercise of State functions ranging from maintaining law and order to exercising executive and legislative responsibility, the absence of any transfer of sovereignty, the temporary nature of occupations and peace-keeping operations and the balance between the security of United Nations forces and preservation of the civilian population’s interests – it is difficult to avoid drawing comparisons and continue denying the similarities between occupation and peace-keeping operations. This has been highlighted in particular by S. Ratner, who states that: *“Over the last decade, a new set of occupiers has increasingly administered territory – international organizations. Although their operations are rarely termed occupations, international organizations have deployed significant civilian and military presences to undertake many of – in some senses, more than – the activities of occupying forces in terms of control and governance. These occupations vary in their level of intrusiveness, with direct administration as the apogee of their power”*⁷⁴.

These characteristics create situations in which the only rules of the law of armed conflict that might be relevant are to be found in the law of occupation; were they not to apply, we would be left with a certain legal

⁷⁴ S. RATNER, "Foreign Occupation and International Territorial Administration: the Challenges of Convergence", *EJIL*, 2005, vol. 16, n°4, p. 696.

vacuum, unable to identify a clear protective legal framework, at least for the inhabitants of the territory on which the peace-keeping operations are being conducted⁷⁵. The law of occupation is therefore a potential reference *corpus juris*.

II. The applicability of the law of occupation to peace-keeping forces: a much debated issue

The applicability of the law of occupation to peace-keeping forces has long been rejected in some quarters on what are often more political than legal grounds. The arguments invoked merit closer examination with a view to being refuted and trying to demonstrate that this body of law may have legal effect during peace-keeping operations.

A. *Legal doctrine is largely opposed to the applicability of the law of occupation to UN peace-keeping operations*

It is our view that the circumstances in which peace-keeping operations are being conducted increasingly justify consideration of the applicability of the law of occupation, but the subject nevertheless remains controversial⁷⁶. In this respect, some scholars stand firm on their position of principle: that the law of occupation cannot apply to peace-keeping operations. They notably put forward the following main arguments *inter alia*⁷⁷:

1. First, that it is essentially impossible – for doctrinal reasons much more than for legal ones – for United Nations peace-keeping forces to be seen as – or worse still, to effectively become – occupation forces within the meaning of IHL. This standpoint takes the old argument so often repeated by certain experts⁷⁸ – that United Nations forces can never, under any circumstances, be a "party to a conflict" within the meaning of the 1949

⁷⁵ See also, D. SHRAGA, "The United Nations as an Actor Bound by IHL" in L. CONDORELLI, A.M. LA ROSA, S. SCHERRER (Eds.), *Les Nations Unies et le DIH*, Pédone, Paris, 1996, p. 325: in that connection the question of the applicability of the Fourth Geneva Convention to the United Nations forces, and whether the latter may be considered an occupying power within the meaning of that convention has arisen. It became particularly relevant when, in situations of total breakdown of governmental authority and state infrastructure, United Nations forces were called upon to perform functions traditionally reserved for States".

⁷⁶ S. VITE, "L'applicabilité du droit International de l'Occupation Militaire aux Activités des Organisations Internationales", *IRRC*, March 2004, n°853, p. 19.

⁷⁷ See also, R.D. GLICK, "Lip Service to the Laws of War: Humanitarian Law and United Nations Armed Forces", *Michigan Journal of International Law*, 1995-1996, pp. 69 et s.

⁷⁸ D. SHRAGA and R. ZACKLIN, *op. cit.*, p. 45.

Geneva Conventions – and tailors it to the law of occupation. In this respect, D. Shruga states: “the United Nations has taken the position that in discharging their mandate, peace-keeping forces act on behalf of the international community at large, and thus cannot be considered as a 'Party' to the conflict, nor a 'Power' within the meaning of the Geneva Conventions. United Nations peace-keeping forces which carry with them the stamp of international legitimacy should be, and be seen to be impartial, objective and neutral, their sole interest in the conflict being the restoration and maintenance of international peace and security”⁷⁹. In the same vein, Shruga also argues that the law of occupation is not applicable to peace-keeping forces because of the altruistic dimension of peace-keeping operations and the absence of antagonism between peace-keeping forces and the local population: “The force acts pursuant to the mandate conferred upon it by the Security Council and with the consent of the Government or the parties concerned. [...] Thus, whereas the essence of an occupant-occupied relationship is that of conflicts of interests, that which characterizes a United Nations 'administration' of a territory is cooperation between the force and the local population”⁸⁰.

The applicability of the law of occupation cannot be ruled out on the basis of this argument alone, however. At the very least, it is indicative of the United Nations' hostility towards the law of occupation as a legal means of limiting their powers in the framework of peace-keeping operations. Unfortunately, this position reflects a purely subjective view of the situation on the ground; as we shall see below, under IHL, a state of occupation – regardless of whether peace-keeping forces are involved – can only be determined to exist upon an objective examination of the facts pointing to the presence of foreign forces on a given territory. It can, therefore, not be assumed that the local officials or population will approve the presence and action of peace-keeping forces, quite the contrary – witness the current situation in the Democratic Republic of the Congo and past events in Somalia. S. Ratner underscores the limits of the

⁷⁹ D. SHRAGA, "The United Nations as an Actor Bound by IHL", *op. cit.*, p. 323.

⁸⁰ *Ibid.* pp. 327-328. See also, M. BOTHE, "Peace-keeping" in B. Simma (Ed.), *The Charter of the United Nations – A Commentary*, p. 600. One should also note that a Belgium Military Court, deciding upon a case related to actions committed by Belgium peacekeepers deployed in Somalia, stated that the situation prevailing in Somalia in 1993 could not be qualified as an international armed conflict insofar as the peacekeeping forces could not be assimilated as a party to the conflict or an occupying force: Cour Militaire Belge, *jugement concernant des violations du droit humanitaire commises en Somalie et au Rwanda*, Nr. 54 A.R. 1997, 20 novembre 1997, *Journal des Tribunaux*, 4 avril 1998, pp. 286-289. In the same vein, see Martial Appeal Court of Canada, *Regina v. Brockleland*, File N° CMAC-383, 2 avril 1996, § 237.

doctrine rejecting peace-keeping forces as potential occupiers and hence the applicability of the law of occupation when he quite rightly states: “international territorial administration is proving more difficult than anticipated [...] both forms of occupation operate across a spectrum of environment with respect to the resistance they face and the coercion – even violence – they will deploy. From a position in which international organizations were seen as the agents for human rights and progress in post-conflict societies [...] they are now discovering that they may limit civil liberties; and some audiences – local and international – are objecting to this trend [...] As a result UN missions confront similar objections to their administration, and to the resultant employment of coercion, as do state occupations [...] With respect to the legitimacy of coercion, as explained above, the internationalization of an occupation will not eliminate security threats to it. An occupied population will not suddenly view foreign troops as liberators simply because they hail from a number of countries or are wearing blue helmets or berets”⁸¹.

Thus, the position of principle that denies the applicability of the law of occupation to peace-keeping forces has no basis in law if an objective analysis of the facts on the ground demonstrates that the criteria for occupation are met. Admittedly, in practice peace-keeping operations that are tantamount to a situation of occupation seem to be the exception rather than the rule. From a legal point of view, however, the possibility that peace-keeping forces may find themselves in the position of occupiers cannot be ignored or ruled out.

2. Likewise, the position of those who maintain that the law of occupation is inapplicable to peace-keeping forces appears to be very much influenced by the negative and “politically incorrect” connotations attached to the status of occupying power. Indeed, State practice tends to demonstrate that in most of the territories occupied in the latter half of the 20th century, the occupying powers “tweaked” the law in an attempt to deny the reality of the situation and thus to reject the applicability of the law of occupation and the limitations this could imply for them⁸². Peace-keeping forces are composed of State forces, and the same reasoning could therefore apply *mutatis mutandis* to peace-keeping operations. In this respect, the DPKO’s apparently very negative reaction to Australia’s initiative in recognizing the applicability of the law of occupation to the

⁸¹ S. RATNER, *op. cit.*, pp. 712-713 and 718.

⁸² E. BENVENISTI, *The International Law of Occupation*, Princeton University Press, 1993, pp. 5-6 et 149-150; E. BENVENISTI, “The Security Council and the Law of Occupation: Resolution 1483 on Iraq in Historical Perspective”, *Israeli Defence Forces Law Review*, 2003, p. 9. See also T. FERRARO, “Enforcement of Occupation Law by Domestic Courts: issues and Opportunities”, *Israel Law Review*, 2008, vol. 41.

Australian contingent deployed in the framework of the UNITAF/UNOSOM operation in Somalia clearly reflects political reluctance to recognize that United Nations forces – especially in the supposedly more restrictive framework of a peace-keeping operation – could be perceived as an occupying power, with all the political implications this can have in today's world⁸³.

3. It has also been argued that because peace-keeping forces do not constitute the source of authority in the territory on which they are deployed, they cannot have the status of occupier or the rights and legal obligations pertaining thereto⁸⁴. In this respect, the principle of effectiveness underlying the law of occupation, including Article 42 of the Hague Regulations, means that the definition of occupation is based, not on a subjectively perceived situation, but on an objectively assessed reality: the submission of a territory and its population to the authority of foreign forces, without the consent of the legitimate local authorities. Thus, in the case in point, what matters is not so much whether the United Nations perceives itself as the source of authority on its area of operation, but whether an objective assessment will show that the conditions in which the peace-keeping forces act, and the responsibilities they perform, effectively make them the objective and effective authority in the area in question.

In a more subtle argument, it has also been suggested that United Nations forces cannot be considered an occupying power insofar as they are not the only source of authority in the territory on which they are present. This analysis does not appear to have any basis under law of occupation, which does not specify that the occupying force must have exclusive and total control over a given territory, but merely that it has effective control. In this regard, the second part of the test proposed in the British military manual for defining a situation of occupation is especially clear: "*Second, that the occupying power is in position to substitute its own authority for that of the former government*"⁸⁵. Furthermore, the law of occupation does not stipulate that to qualify as an occupying power, foreign forces must effectively exercise certain powers and manifest their military superiority by an actual exercise of specific competences over the territory under their control. As the Israeli Supreme Court ruled in

⁸³ M. J. KELLY, *Restoring and Maintaining Order in Complex Peace Operations: the Search for a Legal Framework*, Kluwer Law International, 1999, p. 189.

⁸⁴ D. SHRAGA upheld: "unlike an Occupying Power, the United Nations peace-keeping force does not represent the source of authority in its area of operation, nor does it act necessarily in absence or in place of an ousted sovereign", *op. cit.*, p. 327.

⁸⁵ UK Ministry of Defence, *The Manual of the Law of Armed Conflict*, 2004, point 11.3, p. 275.

connection with the Israeli Defence Forces' military occupation of Lebanon: "The military force may determine, to what degree it exercises its power of civil administration through its direct delegates, and which areas it leaves in the hand of the former government, whether local or central government officials: permitting the activities of such governmental authorities does not, per se, detract from the factual existence of effective military control over the area and the consequences that ensue there from under the law of war"⁸⁶.

This position is also supported by certain provisions of the Fourth 1949 Geneva Convention, whose rationale implies that the occupying power and the local authorities share power and authority while maintaining the general framework of occupation⁸⁷. It is, therefore, not necessary, under the law of occupation, for peace-keeping forces to effectively and actually "administer" or be the sole source of authority in the territory on which they are present to be considered as the occupying power, as long as the local government has submitted to their military power and superiority as demonstrated by their deployment in the territory in question and their ability to exercise and impose their authority at any given moment. Therefore, under the law of occupation a clear cut distinction does exist between vertical and horizontal sharing of authority. If the former is effectively sanctioned by IHL, the latter is not as this would imply that the occupying power has no or has lost its effective control over the concerned territory. Indeed, the bottom line of the theory lies in the fact that this power sharing must not affect the ultimate authority of the occupying power over the occupied territory and must not impinge upon the security and military operations of the occupant. This vertical sharing authority must be the fact of the occupant's genuine will and not result from its inability to overcome the ousted government. A relation of subordination between the occupying power and the ousted government still needs to be observed so that the sharing of authority will not challenge the state of occupation.

4. On another level, it has been said that the lack of any reference to the law of occupation in the United Nations Secretary-General's Bulletin on the observance by United Nations forces of international humanitarian law, issued on 6 August 1999, provides corroboration for the point of view that the law of occupation is inapplicable to peace-keeping forces⁸⁸. Further corroboration may also be found in the fact that this body of law is not mentioned in the Security Council resolutions authorizing the deployment of peace-keeping forces. Nevertheless, this argument does not

⁸⁶ Supreme Court of Israel, H.C.J. 102/82, *Tsemel vs. Minister of Defence*, 37(3) P.D., pp. 374-375.

⁸⁷ See in particular articles 6§3 and 47 of the Fourth Geneva Convention of 1949.

⁸⁸ S. VITE, *op. cit.*, p. 22.

seem to hold much water. Indeed, the list of rules set out in the Bulletin is not exhaustive, and the fact that it does not mention the law of occupation does not preclude the law's application to peace-keeping operations. Indeed, Section 2 of the Bulletin states very clearly: "*The present provisions do not constitute an exhaustive list of principles and rules of international humanitarian law binding upon military personnel, and do not prejudice the application thereof, nor do they replace the national laws by which military personnel remain bound throughout the operation*". Moreover, the Bulletin also states that the rules identified are applicable in "enforcement actions" as well as in peace-keeping operations. As we saw earlier, most scholars agree that the law of occupation can theoretically apply in the context of a peace-enforcement operation conducted within the framework of Chapter VII. Thus, the failure of the Secretary-General's Bulletin to mention the law of occupation in no way constitutes a conclusive argument in the debate on the applicability of this *corpus juris* to peace-keeping forces.

5. Another argument invoked to justify the inapplicability of the law of occupation to peace-keeping forces cites the incapacity of the United Nations to implement certain provisions of IHL that would only be applicable, by their nature and scope, to States. Clearly, some treaty-based provisions of IHL are not easily applicable outside the state structure. Some examples are the provisions that presuppose the existence of a territory, of judicial mechanisms and of specific laws or implementing mechanisms relating in particular to the punishment of offences.

This brings us straight back to the question of the ability of the United Nations and subsidiary organs such as peace-keeping forces to have rights and obligations under the law of occupation within the limits posed by the principle of speciality. In this respect, there seems to be no valid legal reason not to accept the now established point of view concerning the applicability of IHL in general. If we transpose the principles governing that question to the law of occupation, we can see that the rules of IHL can apply to the United Nations and their peace-keeping forces in that some of the objectives and tasks set out in the Charter could lead to situations constituting armed conflict, of which occupation is just one form. Thus, the material capacity to have recourse to armed forces and end up with effective control of a territory means that peace-keeping forces have the subjective capacity to be bound by the rules of IHL and of the law of occupation specifically. The issue is, therefore, not so much the applicability of the law of occupation but more how to adapt it to the specific nature of international organizations such as the United Nations.

In this regard, the arguments set out by P. Benvenuti have

particular resonance⁸⁹: United Nations forces must observe all the rules of IHL, but these rules must be applied taking into account the specific characteristics of the international organization. Although this might well result in doubt about the applicability of certain rules, any doubt would be offset by a true presumption of applicability of all IHL rules, leaving it to the international organization to prove the contrary, i.e. that a given rule is not materially compatible in some cases. In this respect, the United Nations has yet to convince us that the forces it deploys in peace-keeping operations cannot apply and implement, materially and legally, the provisions of the law of occupation, with possible exceptions, for instance Article 49(6) of the Fourth Geneva Convention prohibiting the transfer of the occupying power's population into the territory it occupies. In the absence of evidence to the contrary, the current nature and form of peace-keeping operations compel us to examine the scope of the law of occupation with regard to the forces whenever the criteria for the applicability of that body of law are effectively and objectively met. Moreover, as Michael J. Kelly highlights in his book, the integrated nature of the "new generation" peace-keeping operations and their humanitarian, military and civilian components leave the United Nations uniquely placed - in fact, more so than most States - to take on the obligations and rights stemming from the law of occupation: *"The UN particularly balks at this aspect [implementation of the obligations arising from the Fourth Geneva Convention] given its frequent assertions that, as it lacks the mechanisms and resources of a state, it cannot assume many of the burdens flowing from international humanitarian law relevant to its armed forces. This concern would appear to be based in an unjustified apprehension of the extent of these obligations; obligations which ought to be weighted against the utility of the rights that accrue under the Fourth Convention. In addition, UN's relief, development and disaster agencies, which have almost always been present at the same time as recent UN military interventions, render the UN uniquely placed to meet a significant level of responsibility. In fact, this capacity is well beyond that of most states"*⁹⁰.

6. Lastly, the law of occupation has also been ruled out in some quarters as a legal framework of reference for peace-keeping operations on the grounds that the rights and obligations of peace-keeping forces stem exclusively from the terms of reference set out in the relevant Security Council resolution, especially if the resolution is based on Chapter VII of the Charter. The problem with this argument is that Security Council resolutions are very often ambiguous in terms of applicable law.

⁸⁹ P. BENVENUTI, "The Implementation of IHL in the Framework of Peacekeeping", *op. cit.*, p. 116.

⁹⁰ M.J. KELLY, *Restoring and Maintaining Order in Complex Peace Operations: the Search for a Legal Framework*, Kluwer Law International, 1999, pp. 179-180.

Furthermore, in cases like the one on which this analysis is based, Security Council resolutions, unlike the rules of the law of occupation, generally do not provide guidelines that are clear enough to help identify the rules governing in particular the relationship between peace-keeping forces, the local population and the local authorities. As M. Zwanenburg highlights, the above argument “does not account for the acceptance that other rules of international humanitarian law can apply together with the mandate. Why should the situation be different for the part of international humanitarian law dealing with occupation than for the part of international humanitarian law dealing with, for example, detainees or the use of weapons?”⁹¹.

There is, therefore, no legitimate reason for ruling out the applicability of the law of occupation as such and as a whole solely on the basis of the mandate conferred by the Security Council.

Admittedly, however, the concomitant application of Articles 25 and 103 of the Charter would enable the Security Council to derogate from certain rules of the law of occupation, but not from those that are akin to *jus cogens*⁹² and only, according to the undersigned, if the derogation is expressly stated. Thus, the temptation to evade certain rules of the law of occupation could be explained in part by the different perspectives of the law of occupation and certain recent peace-keeping operations, such as those deployed in Timor or Kosovo, whose aim was to reform and restructure the political and institutional framework of the “host” State. The transformative vocation of some peace-keeping operations apparently contradicts some of the principles underlying the law of occupation. From this point of view, the *status quo* advocated by the law of occupation is more a problem to overcome than a situation to achieve. It should be noted, however, that the transformative impact of some peace-keeping operations can only be materialized at a much later stage than that at which United Nations forces take effective control of a given territory. Thus, the contradiction between this transformative vocation and the principles underlying the law of occupation may be offset by the relevance of and even the need to apply this *corpus juris* in the first phases following

⁹¹ M. ZWANENBURG, "Pieces of the Puzzle: Peace Operations, Occupation and the Use of Force", *Revue de Droit Militaire et de Droit de la Guerre*, 2006, p. 242.

⁹² The limited frame of this article does not allow for an in-depth analysis of the *jus cogens* nature of certain occupation law norms. However, the ICJ, in its 2004 Advisory opinion on the legal consequences of the construction of a wall in occupied Palestinian territory, seems to indicate that certain rules of the law of occupation are effectively peremptory norms of international law from which no derogation is permitted, see M. ZWANENBURG, "Existentialism in Iraq: Security Council Resolution 1483 and the Law of Occupation", *IRRC*, December 2004, n°856, p. 762.

the takeover of a given territory.

In the light of the above, the United Nations clearly cannot definitively fence off its peace-keeping operations from an entire section of IHL. As S. Ratner puts it: *“International organizations engaged in occupation and administration of territory can no longer relegate international humanitarian law to an afterthought. As a doctrinal matter, UN forces - either Blue helmets or ‘coalitions of the will’ [sic] - must follow international humanitarian law, as has been considered in a number of careful scholarly studies”*⁹³. Thus, the applicability of the law of occupation to peace-keeping forces seems to be gradually affirming itself, as we have attempted to demonstrate above. Nevertheless, in order for the law of occupation to have legal effects on peace-keeping operations, the threshold for its applicability to such operations must first be determined.

B. Conditions for the applicability of the law of occupation to peace-keeping forces

The law of occupation is not inherently applicable to every situation in which armed forces are deployed outside their territory of origin. Indeed, for a situation to qualify as an occupation, certain conditions must first be met. These are set out in the 1907 Hague Regulations, Article 42 of which remains the rule of reference on the matter. Thus, for a peace-keeping operation to qualify as an occupation under international humanitarian law, the *lex lata* requires that it meet the conditions set out in the above-mentioned article and that these conditions be objectively analysed in the light of the real situation on the ground rather than on the basis of the subjective interpretation from New York or the capitals of the troops contributing States.

1. Occupation is a question of fact

Indeed, the first sentence of Article 42 of the Hague Regulations is sufficiently clear: *“Territory is considered occupied when it is actually placed under the authority of the hostile army”*. Thus, occupation is not defined on the basis of how a situation is subjectively perceived by the parties concerned, but of an objective reality: that a territory, its legitimate government and its population are *de facto* subject to the authority of the hostile army.

International jurisprudence is particularly clear on this matter. The International Military Tribunal at Nuremberg specified in the *Von List* case that: *“International humanitarian law makes no distinction between a lawful and unlawful occupant in dealing with respective duties of occupant and population in*

⁹³ S. RATNER, *op. cit.*, p. 705.

Occupied Territories [...] Whether the invasion was lawful or criminal is not an important factor in the consideration of the subject"⁹⁴. More recently, the International Court of Justice, in its decision of 19 December 2005 on the *Armed Activities on the Territory of the Congo*, recalled this principle in the following terms: *"In order to reach a conclusion as to whether a State, the military forces of which are present on the territory of another State as a result of an intervention, is an 'occupying Power' in the meaning of the term as understood in the jus in bello, the Court must examine whether there is sufficient evidence to demonstrate that the said authority was in fact established and exercised by the intervening State in the areas in question. In the present case the Court will need to satisfy itself that the Ugandan armed forces in the DRC were not only stationed in particular locations but also that they had substituted their own authority for that of the Congolese Government. In that event, any justification given by Uganda for its occupation would be of no relevance; nor would it be relevant whether or not Uganda had established a structured military administration of the territory occupied"*⁹⁵.

This last sentence calling for a factual analysis of the situation is reminiscent of the reference contained in the last preambular paragraph of Protocol I additional to the Geneva Conventions, which also emphasizes the applicability of international humanitarian law, and thus of the law of occupation, in objective terms: *"Reaffirming further that the provisions of the Geneva Conventions of 12 August 1949 and of this Protocol must be fully applied in all circumstances to all persons who are protected by those instruments, without any adverse distinction based on the nature or origin of the armed conflict or on the causes espoused by or attributed to the Parties to the conflict"*.

Thus, in the light of these elements, the legal status of a situation for the purposes of international humanitarian law cannot be encumbered with political and subjective considerations aimed at shedding the pejorative connotations of the law of occupation and escaping the legal obligations the law entails. From this point of view, it seems completely unjustified, under current IHL, to invoke the concept of "just occupation" (the contemporary form of "just war") – even when conducted by UN forces – to rule out the application of the binding rules of the law of occupation. If the legal conditions for occupation are met, the law of occupation applies to the forces conducting the military operation, whether they are under the authority of a State or an international organization.

⁹⁴ VIII Law reports of Trials of major War Criminals, 38, 55-56 (1949), § 59.

⁹⁵ ICJ, Decision 19 December 2005, Democratic Republic of Congo vs. Uganda, § 173.

2. *A legal definition governed by Article 42 of the 1907 Hague Regulations*

As indicated above, Article 42 of The Hague Regulations defines occupation as follows: "Territory is considered occupied when it is actually placed under the authority of the hostile army. The occupation extends only to the territory where such authority has been established and can be exercised".

This definition has been generally interpreted as the effective control exercised by foreign forces on a given territory. According to international jurisprudence⁹⁶, doctrine⁹⁷ and certain military manuals⁹⁸, effective control can be summarized as the exercise of actual and/or potential control by foreign military forces stationed on a given territory without the consent of the sovereign power. According to the

⁹⁶ Military Tribunal of Nuremberg, *Von List* case, *op. cit.*, §60: "The term invasion implies a military operation while an occupation indicates the exercise of governmental authority to the exclusion of an established government. This presupposes the destruction of the organized resistance and the establishment of an administration to preserve law and order. To the extent that the occupant's control is maintained and that of the civil government eliminated, the area will be said to be occupied". See also ICTY, First Chamber, *Naletilic* case, 31 March 2003, § 217: "To determine whether the authority of the occupying power has been actually established, the following guidelines provide some assistance:

- the occupying power must be in a position to substitute its own authority for that of the occupied authorities, which must have been rendered incapable of functioning publicly;
- the enemy's forces have surrendered, been defeated or withdrawn. In this respect, battle areas may not be considered as occupied territory. However, sporadic local resistance, even successful, does not affect the reality of occupation;
- the occupying power has a sufficient force present, or the capacity to send troops within a reasonable time to make the authority of the occupying power felt;
- a temporary administration has been established over the territory;
- the occupying power has issued and enforced directions to the civilian population".

⁹⁷ See E. BENVENISTI, *The International Law of Occupation*, *op. cit.*, p. 4; G. VON GLAHN, *The Occupation of Enemy Territory*, Minnesota Press, 1957, pp. 27-29; H. P. GASSER, "Belligerent occupation" in D. Fleck (Ed.) *The Handbook of Humanitarian Law in Armed Conflicts*, Oxford Press, 1999, at § 524.

⁹⁸ Notably UK Ministry of Defence, *The Manual of the Law of Armed Conflict* (2004) point 11.3, p. 275: "To determine whether occupation exists, it is necessary to look at the area concerned and determine whether two conditions are satisfied: First, that the former government has been rendered incapable of publicly exercising its authority in that area; Second, that the occupying power is in a position to substitute its own authority for that of the former government".

undersigned, the notion of effective control shall be determined not in reference to the general capabilities of one belligerent as compared to those of its opponent, but rather in reference to the effects of its presence and deployment in an area upon the exercise of authority therein, in particular its specific capability to exert authority over the concerned area in *lieu* and in place of the existing local authority as resulting from the comparative military situation prevailing there.

A more detailed analysis of the concept of effective control shows that the following cumulative conditions must be met:

- The foreign forces are effectively stationed on a given territory without the consent of the central authorities of the affected State;
- The central authorities of the affected State have been rendered substantially or completely incapable of performing their functions (in particular the political direction of the country) by the intervention of the foreign forces on its territory;
- The foreign forces are capable of exercising the State's responsibilities *in lieu* and in place of the central authorities of the affected State.

Studies on the subject have supplemented the above-mentioned prerequisites by identifying complementary elements to take into account. Thus, A. Roberts, in his taxonomic research on the different forms of occupation, proposes other criteria, in particular a difference in nationality and interests between the local population and the forces intervening and exercising effective control on the territory in question, without the population's being bound by any duty of allegiance. Roberts also notes that, although the internal or international legal order may have been weakened by the intervention of foreign forces, public administration and public life have to be maintained and that there is, therefore, a practical need for a set of rules to help reduce the danger resulting from the opposition between the foreign forces and the local population⁹⁹. Considered in this light, the law of occupation would provide a useful and suitable legal frame of reference.

Thus, the conditions specific to situations of occupation examined above are in some ways similar to the characteristics of the peace-keeping operations currently being conducted under the authority and command of the United Nations. It is because of these similarities and because there is no irrefutable legal argument permitting to conclude otherwise that consideration must be given to the applicability of the law of occupation to peace-keeping forces.

It would thus seem logical and perfectly grounded in law to hold

⁹⁹ A. ROBERTS, "What is Military Occupation?", *BYIL* 1984, p. 300.

that a peace-keeping operation must be subject to the law of occupation if the conditions characterizing a situation of occupation are met. This possibility has in fact already been favourably considered by several well-known experts on the subject, such as A. Roberts¹⁰⁰, C. Greenwood¹⁰¹, M. Sassoli¹⁰² and S. Vité¹⁰³ and ultimately even by the opposing school of thought¹⁰⁴.

Thus, the directions and forms that peace-keeping operations take today merely reinforce the relevance of the hypothesis and legal point of view proposed here. It is no easy issue to analyse – from either the legal or the political standpoint – especially since the arguments promoting the applicability of the law of occupation have long been ignored and the matter remains to some extent taboo. We could, of course, take the easy way out and ask whether the very nature of peace-keeping forces,

¹⁰⁰ *Ibid*, p. 289: “Forces acting under the aegis of the United Nations could conceivably be in occupation of all or part of the territory of a State, either in the course of an enforcement operation, or in the course of an armed peacekeeping operation”; see also p. 291.

¹⁰¹ C. GREENWOOD, "IHL and UN Military Operations", *YIHL*, vol. 1, 1998, p. 28: “It is perfectly possible that the United Nations itself or a state or states acting under its authority could occupy part or all of the territory of an adversary in the course of an international armed conflict”.

¹⁰² M. SASSOLI, "Legislation and Maintenance of Public Order and Civil Life by Occupying Powers", *EJIL*, 2005, p. 689: “Some authors consider, in my view correctly, that when the UN or a regional organization enjoys 'the effective control of power...over a territory...., without the volition of the sovereign of that territory', it is an occupying force”. Later on, M. SASSOLI affirms at p. 690: “It is widely accepted that IHL does not apply to peacekeeping forces if and for as long as the sovereign/host government has consented to the deployment of troops on its territory...If the consent vanishes, according to some authors, IHL could subsequently become applicable”.

¹⁰³ S. VITE, "L'application du Droit International Humanitaire et des Droits de l'Homme aux Organisations Internationales", *op. cit.*, p. 218: “Il peut arriver que cet accord [autorisant le déploiement des forces de l'ONU] soit rompu ou que le gouvernement local s'effondre, obligeant les forces internationales à étendre le champ de leurs compétences et à prendre en charge toutes les fonctions de maintien de l'ordre et de la sécurité publique. Dans ce dernier cas, les forces internationales risquent ainsi d'assumer un rôle d'occupant sans que l'ancien souverain n'ait pu se prononcer sur cette évolution”.

¹⁰⁴ D. SHRAGA, *op. cit.*, p. 325: “in that connection, the question of the applicability of the Fourth Geneva Convention to United Nations forces, and whether the latter may be considered an Occupying Power within the meaning of that Convention has arisen. It became particularly relevant when, in situations of total breakdown of governmental authority and State infrastructure, United Nations forces were called upon to perform functions traditionally reserved for States”.

characterized by the international nature of their mandate, could not modify and soften the criteria for occupation and thus call into question the ideas set out above. In so doing, however, we would be reintroducing an element of *jus ad bellum* to the analysis of *jus in bello*. It should be quite clear that international humanitarian law, and hence the law of occupation, applies regardless of how the conflict is defined with respect to *jus ad bellum*. In this regard, M. Sassoli quite rightly notes that “*jus ad bellum not only has no impact upon the applicability of international humanitarian law, but it also may not be used to interpret a provision of international humanitarian law*”¹⁰⁵. From this perspective (which the author endorses), the nature of the military operation, regardless of whether it is conducted under the aegis of the United Nations, has no effect on the conditions derived from Article 42 of the 1907 Hague Regulations. The mere fact that an operation has been mandated by the United Nations should have no impact whatsoever on the applicability of IHL or the law of occupation in the situation examined.

The applicability of the law of occupation to peace-keeping forces thus remains a relevant issue and has recently received several boosts, particularly when certain United Nations peace-keeping missions literally had to step into the shoes of the legitimate authorities in order to carry out the mandate entrusted to them. In this regard, where peace-keeping forces carry out military operations in States with deteriorating or non-existent structures following an armed conflict – thus, where States are incapable of giving their consent – the law of occupation should be presumed to apply, at least in the first phases of effective control, even if the peace-keeping forces meet with no armed resistance (Article 2(2) of the Fourth 1949 Geneva Convention).

Lastly, we could not conclude without drawing attention to the project the ICRC launched in 2007 on the law of occupation and international administration of territory, which the present written contribution quite naturally falls under the scope thereof. The legal questions raised by the project enhance the relevance of its *raison d’être*: to endeavour to clarify and develop the relevant rules of occupation law.

¹⁰⁵ M. SASSOLI, “*Jus ad Bellum and Jus in Bello – the Separation Between the Legality of the Use of Force and Humanitarian Rules to be Respected in Warfare: Crucial or Outdated?*” in *International Law and Armed Conflicts: Exploring the Fault Lines, Essays in honor of Y. DINSTEIN*, Nijhoff, 2007, p. 249.

Substantial relevance of the law of occupation for peace operations¹⁰⁶

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I. Introduction

Peace operations were invented as an improvised and practical response to the failure of the United Nations (UN) Charter system of collective security.¹⁰⁸ As a consequence, the law concerning peace operations has also developed in an *ad hoc* manner. Peace operations are not explicitly referred to in the UN Charter. There is controversy concerning the precise legal basis of such operations, even if their legality as such no longer seems to be contested. There is no ‘law of peace operations’ that clearly sets out the legal framework of peace operations, although this does not mean that such operations take place in a legal vacuum.¹⁰⁹

Military commanders involved in carrying out the mandate of a peace operation want clear guidelines that stay within the applicable legal boundaries. This enables them to draft clear military instructions for their sub commanders and personnel. It also enables them to carry out the mandate without fear of potential subsequent legal process.¹¹⁰ They look to lawyers to provide these guidelines. These lawyers in turn have looked to various branches of international law. One of these branches is the law of occupation. In the context of the law of occupation and peace operations, legal debate has focused primarily on the applicability *de iure* of that body of law.

This article will not deal with that question. Rather, it will focus on the substantial relevance of the law of occupation to peace operations, irrespective of the question whether the law of occupation is or is not

¹⁰⁶ This is a very slightly revised version of the presentation given by the author at the XXXI Round Table on International Humanitarian Law and Human Rights in Peace Operations, San Remo, 4 – 6 September 2008.

¹⁰⁷ Senior legal adviser, Ministry of Defense, the Netherlands. This article was written in a personal capacity and does not necessarily represent the opinions of the Ministry of Defense of the Kingdom of the Netherlands.

¹⁰⁸ See on the development of peace operations M. ZWANENBURG, *Accountability of Peace Support Operations*, 2005.

¹⁰⁹ See B. KONDOCH, “Introduction”, in B. KONDOCH (Ed.), *International Peacekeeping* xiii, 2007, at xxix.

¹¹⁰ See e.g. R. NORTON-TAYLOR, “Military Chiefs Attack Iraq Lawsuits”, *the Guardian*, 15 July 2005.

formally applicable. In other words, is the law of occupation relevant to the factual circumstances of peace operations? If the answer to this question is positive, then it is likely that the law of occupation can contribute to providing guidelines to military commanders engaged in peace operations. To address this question, the expression 'peace operation' will first be defined for the purposes of this article. This is followed by a brief introduction of the law of occupation. Subsequently, the Regulations annexed to the fourth Hague Convention of 1907 and the fourth Geneva Convention of 1949 will be analyzed to determine their relevance to peace operations.¹¹¹ The article concludes with some final remarks.

In view of the limited scope of this article a number of topics are not discussed that have a bearing on peace operations and the law of occupation. These include in particular the relationship between the law of occupation and human rights law, and an extensive discussion of the relationship between the law of occupation and the powers of the UN Security Council under Chapter VII of the UN Charter.

II. Peace operations

'Peace operation' is a term that is used primarily in UN parlance. At the same time, the UN does not appear to have defined the term. The Brahimi Panel simply stated that United Nations peace operations entail three principal activities: conflict prevention and peace-making; peacekeeping; and peace-building.¹¹² This article is principally concerned with peacekeeping and with peace-enforcement, the latter being an activity that the Brahimi Panel did not deal with. A recent UN doctrinal document defines these activities as follows: *"Peacekeeping is a technique designed to preserve the peace, however fragile, where fighting has been halted, and to assist in implementing agreements achieved by the peacemakers. Over the years, peacekeeping has evolved from a primarily military model of observing cease-fires and the separation of forces after inter-state wars, to incorporate a complex model of many elements – military, police and civilian – working together to help lay the foundations for sustainable peace.*

Peace enforcement involves the application, with the authorization of the Security Council, of a range of coercive measures, including the use of military force. Such actions are authorized to restore international peace and security in situations where the Security Council has determined the existence of a threat to the peace,

¹¹¹ In view of the limited scope of this article other instruments relevant to the law of occupation, in particular the 1954 Convention for the Protection of Cultural Property in the Event of Armed Conflict and its two Protocols, are not discussed.

¹¹² Report of the Panel on United Nations Peace Operation, UN Doc. A/55/305 of 21 August 2000, at 2, para. 10.

breach of the peace or act of aggression. The Security Council may utilize, where appropriate, regional organizations and agencies for enforcement action under its authority."¹¹³

NATO uses the umbrella term 'peace support operations', which includes but is not limited to these operations. A 'peace support operation' is defined as an "[o]peration that impartially makes use of diplomatic, civil and military means, normally in support of UN Charter purposes and principles, to restore or maintain peace."¹¹⁴

This article will use the NATO definition. The reason is that it is a useful shorthand that includes a variety of operations to which the law of occupation could potentially be relevant. It includes operations that are led by the United Nations, sometimes referred to as 'blue helmet operations', as well as operations authorized by the Security Council but carried out by one or more States or a regional organization. It also includes operations that are not authorized by the Security Council but that are based on an invitation or the consent of the host State. It is also broad enough to include operations with a narrow mandate as well as those with a broader mandate, in particular the so-called international territorial administrations (ITA).

According to NATO doctrine, the principal distinction between peace support operations and enforcement action or war is that the former are impartial. It must be noted, however, that there is a gray area between the two, and that there are operations that are difficult to group in one category or the other.

This article will refer to two subcategories of peace operations as just defined. One of these is International Territorial Administrations (ITA). The other is 'regular' peace operations, defined here as those peace operations that are not ITA.

III. The law of occupation

The law of occupation is a subset of international humanitarian law (IHL). The origins of the law of occupation can be traced to the Lieber Code of 1863. The main instruments in which this law is codified are the Regulations annexed to Convention (IV) on the Laws and Customs of War on Land ("Hague Regulations") of 1907 and Geneva Convention IV of 1949. It may be noted that both these instruments predate the development of the concept of armed peace operations, which started with the establishment of the United Nations Emergency Force in 1956 (UNEF I).

¹¹³ United Nations Department of Peacekeeping Operations, *United Nations Peacekeeping Operations: Principles and Guidelines* 18, 2008.

¹¹⁴ NATO *Glossary of Terms and Definitions* 2-P-3, 2008.

The Hague Regulations of 1907 include Article 42, which is the closest any legal instrument comes to defining occupation. Article 42 provides, in the official language of the Regulations: *“Un » territoire est considéré comme occupé lorsqu’ il se trouve placé de fait sous l’ autorité de l’ armée ennemie. L’ occupation ne s’ étend qu’ aux territoires où cette autorité est établie et en mesure de s’ exercer.”*

The Hague Regulations also contain a number of provisions setting out prohibitions and obligations incumbent on an occupying power. This instrument primarily aims to strike a balance between the interests of three parties: the occupying power, the population of the occupied territory, and the displaced sovereign. The provisions of Geneva Convention IV relating to occupation are, by contrast, much more focused on interests of the occupied population. This shift in focus was mainly a result of the experience of occupied countries during the Second World War. Both instruments contain ‘negative’ as well as ‘positive’ obligations for the occupying power, i.e. obligations to abstain from certain acts, and obligations to act in a certain matter. Perhaps the most important example of the latter is Article 43 of the Hague Regulations, which provides that: *“The authority of the legitimate power having in fact passed into the hands of the occupant, the latter shall take all the measures in his power to restore, and ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country.”*¹¹⁵

This provision will be discussed in more detail below. There is a longstanding debate as to whether a force conducting a peace operation can be considered an occupying power. It is part of a broader debate on the applicability of IHL to peace operations, and UN peace operations in particular. Although the UN now accepts that peace operation personnel can become combatants in an armed conflict and as such be bound by IHL, it appears more reluctant to accept the potential application of the law of occupation. The UN until now has never considered itself as an occupying power in practice

This is despite the fact that especially transitional administrations show many of the distinctive features of an occupation. In any event, this article is not concerned with the formal application of the law of occupation. Rather, it focuses on the substantive relevance of the law. In other words, are provisions of the law of occupation relevant in situations that arise in peace operations?

¹¹⁵ For ease of reference, the remainder of this article uses the English translation of the 1907 Hague Regulations.

IV. Hague Regulations

As stated, one of the most important provisions of the Hague Regulations – if not the most provision – is Article 43.¹¹⁶ It may be recalled that this article requires the occupying power to respect, unless absolutely prevented, the existing law in the occupied territory. This means that in principle the occupying power should not change the existing legal system. For ‘regular’ peace operations this obligation does not seem pertinent, because this type of operation will normally not be interested in changing the law in the host State. On the contrary, at least in the case of peacekeeping operations a Status of Forces Agreement (SOFA) is often concluded which provides that the peace operation will respect local laws and regulations.

However, the obligation in occupation law to restore, and to ensure as far as possible, public order and safety, is very relevant to these operations. Difficult questions may arise when the operation’s mandate doesn’t reach as far as this requirement of occupation law. One example from practice is the deployment of Dutch forces to Iraq in 2003 – 2005, as part of the Multinational Forces in Iraq (MNF-I). The Netherlands did not consider itself an occupying power in that case, and also wanted to avoid being seen as one. For this reason the forces were not supposed to carry out law enforcement functions, since this is a typical task of an occupying power. It became clear that in practice this restriction was very difficult to uphold, because there was no other authority capable of effectively exercising law enforcement powers.¹¹⁷

In the case of International Territorial Administration the opposite applies, i.e. the mandate will often be broad enough to encompass ensuring public order and safety. This is particularly the case where the administration is fully responsible for the functions of the executive, such as in the case of the UN Mission in Kosovo (UNMIK). For such administrations the obligation to respect the laws in force may be problematic. It is true that Article 43 of the Hague Regulations provides for an exception in case the administration is ‘absolutely prevented’ from respecting local laws. There is some controversy as to the precise meaning of this exception. Some suggest that it refers to cases of military necessity, i.e. only to cases where the military interests of the occupying power are at stake. Many authors, however, accept that the interests of the local population may also excuse an occupying power from applying local

¹¹⁶ More extensively on Art. 43, see. e.g. M. SASSOLI, “Legislation and Maintenance of Public Order and Civil Life by Occupying Powers”, 16 *European Journal of International Law* 661, 2005.

¹¹⁷ Final evaluation SFIR, annex to Kamerstukken II 2005 – 2006, 29521, nr 17, (letter from the Government of the Netherlands to Parliament) at 10.

legislation. Even if this broader interpretation is accepted, there is still a limit to how far the meaning of 'unless absolutely prevented' can be stretched.

Some provisions of the Hague Regulations appear to be relevant mainly for ITA. Articles 48 and 49 are examples. Article 48 is concerned with the collection of taxes, dues and tolls by the occupying power. Such collection is a function that UNMIK has exercised in Kosovo, for example. Article 48 requires that an occupying power should do this, as far as possible, in accordance with the rules of assessment and incidence in force, and shall in consequence be bound to defray the expenses of the administration of the occupied territory to the same extent as the legitimate government was so bound. UNMIK, however, created an entirely new tax system rather than applying the legislation previously applicable.

The Hague Regulations contain a number of provisions dealing with the taking and use of property. These generally make a distinction between private property and public property, the occupant having more freedom with respect to the latter. The provisions concerned are relevant for all types of peace operations. All peace operations are confronted with questions of how to deal with the property of third parties. One example is the situation where land is used to build a compound for the operation in case such land is not provided by the host State. Although in many cases the host State in a SOFA undertakes to provide land, in practice this is often not the case. Provisions in the Hague Regulations concerning property are, therefore, highly relevant and appear to potentially provide useful guidelines for military commanders. These provisions include Articles 47, 51 - 53 and 55 - 56.

V. Geneva Convention IV

As noted above, Geneva Convention IV (GC IV) is principally focused on the relationship between the occupying power and the local population, and in particular the rights of the latter. For that reason it contains many provisions on the protection of individual 'protected persons'. Article 4 of the Convention defines protected persons as: *"those who, at a given moment and in any manner whatsoever, find themselves, in case of a conflict or occupation, in the hands of a Party to the conflict or Occupying Power of which they are not nationals."*

Part III, section I contains provisions on the status and treatment of protected persons in the territories of the parties to the conflict and occupied territories. This section includes Article 27, which contains a number of basic safeguards for protected persons. This article is described in the International Committee of the Red Cross Commentary to the

Convention as “the basis of the Convention, proclaiming as it does the principles on which the whole of “Geneva Law” is founded.”¹¹⁸

Articles 31 and 33 are other examples of provisions setting out basic standards of treatment. Because contemporary peace operations interact with individuals in the host State continuously, standards for dealing with them are extremely important. In other words, the standards provided by GC IV are very useful. At the same time it must be noted that these standards are rather generally formulated and, therefore, provide only limited practical guidance. Also, the Convention itself, in particular Articles 5 and 27, provide exceptions to the general standards. Article 27 for example provides that “the Parties to the conflict may take such measures of control and security in regard to protected persons as may be necessary as a result of the war.”

One important aspect of the treatment of persons is detention. Detention is a very important issue in peace operations.¹¹⁹ This is illustrated for example by the initiation of the so-called ‘Copenhagen Process’ by the Government of Denmark, which aims at coming up with multilateral solutions to challenges arising out of detention in international military operations.¹²⁰ A need is clearly felt for guidelines on this issue. A number of provisions in GC IV appear suitable for giving guidance in respect of detention. The Australian experience in East Timor is particularly interesting in this respect. The Australian armed forces relied on the application by analogy of a number of occupation rules in drafting a detention policy for the International Force in East Timor. These included Articles 70 and 76 of Geneva Convention IV.¹²¹ Other articles which appear useful guidance are Articles 68, 78 and 45. Articles 68 and 78 are important because under the law of occupation they provide a legal basis for detention. Obviously, they can only be invoked as a legal basis for internment in cases where the law of occupation applies *de iure*. Where this is not the case, they may nevertheless be useful in further fleshing out the peace operation’s mandate with respect to detention. Often, this mandate

¹¹⁸ J. PICTET (Ed.), *Commentary: the Fourth Geneva Convention Relative to the Protection of Civilian Persons in Time of War*, pp. 199-200, 1958.

¹¹⁹ See generally B. OSWALD, “Detention in Military Operations; Some Military, Political and Legal Aspects”, 46 *Revue de Droit Militaire et de Droit de la Guerre Operational* 341, 2007.

¹²⁰ See for information on this process: <http://www.ambottawa.um.dk/NR/rdonlyres/E13E6FCF-C0D0-48E8-BC5C-BD172BA44786/0/CopenhagenProcess.pdf>

¹²¹ See M. KELLY, T. MCCORMACK, P. MUGGLETON & B. OSWALD, “Legal Aspects of Australia’s Involvement in the International Force for East Timor”, 83 *International Review of the Red Cross* 101, 2001.

is limited to the statement in a Security Council resolution that the operation may use 'all necessary means'. This is shorthand for an authorization to use necessary and proportional force to achieve the mandate. If force may be used, then it is implied that the lesser tool of detention is also authorized. However, this simple statement in a resolution does not provide guidance on how the power to detain should be exercised.

Article 45 GC IV deals with the transfer of detainees. It provides *inter alia* that a protected person may be transferred by the detaining power to another power only after the detaining power has satisfied itself of the willingness and ability of such transferee power to apply the Convention. It also provides that in no circumstances shall a protected person be transferred to a country where he or she may have reason to fear persecution for his or her political opinions or religious beliefs. Peace operations do in practice transfer detainees to third parties. This is the case with the International Security Assistance Force (ISAF) in Afghanistan, for example, which transfers detainees to the Afghan authorities. The transfer of detainees by peace operations to third parties has been the source of much recent debate.

Article 45, applied by analogy, provided one basis for the various safeguards that States participating in ISAF have put in place in connection with transfer of detainees to the Afghan authorities. The Netherlands, for example, has concluded a Memorandum of Understanding (MOU) with the Afghan authorities relating to the transfer and treatment of detainees. Article 45 of GC IV was one of the sources of inspiration when drafting this MOU.

Section IV of Geneva Convention IV contains a long list of regulations for the treatment of detainees. These are relevant for peace operations, in particular where they detain persons for long periods of time. Both human rights law and IHL, where applicable, require that detainees be treated humanely. Aside from these legal rules, humane treatment of detainees is also a moral requirement, and for this reason the treatment of detainees is subject to public and political scrutiny in the sending States. In other words, not treating detainees well is likely to seriously affect public support for the operation in question. The provisions on the treatment of detainees in Geneva Convention IV provide useful standards for the military commander to ensure the expectations of humane treatment are complied with, even if these standards are not legally binding on that operation.

Geneva Convention IV also contains a number of provisions which require an occupying power to provide certain public services to the population. Article 55, for example, provides that to the fullest extent of

the means available to it, the Occupying Power has a duty to ensuring the provision of food and medical supplies to the population. Other provisions in this category are Articles 50 and 56. The provision of public services will often be part of the mandate of an ITA. Where an international organization takes over the entire administration of a territory, this is just one aspect of such administration. For regular peace operations, however, the mandate may be more limited than what occupation law calls for. The practical effects of the resultant lower requirements to provide for the wellbeing of the population within the territory may be mitigated to some extent by the presence of non-governmental organizations and intergovernmental organizations such as the World Food Programme and UNHCR, which provide assistance to the local population. In some cases, the peace operation may even be mandated to protect or support these organizations.¹²² However, the efforts of intergovernmental and non-governmental organisations may not be sufficient to support the needs of the population in some cases, leading to difficult questions for the peace operation in question. If the presence of a peace operation does not lead to the local population having food and other basic necessities, the local population has every right to ask what is the use of the operation, and may turn against it. To follow the strictures of occupation law, on the other hand, may lead to mission creep and to the operation undertaking unauthorized tasks.

Finally, attention may be called to Article 47 of the Geneva Convention IV. This article provides that: *“Protected persons who are in occupied territory shall not be deprived, in any case or in any manner whatsoever, of the benefits of the present Convention by any change introduced, as the result of the occupation of a territory, into the institutions or government of the said territory, nor by any agreement concluded between the authorities of the occupied territories and the Occupying Power, nor by any annexation by the latter of the whole or part of the occupied territory.”*

At first sight this appears to place strong limits on what an ITA may do, although this is not really the case. An ITA generally aims at handing over (parts of) the administration to local actors as soon as possible. For this reason another term sometimes used for ITA, which underlines its temporary nature, is ‘transitional administration’. Before powers are transferred, however, the ITA may make important changes to the institutional, political and economic make-up of the territory concerned. The ICRC commentary to Article 47 makes it clear that the

¹²² See e.g. the mandate of the UN/AU mission in Darfur, which includes ensuring the security and freedom of movement of humanitarian workers, UN Security Council Res. 1769 of 31 July 2007, UN Doc. S/RES/1769, o.p. 15.

article does not prohibit such change in itself.¹²³ The article does not expressly prohibit the occupying power from modifying the institutions or government of the occupied territory. The main point, according to the Convention, is that changes made in the internal organization of the State must not lead to protected persons being deprived of the rights and safeguards provided for them.¹²⁴

In time of occupation, changes made to the institutions of the occupied territory may not negatively affect the rights or benefits of the local population. If there is no occupation, there is no such limitation. This leads to the conclusion that the application of Article 47, perhaps more so than many of the other provisions of GC IV, is linked to the question of the existence of an occupation.¹²⁵

VI. Conclusion

Some conclusions may be drawn from the overview above, which as mentioned is far from complete.

First, a relatively large part of occupation law appears relevant to peace operations. In other words, the provisions concerned are designed to regulate the same or similar types of factual situations as peace operations are likely to find themselves in. They can thus provide useful guidelines for military commanders, or for those drafting instructions for military commanders, even in situations where the law of occupation is not applicable *de iure*.

Secondly, which parts of occupation law are relevant depends on the type of peace operation concerned: ITA or regular peace operation.

Third, in both categories of peace operations the provisions of the law of occupation on the treatment of protected persons are useful. At the same time it must be noted that these standards are rather generally formulated and, therefore, provide only limited practical guidance. Also, the Convention itself, in particular Articles 5 and 27, provide exceptions to the general standards. This points to the need for more clarity on the application of human rights law to peace operations in general, and the relationship between IHL and human rights in such operations in particular.

Fourth, the application (*de iure* or by analogy) to peace operations

¹²³ Such change may however be prohibited under Art. 43 of the Hague Regulations, which is generally understood as prohibiting changes to institutions. See SASSOLI, *supra* note 116, at 671.

¹²⁴ PICTET, *supra* note 118, at 274.

¹²⁵ On this question see M. ZWANENBURG, "The Law of Occupation Revisited: The Beginning of an Occupation", forthcoming in the *Yearbook of International Humanitarian Law*.

raises difficult questions in cases where the law of occupation requires more positive action than the mandate of the operation concerned includes. The same is true for the reverse, i.e. in the case where the international community wants to include something in the mandate that goes beyond occupation law. This situation, in particular, raises the question whether and to what extent the UN Security Council may override the law of occupation. A discussion of this question falls outside the scope of this article.

Finally, it must be stated that this article has primarily dealt with the substantive law, and less with compliance and accountability mechanisms. Such mechanisms, in particular in the context of peace operations, are rightly receiving increasing attention. IHL and the law of occupation as a subset of that law have little to offer in this respect.

**International humanitarian law and the administration of
territories by the United Nations**

Administration of territories by the United Nations: is there room for international humanitarian law?

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I. Introduction

The fundamental starting point of this conference is that peace operations represent a challenge to the implementation of international humanitarian law (IHL) for the simple reason that IHL was developed for states conducting hostile military operations against other states or non state actors.

Administration of territories represents one subset of peace operations – continuation of second-generation peacekeeping (PK) where parties, typically prodded by outsiders, formally delegate to the United Nations (UN) authority for the implementation of a peace agreement – though it has also been extended to situations where final status and outcome are not sure, as with East Timor and Kosovo.

Thus, international territorial administration (ITA) should under this view represent a similar challenge – indeed, there is great resistance to saying that the body of IHL addressing occupation of territory is relevant to ITA. However, it is much more common to talk about application of human rights (HR) law than IHL.

My thesis today is that occupation and ITA have much more in common than we care to admit and thus that IHL has significant relevance for ITAs.

Apart from building on the observations of Shraga and Sassoli about peacekeeping operations (PKOs) generally, I'm not sure what's left to say. Maybe, just pull the *canevalas* out for a more conceptual, less doctoral view of the problem.

II. What are the commonalities, and why are they ignored?

The first instinct is to contrast the two phenomena of occupation and ITA – one involves states, the other international organizations; one is coercive, the other consensual. But the reality of what actually happens on the ground is more important than formalities:

1. both involve intrusive involvement of foreign forces and civilians, affecting daily lives, local law and governing structures;
2. both face a range of reactions from the population, from outright welcome (even for occupiers, as in Northern Cyprus or Northern Iraq), to suspicion (even for ITAs, as with the Khmer Rouge or

Kosovo Serb reactions to a UN presence). Thus it can't be assumed that foreign forces will be greeted as liberators just because they wear Blue Helmets or are formally given power under a UN Security Council resolution – the population may just not care;

3. both involve a combination of military/security activities and civilian operations; and
4. as a legal matter, both must decide on what to do with legal norms from above – Security Council, IHL, international HR law – or below – state law – and must figure out how to reconcile them.

The reasons for the reluctance to see commonalities are:

1. aversion among those involved in ITA to thinking of themselves as occupiers, a tainted concept in contemporary international law;
2. the feeling of 'insiders' and 'outsiders' – that the multinational nature of ITAs and the Blue Helmet/Beret makes them a different species of foreign involvement than traditional occupation by states;
3. greater involvement in ITA of civilians within the UN and its member states, rather than the military; and
4. a resultant inclination to see only HR law and not IHL as applicable to their work.

Indeed, the relatively peaceful implementation of second-generation UN PKOs like Namibia, El Salvador, and Cambodia, all of which were precursors to *bona fide* administration of territories, suggested that IHL really would not come to play a role.

The commonalities have been seen in the military complexities arising in operations in East Timor and Kosovo – suddenly UN forces had to arrest and detain people. The UN position has been adjusted with the Secretary-General's 1999 bulletin, which does not distinguish between UN administration and other forms of military actions by the UN – but it's difficult to know the practical effect of this document, and it doesn't cover forces delegated authority by the UN, which would include KFOR/SFOR while in UN-administered Kosovo. So, clearly, there are many unaddressed questions at this point.

III. Where is IHL most likely to play a role in ITAs?

a. Several roles for IHL

IHL has a direct application in situations where the ITA actually involves the use of military force by UN forces beyond police measures – where the ITA overlaps with a situation of international or, more likely, non-international armed conflict, such as situations in East Timor and Kosovo where IHL might have been directly applicable, even if the actual posture of the UN in these cases was somewhat ambiguous.

Ideally, of course, this is not what we want. The best ITA is one where there is significant resistance and any security measures can be taken in the form of police measures. Like Sassoli, I don't want to deny textual difficulties but the functional approach he offers seems right and I suspect troop contributors recognize this, so *de jure/de facto* it is not really that important to me.

While the indirect application of the law of occupation, insofar as it may offer ideas for the administration of territory by the UN, may not be binding, the underlying assumptions of occupation law in terms of the balancing of the needs of the occupied and those of the civilian population may offer ideas for those involved in the administration of territory: Zwanenburg has shaken us.

There is one clear example in GCI's provisions for detention in response to security threats - where the law is considered as inspiration for policy rather than as a set of rules saying what's permitted and prohibited. This is very important for the practicing lawyer.

It may also give some useful guidance on dealing with the needs of the civilian population. It may provide placed additional duties of conduct on the ITA in a way that human rights law does not place them on a government - more clear affirmative duties.

Each of these cases suggests that those involved in ITA need to know their IHL and not just the JAGs in the force contingents, but the Special Representative of the Secretary-General and his or her aides as well.

At the same time, IHL will not play much of a role regarding conditions for free and fair elections, disbursement of foreign assistance, accountability for past human rights violations, neutrality of the media, and probably it would not play much of a role in the repatriation of refugees.

IV. Is there legal room for IHL given all the other sources of law governing ITAs?

Whether IHL is directly or indirectly applicable to a UN operation, we know it is not the only body of law for these operations - mandates from the Security Council, international HR law, the law of international organizations (e.g. immunities of officials), and domestic law are also involved in a UN administration. Moreover, these different laws can actually conflict, as where HR law offers one set of norms for detention and IHL offers another; or, more relevantly, HR law says change the local law and IHL says preserve it.

One possibility is for IHL to be the main governing body of law - if the law of occupation is the starting point for all foreign occupation of

territory, then why not build on the similarities, especially if the operation is under Chapter VII like Kosovo? So IHL would be applied as the default body of law.

The core of IHL does assume a fundamentally hostile starting point - there is no consent whatsoever to the presence of foreign troops by the sovereign nation. The pattern of ITAs has not complied with this assumption - Indonesia consented to UNTAET and Serbia to UNMIK/KFOR, after a fashion. Given the role of consent, even if it's somewhat contrived, IHL seems like the wrong body of law to provide the default rules. On the other hand, I don't want to rule out a truly unconsented administration of territory, although this seems more theoretical than real. In those cases, the ITA could be so much like a typical occupation that IHL should be the applicable body of law.

For ITAs as they currently operate, IHL will need to govern, but only to the extent that the UN's control over the territory is seriously challenged through armed resistance. I am not sure whether this is identical with the criteria for a non-international armed conflict (NIAC) on the territory or parts of it, because the situation is somewhat different legally and practically if the UN is administering the territory in the first place. Perhaps the UN, like a state occupier, should have authority to switch to IHL in situations short of non-international armed conflict as understood in common Article 3 or certain provisions in Additional Protocol II.

Whatever the exact threshold, I can't see how the UN can be limited in its use of force to police actions per the MaCann case, when there is such resistance on the territory it administers. I also don't want to exclude the possibility of an international armed conflict as well, where a state - I am not sure if it's a state where the UN operates or an outside state - somehow interferes with the work of the ITA.

There is always the possibility that the UN will shift to IHL too early - indeed the Ombudsman in Kosovo, and non-governmental organizations (NGOs), essentially criticized KFOR for doing this. This is a particular risk when the security arm of the operation is under a different authority from the civilian component, and it is unclear whether the former is controlled by the latter.

But the culture of ITA reduces my concerns that this will get out of hand - a culture in favour of human rights is very strong within those charged with ITA. Indeed, critics of ITA like Wilde might even suggest that IHL is more likely to protect the status quo in a good way, and avoid the problems of neo-trusteeship that he thinks ITA engenders.

As for the possibility of conflicts with other areas of law in cases of ITA, I can't come up with some neat doctrinal map to deal with these

conflicts as each situation is different in terms of the wording of the UN resolutions; so it is better to speak of practical guidelines:

1. if the UN Security Council has directed the UN under Chapter VII to administer territory in a way that is not consistent with IHL, that resolution must either control the interpretation of the IHL or, if truly irreconcilable, must override it. However, I think the possibility of the Security Council running afoul of *jus cogens* norms is more in the realm of academic speculation than actual Security Council practice. Perhaps there is a danger that the Security Council will pick a side in a way that IHL does not, but this is part of its special authority under the UN Charter, and political mechanisms on the Council will probably correct for the worst abuses;
2. to the extent that IHL norms conflict with those of HR law in terms of completing obligations, then IHL should be limited to those situations of serious security threats; otherwise HR law, as the law governing the normal order of state - individual relations, should be the controlling law; and
3. reliance by UN forces on IHL in some situations does not mean that all of IHL applies - for instance, if it's relying on other aspects of IHL to address security situations but domestic institutions and laws are clearly incompatible with human rights norms, the UN should be able to change domestic law beyond what would be allowed under occupation law. This change to the status quo is especially defensible in the case of the UN because there is less risk that the UN's changes will be part of an effort leading to annexation, whereas occupation law's constraints on the occupier in this area are meant to preserve the status quo for the returning sovereign - one clear way that ITA differs from traditional occupation.

V. Conclusion

It is very hard to know what the future of ITA is at this point - Kosovo has left a pretty bad taste in just about everyone's mouth - but chances are, it will come along again as new entities seek independence and the world does not know what to do with them.

IHL will never be at the core of ITAs, but the law of occupation is part of the fabric of law that will govern them, as the consent that lies at the core of ITAs can dissolve and cause ITAs to resemble a more traditional occupation. Those observing ITAs will worry about both too much application of IHL - giving the UN too much free reign regarding the use of force - as well as too little application of IHL - giving the UN

too much free reign to change the status quo. These are legitimate worries, but I think my guiding principles can be a start towards addressing them.

In the end, pragmatism should be used in applying IHL, rather than attempting at complex doctrinal solutions that may be outdated before we know it.

Understanding the international territorial administration accountability deficit: trusteeship and the legitimacy of international organizations

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Introduction

When the UN took on the role of territorial administrator in Kosovo and East Timor in 1999, attention was initially focused mostly on the formidable practical challenges raised by these missions.¹²⁶ Over time, and particularly in relation to the activities of the United Nations Mission in Kosovo (UNMIK), commentary shifted into the normative terrain of accountability, often raising concerns about the lack of national or international review mechanisms and/or the bars to the exercise of jurisdiction by such mechanisms created by immunity law, and substantive complaints about particular practices conducted, notably the use of security detentions in Kosovo.¹²⁷

Such criticism came from both academics and expert bodies such as independent Ombudsperson in Kosovo and the Venice Commission of the Council of Europe, and invariably included wry remarks about the irony of the United Nations seeking to promote democracy, human rights and the rule of law while acting in a manner that is undemocratic, violative of human rights, and above the law.¹²⁸

The office of the Independent Ombudsperson in Kosovo, for example, stated in its second annual report in 2002 that: *“UNMIK is not structured according to democratic principles, does not function in accordance with the rule of law, and does not respect important international human rights norms. The people of Kosovo are therefore deprived of protection of their basic*

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¹²⁶ On these missions and the commentary on them, see Ralph WILDE, *International Territorial Administration: How Trusteeship and the Civilizing Mission Never Went Away*, Oxford University Press, 2008, Chapter 1 and the academic commentary listed in ss 5.1 and 5.2 of the List of Sources.

¹²⁷ See the sources cited *ibid.*, List of Sources, s 5.2.7.

¹²⁸ See *ibid.*, Chapter 1, note 26 and sources cited therein.

rights and freedoms three years after the end of the conflict by the very entity set up to guarantee them. [...]"

It is ironic that the United Nations, the self-proclaimed champion of human rights in the world, has by its own actions placed the people of Kosovo under UN control, thereby removing them from the protection of the international human rights regime that formed the justification for UN engagement in Kosovo in the first place.¹²⁹

Underlying such commentary is the widely-held assumption that what I term International Territorial Administration (ITA) should be made fully accountable, particularly through domestic institutions.¹³⁰ If the UN is acting as the government, then it should be subject to the same checks and balances as any other government.

Should, then, ITA be made accountable and, if so, why have the accountability mechanisms operating in relation to it been so inadequate? In this piece I will suggest that to answer these questions, it is necessary to place the projects in a broader historical context, and consider the extent to which they are similar or different from analogous activities conducted by states operating on the basis of 'trusteeship.' The concept of trusteeship, and the relative distinctions made in normative understandings of states, on the one hand, and international organizations, on the other hand, as trustees, are central in explaining both how ITA should be rendered accountable and also, conversely, why this has not happened properly.¹³¹

Trusteeship

Colonial trusteeship

At its core, trusteeship denotes a relationship of care whereby a trustee or guardian exercises control over a beneficiary or ward, acting on behalf of the latter entity, not in its own interest.¹³²

¹²⁹ Ombudsperson Institution in Kosovo, *Second Annual Report 2001 – 2002*, 10 July 2002, obtainable from <http://www.ombudspersonkosovo.org>, pp. 3 and 7 respectively.

¹³⁰ On International Territorial Administration, see generally Ralph WILDE "From Danzig to East Timor and Beyond: the Role of International Territorial Administration", 95 *AJIL* 583, 2001; WILDE, *International Territorial Administration* (above n.1) and sources cited therein. For a list of academic commentary covering issues of accountability, often including calls for greater accountability, see *ibid.*, List of Sources, section 5.2.7.

¹³¹ The following analysis is drawn from the ideas set out in more detail *ibid.*, Chapter 8.

¹³² For commentary on the concept of international trusteeship conducted by individual states, mostly concerned with either or both of colonialism and the mandates and trusteeship systems, see, e.g., PH KERR, "Political Relations between

On the international level, the concept of trust became associated with certain forms of colonialism, as illustrated in Edmund Burke's influential recitation of the concept in relation to British rule in India in 1783, formulated in the gendered language of his day as follows:

"...all political power which is set over men ... being wholly artificial, and for so much a derogation from the natural equality of mankind at large, ought to be some way or other exercised ultimately for their benefit. If this is true with regard to every species of political dominion... then such rights, or privileges, or whatever you choose to call them, are all, in the strictest sense, a trust."¹³³

Advanced and Backward Peoples", in AJ GRANT, A GREENWOOD, JDI HUGHES, PH KERR and FF URQUHART, *An Introduction to the Study of International Relations*, Macmillan, 1916, p. 141; CG FENWICK, *Wardship in International Law*, US Government Printing Office, 1919; AH SNOW, *The Question of Aborigines in the Law and Practice of Nations*, US Government Printing Office, 1919; MF LINDLEY, *The Acquisition and Government of Backward Territory in International Law: Being a Treatise on the Law and Practice Relating to Colonial Expansion*, Longmans, Green & Co., 1926; FD LUGARD, *The Dual Mandate in British Tropical Africa* (3rd ed.), Blackwood, 1926, *passim*; Q WRIGHT, *Mandates Under the League of Nations*, University of Chicago Press, 1930, Chapter 1; KE ROBINSON, *The Dilemmas of Trusteeship: Aspects of British Colonial Policy Between the Wars*, OUP, 1965; RN CHOWDHURI, *International Mandates and Trusteeship Systems: A Comparative Study*, Martinus Nijhoff, 1955, pp. 13-6, 20-4, 35-6; RH JACKSON, *Quasi-States: Sovereignty, International Relations and the Third World*, Cambridge University Press, 1990, pp. 71-4; B ASHCROFT, G GRIFFITHS and H TIFFIN, *Post-Colonial Studies: The Key Concepts*, Routledge, 2000, p. 47; AWB SIMPSON, *Human Rights and the End of Empire: Britain and the Genesis of the European Convention*, Oxford University Press, 2001, pp. 291-5; RH JACKSON, *The Global Covenant: Human Conduct in a World of States*, Oxford University Press, 2000, Chapter 11; S SCHAMA, *A History of Britain, Volume 3: The Fate of Empire 1776 - 2000*, Miramax Books, 2002, pp. 269-70; W BAIN, *Between Anarchy and Society. Trusteeship and the Obligations of Power*, Oxford University Press, 2003, *passim*; RE GORDON, "Saving Failed States: Sometimes a Neocolonialist Notion", 12 *American University Journal of International Law & Policy* 903, 1997, p. 926; A ANGHIE, "Finding the Peripheries: Sovereignty and Colonialism in Nineteenth-Century International Law", 40 *Harvard International Law Journal* 1, 1999, pp. 62-5 and sources cited therein; N TSAGOURIAS, "Humanism and the Mandates System: Its Modern Revival", 13 *Hague Yearbook of International Law* 97, 2000, *passim*. See also the separate opinion of Judge Sir Arnold McNair in *International Status of South West Africa, Advisory Opinion*, ICJ Reports 1950, 128, *passim* and in particular 149. Trusteeship is of course related to the concept of paternalism. On the latter concept see, e.g. G DWORKIN, "Paternalism", in RA WASSERSTROM (Ed.), *Morality and the Law*, Wadsworth Publishing Company, 1971, p. 107.

¹³³ E BURKE, "Speech on Mr. Fox's East India Bill, 1 December 1783", reproduced in E BURKE, *The Speeches of the Right Honorable Edmund Burke in the House of*

Trusteeship was adopted in Article IV of Chapter I of the General Act of the Berlin Conference of 1884 – 1885, under which the colonial powers in Africa were bound to “...watch over the preservation of the native tribes, and to care for the improvement of the conditions of their moral and material well-being.”¹³⁴

Later in the UN Charter of 1945, the Declaration on Non-Self-Governing Territories (*i.e.*, colonies) stated that *the interests of the inhabitants of these territories are paramount*, and that the colonial powers accept as a sacred trust the obligation to promote to the utmost...the well-being of the inhabitants.¹³⁵

Commons, and in Westminster-Hall, Longman & Ridgeway, 1816, vol. II, 406, at p. 411 (emphasis in original). In its 1923 parliamentary White Paper on Kenya, the British Government stated that they “regard themselves as exercising a trust on behalf of the African population”; “Indians in Kenya”, *Parliamentary Papers* Cmd. 1922, 1923, p. 10 quoted in BAIN (above n. 132), 62. On this statement see, e.g., R HYAM, *Britain’s Imperial Century, 1815 – 1914* (3rd ed.), Palgrave MacMillan, 2002, p. 265 and SIMPSON (above n. 132), p. 291. So for Brian Simpson, in the case of British colonial ideology, “... the basic justifying conception, derived from the common law tradition, was trusteeship; colonial peoples were the beneficiaries, the colonial power the trustee.” SIMPSON, *ibid.*, p. 291. The association of the concept of trust with colonial ideology was taken up by the international lawyers of the time, as reflected in the statement of Joseph Hornung in 1885 that “we accept the hegemony and trusteeship of the strong but only in the interests of the weak and in view of the full future emancipation.” J HORNUNG, “Civilisés et Barbares” (Part 3), 17 *Recueil de Droit International* 559, 1985, quoted in M KOSKENNIEMI, *The Gentle Civilizer of Nations*, Cambridge University Press, 2002, p. 130. On this generally, see, e.g., the discussion in A ANGHIE, *Imperialism, Sovereignty and the Making of International Law*, Cambridge University Press, 2005, Chapter 2 and KOSKENNIEMI, *ibid.*, Chapter 2. Edmund Burke is popularly regarded as the original theorist of colonial trusteeship, but the concept is evident in the ideas of Francisco de Vitoria and Bartolomé de Las Casas in relation to Spanish colonialism in the 16th Century. See F DE VITORIA, “On the American Indians” (1539), in A PAGDEN and J LAWRENCE (Eds. and transl.), *Vitoria – Political Writings*, Cambridge University Press, 1991, p. 231 and, for commentary, the discussion in CHOWDHURI (above n. 132), pp. 20–4, ANGHIE, *Imperialism* (above n. 133), Chapter 1; A ANGHIE, “Francisco de Vitoria and the Colonial Origins of International Law”, 5 *Social & Legal Studies* 321, 1996; Bain (above n. 132), 15 *et seq.*

¹³⁴ General Act of the Conference respecting (1) Freedom of Trade in the Basin of the Congo; (2) the Slave Trade; (3) Neutrality of the Territories in the Basin of the Congo; (4) Navigation of the Congo; (5) Navigation of the Niger; and (6) Rules for Future Occupation on the Coast of the African Continent, signed at Berlin, 26 February 1885, 165 CTS 485 (hereinafter ‘Berlin Conference General Act’), Chapter I, Art. VI.

¹³⁵ UN Charter, Art. 73. For commentary, see, e.g., U FASTENRATH, “Article 73”, in

The concept was adopted as the explicit basis for the Mandate and Trusteeship systems after the two World Wars of the twentieth century, which were conceived in relation to the detached colonies of the defeated powers.¹³⁶ According to Article 22 of the League Covenant, the people of Mandated territories were deemed 'not yet able to stand by themselves' and the administration of the Mandates was to be a 'sacred trust of civilization.' In the UN Charter, the concept of trust is reflected in the name given to the arrangements; the designation of incapacity, by contrast, was made by implication, in the provision for trusteeship itself, and the objectives for trusteeship administration such as the promotion of development.¹³⁷ So the imperial concept of colonial trusteeship was refashioned as the explicit basis for a set of modified colonial arrangements.¹³⁸

The colonial concept of trust was often understood to have a two-part character in terms of the role of the trustee: first, to care for the ward, and second, tutelage of the ward in order that it can mature and eventually care for itself. In the context of colonialism, then, the idea of the 'civilizing mission' was to govern so as to address the perceived incapacity for self-government, or at least governance that meets the standard of civilization, and also to build up local capacities, sometimes with the aim that self-administration, meeting the standard, is eventually possible.¹³⁹

B SIMMA (Ed.), *The Charter of the United Nations: A Commentary* (2nd Ed.), Oxford University Press, 2002, vol. 2, p. 1089 and sources cited therein.

¹³⁶ On the Mandates and Trusteeship systems, see the sources cited in WILDE, *International Territorial Administration* (above n. 126), Chapter 5, notes 43 and 44 respectively.

¹³⁷ On the common origins and bases for both systems, see, e.g., Chowdhuri (above n. 132), *passim* and especially 8-12 and ch III; RY JENNINGS and A WATTS, *Oppenheim's International Law*, Vol. 1, Peace (9th ed.), Longman, 1992, §89; DJ HARRIS, *Cases and Materials on International Law* (6th ed.), Sweet & Maxwell, 2004, p. 130. On the origins of the Mandates system, see WRIGHT (above n. 132), Chapter I. On the origins of the Trusteeship system, see CHOWDHURI, *ibid.*, 27-35. On the provisions for trusteeship and development for Trust Territories, see UN Charter, Art. 76

¹³⁸ The notion that the Mandates were a class of colonies is illustrated, for example, in the sub-title of James Hales' study of the Mandates arrangements: "A Study in International Colonial Supervision"; see JC HALES, "The Creation and Application of the Mandate System. (A Study in International Colonial Supervision)", 25 *Transactions of the Grotius Society* 185, 1939.

¹³⁹ See generally the sources cited above n. 132. For Bill Ashcroft, Gareth Griffiths and Helen Tiffin, through the civilizing mission, "... colonialism could be (re)presented as a virtuous and necessary civilizing task involving education and paternalistic nurture": ASHCROFT, GRIFFITHS & TIFFIN (above n. 132), p. 47. Antony

The general contours of this two-part conception of trusteeship are evident in the earlier quotation from the General Act of the Berlin Conference, with its obligation to 'watch over' and 'care for improvement'.¹⁴⁰ In the same way, Article 22 of the League Covenant articulates the 'sacred trust of civilization' forming the basis for the Mandate arrangements in terms of the 'well-being and development' of the people in Mandated territories.¹⁴¹ The provisions of the UN Charter concerning Non-Self-Governing Territories and Trust Territories are similarly concerned with ideas of both care and advancement.¹⁴²

International Territorial Administration as a form of trusteeship

ITA similarly manifests the central elements for a trust relationship – the idea of the 'ward' placed under the care of another actor, who performs this role not for its own gain but in the ward's own interest.¹⁴³ Like colonial trusteeship, ITA is often associated with the dual objective of remedying perceived incapacities for governance, either at all, or governance that conforms to certain policy objectives, and also transforming the situation locally so that these problems no longer exist and the local population can run their own affairs.¹⁴⁴

In East Timor, for example, UN administration was introduced on the basis that, in the short term, local people were deemed incapable of self-administration, the objective being to both provide governance and build up local capacities.¹⁴⁵ In Bosnia and Herzegovina, the Office of the High Representative (OHR) has exercised purported powers to legislate

Anghie describes the civilizing mission as the idea of "extending Empire for the higher purpose of educating and rescuing the barbarian": ANGHIE, *Imperialism* (above n. 133), p. 96; see also *ibid.*, p. 96 *et seq*; KOSKENNIEMI (above n. 133), pp. 145, 147, 168.

¹⁴⁰ Berlin Conference General Act (above n. 134), Chapter I, Art. VI. In its 1923 parliamentary White Paper on colonial rule in Kenya, the British Government stated that the 'object' of the trust exercised by the Crown in Kenya was the "protection and advancement of the native race": "Indians in Kenya" (above n. 133), p. 10.

¹⁴¹ On this, see further the *dictum* of the International Court of Justice in the *International Status of South West Africa, Advisory Opinion*, ICJ Reports 1950, 128, at 131.

¹⁴² For Non-Self-Governing Territories, see UN Charter, Art 73; for Trust Territories, see *ibid.*, Art 76.

¹⁴³ See further WILDE, *International Territorial Administration* (above n. 126), Chapters 1 and 2.

¹⁴⁴ See *ibid.*, Chapter 6.

¹⁴⁵ See *ibid.*

and remove elected governmental officials in order to further a particular agenda for the economic and political system in the state.¹⁴⁶ So, for example, elected officials have been removed from office when they have been deemed to be acting to undermine the integrity of Bosnia and Herzegovina as single state.¹⁴⁷

The progressive internationalization of trusteeship

This role for ITA can be seen as the ultimate internationalized manifestation of trusteeship. Initially internationalization occurred through the articulation of ideas of trusteeship as legal obligations operating in relation to colonial rule in the Berlin Final Act. With the Mandates and Trusteeship systems, this idea was again adopted in relation to an entire class of territories, but at the commencement of their administration by the victorious states rather than, as with colonialism, after foreign administration had been introduced. Moreover, unlike with the Berlin Final Act, an overall structure was created to supervise these arrangements.¹⁴⁸ As far as internationalization is concerned, then, the focus moved beyond the basis for administration to include a regime of accountability.

ITA takes things one step further by internationalizing the actor involved in conducting territorial administration. However, as will be illustrated below, conversely it involves a step backwards in terms of the quality of international supervision provided. Understanding why this has happened requires further consideration of the idea of trusteeship administration and how its normative character is understood in the case of ITA.

Accountability under trusteeship

Humanizing colonialism

The concept of trust was understood by its proponents as a means of placing colonial rule by European states on an ethical, humanitarian footing.¹⁴⁹ In some cases the need for this arose in part from concerns related to that which 'trusteeship' administration was called upon to replace: earlier forms of state colonialism and/or control by corporate

¹⁴⁶ See *ibid.*

¹⁴⁷ See *ibid.*

¹⁴⁸ See the discussion in WRIGHT (above n. 132), Chapters 1 and 2. In the words of William Bain: "The mandates system reaffirmed the principle of trusteeship enshrined in the Berlin Act; but it went further than the arrangements of Berlin in specifying procedures of international supervision." BAIN (above n. 132), p. 79. See also *ibid.*, p. 102.

¹⁴⁹ See, e.g., BAIN (above n. 132), *passim*, especially pp. 1, 53 *et seq.*, Chapter 2.

entities like the trading companies understood in terms of neglect, exploitation, profit and general irresponsibility.¹⁵⁰

Requirement of accountability

Most obviously, trusteeship requires accountability because of the imbalance in the power relationship between the trustee and the ward, and the resulting possibilities for abuse. As Michael Reisman observes in his discussion of the law applicable to trusteeship arrangements, the requirement of accountability is rooted in the fact that 'the power relationship between the parties concerned is manifestly asymmetrical'.¹⁵¹ In other words, it is not enough to humanize forms of foreign domination to ensure that they operate for the benefit of the local population; there must also be mechanisms to ensure that these humanitarian standards are adhered to.

So Edmund Burke regarded accountability to be 'of the very

¹⁵⁰ Indeed, in the case of British colonialism, ideas of trusteeship originated in attempts to regulate the activities of the British East India Company, the perceived failure of which led to calls for rule by the crown and the eventual dissolution of the Company. See generally the discussion in BAIN (above n. 132), Chapter 2; ANGHIE, *Imperialism* (above n. 133), p. 69, and sources cited therein at n. 104; ANGHIE, 'Finding the Peripheries' (above n. 132). Antony Anghie reports that: "By the end of the nineteenth century ... [the] direct involvement of European States in the whole process of governing resulted in a shift in the ideology justifying Empire from the vulgar language of profit to that of order, proper governance and humanitarianism. *Ibid.*, at p. 37. See also ANGHIE, *Imperialism*, p. 69. In 1945 the international lawyer Philip Marshall Brown stated that: "Arbitrary rule and selfish exploitation has gradually given way to the recognition of the right of such [colonial] peoples to attain self-government and enjoy their own material resources. The present war has given a great impetus to the acceptance of the principle that colonial administration must be considered as a trusteeship in [sic] behalf of the subject peoples.": PM BROWN, "Editorial Comment: Imperialism", 39 *AJIL* 84, 1945, p. 85. On the notion that trusteeship administration would replace control by "private companies that pursue no other objective than immediate personal enrichment": C SALOMON, *L'Occupation des Territoires sans Maître*, A Giard, 1889, p. 186; see, e.g., the discussion in KOSKENNIEMI (above n. 133), pp. 118, 144. On the general idea of the civilizing mission as a shift towards a humanitarian ethic for colonialism, see also DK FIELDHOUSE, *Colonialism 1870-1945: An Introduction*, Palgrave Macmillan, 1981, p. 173; KOSKENNIEMI, *ibid.*, pp. 151, 129 - 30.

¹⁵¹ WM REISMAN, "Reflections on State Responsibility for Violations of Explicit Protectorate, Mandate, and Trusteeship Obligations", 10 *Michigan Journal of International Law* 231, 1989, at p. 233.

essence of every trust.¹⁵² Those who advocated reconceiving colonialism to operate on the basis of trust did so in part because this would provide a basis for subjecting colonial administration to third party review.¹⁵³ Who, then, should international trusteeships be accountable to?

Accountability in the trusteeship context

Richard Caplan asks "*Whose opinion should count ...? International transitional authorities cannot function as governments answerable primarily to the people whose territories they administer. International trusteeships are not representative democracies...*"¹⁵⁴

Even if the international administrators have not been elected by the people they govern, does this necessarily mean that they should not be answerable to them? Simon Chesterman argues that: "... *final authority remains with the international presence and it is misleading to suggest otherwise. If the local population had the military and economic wherewithal to provide for their security and economic development then a transitional administration would not have been created. Where a transitional administration is created, its role is – or should be – precisely to undertake military, economic, and political tasks that are beyond existing capacities.*"¹⁵⁵

The suggestion is that direct accountability is at odds with the underlying enterprise: international organizations have taken over control of governance because of a judgment concerning the inability or unwillingness of the local population to perform this role themselves, either at all, or in a manner that conforms to certain policy objectives. To render the projects directly accountable to the local population in any meaningful way – i.e., in a way that meant policies were altered to take into account the views of that population – would be to miss the point of the enterprise. In Bosnia and Herzegovina, for example, as discussed the High Representative sometimes removes elected officials from office, *inter alia* because the policies espoused by the officials in question, such as what is deemed to be extremist nationalism, runs counter to the political agenda OHR has for Bosnia and Herzegovina. Necessarily this goes against the

¹⁵² E BURKE, "Speech on Mr Fox's East India Bill, 1 December 1783", reproduced in E BURKE, *The Speeches of the Right Honorable Edmund Burke in the House of Commons, and in Westminster-Hall*, Longman & Ridgeway, 1816, vol. II, 406, at p. 411 (emphasis in original).

¹⁵³ See the sources cited above, n. 132.

¹⁵⁴ R CAPLAN, *International Governance of War-Torn Territories: Rule and Reconstruction*, Oxford University Press, 2005, p. 246, emphasis added, footnote omitted.

¹⁵⁵ S CHESTERMAN, *You, the People: The United Nations, Transitional Administrations, and State-Building*, Oxford University Press, 2004, p. 143.

popular will insofar as it was meaningfully exercised in the vote that brought the official in question to office in the first place.

Even on its own terms such an argument only goes so far, however. It only applies to those ITA policies, concerned with remedying problems associated directly with the local population. For missions concerned with, for example, enabling the transfer of the territory from one political group to another, such as UNTAES in Eastern Slavonia transferring control from local Serbs to Croatia, there is nothing contradictory with the mission's objective in making the policies it promotes during the period of administration accountable directly to the local population.¹⁵⁶ The fact that a mission is intended to hand the territory over to another sovereign after an interim period does not by itself necessitate, for example, an ability to make decisions about the economy of the territory during that period without having to account to the local population in doing so.

Even in ITA mandates responding to perceive problems with the way local actors carry out governance, the mandate itself should not be taken for more than it is. A mandate to foster economic development and reconstruction, for example, does not by itself presuppose that the economic model being implemented in the territory should not be determined by the local population. In East Timor, for example, development was needed because the East Timorese had been denied self-determination, not because the local population were deemed incapable of making decisions on economic matters. Part of the answer to the accountability issue, then, concerns the scope of the mandate and what this means in terms of decision-making.¹⁵⁷

More fundamentally, however, accountability issues run much wider than the particular policies being promoted: corruption, mismanagement and human rights abuses are not part of the mandate of the projects, and to exercise scrutiny over them is not to undermine the policy objectives of the mission. Effective accountability mechanisms concerning such matters are not incompatible with the idea of ITA itself; indeed, for those projects concerned with transforming the politics of the territory concerned along the lines of the rule of law and the promotion of human rights, a key component of 'tutelage' is leading by example.

A range of commentators have discussed the nature of the accountability mechanisms operating in relation to the current and recent

¹⁵⁶ On UNTAES, see the discussion in WILDE, *International Territorial Administration* (above n. 126), Chapters 2 and 6, *passim*.

¹⁵⁷ In both Kosovo and East Timor, the UN set up bodies to which certain prerogatives were devolved, but final authority on decision making always resided in the head of the UN mission. See the discussion *ibid.*, Chapter 1, notes 1 and 2.

ITA projects. Reflecting the sentiments expressed in the quotation from the office of the Independent Ombudsperson in Kosovo above, the general conclusion is that accountability mechanisms operated by third parties in relation to ITA have been inadequate.¹⁵⁸ In understanding why this is the case, again a focus on the trust nature of the activity under evaluation can be illuminating.

Reviving the Trusteeship Council

International oversight of state-conducted trusteeship

As mentioned earlier, the key internationalized feature of trusteeship with the Mandates and Trusteeship systems was to supplement the legalization of trusteeship as an obligation with the creation of specific institutional mechanisms that operated to enforce these obligations and provide, in the words of Article 22 of the League Covenant in relation to the Mandates arrangements, ‘securities for the performance of this trust’.

With the Mandates, oversight of different kinds was provided by the League of Nations Assembly, the Council, the Permanent Mandates Commission (to whom individuals in the Mandates could bring petitions), the Mandates section of the Secretariat, other League bodies and the possibility that issues relating to the Mandates could be brought before the Permanent Court of International Justice.¹⁵⁹ Oversight was exercised in relation to Trust Territories by the UN General Assembly and the Trusteeship Council and through the possibility that issues relating to Trust Territories could be brought before the International Court of Justice.¹⁶⁰ Oversight was exercised in relation to Non-Self-Governing territories through the reporting obligations under Art. 73(e) of the Charter.¹⁶¹

For all the main forms of state-conducted trusteeship, then, dedicated international mechanisms of oversight operated as integral parts of the two main international organizations of the 20th Century.¹⁶²

The Trusteeship Council and ITA

The UN Trusteeship System was mothballed with the termination of the final Trust territory, Palau, in 1994. However, under the Charter it was and is open to territories, ‘voluntarily placed under the system by

¹⁵⁸ See the commentary listed *ibid.*, List of Sources, s 5.2.7.

¹⁵⁹ See *ibid.*, Chapter 8, note 411 and sources cited therein.

¹⁶⁰ See *ibid.*

¹⁶¹ See *ibid.*

¹⁶² Critics did, however, argue that these mechanisms had important limitations. See *ibid.*, Chapter 8, note 412 and sources cited therein.

States responsible for their administration',¹⁶³ and the administering authority can be individual states or the UN itself.¹⁶⁴ East Timor fitted into the category of a Trust territory: it had been detached from what was in effect a colonial power; its people enjoyed a right of self-determination; it was not under the sovereignty of any other actor but rather had distinct legal personality by virtue of the self-determination entitlement; and the East Timorese were deemed incapable of self-administration in the short term following Indonesian withdrawal.¹⁶⁵

Despite this fit between East Timor and the Trusteeship model, the Trusteeship Council was not revived for the East Timor administration project. Nonetheless, commentators have proposed that the Trusteeship Council should be revived to provide oversight to ITA missions.¹⁶⁶ However, there seems to be a general international consensus that the Council be abolished, as proposed by Kofi Annan and endorsed by the General Assembly in 2005.¹⁶⁷ Attention has shifted towards the Peacebuilding Commission as a body that might become involved in such oversight.¹⁶⁸

Why was the Trusteeship Council not revived for East Timor? Why, given the existence of the Kosovo and East Timor UN projects, and the role of OHR in Bosnia and Herzegovina, did states nonetheless wish to see it abolished? Is this because they thought the Peacebuilding Commission would necessarily provide an equivalent role, and more broadly, will that body operate effectively in exercising oversight?

¹⁶³ UN Charter, Art. 77.

¹⁶⁴ UN Charter, Art. 81.

¹⁶⁵ On the legal status of East Timor during the period of UN administration, see the discussion in WILDE, *International Territorial Administration* (above n. 126), Chapter 5, s 5.7.

¹⁶⁶ M RUFFERT, "The Administration of Kosovo and East Timor by the International Community", 50 *ICLQ* 613, 2001, p. 631; T PARKER, *The Ultimate Intervention: Revitalising the UN Trusteeship Council for the 21st Century*, Sandvika, Norwegian School of Management, 2003, pp. 43-50.

¹⁶⁷ See "In Larger Freedom, Towards Development, Security and Human Rights for All", Report of the Secretary-General, 21 March 2005, UN Doc. A/59/2005, Chapter V, Section B, paras 165-6 and section F, para. 218; *2005 World Summit Outcome*, GA Res. 60/1, 16 September 2005, para. 176.

¹⁶⁸ The creation of the Peacebuilding Commission was recommended by the General Assembly in 2005; see *2005 World Summit Outcome*, GA Res. 60/1, 16 September 2005, para. 176, paras 97-105; on the establishment of the Commission, see SC Res. 1645 (2005), 20 December 2005; SC Res. 1646 (2005), 20 December 2005; GA Res. 60/180, 30 December 2005. On the Peacebuilding Commission see, in general, <http://www.un.org/peace/peacebuilding/>.

In the case of East Timor, clearly several potentially mediating factors are in play, including the fact that East Timor had already been officially classified within the UN as a 'Non Self-Governing Territory' as a former colony.¹⁶⁹ Two such factors, which are, moreover, relevant to ITA generally, can, however, be seen in the light of what has been said about the trusteeship nature of the activity involved.

Self-determination as an explanation for the lack of accountability

The repudiation of trusteeship

The first factor is found, paradoxically, in the self-determination entitlement which is necessarily sidelined, even if ostensibly on a temporary basis in most cases, in relation to ITA. The call for self-determination amounted to a repudiation of foreign territorial administration.¹⁷⁰ Administration by an outside actor, necessarily preventing self-administration, was considered *ipso facto* objectionable.¹⁷¹

¹⁶⁹ See the discussion in WILDE, *International Territorial Administration* (above n. 126), Chapter 5, s 5.7.

¹⁷⁰ On self-determination, see UN Charter, Arts 1(2) and 55; International Covenant on Civil and Political Rights, 16 December 1966, 999 *UNTS* 171, Art. 1; International Covenant on Economic, Social and Cultural Rights, 16 December 1966, 993 *UNTS* 3, Art. 1; GA Res. 1514 (XV), 14 December 1960; GA Res. 1541 (XV), 15 December 1960; SC Res. 183, 11 December 1963, para. 4; GA Res. 2621 (XXV), 12 October 1970; Declaration on Principles of International Law Concerning Friendly Relations and Cooperation among States in Accordance with the Charter of the United Nations ('Friendly Relations Declaration'), GA Res. 2625 (XXV), 24 October 1970; GA Res. 3103 (XXVIII), 30 December 1973; Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, ICJ Reports 1971, 16 (hereinafter 'Namibia Advisory Opinion'); Western Sahara, Advisory Opinion, ICJ Reports 1975, 12; East Timor (Portugal v. Australia), ICJ Reports 1995, 90; Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territories, Advisory Opinion, ICJ Reports 2004, 136; Reference re Secession of Quebec, Supreme Court of Canada, 28 August 1998, [1998] 2 RCS 217, 37 (1998) ILM 1340; for academic commentary, see the sources in WILDE, "International Territorial Administration" (above n. 126), List of Sources, s 5.4.

¹⁷¹ In the words of Robert Jackson: "... for several centuries prior to the middle of the twentieth century, an activist doctrine of military intervention and foreign rule was a norm that was imposed by the West on most of the world. By 1960 that old doctrine had been completely repudiated by international society. That was not because trusteeship could not produce peace, order, and good governance in some places. It was because it was generally held to be wrong for people from some countries to appoint themselves and install themselves as rulers for people in other countries ... Self-government was seen to be morally superior to foreign

In the particular case of foreign administration introduced on a trusteeship basis because of the perceived incapacity for self-administration, independence was no longer to be granted if and when the stage of development had reached a certain level; it was an automatic entitlement. Thus even if there was not much local capacity for governance, self-administration would take place unless the people of the territory decided otherwise.¹⁷² Under paragraph 3 of General Assembly Resolution 1514 of 1960, [i]nadequacy of political, economic, social or educational preparedness should never serve as a pretext for delaying independence.¹⁷³

As Robert Jackson states: "*Independence was a matter of political choice and not empirical condition.*"¹⁷⁴

In the words of William Bain: "... *decolonization abolished the distinction upon which the idea of trusteeship depended. There were no more 'child-like' peoples that required guidance in becoming 'adult' peoples: everyone was entitled by right to the independence that came with adulthood. Thus it no longer made any sense to speak of a hierarchical world order in which a measure of development or a test of fitness determined membership in the society of states.*"¹⁷⁵

Concerns by western states about 'underdevelopment' in the global south, and activities by them to try and 'improve' this situation shifted into the arena of what is now called 'aid' or 'development assistance'.¹⁷⁶

The link with accountability

Given this normative position, it can be speculated that, although,

government, even if self-government was less effective and less civil and foreign government was more benevolent. Political laissez-faire was adopted as the universal norm of international society." JACKSON, *Global Covenant* (above n. 132), 314. In the words of William Bain, "the idea of trusteeship ... was relegated to the dustbin of history along with the legitimacy of empire' because of a 'normative shift whereby independence became an unqualified right and colonialism an absolute wrong"; BAIN (above n. 132), pp. 4 and 134 respectively.

¹⁷² For Robert Jackson, decolonization thus shifted from being 'evolutionary', i.e. depending on improvements in and capacity for self-administration, to being 'accelerated' and 'precipitous'; JACKSON, *Quasi-States* (above n. 132), pp. 95-102.

¹⁷³ GA Res. 1514 (XV), 14 December 1960, para. 3.

¹⁷⁴ See JACKSON, *Quasi-States* (above n. 132), p. 95. Of course, which particular associations of people could claim or, put differently, which territorial units would form the basis for independence was in part a matter of the 'empirical condition'.

¹⁷⁵ BAIN (above n. 132), p. 135.

¹⁷⁶ For an example of commentary on this link between contemporary notions of development assistance and the activities of colonial trusteeship, see, eg, BAIN (above n. 132), p. 7.

in fact, trusteeship continued in its fully internationalized form, this only happened in a few places; more generally there is considerable international resistance to it as a general idea, particularly amongst G77 states.¹⁷⁷

To revive the Trusteeship Council or to explicitly provide for oversight of ITA by the Peacebuilding Commission would be to accept that the self-determination paradigm has somehow become qualified – that trusteeship is back as a legitimate feature of international public policy. Formalizing an accountability mechanism would inevitably represent the formalizing and legitimizing of the trusteeship paradigm itself. If there is no general acknowledgment that trusteeship is back, then one cannot invoke this as the basis for greater accountability. The denial of accountability, then, is in this sense structurally tied to the self-determination entitlement.

The ‘legitimacy’ of international organizations as an explanation for the lack of accountability

A second explanation for the inadequate nature of accountability in relation to ITA can be found in normative treatment of state-conducted trusteeship and political ideas about the legitimacy of international organizations.

Normative ideas of state-conducted trusteeship

One central critique of colonialism was that the colonial states were acting in their own interest.¹⁷⁸ Colonialism was often associated explicitly

¹⁷⁷ See further International Commission on Intervention and State Sovereignty, *The Responsibility to Protect*, December 2001, available at <http://www.iciss.ca/pdf/Commission-Report.pdf>, at p. 43, para 5.2.4; RUFFERT (above n. 166), p. 631; CHESTERMAN, *You, the People* (above n. 155), p. 33; S CHESTERMAN, “Virtual Trusteeship” in D MALONE (Ed.), *The UN Security Council: From the Cold War to the 21st Century*, Lynne Rienner, 2004, 219, at p. 222 and S CHESTERMAN, “Occupation as Liberation: International Humanitarian Law and Regime Change”, 18:3 *Ethics & International Affairs* 51, 2004, p. 58.

¹⁷⁸ For critiques of colonialism generally, see the discussion in WILDE, *International Territorial Administration* (above n. 126), Chapter 8, s 8.5 and sources cited therein, and the sources cited in *ibid.* List of Sources, ss 5.3.1, 5.3.3 and 5.3.4. On the critique alleging self-serving motivations in particular, see, e.g., K NKRUMAH, *Towards Colonial Freedom: Africa in the Struggle Against World Imperialism*, Heinemann, 1962, *passim* and especially pp. 1 – 6 and 35. Antony Anghie defines colonialism as “[t]he conquest of non-European peoples for economic and political advantage...”; ANGHIE, *Imperialism* (above n. 133), p. 32. For Bipan Chandra: “... the fundamental aspects of the colony’s economy and society are determined... by the needs and interests of the metropolitan economy and its capitalist class ...

with policies concerning the interests of the colonial state, its settlers, and corporate interests, from wealth extraction to opening markets and protecting traders.¹⁷⁹ This was critiqued as a perversion of the concept of trust, contradicting the idea that the trustee is supposed to be acting selflessly, in the interests of the beneficiary only and not also for its own sake.¹⁸⁰ It was argued that the humanitarian civilizing policies associated with colonialism were often invoked in bad faith: there was, therefore, little else being done other than the promotion of the state's interests; the actuality of trusteeship was, therefore, largely a fiction.

Critiques focusing on the self-serving nature of colonialism went beyond accusations of bad faith, of course: for many, as far as its effect on the local population, colonialism was nothing short of exploitation. In the words of Kwame Nkrumah: "[b]eneath the 'humanitarian' and 'appeasement' shibboleths of colonial governments, a proper scrutiny leads one to discover nothing but deception, hypocrisy, oppression, and exploitation."¹⁸¹

In many instances the people of colonial territories were treated in a discriminatory, oppressive and sometimes violently brutal manner, from structural arrangements that privileged settlers over 'natives' to specific atrocities such as the suppression of the Mau Mau rebellion in Kenya and generalized systems of oppression such as the introduction of bonded labour, or slavery, in the Belgian Congo.¹⁸²

subordination of the colony's economy and society is the crucial or determining aspect..." B CHANDRA, *Essays on Colonialism*, Sangam Books, 1999, p. 10. For Jürgen Osterhammel, colonial territories were "transformed according to the needs and interests of the colonial rulers": J OSTERHAMMEL, *Colonialism: A Theoretical Overview* (trans. SL FRISCH), Markus Wiener Publishers, 1997, p. 15.

¹⁷⁹ Anthony Anghie identifies the "central importance of colonial possessions for the economic well being of the metropolitan power": ANGHIE, *Imperialism* (above n. 133), p. 142. Bill Ashcroft, Gareth Griffiths and Helen Tiffin report the "perception of colonies as primarily established to provide raw materials for the burgeoning economies of the colonial powers": ASHCROFT, GRIFFITHS & TIFFIN (above n. 132), p. 46.

¹⁸⁰ See, e.g., BAIN (above n. 132), p. 130.

¹⁸¹ NKROMAH (above n. 178), xvi, cited in BAIN (above n. 132), p. 130.

¹⁸² On settler privileges, see, e.g., SIMPSON (above n. 132), p. 318 and Anghie, *Imperialism* (above n. 133), p. 176. For a discussion of the use of security detentions, restrictions on freedom of expression and collective punishments in British colonies, see SIMPSON, *ibid.*, pp. 317–21. On the Mau Mau rebellion, see, e.g., D ANDERSON, *Histories of the Hanged: Britain's Dirty War in Kenya and the End of Empire*, Weidenfeld & Nicholson, 2005; C ELKINS, *Imperial Reckoning. The Untold Story of Britain's Gulag in Kenya*, Henry Holt, 2005. On the Congo, see, e.g., F CATTIER, *Etude sur la situation de l'Etat indépendant du Congo* (2nd ed.), Larcier and Pedone, 1906; R ANSTEY, *King Leopold's Legacy: The Congo under Belgian Rule, 1908 –*

Normative ideas of international organizations

One powerful way in which ITA is distinguished from colonialism is through a distinction in the normative character of international organizations when compared with states.

The normative character of the two is often understood by way of a sharp contradistinction operating between them.¹⁸³ In this Manichean, two-legs-bad four-legs-good vision, whereas states are considered to be potentially 'imperial,' self-interested and exploitative, international organizations are presented as selfless and humanitarian.

Such relational positioning, however simplistic, is a powerful aid in distinguishing international territorial administration from colonialism in that it enables the activity of territorial administration when conducted by international organizations to be disassociated, normatively, from the same activity when performed by states, which would always be vulnerable to suspicions of bad faith and self-serving motivations.

There are two interrelated aspects to this idea. In the first place, on a political level the reidentification of the 'international' in the form of international organizations permits the notion of a distinct actor, created by, but separate from, states. This enables international organizations to be presented as independent from states, as impartial manifestations of the global community.¹⁸⁴ Actions conducted by such actors are 'public' in the sense that they are not conducted by an individual member of the international 'polity' (a particular state) but rather the 'polity' as a whole.

In the second place, on a normative level, states and international organizations are set up as binary opposites. Whereas states are suspected of acting for self-serving motives, international organizations are considered selfless, neither representing the interests of particular states,¹⁸⁵

1960, Oxford University Press, 1966; A HOCHSCHILD, *King Leopold's Ghost*, Houghton Mifflin, 1999; see also KOSKENNIEMI (above n. 133), p. 158.

¹⁸³ See the discussion in WILDE, *International Territorial Administration* (above n. 126), Chapter 8, text accompanying note 501 *et seq.* and sources cited therein.

¹⁸⁴ See S VOHRA, "Impartiality in United Nations Peace-Keeping", 9 *Leiden Journal of International Law* 63, 1996; M VON GRUNIGEN, "Neutrality and Peace Keeping", in A CASSESE, *United Nations Peace-Keeping: Legal Essays*, Sijthoff & Noordhoff, 1978, p. 125.

¹⁸⁵ As for independence in terms of member states, Art. 100 of the UN Charter states that:

1. In the performance of their duties the Secretary-General and the staff shall not seek or receive instructions from any government or from any other authority external to the Organization. They shall refrain from any action which might reflect on their position as international officials responsible only to the

nor pursuing any self-interested objectives other than what is for the benefit of the so-called 'international community' as a whole.¹⁸⁶ Equally, the suspicion of self-interest on the part of states leads to a fear that states' actions outside their territory will be exploitative of the population in those territories. International organizations, by contrast, are presented as intrinsically humanitarian and benign. ITA projects, therefore, are acts not of conquest but of charity.

This essentialized portrayal of the normative difference between international organizations and individual states, however simplistic and potentially problematic, is of significant purchase when understanding ideas of legitimacy associated with ITA, especially when a comparison is made with colonial arrangements.¹⁸⁷

Organization.

2. Each Member of the United Nations undertakes to respect the exclusively international character of the responsibilities of the Secretary-General and the staff and not to seek to influence them in the discharge of their responsibilities.

The UN Staff Regulations state that the responsibilities of UN staff "are not national but exclusively international", and must declare that they will regulate their conduct "with the interests of the United Nations only in view": "Staff Regulations of the United Nations", Secretary-General's bulletin ST/SGB/2000/7, 23 February 2000, Regulation 1.1. See also *ibid.*, Regulation 1.2. For commentary, see, e.g., C SCHREUER and C EBNER, "Article 100", in B SIMMA (Ed.), *The Charter of the United Nations. A Commentary* (2nd ed.), Oxford University Press, 2002, vol. 2, 1230, at pp. 1232-51 and sources cited therein. On the 'impartiality' of UN peace operations, see, e.g., VOHRA (above n. 184) and sources cited therein.

¹⁸⁶ See, for example, the award of the Nobel peace prize to the UN and its Secretary-General in 2001, "for their work for a better organized and more peaceful world": see Norwegian Nobel Committee, Press Release, 'The Nobel Peace Prize 2001', 12 October 2001, obtainable from <http://www.nobel.se/peace/laureates/2001/press.html>.

¹⁸⁷ Steven Ratner finds that the "tar of colonialism is not sticking" to ITA and speculates that one possible reason for this is the "the absence of an exploitative economic motive"; SR Ratner, "Foreign Occupation and International Territorial Administration: The Challenges of Convergence", 16 (2005) *EJIL* 695, 2005, P 696. Considering ideas of impartiality associated with the United Nations and their significance for the use of the 'occupation' label in relation to ITA projects, he states that: "... from this perspective, state occupiers, even so-called 'coalitions of the willing,' lack the broad multinationality of the UN; they are in a confrontational relationship with the population, self-interested, and in need of reining in. In contrast, the UN, thanks to its multinationality, can only be working for loftier goals to benefit the population: thus its operations cannot be termed occupations." RATNER, *ibid.*, pp. 711 - 712. See also WJ DURCH, "Building on Sand: UN Peacekeeping in the Western Sahara", 17 *International Security* 151, 1993; CAPLAN (above n.), pp. 4 and 34; TSAGOURIAS (above n.), *passim*.

Just as territorial administration by foreign states was presented as essentially unjust in the era of decolonization, so this activity performed by international organizations is sometimes considered essentially legitimate because it is conducted by international organizations. At the very least, the presumption is reversed; what was presumed to be illegitimate is now presumed to be legitimate. Mathias Ruffert, for example, essentializes the normative tenor of 'international administration' in terms of a 'benevolent character'.¹⁸⁸

For the purposes of the present enquiry on accountability, a key consequence of these ideas is the notion that the use of a humanitarian actor as the administering authority is seen by some as obviating the need for the same kinds of accountability that would be in order were states to be involved. The dominant normative portrayal of international organizations as selfless and humanitarian operates as a powerful alternative source of legitimation: whereas colonial trusteeship was seen as requiring international oversight through the Mandates and Trusteeship systems because of concerns that, without such checks and balances, states would act in a self-interested and exploitative manner, the same concerns in the context of ITA are addressed through the choice of the administering actor, rather than the introduction of an oversight mechanism.

The disregard for the Trusteeship Council when UN administration was planned for East Timor underlines the normative distinction between states and international organizations. Now that the administering actor *is* the United Nations – the very actor that would safeguard the interests of the people through supervising the conduct of administration by individual states – the need for a supervisory mechanism is obviated. While with states, good faith and selflessness is questioned, with the United Nations it is assumed

The start of this paper quoted the office of the independent Kosovo Ombudsperson to the effect that it is ironic that the UN, the champion of human rights, has placed the people of Kosovo into a governmental structure that is not subject to human rights protections. Given what has been said about the normative portrayal of the UN, perhaps this is less of a surprise. The lack of accountability can be understood to be bound up in the UN's identity as the champion of human rights.

¹⁸⁸ RUFFERT (above n. 166), p. 629. See the discussion in A ORFORD, *Reading Humanitarian Intervention: Human Rights and the Use of Force in International Law*, Cambridge University Press, 2003, p. 142.

Conclusion

This paper has focused on the normative identity of the United Nations and the general denial of the legitimacy of international trusteeship as a way of understanding why the accountability structures operating in relation to ITA have been inadequate. The point of this analysis has been exclusively explanatory, however; it has not been suggested that the explanations offered necessarily legitimate the inadequacy of the accountability structures. Rather, they illustrate two of the broader issues - the global self-determination entitlement and the legitimacy of international organizations - that will be implicated in attempts seeking to change the situation. Because of the significance of the second issue in particular, such attempts should form part of the broader enterprise, a key component of efforts to critically evaluate the accountability of international organizations generally, to challenge dominant understandings of the political character of such actors so as to better acknowledge their normatively complex position.

**IMPLEMENTATION OF INTERNATIONAL HUMANITARIAN LAW IN PEACE
OPERATIONS**

Working Group 1: Peace operations and the protection of civilians

The responsibility to protect: an introduction

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1. The Responsibility to Protect (R2P) as described in the ICISS Report: main features

At the United Nations (UN) General Assembly in 1999 and in 2000, Secretary-General Kofi Annan strongly asked the international community to address a key issue:

“...if humanitarian intervention is, indeed, an unacceptable assault on sovereignty, how should we respond to a Rwanda, to a Srebrenica – to gross and systematic violations of human rights that affect every precept of our common humanity?”.

In response to this challenge, the Government of Canada, together with a group of foundations, announced at the UN General Assembly in September 2000 the establishment of the *International Commission on Intervention and State Sovereignty* (ICISS), an independent body of distinguished personalities chaired by Gareth Evans and Mohamed Sahnoun. The ICISS Report, issued in December 2001¹⁸⁹, is about the so-

¹⁸⁹ ICISS, *The Responsibility to Protect - Report of the International Commission on Intervention and State Sovereignty*, International Development Research Centre, Ottawa, 2001. A supplementary volume to the Report (410 pages) collects “research, bibliography and background”. T. MERON, *The Humanization of International Law*, Leiden Boston, 2006, referring to the proposals for rule-making and suggested guidelines, mentions the ICISS Report as “perhaps the most prominent of such proposed guidelines” (p. 525). The acronym R2P is now broadly used, and has the advantage of being read the same way in English and in French.

See E. NEWMAN, “Humanitarian Intervention, Legality and Legitimacy”, in *The International Journal of Human Rights*, 2002, p. 102; J.I. LEVITT, *The Responsibility to Protect: a Beaver without a Dam*, in *Michigan Journal of International Law*, 2003, p. 153; R. THAKUR, *In Defence of the Responsibility to Protect*, in *International Journal of Human Rights*, 2003, p. 160; S. N. MACFARLANE, C. J. THIELKING, T. WEISS, *The Responsibility to Protect: Is Anyone Interested in Humanitarian Intervention?*, in *Third World Quarterly*, 2004, p. 977; T. WEISS, *Military-Civilian Interactions: Intervening in Humanitarian Crises*, Lanham, 2005; HAMILTON, *The Responsibility to Protect from Document to Doctrine – But What of Implementation?*, in *Harvard Human Rights Law Journal*, 2006, p. 289; R. BELLAMY, *Preventing Future Kosovos and Future Rwandas: The Responsibility to Protect after the 2005 World Summit*, New York 2006; R. THAKUR, *The United Nations, Peace and Security: From Collective Security to the Responsibility to Protect*, Cambridge, 2006; C.

called 'right of humanitarian intervention', or '*droit d'ingérence*'¹⁹⁰: "the question of when, if ever, it is appropriate for States to take coercive – and in particular military – action, against another State for the purpose of protecting people at risk in that other State". At least until the terrible attacks of 11 September 2001 brought to centre stage the international response to terrorism, the issue of intervention for human protection purposes was seen as one of the most controversial and difficult of all international relations questions.

The end of the Cold War opened the gate to many dramatic situations which gave origin to calls for intervention – some of which have been answered, and some ignored. But there continues to be disagreement as to whether there is a right of intervention, how and when it should be exercised, with which degree of legitimacy, and under whose authority. Military intervention for human protection purposes has been controversial both when it has happened – as in Somalia, Bosnia and Kosovo – and when it has failed to happen, as in Rwanda. For some, the new activism has been "*a long-overdue internationalisation of the human conscience*"; for others it has been an alarming breach of an international order dependent on the sovereignty of States and the inviolability of their territory. For some, the only real issue is ensuring that coercive interventions are effective. For some, the key element is the search for legitimacy.

NATO's controversial intervention in Kosovo in 1999 probably raised the highest level of discussion. Security Council members were

STAHN, *Responsibility to Protect: Political Rhetoric or Emerging Norm?*, in *American Journal of International Law*, 2007, p. 99; L. POLI, *La Responsabilità di Proteggere*, Tesi di dottorato, Università di Milano, 2007.

In 2007, the Société Française pour le Droit International has significantly dedicated its annual congress to the R2P. The interesting proceedings are in SFDI, *La responsabilité de protéger*, Colloque de Nanterre, Paris, 2008. The general report is by P. DAILLIER, *La responsabilité de protéger corolla ire ou remise en cause de la souveraineté?*, p. 41 *et seq.*

¹⁹⁰ See M. BETTATI, *Le droit d'ingérence. Mutation de l'ordre international*, Paris, 1996; C. FOCARELLI, "La Dottrina della "Responsabilità di Proteggere" e l'Intervento Umanitario", in *Rivista di diritto internazionale*, 2008, p. 317 *et seq.* is of the opinion that the doctrine of the R2P is basically a new presentation of the problem of the admissibility of humanitarian intervention and, therefore, as such is being understood by States and – by most of them – strongly opposed. On the relationship between humanitarian intervention and R2P, "sur le fond, la C.I.I.S.E. renouvelle la réflexion et d'abord le vocabulaire. Au droit ou au devoir d'ingérence la C.I.I.S.E. substitue le concept de responsabilité de protéger, moins attentatoire en apparence au principe de souveraineté nationale" (M. BETTATI, "Allocution", in *SFDI, op. cit.*, p. 11).

divided; the legal justification for military action without new Security Council authority was asserted but largely unargued; the moral or humanitarian justification for the action was clouded by allegations that the intervention generated more victims than it averted; and there were many criticisms of the way in which the NATO allied forces conducted the air campaign.

The central theme of the ICISS report, reflected in its title, is “The Responsibility to Protect”; that is, the idea that sovereign States have a responsibility to protect their own citizens from avoidable catastrophe – from mass murder and rape, from starvation – but that when they are unwilling or unable to do so,¹⁹¹ that responsibility must be borne by the community of States. The nature and dimensions of that responsibility are argued out, as are all the questions that must be answered about who should exercise it, under whose authority, and when, where and how. The Commission’s Report appears fully aware of all these limits, and all these open questions.

I would like to underline what the report calls “*the intervention dilemma*”. The Commission underlines that “*Rwanda in 1994 laid bare the full horror of inaction*”.¹⁹² The United Nations Secretariat and some permanent members of the Security Council knew that officials connected to the then government were planning genocide, and that they were doing it for a long time and openly; UN forces were present in the country, though not in sufficient number and with too limited a mandate; and credible strategies were available to prevent, or at least greatly mitigate, the slaughter which followed, but the only practical result was an indecent inaction by both the Security Council and individual States deeply involved in Rwandan affairs (Belgium, France, the US). “*That – according to the Report – was a failure of international will – of civic courage – at the highest level*”.

The key issue is, therefore, the meaning of sovereignty, which is closely linked to the norm of non-intervention. “*Sovereignty has come to signify, in the Westphalian concept, the legal identity of a State in international law*”. It is a concept which is supposed to provide order, stability and predictability in international relations since sovereign States are legally regarded as equal, regardless of comparative size, or military or economic power. The principle of sovereign equality of States is codified and enshrined in Article 2.1, right at the fore of the UN Charter. Internally,

¹⁹¹ The situation is typical of weak or ‘failed’ States.

¹⁹² See R. DALLAIRE, *Shake Hands with the Devil. The Failure of Humanity in Rwanda*, Toronto, 2003; S. POWER, *A Problem from Hell. America and the Age of Genocide*, New York, 2002, 329 *et seq.*

sovereignty signifies the capacity to make authoritative decisions with regard to the people and resources within the territory of the State. Externally, it implies in the first place independence.

A condition of any one State's sovereignty is a corresponding obligation to respect every other State's sovereignty: the norm of non-intervention is enshrined in Article 2.7 of the UN Charter, which concerns a State's so-called 'domestic jurisdiction'. A sovereign State is empowered in international law to exercise exclusive and total jurisdiction within its territorial borders. Other States have the corresponding duty not to intervene in the internal affairs of a sovereign State. If that duty is violated, the victim State has the further right to defend its territorial integrity and political independence. In the era of decolonisation, the sovereign equality of States and the correlative norm of non-intervention received its most emphatic affirmation from the newly independent States.

At the same time, while intervention for the sake of human protection purposes was extremely rare, during the Cold War years State practice reflected the unwillingness of many countries to give up the use of intervention for political or other purposes as an instrument of policy¹⁹³. As is stressed in the Report, leaders on both sides of the ideological border decided to heavily intervene in support of friendly regimes as against local populations, while also supporting rebel movements in States to which they were ideologically opposed.

The established and universally acknowledged right to self-defence, embodied in Article 51 of the UN Charter and fully recognised by customary law, has sometimes been extended to include the right to launch punitive raids into neighbouring countries that had shown themselves unwilling or unable to stop their territory from being used as a base for cross-border armed raids or terrorist attacks. But even in such a situation, the many examples of intervention in State practice throughout the 20th century did not lead to an abandonment of the general norm of non-intervention.

In the United Nations, according to the Report, sovereignty has become "*the organising principle*". Membership of the United Nations was "*the final symbol of independent sovereign statehood and thus the seal of acceptance into the community of nations*". The UN also became the principal international forum for collaborative action in the shared pursuit of the three goals of State building, nation building and economic development. The UN was, therefore, the main arena for the jealous protection of State sovereignty, and not the framework for its limitation.

The UN is an organisation dedicated in the first place to the

¹⁹³ See A. CASSESE, *International Law in a Divided World*, Oxford, 1986.

maintenance of international peace and security on the basis of protecting the territorial integrity, political independence and national sovereignty of its member States. But the overwhelming majority of today's armed conflicts are internal, not inter-state.¹⁹⁴ Moreover, the proportion of civilians killed in armed conflict increased from about one in ten in World War I, to one in two in World War II and finally to around nine in ten in the Balkan Wars at the end of the 20th century. This, according to the ICISS Report, has presented the UN with a major difficulty: how to reconcile its foundational principles of member States' sovereignty and the accompanying primary mandate to maintain international peace and security ("*to save succeeding generations from the scourge of war*") – with the equally compelling mission to promote the interests and welfare of people within those States ("*We the peoples of the United Nations*", is the emphatic *incipit* of the Charter, always left without practical consequences).

But here we come to the key assumption, which is based on a new reading of sovereignty: Sovereignty as Responsibility. As a matter of fact, the idea is not entirely new, as the history of the modern age shows political movements, principles and rules that aim at shielding the individual from the arbitrary exercise of State authority.¹⁹⁵ Moreover, sovereignty has always faced quite a number of duties (and therefore limits) in the framework of an international legal order. The UN Charter is itself an example of an international obligation voluntarily accepted by member States. On the one hand, in granting membership of the UN, the international community welcomes the signatory State as a responsible member of the community of nations. On the other hand, the State itself, in signing the Charter, accepts the responsibilities of membership arising from that signature. There is no transfer or dilution of State sovereignty. But there is a necessary re-characterization involved: from *sovereignty as control* to *sovereignty as responsibility* in both internal functions and external duties.

According to the ICISS Report, thinking of sovereignty as responsibility, in a way that is being increasingly recognized in State practice, has a threefold significance. First, it implies that the State authorities are responsible for the functions of protecting the safety and lives of citizens and promoting their welfare. Secondly, it suggests that the national political authorities are responsible to the citizens internally and to the international community through the UN. And thirdly, it means that the agents of the State are responsible for their actions; that is to say, they are accountable for their acts of commission and omission. The case for

¹⁹⁴ See also B. BOUTROS-GHALI, *An Agenda for Peace*, New York, 1995.

¹⁹⁵ See. C. STAHN, *op. cit.*, p. 11.

thinking of sovereignty in these terms is strengthened by the ever-increasing impact of international human rights norms, and the increasing impact in international discourse of the concept of human security.

The meaning and scope of security have become much broader since the UN Charter was signed in 1945. Human security means *“the security of people – their physical safety, their economic and social well-being, respect for their dignity and worth as human beings, and the protection of their human rights and fundamental freedoms”*.

The Commission is of the view that the debate about intervention for human protection purposes should, therefore, focus not on ‘the right to intervene’ but on ‘the responsibility to protect.’ The proposed change in terminology is also a change in perspective, reversing the perceptions inherent in the traditional language, and adding some additional ones:

□ First, the responsibility to protect implies an evaluation of the issues from the point of view of those seeking or needing support, rather than those who may be considering intervention. The focus should therefore move to the duty to protect communities from mass killing, women from systematic rape and children from starvation.

□ Secondly, the responsibility to protect acknowledges that the primary responsibility in this regard rests with the State concerned, and that it is only if the State is unable or unwilling to fulfil this responsibility, or is itself the perpetrator, that it becomes the responsibility of the international community to act in its place. In many cases, the State will seek to acquit its responsibility in full and active partnership with representatives of the international community. Thus, the ‘responsibility to protect’ is more of a linking concept that bridges the divide between intervention and sovereignty; the language of the ‘right or duty to intervene’ is intrinsically more confrontational.

□ Thirdly, the responsibility to protect means not just the ‘responsibility to react,’ but the ‘responsibility to prevent’ and the ‘responsibility to rebuild’, as well.

The Commission believes that responsibility to protect resides in the first place with the State whose people are directly affected. This fact reflects not only international law and the modern State system, but also the practical realities of who is best placed to make a positive difference. *“The domestic authority is best placed to take action to prevent problems from turning into potential conflicts”*. When problems arise the domestic authority is also best placed to understand them and to deal with them. *“When solutions are needed, it is the citizens of a particular State who have the greatest interest and the largest stake in the success of those solutions, in ensuring that the domestic authorities are fully accountable for their actions or inactions in addressing these problems, and in helping to ensure that past problems are not*

allowed to recur”.

Finally, while the State whose people are directly affected has the default responsibility to protect, a residual responsibility also lies with the broader community of States. According to the Report, “*this fallback responsibility is activated when a particular State is clearly either unwilling or unable to fulfil its responsibility to protect or is itself the actual perpetrator of crimes or atrocities; or where people living outside a particular State are directly threatened by actions taking place there*”. This responsibility also requires that in some circumstances action must be taken by the broader community of States to support populations that are in jeopardy or under serious threat.

One crucial element in the Report is that the so-called right to intervene belongs to *any* State. On the other hand, the R2P belongs to *every* State. This element seems to link the concept to obligations *erga omnes*.¹⁹⁶

Another relevant document reflects the same approach, and has clearly inspired ICISS. The Rome Statute of the International Criminal Court, in Article 17, addresses the inability and unwillingness of States as situations in which the ICC may be called to act.¹⁹⁷

2. Substantial Elements of the R2P

The substance of the responsibility to protect is the provision of life-supporting protection and assistance to populations at risk. This responsibility is an ‘umbrella concept’, embracing three integral and essential components:

1. *the responsibility to prevent*: to address root and direct causes of internal conflict and other man-made crises putting populations at risk¹⁹⁸;
2. *the responsibility to react*: to respond to situations of compelling human need with appropriate measures, which may include coercive measures like sanctions and international prosecution, and in extreme cases military intervention;
3. *the responsibility to rebuild*: to provide, particularly after a military intervention, full assistance with recovery, reconstruction and reconciliation, addressing the causes of the

¹⁹⁶ See P. PICONE, “Interventi delle Nazioni Unite e obblighi *erga omnes*”, in P. PICONE, *Interventi delle Nazioni Unite e diritto internazionale*, Padova, 1995, p. 517; and P. PICONE, *Comunità internazionale e obblighi erga omnes*, Napoli, 2006.

¹⁹⁷ See W.A. SCHABAS, *An Introduction to the International Criminal Court*, Cambridge, 2007; E. GREPPI, “Inability to Investigate and to Prosecute in Article 17”, in M. POLITI – F. GIOIA, *The International Criminal Court and National Jurisdiction*, Aldershot, 2008, p. 63 *et seq.*

¹⁹⁸ See A. J. BELLAMY, “Conflict Prevention and the Responsibility to Protect”, in *Global Governance*, 2008, p. 135.

harm the intervention was designed to halt or avert.¹⁹⁹

The responsibility to react appears the very heart of the Report. Intervention – even in a preventive form – is only admissible in cases in which peaceful measures are insufficient (§ 4.1 of the Report), that is, when the international community faces violations that “*genuinely shock the conscience of mankind*” (§ 4.13).

As the Commission clearly stressed, changing the terms of the debate from ‘right to intervene’ to ‘responsibility to protect’ helps to shift the focus of discussion where it belongs – on the requirements of those who need or seek assistance. But while this is an important and necessary step, it does not by itself resolve the difficult questions relating to the circumstances in which the responsibility to protect should be exercised – questions of legitimacy, authority, operational effectiveness and political will.

As far as the reaction is concerned, military intervention for human protection purposes could be just (the Report refers to the traditional concept of *just cause*) within the limits of an exceptional and extraordinary measure, in case of:

1. *large scale loss of life*, actual or apprehended, with genocidal intent or not, which is the product either of deliberate State action, or State neglect or inability to act, or a failed State situation; or
2. *large scale ‘ethnic cleansing’*, actual or apprehended, whether carried out by killing, forced expulsion, acts of terror, or rape.

Apart from this threshold condition, the ICISS envisaged some additional precautionary principles which must be satisfied, to ensure that the intervention “*remains both defensible in principle and workable and acceptable in practice*”²⁰⁰: right authority, right intention, last resort, proportional means, reasonable prospects.

Right intention: the primary purpose of the intervention, whatever other motives intervening States may have, must be to halt or avert human suffering. Right intention is better assured with multilateral operations, clearly supported by regional opinion and the victims concerned.

Last resort: military intervention can only be justified when every non-military option for the prevention or peaceful resolution of the crisis has been explored, with reasonable grounds for believing lesser measures would not have succeeded.

Proportional means: the scale, duration and intensity of the planned military

¹⁹⁹ A step in this field is the creation of a Peacebuilding Commission in the institutional framework of the UN.

²⁰⁰ ICISS, *op. cit.* 2001, p. 29, § 4.2.

intervention should be the minimum necessary to secure the defined human protection objective.

Reasonable prospects: there must be a reasonable chance of success in halting or averting the suffering which has justified the intervention, with the consequences of action not likely to be worse than the consequences of inaction.

Right authority: the question of authority is the most sensitive one. The ICISS Report underlines that the Security Council is the most appropriate body to authorize military intervention for human protection purposes and that, as a consequence, the task is not to find alternatives to the Security Council as a source of authority, but to make the Security Council work better. In this perspective, for example, the Permanent Five members of the Security Council should agree not to apply their veto power, in matters where their vital State interests are not involved, to obstruct the passage of resolutions authorizing military intervention for human protection purposes for which there is otherwise majority support.

The ICISS has notwithstanding considered the case of the Security Council failing to deal with the question of military intervention for human protection purposes, identifying two alternative options:

1. consideration of the matter by the General Assembly in Emergency Special Session under the 'Uniting for Peace' procedure; or
2. action within the area of jurisdiction by regional or sub-regional organizations, under Chapter VIII of the Charter, subject to their seeking subsequent authorization from the Security Council.

While the Uniting for Peace procedure never had concrete application (and was heavily criticised)²⁰¹, practice has shown some examples of anticipated interventions by regional organizations which obtained a subsequent (implicit) authorization from the Security Council (eg. ECOMOG in Liberia and Sierra Leone).

3. The Impact of the R2P on Some Relevant Documents: from Concept to Policy and Law

The Report produced by the ICISS in 2001 represents a new conceptual approach to the question of the legitimacy of humanitarian intervention. Since 2004, various UN documents mentioned the R2P and attention to the concept has grown among international institutions and civil society.

Particularly significant is the project "Responsibility to Protect -

²⁰¹ See B. CONFORTI, *Le Nazioni Unite*, Padova, 2005, p. 231.

Engaging Civil Society”, launched in 2002 by the World Federalist Movement – Institute for Global Policy. The project aims to:

1. increase awareness of R2P and build a civil society advocacy capacity;
2. strengthen the acceptance of R2P as a norm;
3. promote the implementation of R2P by UN, regional and national actors; and
4. create an NGO Coalition on R2P²⁰².

If there are doubts about the attitude of States regarding an undisputed acceptance of the R2P, much more enthusiasm has been shown by NGOs.

Furthermore, Prof. Edward Luck has been recently appointed by UN Secretary-General Ban Ki-Moon as Special Advisor on the Responsibility to Protect (February 2008), as set out by the General Assembly in § 138 and 139 of the 2005 Summit Outcome Document. The Special Advisor’s primary role will be to develop conceptual clarity and consensus on the evolving norm.

3.1 *The High-level Panel’s Report*

The first relevant document mentioning the R2P is the report by the High-level Panel on Threats, Challenges and Change, “A more secure world: our shared responsibility”, published in 2004. The Panel has been invited by Secretary-General Kofi Annan “to examine the current challenges to peace and security; (...) to consider the contribution which collective action can make in addressing these challenges; (...) to review the functioning of the major organs of the United Nations and the relationship between them and to recommend ways of strengthening the United Nations through reform of its institutions and processes”²⁰³.

According to the Panel, there would be “a collective international responsibility to protect, exercisable by the Security Council authorizing military intervention as a last resort, in the event of genocide and other large-scale killing, ethnic cleansing or serious violations of international humanitarian law which sovereign Governments have proved powerless or unwilling to prevent”²⁰⁴. This responsibility has been described as an emerging norm.

²⁰² More info: <http://www.responsibilitytoprotect.org>

²⁰³ UN Secretary-General, *Address to the General Assembly*, 23 September 2003, <http://www.un.org/webcast/ga/58/statements/sg2eng030923.htm>.

²⁰⁴ High-level Panel on Threats, Challenges and Change, *A More Secure World: Our Shared Responsibility*, United Nations Department of Public Information, 2004, p. 66, § 203. For a sharp criticism see B. CONFORTI, “Il Rapporto del “High Level” Panel sul Come Rendere più Efficace l’Azione dell’ONU, Ovvero la Montagna ha Partorito un Topo!, in *Rivista di diritto internazionale*, 2005, p. 149.

The Panel refers to the responsibility to protect twice:

- at the beginning of the Report, underlining that sovereignty implies not only rights but duties as well (*“the notion of State sovereignty, today (...) clearly carries with it the obligation of a State to protect the welfare of its own peoples and meet its obligations to the wider international community”*) and that in cases in which the State is not able or willing to accomplish its tasks, *“the principles of collective security mean that some portion of those responsibilities should be taken up by the international community, acting in accordance with the Charter of the United Nations and the Universal Declaration of Human Rights, to help build the necessary capacity or supply the necessary protection, as the case may be”*²⁰⁵;
- in the third part of the report, devoted to *“Collective security and the use of force”*; a special section is entitled *“Chapter VII of the Charter of the United Nations, internal threats and the responsibility to protect”*: the Panel affirms that *“under Chapter VII and in pursuit of the emerging norm of a collective international responsibility to protect, (the Security Council) can always authorize military action to redress catastrophic internal wrongs if it is prepared to declare that the situation is a “threat to international peace and security”, not especially difficult when breaches of international law are involved”*²⁰⁶.

3.2 The UN Secretary-General's Report

In the Report *“In Larger Freedom: Towards Development, Security and Human Rights for All”*, Secretary-General, Kofi Annan urged the Heads of State and Government *“to embrace the 'responsibility to protect' as a basis for collective action against genocide, ethnic cleansing and crimes against humanity and agree to act on this responsibility, recognizing that this responsibility lies first and foremost with each individual State, whose duty it is to protect its population, but that if national authorities are unwilling or unable to protect their citizens, then the responsibility shifts to the international community to use diplomatic, humanitarian and other methods to help protect civilian populations, and that if such methods appear insufficient the Security Council may out of necessity decide to take action under the Charter, including enforcement action, if so required”*²⁰⁷.

The concept of R2P has been considered under the Chapter *“Freedom to live in dignity”*, losing the strong link with the question of the use of force. This choice reflects the concerns for the risks connected with

²⁰⁵ High-level Panel, *op. cit.*, p. 17, § 29.

²⁰⁶ High-level Panel, *op. cit.*, p. 66, § 202.

²⁰⁷ UN Secretary General, *In Larger Freedom: Towards Development, Security and Human Rights for All*, 21 March 2005, doc. A/59/2005, p. 59, § 7 (b).

the implications of 'responsibility' in terms of 'automatic' use of force.

Again, the R2P is described as 'an emerging norm'; as far as the contents of the doctrine are concerned, the Secretary-General underlined that the *"responsibility lies, first and foremost, with each individual State, whose primary raison d'être and duty is to protect its population. But if national authorities are unable or unwilling to protect their citizens, then the responsibility shifts to the international community to use diplomatic, humanitarian and other methods to help protect the human rights and well-being of civilian populations. When such methods appear insufficient, the Security Council may out of necessity decide to take action under the Charter of the United Nations, including enforcement action, if so required."* The recourse to military action – through Security Council authorization – is an extreme measure.

3.3. The World Summit Outcome Document

The UN General Assembly has recognized that *"each individual State has the responsibility to protect its populations from genocide, war crimes, ethnic cleansing and crimes against humanity"* and that the international community should first and foremost *"encourage and help States to exercise this responsibility and support the United Nations in establishing an early warning capability"*.²⁰⁸ Should peaceful means be inadequate and national authorities unwilling or unable to protect their populations, the international community has to be *"prepared to take collective action, in a timely and decisive manner, through the Security Council, in accordance with the Charter, including Chapter VII, on a case-by-case basis and in cooperation with relevant regional organizations as appropriate"*²⁰⁹.

Like in the Annan Report, the issue is considered not in the part devoted to the use of force, but in a section entitled "human rights and the rule of law".

One peculiar element is the fact that so-called 'ethnic cleansing' has been here introduced as a new kind of category, whose features are not well established in the various agreements and statutes of tribunals of the last decades. As a matter of fact, ethnic cleansing belongs to the families of crimes against humanity and genocide (probably the first rather than the second),²¹⁰ and was never before treated as an autonomous chapter of international crimes²¹¹.

The World Summit Outcome does not refer to an 'emerging norm'. States declare that they are *"prepared to take collective action ... through the*

²⁰⁸ UN General Assembly, *2005 World Summit Outcome*, § 138.

²⁰⁹ General Assembly, *op. cit.*, § 139.

²¹⁰ W. A. SCHABAS, *op. cit.*, pp. 98 and 105.

²¹¹ See E. GREPPI, *I crimini di guerra e contro l'umanità nel diritto internazionale. Lineamenti generali*, Torino, 2001.

Security Council” but “*on a case by case basis*”. This formula means that States avoid taking on obligations to act systematically. It is also consistent with the nature of the Security Council (and the General Assembly) as a political body. Having established the four categories of mass atrocities, the document – unlike the preceding ones – leaves aside the conditions under which action should be decided.

Even if the outcome is not an agreement concluded in due form, it can be considered an important assessment of the duties of the international community. Therefore, the reference to R2P is clearly relevant as far as it indicates a position shared by more than 170 UN member States, including the only superpower, the United States. The largest gathering of Heads of State and Government the world has seen²¹² solemnly declared: “*We accept that responsibility and will act in accordance with it*”.

3.4. *Security Council Resolution n. 1674 (2006), 28th April 2006*

The R2P is clearly stated also in a Security Council Resolution, that is, in a document adopted by the only UN body entitled to decide and to take collective security measures binding upon member States. In the text of the Resolution, which concerns the protection of civilians in armed conflict, the Security Council “*reaffirms the provisions of paragraphs 138 and 139 of the 2005 World Summit Outcome Document regarding the responsibility to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity*”.²¹³ It is not much, as far as the concrete consequence of a possible action is concerned, but it appears as a beginning of a UN practice.

3.5. *The African Union and Regional Practice*

The African Union statute, in Article 4 lett. h), states that “*The Union shall function in accordance with the following principles: (h) The right of the Union to intervene in a Member State pursuant to a decision of the Assembly in respect of grave circumstances, namely war crimes, genocide and crimes against humanity*”. Moreover, according to Article 4 (j) of the Protocol establishing the Peace and Security Council, “*The Peace and Security Council shall be guided by the principles enshrined in the Constitutive Act, the Charter of the United Nations and the Universal Declaration of Human Rights. It shall, in particular, be guided by the following principles (...) j. the right of the Union to intervene in a Member State pursuant to a decision of the Assembly in respect of*

²¹² “Secretary-General Defends, Clarifies “Responsibility to Protect” at Berlin Event on “Responsible Sovereignty: International Cooperation for a Changed World”, 15 July 2008.

²¹³ SC Res. 1674 (2006), 28 April 2006, § 4.

grave circumstances, namely war crimes, genocide and crimes against humanity, in accordance with Article 4(h) of the Constitutive Act".

This wording appears potentially even more effective than that of the UN General Assembly, as it makes explicit reference a 'right to intervene'.

3.6. *The International Court of Justice and the R2P*

In its long awaited judgment in the Bosnia and Herzegovina v. Serbia and Montenegro case (26 February 2007), the International Court of Justice (ICJ) reinforced the R2P as it is in the World Summit Outcome of 2005. Indeed, the ICJ went even further by elevating the duty to protect to a treaty obligation, and one that is actionable before the International Court of Justice for States that have ratified the Genocide Convention without reservation to Article IX.²¹⁴ The Court found that the acts of genocide committed at Srebrenica couldn't be attributed to the Respondent as having been committed by its organs or by persons or entities wholly dependent upon it, nor as having been perpetrated by persons not having the status of organs but acting on the Respondent's instructions or under its direction and control. Nevertheless the ICJ concluded that Serbia has violated its obligation to prevent the Srebrenica genocide (Art. I of the 1948 Genocide Convention), being the "*capacity to influence effectively the action of persons likely to commit, or already committing genocide*" (§ 430).

The importance of the ICJ conclusion is outstanding as far as R2P is considered: for the first time it has been recognized that one State could be held internationally responsible for violations that occurred neither under its jurisdiction, nor through its organs or persons under its control or direction, but simply by reason of its capacity to impede, or at least obstruct those violations. That is properly the responsibility to protect borne by the international community in case of State inability or unwillingness to protect its own citizens.

4. The Problem of the Legal Nature of the R2P: a New Norm, an Emerging Norm, a Policy or simply a New Approach?

As already explained, relevant documents describe the R2P as an 'emerging norm'. The crucial question, then, is the following: is it really – and to what extent – an 'emerging norm'? May it become a 'norm' in the proper sense? Does it belong to the sphere of politics or does it have appropriate legal features?

²¹⁴ Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide, February 26, 2007. See W. A. SCHABAS, "Whither Genocide? The International Court of Justice Finally Pronounces", in *Journal of Genocide research*, 2007, p. 185.

Some distinguished scholars have shown their scepticism, considering that the concept just represents “*une confirmation solennelle (...) de ce qu’on pourrait qualifier la collectivisation de la responsabilité de protéger tous les êtres humains contre les violations les plus graves des droits de l’homme*”.²¹⁵ According to these authors, the R2P simply restates already established humanitarian law principles provided by common Art. 1 of the Geneva Conventions and Art. 89 of Protocol I, and clarified by the ICJ in the Israeli Wall Advisory Opinion. In this opinion, the ICJ specified that the principle ‘to respect and to ensure respect’ entails both negative²¹⁶ and positive²¹⁷ obligations: “*il ne s’agit pas seulement de ne pas reconnaître les situations illégales, mais il faut aussi que chacun agisse positivement pour les faire cesser, en utilisant dans ce but tous les moyens disponibles et juridiquement admissibles*”²¹⁸. The opinion demonstrates, according to the authors, that the approach expressed in the World Summit Outcome is not new, but simply confirms something borrowed by the principle ‘to respect and to ensure respect’.

However, it should be considered that there are some differences between the R2P and the principle derived from common Art. 1 of the Geneva Conventions. As far as the reaction to a violation is concerned, while the R2P conceives an armed action (even if just in circumstantial hypotheses), no such action can be inferred from common Art. 1 of the Geneva Conventions. Moreover, the R2P does not necessarily refer only to the UN (as clearly does Art. 89 Protocol I), but considers the option of an

²¹⁵ L. BOISSON de CHAZOURNES, L. CONDORELLI, “De la « Responsabilité de Protéger », ou d’une Nouvelle Parure Pour une Notion Déjà Bien Etablie”, in *Revue Générale de Droit International Public*, 2006, pp. 12-13.

²¹⁶ “The Court is of the view that all States are under an obligation not to recognize the illegal situation resulting from the construction of the wall in the Occupied Palestinian Territory, including in and around East Jerusalem. They are also under an obligation not to render aid or assistance in maintaining the situation created by such construction”, International Court of Justice (ICJ), Advisory Opinion 9 July 2004, “Legal consequences of the construction of a wall in the occupied Palestinian territory”, p. 200, § 159.

²¹⁷ “It is also for all States, while respecting the United Nations Charter and international law, to see to it that any impediment, resulting from the construction of the wall, to the exercise by the Palestinian people of its right to self-determination is brought to an end. In addition, all the States parties to the Geneva Convention relative to the Protection of Civilian Persons in Time of War of 12 August 1949 are under an obligation, while respecting the United Nations Charter and international law, to ensure compliance by Israel with international humanitarian law as embodied in that Convention”, ICJ, Advisory Opinion cit., p. 200, § 159.

²¹⁸ L. BOISSON de CHAZOURNES, L. CONDORELLI, *op. cit.*, p.15.

anticipatory role for regional organisations. Another opinion is that an extreme ambiguity surrounds the doctrine of the R2P.²¹⁹

There still is one major problem, closely linked to the issue of legitimacy: in cases of inaction by the United Nations or other regional organisation, is there room for unilateral action? If we carefully read § 203 of the High Level Panel Report, we should conclude that only the Security Council is entitled to decide to take action. This is not new, as it is what was established by the UN Charter from its inception. The wording is different, because it takes into account tragedies and State practice in the last decades, but the substance appears the same. A significant contribution to broadening the principle would have been to envisage that – at least in extreme cases – unilateral action could be tolerated.²²⁰

This appears as a possible reading of the World Summit Outcome document of 2005. It seems to allow some kind of legal justification for limited forms of regional and even unilateral action, including military action, in cases in which the United Nations fails to act to protect populations from one of the four accepted and recognised extreme categories of atrocities (genocide, war crimes, ethnic cleansing and crimes against humanity).²²¹ This possibility of unilateral action is limited to gross human rights abuses and could be justified only when UN action has proved impossible.²²² In other words, if it is accepted, unilateral action is clearly a last resort.²²³

The starting point is thus UN inaction, which opens a kind of a legal void, enabling States to take initiatives to effectively (and quickly) address this institutional failure. UN inaction can arise out of vetoes by permanent Security Council members (expressed or threatened), and time-consuming diplomatic negotiations that undermine or delay effective action. If we read the ICISS Report in this perspective, we can also find a possibility of justifying unilateral action:

“If the Security Council expressly rejects a proposal for intervention where humanitarian or human rights issues are significantly at stake, or the Council fails to deal with such a proposal within a reasonable time, it is difficult to argue that alternative means of discharging the responsibility to protect can be entirely

²¹⁹ C. FOCARELLI, *op. cit.*, p. 343.

²²⁰ See B. CONFORTI, *op. cit.*, p. 150.

²²¹ In principle, ethnic cleansing should be included in the crimes against humanity.

²²² In this sense see A. L. BANNON, “The Responsibility To Protect: The U.N. World Summit and the Question of Unilateralism”, in *The Yale Law Journal*, 2006, p. 1157 *et seq.* The author considers the World Summit Outcome a real international agreement.

²²³ ICISS Report, §§ 6.36, 6.37.

discounted".²²⁴

The limits are clearly set out in the document itself. It only applies to extreme human rights abuses (the four listed atrocities, and not violations of fundamental freedoms or the need to fight terrorism), it only applies to ongoing crimes (and not cases that have happened in the past).²²⁵ Another key limitation is that all UN tools (including possibly action through the General Assembly) have been exhausted, and that unilateral action is taken only when other peaceful means - like every possible diplomatic effort and economic sanctions - are ineffective. Last but not least, unilateral action must have as its legitimate object the protection of a population from genocide or other atrocities, not affecting sovereign rights, territorial integrity and political independence. If a State exceeds these limits, this intervention would be considered illegal and action by the Security Council against this State would be fully and undeniably justified.

In another perspective, Gareth Evans addressed the "Legality Test" in a Geneva conference in 2005:²²⁶ *"The ICISS Commission's response to this dilemma was not to try and establish some alternative basis for the legality of interventions in these situations - we saw our role as not to find alternatives to the Security Council as a source of authority, but to make it work better. We opted instead for a clear political message: if an individual state or ad hoc coalition steps in, fully observes and respects all the necessary criteria of legitimacy, intervenes successfully, and is seen to have done so by world public opinion, then this is likely to have enduringly serious consequences for the stature and credibility of the UN itself. That is pretty much what happened with the U.S. and NATO intervention in Kosovo, and the UN cannot afford to drop the ball too many times on that scale"*.

In my opinion, the most relevant features of the R2P are those which affect the traditional relationship between the State and the individual. Until the end of the 20th century, paramount importance and attention was given to sovereignty and States were jealous defenders of their domestic jurisdiction. Individuals were only considered as objects of sovereignty, and unlimited State power.

The R2P tries to switch and reverse the perspective. Sovereignty implies duties rather than rights. Moving to general theory, the key

²²⁴ ICISS Report, § 53.

²²⁵ This leads to consider as not justifiable the US intervention in Iraq, as is clearly explained by A. L. BANNON, *op. cit.*, p. 1163.

²²⁶ G. EVANS, *Halting Genocide. Intervention and Legitimacy*, Geneva Centre for Security Policy Forum, Global Peace and Security: Challenges and Responses, Geneva 18 May 2005, available at:

<http://www.crisisgroup.org/home/index.cfm?id=3442&l=1>

question is, therefore, the following: is the individual for the State or is the State for the human being?

Furthermore, is it possible to imagine that international law is moving from a pure inter-State perspective to one placing the human being at the centre of a legal order?

I am an optimist. I believe that human rights law and humanitarian law over the last sixty years greatly contributed to the erosion of the traditional concept of State sovereignty in the international community. Affirming that sovereignty entails responsibility is a relevant contribution in the same direction.²²⁷ And it is useless to look for possible contradictions between sovereignty and protection: *“On peut, sur ce sujet sensible, se rallier aux conclusions d’une grande sagesse de M. Boutros Boutros-Ghali: “il n’y a pas lieu de s’enfermer dans le dilemme respect de la souveraineté – protection des droits de l’homme. L’O.N.U. n’a nul besoin d’une nouvelle controverse idéologique. Ce qui est en jeu, ce n’est pas le droit d’intervention, mais bien l’obligation “collective qu’ont les Etats de porter secours et réparation dans les situations d’urgence où les droits de l’Homme sont en peril” (rapport sur l’activité de l’Organisation pour 1991),²²⁸*

The R2P probably cannot be considered an existing and accepted new principle or set of rules. The relevant UN documents cited go no further than affirming that there is a kind of trend, a sort of ‘emerging norm’. In other words, I believe that we could consider that today – thanks to the ICISS Report – we can count on a new approach, offering a new path to address this key issue of the relationship between an individual and a State. It is not yet hard law, but at the same time it clearly shows a trend towards going beyond the limits of a simple soft law or merely political principle.

Secretary-General Ban Ki-Moon recently stated that *“the R2P is a concept, not yet a policy; an aspiration, not yet a reality”*.²²⁹ This appears as a kind of understatement because, as the Outcome Document clearly shows, we have now reached a stage beyond the simple ‘aspiration’, and the commitment expressed by the Heads of State and Government at least mirrors a policy-oriented attitude. In the same speech, the Secretary-General underlined that the UN *“was built on ideas, ideals and aspirations”*, clearly meaning that the UN can still play the role of a cradle for the growing and the development of this young creature.

In other words, the adoption of the concept by the World Summit

²²⁷ See also P. GARGIULO, *“Dall’intervento Umanitario alla Responsabilità di Proteggere: Riflessioni sull’uso della Forza e la Tutela dei Diritti Umani, in La Comunità Internazionale, 2007, p. 639.*

²²⁸ P. DAILLIER - A. PELLET, *Droit international public, Paris, 2002, p. 449.*

²²⁹ *“Secretary-General Defends, Clarifies”, op. cit., p. 3.*

Outcome is an important result, witnessing that there is a trend away from a rigid conception of sovereignty and towards a limited notion of it, at least as far as the protection of 'human security' is concerned. This could be included in the more general transformation of international law from a "State and governing-elite-based system of rules into a framework designed to protect certain human and community interests"²³⁰. And – as a beginning of a practice by States – it could represent the origin of a development in the field of international law.

International human rights law, international humanitarian law, international criminal law and justice in these last 60 years greatly contributed to opening and preparing the way. States and their political and military leaders are no more left free to consider individuals as mere objects of their sovereign power within a domestic jurisdiction shielded from external scrutiny. They have a major responsibility, and they may be called to account for their behaviour before a judge, even an international judge. Their responsibility has become one 'under international law'. This is not simply one view or perspective. This is already international law in force. Herman Goering the day before yesterday, Slobodan Milosevic yesterday and Radovan Karadzic today have been brought before international tribunals because they failed to protect, because they did not fulfil their obligations under international law, because they did not accept the real key burden of sovereignty, which is connected to responsibility.

The future is left in the hands of States and international institutions. These are the only subjects who can make the 'emerging norm' emerge²³¹. The future will tell if there is the political will – more than a decade after the world stayed at the window instead of halting genocide in Rwanda – to apply the concept of R2P in cases like Darfur or Zimbabwe, and even (although much more controversial) Burma²³².

In March 2007, after a month of investigation, a report by the UN High-Level Mission on the situation of human rights in Darfur sharply criticized Sudan for its role in continuing the conflict in Darfur and called upon the international community to act, invoking the 'Responsibility to Protect'. On 30 April 2007, UN Security Council Resolution 1755

²³⁰ C. STAHN, *op. cit.*, p. 101.

²³¹ A solid base cannot be provided "par une règle émergente, sans aucune pratique qui la soutienne" warns P. PICONE, "L'évolution du Droit International Coutumier sur l'Emploi de la Force Entre Obligations *erga omnes* et Autorisations du Conseil de Sécurité, in E. CANNIZZARO – P. PALCHETTI (Eds.), *Customary International Law On the Use of Force*, 2005, p. 316.

²³² See E. GREPPI, "Crisi in Zimbabwe e "Responsibility to Protect" della Comunità Internazionale", *ISPI Policy Brief*, Milano luglio, 2008, http://www.ispionline.it/it/documents/PB_91_2008.pdf

reaffirmed the World Summit Outcome document, which endorsed the responsibility to protect, and Resolution 1674 on the Protection of Civilians, which reaffirmed the World Summit Outcome Document.²³³ These appear as further steps on the path of state and international organisation practice.

In conclusion, the R2P should be accepted for what it is: a defying concept being translated into a policy, a real stimulating challenge to the international community to develop international law. At the same time, we should be conscious that it is "*un concept aussi nécessaire que dangereux*". It is necessary, as "*ne rien voir, ne rien entendre, ne rien dire face aux violations massives des droits de l'homme qui se déroulent devant nos yeux – cela serait immoral*"²³⁴. On the other hand it is a dangerous concept, as it is perceived by Third World countries as a new means for neocolonialism and imperialism, and it may give rise to a number of abuses, in particular in situations in which States act unilaterally because the UN has proved inactive and inefficient.

Furthermore, international law needs time to consolidate principles and rules. A new approach - although fascinating - is not enough to reshape a traditional pillar like that of sovereignty, still standing as a rock, a real cornerstone, in the international community.

A strong political commitment, like that expressed by the Heads of State and Government at the UN World Summit, has to be transformed into legally binding rules, broadly accepted in the international community.

The Outcome Document, although highly authoritative, is a

²³³ This decision is an interesting example of a possible application of the R2P in UN practice, in full respect of Charter provisions. "*Recalling also its previous resolutions 1325 (2000) on women, peace and security, 1502 (2003) on the protection of humanitarian and United Nations personnel, 1612 (2005) on children and armed conflict, and 1674 (2006) on the protection of civilians in armed conflict, which reaffirms inter alia the provisions of paragraphs 138 and 139 of the 2005 United Nations World Summit Outcome document. Acting under Chapter VII of the Charter of the United Nations: (a) Decides that UNMIS is authorized to use all necessary means, in the areas of deployment of its forces and as it deems within its capabilities: - to protect United Nations personnel, facilities, installations and equipment, to ensure the security and freedom of movement of United Nations personnel, humanitarian workers, assessment and evaluation commission personnel, to prevent disruption of the implementation of the Darfur Peace Agreement by armed groups, without prejudice to the responsibility of the Government of the Sudan, to protect civilians under threat of physical violence*" (Res. 1755).

²³⁴ M. BOTHE, "Introduction", in Société Française pour le Droit International, *La responsabilité de protéger*, Paris, 2008, p. 17.

General Assembly resolution – that is, not a real international agreement – which needs formal signature and acceptance by ratification from a relevant number of States.

As far as customary international law is concerned, two elements are necessary: the *opinio iuris* and *diuturnitas*. The Outcome Document can be considered an important expression of a widely spread *opinio iuris*. This element has to be strengthened by consensus in the literature and by determinations of the ICJ or other international tribunals. It is also an important achievement in the field of international practice. But we still lack *diuturnitas*, that is a robust “*evidence of a general practice*”, according to Article 38 of the ICJ Statute. The material sources of custom are numerous: “*diplomatic correspondence, policy statements, press releases, the opinions of official legal advisers, official manuals on legal questions, e.g. manuals of military law, executive decisions and practices, orders to naval forces etc., comments by governments on drafts produced by the International Law Commission, state legislation, international and national judicial decisions, recitals in treaties and other international instruments, a pattern of treaties in the same form, the practice of international organs, and resolutions relating to legal questions in the United Nations General Assembly*”²³⁵.

Political and moral inspiration are needed. Crimes and atrocities imply three main categories of subjects: perpetrators, victims and by-standers. For too long we, “*we the peoples*” in the language of the UN Charter, have been among the by-standers, in full respect of an old conception of sovereignty. This is why it is probably time to let the emerging norm of R2P emerge.

I firmly want to believe that the international community will one day be able to look into the eyes of the Rwandan child, whose terrible story has been told by Samantha Power in her Pulitzer Prize winning book “*A Problem from Hell*”²³⁶.

“*Because the Hutu and Tutsi had lived intermingled and, in many instances, intermarried, the outbreak of killing forced Hutu and Tutsi friends and relatives into life-altering decisions about whether or not to desert their loved ones in order to save their own lives. At Mugonero Church in the town of Kibuye, two Hutu sisters, each married to a Tutsi husband, faced such a choice. One of the women decided to die with her husband. The other, who hoped to save the lives of her eleven children, chose to leave. Because her husband was Tutsi, her children had been categorized as Tutsi and thus were technically forbidden to leave. But the machete-wielding Hutu attackers had assured the woman that the children would be permitted to depart safely if she agreed to accompany them. When the woman stepped out of the church, however, she saw the assailants butcher eight of the*

²³⁵ I. BROWNLIE, *Principles of Public International Law*, Oxford, 2003, p. 6.

²³⁶ S. POWER, *op. cit.*, p. 334.

eleven children. The youngest, a child of three years old, pleaded for his life after seeing his brothers and sisters slain. "Please, don't kill me", he said, "I'll never be Tutsi again". But the killers, unblinking, struck him down".

Protection of civilians in peace operations, or the “operationalisation” of the responsibility to protect

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It is a central characteristic of the responsibility to protect norm (R2P), properly understood, that it should only involve the use of coercive military force as a last resort: when no other options are available, this is the right thing to do morally and practically, and it is lawful under the UN Charter. If such force from outside has to be used as the only way to protect people from genocide and mass atrocity crimes, then it is far better for this to happen with the consent of the government in question. But if that consent is not forthcoming, perhaps because the government itself is part of the problem, then—in extreme cases—outside forces will have to take action without it.²³⁷

Exercising this responsibility poses a number of very difficult problems for military planners because it is not the kind of role in which militaries have been traditionally engaged, where they have well-developed doctrine and for which they can draw on a large body of experience. What is involved here is neither traditional war fighting (where the object is to defeat an enemy, not just to stop particular kinds of violence and intimidation) nor, at the other extreme, traditional peacekeeping (peace operations which assume that there is a peace to keep and are concerned essentially with monitoring, supervision, and verification).

The new task is partly what is now described as ‘peacekeeping plus’ or ‘complex peacekeeping,’ where it is assumed from the outset that the mission, while primarily designed to hold together a ceasefire or peace settlement, is likely to run into trouble from spoilers of one kind or another; that military force is quite likely to have to be used at some stage, for civilian protection purposes as well as in self-defence; and where, accordingly, a Chapter VII rather than just Chapter VI mandate is required. New peacekeeping missions in recent years have been constructed almost routinely on this basis, but that does not mean that military planners and commanders are yet comfortable with running

²³⁷ This brief discussion is drawn from Chapter 9 of my *The Responsibility to Protect: Ending Mass Atrocity Crimes Once and for All*, to be published later this month by Brookings Institution Press. I have focused here on coercive military operations: not all ‘peace operations’ are of this character.

them.

And that is not the end of the R2P story: the other part of the task is that which may arise in a Rwanda-type case, where there is the sudden eruption of conscience-shocking crimes against humanity, beyond the capacity of any existing peacekeeping mission to deal with, demanding a rapid and forceful 'fire brigade' response from a new or extended mission to quash the violence and protect those caught up in it. This is more than just 'peacekeeping plus'—dealing with spoilers—but, again, it is not traditional war fighting either.

Together, these 'peacekeeping plus' and 'fire brigade' operations are appropriately described as 'coercive protection missions', which is as useful terminology as any to use in addressing what is needed to create the capability—essentially the same in both cases—to operate them effectively.²³⁸ But getting reasonably clear the overall concept of operations, as this language does, is only the beginning of the story. Operational effectiveness in practice depends on getting a number of other things right: force configuration (what kind of force structure, and quantities of personnel and equipment, do militaries have to have to be able to mount these kinds of operations, individually or collectively?); deployability (how rapidly can the necessary forces get to whatever theatre is involved?); preparation (ensuring that doctrine and training are matched to these operations); mandates and rules of engagement (ensuring that they are appropriate for the particular mission proposed); and military-civilian cooperation (ensuring that structures and processes are in place to maximize the effectiveness of each). Systematic attention is now being paid to all of these issues by a number of national forces, and increasingly by those multilateral actors capable of mounting military operations, but it is still not enough.

For present purposes I will leave aside the issues of force configuration, deployability and military-civil cooperation, not because they are not operationally important but simply because they do not relate as closely to the theme of this conference as do the issues of doctrine, mandates and rules of engagement.

The distinctiveness of coercive protection operations from more familiar military tasks—and the need to tread a line that involves something short of a full-scale war-fighting mindset but more than an observing and monitoring one—makes it crucial that forces be properly prepared for them. That in turn means much attention to training, and also

²³⁸. This is the terminology employed by Victoria K. HOLT and Tobias C. BERKMAN, *The Impossible Mandate: Military Preparedness, the Responsibility to Protect and Modern Peace Operations*, Washington, D.C., Henry L. Stimson Center, 2006.

to ensuring that the training is properly focused on the principles or doctrine on which it is based. 'Doctrine', in military parlance, is essentially the formal written guidance that translates broad concepts—for example, the umbrella concept of 'coercive protection operations' being used here—into the kind of actual action required at the strategic, operational, and tactical levels. The International Commission on Intervention and State Sovereignty commissioners spelled out their own view of the principles on which the doctrine required for UN-mandated human protection operations should be based:

- the operation must be based on a precisely defined political objective expressed in a clear and unambiguous mandate, with matching resources and rules of engagement;
- the intervention must be politically controlled, but be conducted by a military commander with authority to command to the fullest extent possible, who disposes of adequate resources to execute his mission, and with a single chain of command which reflects unity of command and purpose;
- the aim of the human protection operation is to enforce compliance with human rights and the rule of law as quickly and as comprehensively as possible, and it is not the defeat of a state; this must be properly reflected in the application of force, with limitations on the application of force having to be accepted, together with some incrementalism and gradualism tailored to the objective to protect;
- the conduct of the operation must guarantee maximum protection of all elements of the civilian population;
- strict adherence to international humanitarian law must be ensured;
- force protection for the intervening force must never have priority over the resolve to accomplish the mission; and
- there must be maximum coordination between military and civilian authorities and organizations.²³⁹

For the most part national militaries have developed doctrine for different kinds of peace support operations, although of varying degrees of sophistication and detail. Of the key nations surveyed in this respect by Holt and Berkman, Canada and the United Kingdom appear to provide the clearest guidance to their armed forces on coercive protection, closely reflecting R2P language. By contrast, none of the relevant multilateral organizations—the UN, EU, AU, ECOWAS, or even NATO—have

²³⁹ ICISS, *The Responsibility to Protect*, Ottawa, International Development Research Center, 2001, p. 67.

doctrine designed specifically for operations involving the protection of civilians under imminent threat. NATO has a good deal of fully developed doctrine on various kinds of missions and recognizes many individual military tasks required to protect civilians, but it has no specific civilian protection section as such.²⁴⁰ These are gaps that need to be filled, and so far as possible with common concepts and terminology among the different governments and organizations.

Training, similarly, leaves much to be desired, to the extent that practically nowhere is it very well geared—either in general or in the case of specific pre-deployment training—to missions where civilian protection is the central task, or at least a very explicit goal, of the mission, and coercive force is a permissible element in the response. Changes are gradually being made to reflect the nature of these contemporary missions and the stronger mandates that are going with them, but in both national and multilateral contexts, current modules are often strong in areas like managing evacuations, crowd control, securing facilities, and conducting patrols—but not, for example, on how to stop a belligerent from committing gross human rights abuses. It is better understood now than it was at the time of Srebrenica that UN peacekeeping principles of minimum use of force, impartiality, and consent do not justify inaction in the face of atrocities, but what actual action is required and permitted, and how to carry it out, needs more attention, with many more well-developed exercises and simulations.²⁴¹

Mandates and Rules of Engagement are the legally binding instructions for particular missions, describing at different levels of generality not only what their basic tasks are but when, where, and to what extent their members may use force. For example, in the case of the UN Mission in the Democratic Republic of Congo (MONUC), the mandate spelled out in Security Council Resolution 1565 of 2004 included paragraphs making clear that the Security Council was acting “*under Chapter VII of the Charter of the United Nations*”; that it was mandating (that is, instructing) MONUC, among a number of other tasks, “*to ensure the protection of civilians, including humanitarian personnel, under imminent threat of physical violence*”; and that it was authorizing the mission, in carrying out this among other tasks “*to use all necessary means, within its capacity and in the areas where its armed units are deployed.*”

The rules of engagement (ROEs) for this mission made clear, in turn, exactly what “*all necessary means*” meant, with ROE 1.7 reading,

²⁴⁰ HOLT and BERKMAN, *The Impossible Mandate?* pp. 114 (in regard to Canada and the United Kingdom) and 126 (in regard to multilateral organizations).

²⁴¹ *Ibid.*, pp. 133–154, 188–191.

*“Forces may use up to deadly force to protect civilians when competent local authorities are not in a position to do so.”*²⁴² The “up to” language used here of course indicates that any such use of force should be proportional to the situation faced.

There is a crucial need that in every coercive protection mission—and indeed every military mission of any kind—mandates and rules of engagement be, first, completely appropriate to the task required, with Chapter VII powers being given where they are needed, and second, articulated with absolute clarity, with no ambiguity or room for any other misunderstanding as to what is intended.²⁴³ The operational effectiveness of a mission is as dependent on these instructions being right as on anything else. That these propositions are self-evident, however, is no reason to assume they have been observed in the past or will be in the future.

If we want to ensure that coercive peace operations carried out under the umbrella of the R2P norm are, in their conceptualization, detailed planning and on-the-ground execution, absolutely consistent with international humanitarian law, we still have a long way to go.

²⁴² *Ibid.*, chap. 5; for ROE 1.7, see p. 95, for the MONUC mandate, see p. 205.

²⁴³ See ICISS, *The Responsibility to Protect*, paragraphs 7.15–17 on mandates, and 7.26–29 on rules of engagement.

The responsibility to protect and international humanitarian law

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The subject that has been assigned to me apparently presupposes that international humanitarian law (IHL) is applicable in the case of peacekeeping operations (PKOs). But this is not necessarily the case. More often, a PKO contributes to the maintenance of law and order by a number of means. None of them involves actual fighting which is regulated by IHL. These activities of PKOs are much closer to police or law enforcement action than to the conduct of hostilities. As far as international legal standards of their behaviour are concerned, they derive from human rights. However, in the course of PKOs, situations may arise where there is indeed actual fighting – and this is regulated by IHL, whether the PKO is undertaken by the UN or other international organisations. This follows from the fact which has led to a number of controversies, but is more and more recognised, that activities of international organisations are subject to customary international law, to the extent that those rules really deal with a situation which corresponds to that in which the organisation find themselves. But it is exactly the case for human rights and international humanitarian law.

This dichotomy between law enforcement and the conduct of hostilities, both subject to different yet overlapping legal regimes, also occurs in other contexts, in particular in non-international armed conflicts (NIACs) and in the case of occupation. The State, of course, normally acts in a law enforcement mode when it deals with internal violence. Only if there is an armed conflict, the rules of behaviour also are regulated by IHL as it applies to NIACs. An occupying power is responsible for maintaining law and order in an occupied territory, and it does so in the law enforcement mode. This is what the IHL concerning occupation implies, it only adds a few guarantees to these rules. But in addition, IHL as it applies to the conduct of hostilities becomes relevant where hostilities flare up in an occupied territory.

As to the United Nations, this dichotomy is reflected in two relevant instruments, namely: the well-known Bulletin of the Secretary-General on the application of IHL to UN PKO, on the one hand; and the Convention on the protection of UN and associated personnel, on the other. The Protection Convention does not apply where UN peacekeepers act in the conduct of hostilities, IHL, according to the Bulletin, does.

If there is a situation where IHL applies, the question arises

whether it really applies in exactly the same way as it applies to States. The answer to this question is both yes and no. This is only where the problem, for the purpose of this presentation, starts. PKOs implement the responsibility to protect. Is it compatible with the very idea of the responsibility to protect that the protectors are entitled to cause civilian damages to the same extent as any 'normal' belligerent? A visceral reaction to this question is: no. The protectors must avoid such damage which otherwise is the usual fallout of war. But is this 'no' a matter of policy or a matter of law? A legal answer to this problem lies in a more precise analysis of the notions of military objectives and of the principle of proportionality in relation to collateral damage.

A military objective is an object the destruction etc. of which provides a military advantage. But what is a military advantage in the context of a peacekeeping operation implementing the responsibility to protect? Can any destruction which would facilitate the action of a peacekeeping operation be considered as a 'military' advantage (justifying the destruction) in the context of an operation the specific purpose of which is to avoid further suffering of the civilian population?

Similar problems apply to the principle of proportionality. What type of collateral damage could be considered as 'non excessive' and, therefore, acceptable under IHL if it is done to the very persons and objects a peacekeeping operation is meant to protect? Is the balance sheet which governs the operation of the proportionality principle really the same in the case of peacekeeping operations? My negative answer does not necessarily mean that customary IHL applies to the UN in a way which differs from the application to States. Quite to the contrary: the context of an operation should, when it comes to the definition of military objectives and the application of the principle of proportionality, also be taken into account in the case of military operations conducted by States when implementing the responsibility to protect.

There are, however, certain questions where IHL may become relevant for PKOs which are not acting in the conduct of hostilities.

IHL only contains a few norms on third party involvement in a conflict for the sake of assisting the civilian population. The most important element is the rules on relief operations. International organisations are actors qualified to undertake such operations and the relevant provisions of the Fourth Convention and of Additional Protocols I and II apply to them (as they also apply to non-State actors). Peacekeeping operations could also have the task to protect and facilitate relief operations – and have done so in the past, in particular in certain phases of the conflict in the former Yugoslavia. This has no explicit basis in any provision of an IHL treaty, but it is an implementation of the basic rule

formulated in Additional Protocol I that relief operations “*shall be undertaken*”. The explicit basis, however, would lie in the mandate of the peacekeeping operation given by the Security Council or another competent body. This is a particularly important way in which peacekeeping operations would implement the responsibility to protect.

There are additional provisions relating to the intervention by third parties in an armed conflict for the sake of protecting war victims. These are the provisions on medical units and on civil defence units provided by third parties. Art. 9(2) on medical units provided by third parties does not mention medical units provided by international organisations. It is also questionable whether medical units for peacekeeping operations (which have played an important role in some PKOs) could or would submit to the requirement contained in that provision, namely, that they are under the control of the party to the conflict in question.

The situation is somewhat different in relation to civil defence. Indeed, peacekeeping operations provide assistance to the civilian population, which is part of civil defence activities as defined by Additional Protocol I. De-mining is an important example. These are activities which are very important for the welfare of the civilian population, and thus a way to implement the responsibility to protect. Art. 64 of Additional Protocol I expressly provides for the possibility that an international organisation plays a role in the coordination of civil defence activities carried out by third parties. When the provision was drafted, the authors did not have peacekeeping operations in mind, but rather a specialised organisation which never made it into the family of specialised agencies of the United Nations, namely the International Civil Defence Organisation. Whether a peacekeeping operation could or should be brought under the coverage of that provision, is doubtful. It would have to form a civil defence unit exclusively devoted to this purpose. Only then, according to Art. 64, would it come under the civil defence regime of Additional Protocol I, being permitted, *inter alia*, to use the distinctive emblem of civil defence. Whether this enhances the protection provided by the blue helmet is another question.

Working Group 2: Peace operations and detention

Right to detain during peace operations: some legal and operational issues

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It is a great pleasure and privilege to be here and it's an opportunity for me to share with you some thoughts that have been a part of my military and academic journey over a number of years.

In December 1994 I was serving with the UN Assistance Mission in Rwanda. We were doing a co-ordinate search operation in *Kambai* camp. As part of the co-ordinate search operation the operational order said that we were to detain anybody who was a part of *Interahamwe*, the people who perpetrated the genocide. In that operation we detained a number of people and at the end of the operation some were released and then about 54 were handed over to the local authorities. It is the first time in my professional career that I had to come to grips with the right to detain or one of the first times anyway.

What I am going to cover is the definition of the detention context, a *chapeau* principle in relation to the legal basis for taking detainees and applicable law. The area I am going to spend a little bit of time focussing upon is the expressed and implied right to detain. I shall then talk about limitations concerning the right to detain and then I shall talk about the difference between detention and arrest.

I would also recognise formally that this issue is being considered in other *fora* as well, such as the Copenhagen process, which we will hear more about a bit later. It is also being considered, I understand, by the United Nations as a part of the Department of Peace-Keeping Operations and I know that the African Union as well as the EU are looking at similar types of issues. Certainly it is an issue that arises in current military operations.

The photograph I have here is of an ICRC delegate talking to me in *Kambai* while we were taking detainees and I thought it would be an appropriate photograph to show in this context.

So, some definitions. "The right to detain", to me, means the entitlement to detain somebody. "Peace operations" refers to those operations involving military, and these days we increasingly see police forces deployed to deal with threats to international peace and security. It includes UN sanctions and UN command and control and multinational peace operations. "Detention" means, and this is a controversial definition in some quarters, the condition of depriving a person of their liberty. I am

saying it is controversial and unsettled because if you look at the military doctrine of various military forces, such as NATO, and you look at definitions in domestic law, “detention” is defined differently and it depends upon the context in which detention is being imagined.

If you look at human rights and the concept of detention you will see that human rights law (HR), and international humanitarian law (IHL) for that matter, focus much more heavily on the treatment of detainees rather than establishing what it means to detain someone. What is the benchmark on which we judge whether somebody is detained? There is very, very little guidance on that issue.

Let me move on to this concept of arrest. It means the exercise of the power to detain for specific law enforcement purposes, such as those found in criminal law. Again not everybody recognises the difference between arrest or detention but for the research and the practical work I do, it is a useful distinction to make and I am more than happy to discuss in question time why I think it is a useful distinction to make.

All detention will involve a restriction of the freedom of movement but not all restriction of freedom of movement of an individual will result in a detention. For those of you who are criminal lawyers this is the difference between somebody being asked a question and giving their consent to being asked to answer the question – certainly their freedom of movement has been deprived but because they consent to answering the questions there can be no issue of whether they have been detained or otherwise, (putting aside the question of whether it is informed or uninformed consent, which I will not touch on).

In what sort of context am I talking about detention? Detention in peace operations can occur in many contexts: to maintain law and order, to ensure the safety of the mission and other personnel, to protect property, ensure freedom of movement, and then, certainly, in transitional administrations, people have already heard in the last couple of days, that detainees are taken. It is of interest to me both as a practitioner as well as a researcher that I have not been able to find a single legal framework that covers the spectrum of military operations where detainees are taken and, therefore, most of us who work in this area develop more by analogy and arguably, and I don't mean this as an insult to those of us who do work in developing the law *ad hoc*. We develop it by analogy and often its done on an *ad hoc* basis, but, as I say, that is not meant as a criticism, that is the reality we face.

I say there is no legal framework because on many operations you would have to look at international humanitarian law, you would have to look at human rights law, you would have to look at the law of privileges and immunities, you would have to look at international criminal law, you

would have to look at the domestic law of the host nation and you would have to look at your own domestic law to understand who you can and cannot detain.

The “*Chapeau Principle*” of the right to detain is premised on the fundamental legal principal that detention must be lawful and must not be arbitrary. When the principle of lawfulness and arbitrary detention were being discussed in the context of the International Covenant for Civil and Political Rights (ICCPR) when it was being developed, there was considerable discussion as to whether the term detention actually covered arbitrary detention as well. It is now generally accepted that it is both lawfulness and arbitrariness that the concept of detention engages.

Let me move on to lawful detention. The deprivation of liberties is permissible only when it is on grounds and in accordance with such procedures as are established by law. The important and fundamental question to ask here is, whose law? Which law? So, if I was conducting military operations in Rwanda, as I describe to you, am I looking at, in order to make the detention lawful and not to make it arbitrary, am I looking at Rwandan law to give me the legal basis? Am I looking at international law? And if I am looking at international law, which part of international law? Or am I looking at my own domestic law as in the troop- or police-contributing country law? Remembering, and this is why I have the quote from the ICTY *Delalic* case, that the concept of arbitrariness and unlawfulness extends as well to questions of procedure and not just questions of the reasons for detention.

In the context of which law you can understand the difficulty in the context of peace operations if you say it is the domestic law of the host nation. There are difficulties in recognising what the extent of applications of domestic law is when you look at the Status-of-Forces Agreements (SOFA), but there are also difficulties in understanding, particularly in the initial phases of the operation, I am talking about the first two or three weeks when you are trying to establish your control or a safe, secure local environment as to how much time you have to research the local war in trying to understand whether you can detain individuals.

So that brings me to the question of applicable law. I have taken a very broad approach both in practice as well as in research as to what applicable law is. In this context it is the UN Security Council resolutions, the Status-of-Forces Agreements. There are host State agreements as well which include the peace agreements, *ad hoc* arrangements, and special regimes of international law such as international humanitarian law. We heard Martin’s wonderful presentation today where the law of occupation may give a basis for taking detainees. The Genocide Convention arguably gives a basis for taking detainees when that Convention has been breached

and then, of course, there is the general principle of law relating to self defence.

We can separate detention into two questions: what is lawful detention? And how does the arbitrary detention fit into the concept of lawful detention? In order for detention not to be arbitrary, it must be justified in relation to operational requirements and, therefore, it must be appropriate, reasonable and necessary. In order for it to be appropriate, reasonable and necessary, what does that actually mean? There must be a factual basis for detention, it must be of last resort, it cannot be a punishment or retribution or reprisal and it cannot be for prolonged reasons without review. One should just add in that last point, when I say "not prolonged" it means "not prolonged without review".

The issue of it being a last resort, I think, is of fundamental importance. You cannot give orders to military or police personnel to go into a local village and then detain all males above the age of 16 and below the age of 80 because somebody in that village was accused of doing something against peacekeepers or had committed a war crime or a crime against humanity. You need to have a factual basis and you need to have isolated who it is you want to detain, and as a part of that equation identify the reason for the detention.

There are two aspects, the law itself must not be arbitrary, and the enforcement of the law itself must not be arbitrary. Here, clearly, I am focusing on the enforcement of the law not being arbitrary.

You can have a Security Council resolution or agreement where detention is expressly authorised. And in the next slide I shall show you some Security Council resolutions that I have researched that demonstrate and express authorisation for detention. There are other circumstances where Security Council resolutions or agreement will by implication allow a UN Force to detain. Then there is a Status of Force Agreement (SOFA) basis on which detention is either expressly or by implication authorised and I shall try and give you some examples of each of these.

As an expressed task - three missions - these are the only three missions that I have been able to find where the Security Council has expressly mandated that detainees may be taken. I would be more than happy if you found me other examples of where such an expressed task has been established. ONUC back in 1961, 1993 in Somalia in relation to the massacre of the Pakistani peacekeepers, then Liberia in relation to the former President Charles Taylor. As a SOFA, only one example I have managed to find in relation to Cyprus, where the UN was authorised to take Cypriot citizens committing an offence or causing a disturbance on UN premises. Many would argue that this is part of normal SOFA understanding even though it is no longer expressed explicitly in SOFA. I

should say that when I use the term SOFA in relation to this particular operation I am really referring to the exchange of letters constituting an agreement between the United Nations and the Government of Cyprus concerning the Status-of-Forces Agreement in relation to that operation.

So, the more controversial area is where it is an implied task and here I take my inspiration from the "Certain Expenses" case where the UN is deemed to have those powers which though not expressly provided in the UN Charter, are conferred upon it by necessary implication. I have been accused of drawing a long bow here by taking that concept of implied task and applying it at tactical level on UN operations. But there you go - one of the advantages of being an academic you can pull long bows - so I fulfil that requirement of academic life.

Dag Hammarskjold, in 1958, as I recollect, when he wrote his brief to the Security Council, the first Secretary-General's Report on a UN peace operation, made it absolutely clear, absolutely clear that he considered this a part and parcel of peacekeeping, that peacekeepers, to maintain the security of the environment, would take detainees in UNAMIR. I have already described that, as an implied task, we did the co-ordinance search operation and undertook detention but I shall not go into the details now.

There are also multi-lateral operations: RAMSI (Regional Assistance Mission in the Solomon Islands), the operation in the Solomon Islands where there is an expressed agreement that you can take detainees and then certainly INTERFET (International Force for East Timor), took it as an expressed task based on the mandate saying that we could take all necessary means - that is, Mandate 1264.

Very briefly, who may be taken as a detainee? Application of privileges and immunities, for example, would limit who you could take as a detainee. The principle of sovereignty, the gravamen for me on UN peace operations - this is the key to understanding the limitations on the manner in which peacekeepers can exercise their powers of detention, such as that discrimination, retaliation, retribution, or reprisal cannot be the basis of detention and, of course, you cannot breach fundamental laws such as discrimination on the basis of sex, etc. And you cannot act beyond the powers you are authorised - of course that is a controversial issue - who determines you are acting beyond the power and how do you define that you have now gone into "mission creep". The right to arrest is obviously an important distinction to make. Peacekeepers on most missions, unless they have been given express power from the local authorities to carry out arrest, in my view, do not arrest individuals or civilians, they take them into custody or detain them, they do not carry out arrests. If an arrest power is given it should be given expressly either through a Security Council resolution or by a mandate.

So, a very quick *tour de force* through what I believe are the general principles of the right to detain. At the end of the day, you have got operational reasons for taking detainees, you often have to figure out what the applicable law is, and this is often done, nowadays, on an *ad hoc* basis, and by analogy, detention, no matter which way you look at it, must be lawful and cannot be arbitrary. UN practice demonstrates clearly that detainees are taken, and my research into every single operation since 1956, where detainees have been taken, and you have got to recognise that limitations do exist and the challenges to find out what those limitations are, and the photograph that is on the slide is of a detainee, and he is being spoken to by ICRC delegate as a part of normal military operational practice. Thank you very much.

Detention in peace operations: a practical approach

Jérôme CARIO

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“More and more often, our armies intervene in complex situations in which positive laws do not always give all the answers. Military ethics and professionalism thus become fundamental in decision-making. Military ethics are primarily a question of culture but also of experience. Here we come to the heart of what makes up an army. There is a duty to teach the rules of conduct to all. At the same time, there is the responsibility to forge strong consciences within individuals. (...) There can be no compromise in the values of an army; its ethics are not flexible, but are the cornerstone of every soldier's conscience and actions.”

Mme Michèle Alliot-Marie,
former Minister of Defence, France.

Introduction

The Geneva Conventions of 1949 make up the core of contemporary international law and hold the respect for the individual at the centre of their values. The respect for prisoners of war and captured persons, however, dates back well before the drafting of these modern instruments. The inhuman and odious phenomenon of warfare has occurred in every age known to man; ever since humans have existed, war has existed; ever since war has existed, human beings have sought to limit its consequences. Indeed, we must point out the attempts to limit the conduct of warfare that have been inspired by charity and humanity.

The laws of armed conflict have always been based upon the distinction between combatants and non-combatants. Only combatants have the right to take part in conflict and may be attacked. Civilians may not take part in hostilities; providing they do not, civilians may not be the object of attack.

Once captured, a combatant may not be punished for having taken up arms and for having taken the life of other combatants. As a prisoner of war, a combatant may be detained, not for punishment, but for the sole aim of preventing him or her from being able to return to participate in military operations.

The situation is fundamentally different for a civilian who 'irregularly' takes part in combat situations. Such an act by a civilian is not

justified. In taking the life of another, he or she is committing a crime – voluntary homicide, or murder – and may be punished for this act by the most severe punishments of the penal code. Further, he or she will not benefit from the privileged status reserved for prisoners ‘of war’ but will be treated as a criminal under ordinary penal law.

When doubt arises regarding the status of a civilian bearing arms who claims to be the member of a resistance, guerilla or rebel movement, that person must be afforded the treatment of a prisoner of war until a competent tribunal decides upon his true status.

Notwithstanding, the norms that a State adopts in its treatment of detained persons are indicative of its civilisation and of its humanity which are exposed for all to see.

I. The framework in which Armed Forces are used

First of all, I would like to return to the political-judicial scope of the deployment of armed forces today. Operations that take place in the “stabilization” phase, in which armed forces are involved, take place in a situation of war that is not declared in the legal sense of the term. However, very often the resolutions adopted by the Security Council are made using Chapter VII of the UN Charter. In other words, these Security Council resolutions authorize the use of force in peace enforcement of peace-building missions.

Thus, the use of force that in a situation of ‘judicial’ peace, with both periods of armed conflict and periods of peace, must be in conformity with the application of regular and adapted rules on the treatment of captured person in order to avoid any breach or exaction of those rules.

Any ‘armed force’ – whether an official State army, a regular army of a government that is not recognized by the adversary, or a resistance, guerilla, rebel or militia movement – must satisfy the same four conditions for their members to be immune from being punished for bearing arms in the case of capture. They must:

- be a member of a military organisation;
- be under responsible command;
- respect the rules of the law of armed conflict; and
- distinguish themselves from the civilian population.

Being a member of a military organisation:

The units must have a military structure and organisation. This implies the need for a hierarchy and effective disciplinary measures.

Disorganized and civilian groups that are constituted on an irregular basis will not be afforded the status of combatants. Similarly, a civilian who individually commits acts of warfare, sabotage or antagonism

against the enemy will not benefit from the protection of combatant status.

Being under responsible command

Every armed force must be placed under a command responsible for the acts of its subordinates before the government or other political authority (provisional government, government in exile, the authority of a liberation movement, etc.).

It matters little whether or not this authority is officially recognized by the adversary. The essential thing is that members of armed forces are accountable before a political or judicial authority for acts which are contrary to the laws of armed conflict and, more specifically, contrary to the rules governing the limitations of the means and methods of warfare.

Respect for the rules and customs of war

The military command must ensure respect for the principles of armed conflict. An isolated violation of one of these principles by one or more combatants is not in itself enough to indicate a failure of the general obligations of the entire force. This would be the case if a war crime is committed by a member of an organised resistance group. A single act of misconduct committed during a large number of operations and over a long period will not result in all members of the movement losing their combatant status.

It is necessary to highlight the fact that a combatant, even after breaching a rule of war, will nevertheless retain his or her status of prisoner of war if captured. He or she will certainly be pursued for the war crime committed. Some States take a more restrictive view of this issue.

Indeed, since the ratification of the Geneva Conventions, different countries have declared that a combatant, even when regular and recognized, who commits a war crime will not benefit from the privileged status afforded to prisoners during their trial and the carrying out of their punishment: the right to have contact with the outside world; the right to receive aid; the right to a fair defence; the right of the ICRC to intervene as a protecting power; the right to assistance in defence, interpreters, witnesses, etc. Such States, therefore, apply the same legal regime to war criminals as would be applied to persons condemned for a crime under the regular law of the country.

Distinguishing from the civilian population

Armed forces, whether they be regular or irregular, are obliged to distinguish themselves as clearly as possible from the civilian population. In practice this generally means wearing a uniform for the "classic" armed forces, or, for resistance or liberation movements, a distinctive fixed sign

that is recognizable from a distance.

Wearing a distinctive sign or uniform cannot always be permanent, for example, in occupied territory. Nevertheless, combatants are required to distinguish themselves from the civilian population for such time as they are taking part in an attack or during the military operations leading up to an attack.

This brings to mind certain guerilla actions in occupied territories, ambushes, sabotage, road combat, fighting in vegetation, etc. In some extreme cases, there are situations where, by reason of the nature of hostilities such as urban sabotage or guerilla warfare, an armed combatant is unable to distinguish himself or herself from the civilian population. In these conditions, combatants are obliged to carry their arms openly during every military engagement and during all military operations prior to an attack in which they are participating when they are exposed to the view of the adversary.

Some would argue that arms must be worn openly from the moment they are put in use. The extent of this obligation takes into account the particular circumstances of each case. The general principle is always the necessity to avoid mixing combatants with the civilian population. Unfortunately, failure to comply with this obligation of distinction from the population is a method of combat that is often used.

In any case, contrary to what is often argued, the text of Additional Protocol I - which deals with armed groups - does not in any respect grant the status of combatant to those who commit acts of 'terrorism'. The protection afforded by Additional Protocol I to certain guerilla movements and resistance armies only applies in situations of armed conflict between States or within States. Violence of a terrorist nature does not fall under this protection.

Those who commit terrorist acts inspire terror within populations by using violence against civilians who are completely removed from the terrorists' motives. These actions reside at the outer extremities of armed conflicts. The law of armed conflicts prohibits, even in the case of reprisals, any sort of attack against the civilian population and, in particular, prohibits the use of terror as a method of warfare. The first protocol is very clear on this subject.²⁴⁴ To benefit from combatant status

²⁴⁴ It can be seen that non-conventional combatants authorize anything that is, justifiably and formally, envisaged and prohibited by the conventions relative to the conduct of hostilities in armed conflicts (*jus in bello*). Thus, the law of armed conflict takes into account the quasi-totality of acts of war that these perpetrators of violence commit against their victims:

- the obligation to distance military objectives from populated areas (Geneva Convention III, (GCIII));

and, therefore, acquire the status of prisoner of war upon capture, all persons who take part in combat operations must be part of a structured organisation, which respects the rules of the law of armed conflict. This is not the case with those who commit terrorist acts, and so they are subject to the criminal law of the territory in which they committed the crimes.

II. Persons captured during peacekeeping operations or peacebuilding operations

Persons who surrender to armed forces during an operational engagement or during hostilities become prisoners under the provisions of the Geneva Conventions. Conversely, 'civilians' who oppose missions conducted by the armed forces may be 'captured' in the course of the operation. These persons are then detained or held, but only if the rules of engagement so permit. The host State is responsible for protecting, controlling and caring for these persons. When such a host State does not exist or it is in the hands of adversaries, responsible protecting forces take on the responsibility for these individuals. Additionally, the classification of captured persons means that the forces will adopt a strictly regulated system.

The term 'captured' includes several categories of persons. Prisoners are generally treated in a consistent and uniform manner. The only real exception to this is during interrogation. By contrast, captured civilians may be treated differently depending upon the reasons for their arrest. The need to treat certain captured persons differently does not mean that different norms will apply. Whether the person is guarded by the armed forces or is handed over to the civilian police, they must at all times be treated in conformity with the norms established for prisoners in the Third Geneva Convention.

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- unlawful attacks on civilian property (Art. 52 of Additional Protocol I (API))
 - direct unlawful attacks on civilians (Arts. 48 and 51 of API)
 - the unlawful use of non-combatants to protect military objectives;
 - unlawful indiscriminate attacks;
 - unlawful attacks on undefended areas (Art. 59 §1 API)
 - unlawful attacks on neutral, demilitarized and/or safety zones (Arts. 14 & 15 of GCIV and 23 GCI);
 - unlawful attacks against objects necessary for the survival of the civilian population, cultural property and places of worship (Arts. 53 & 54 API);
 - unlawful attacks against the natural environment (Art. 55 API)
 - unlawful recruitment of children
 - unlawful attacks upon works and installations containing dangerous forces.

Five categories of prisoners can be defined ²⁴⁵

Category 1: belligerents, including civilian armies, who take part in hostilities, demonstrate hostile intentions or oppose in another manner the action of friendly forces during operations.

Category 2: belligerents or non-belligerents suspected of having committed war crimes, crimes against humanity or other grave violations of humanitarian law and human rights law.

Category 3: non-belligerents who commit acts of aggression against friendly forces, who attempt to steal or pillage protected objects or property of friendly forces, or who commit grave infringements as defined by the commander of the force.

Category 4: non-belligerents who, without authorization, enter or attempt to enter zones controlled by friendly forces or who oppose the progression of friendly forces by manifestations, riots or other hostile methods.

Category 5: non-belligerents held for reasons of security who are not suspected of criminal activities.

III. The responsibility of the command over captured persons

While we must remain aware of the 'legalism' of operations, we must also not lose sight of the ambit of action. Naturally, this must be taken into account by the military in the planning phase as well as during the conduct of operations. Even if the situations of armed conflict are not wars, either legally speaking or in degree of intensity, it is necessary to specify that the *savoir-faire* and the *savoir-être* of the military are, for the large part, still identical, and inspired – individually or collectively – by international humanitarian law, the respect for individuals and, in particular, the application of the Third Geneva Convention. Simply speaking, the situations in which French soldiers are currently involved are complex, where the enemy of one day becomes the ally of the next.

This implies that we must be more demanding as to what should be done: firstly, demands placed upon ourselves; equally, demands from our leaders (the clarity of orders, stepping back when necessary) and demands towards our subordinates (understanding, application and execution).

This means:

- control of the force is always the mark of a real soldier. In particular one must never let hate and violence govern one's actions;

²⁴⁵ Categories listed in the joint doctrine manual of the National Defence of Canada. Treatment of prisoners of wars and detained persons. Interrogations and interpellations during international operations / J7 doc.4/du 01/08/2004.

- know how to care, capture, tolerate, provide for and respect the enemy;
- manage one's subordinates after a skirmish;
- support the morale of subordinates;
- reassure the population;
- manage the tensions of the situation.

It is the responsibility of the military leader on the ground who conducts the action to instill these fundamental principles in his or her troops, and to make them applicable in each particular circumstance regardless of the complex and diverse difficulties that are linked to the situation. One thing, however, remains: the chief of operations, whatever his or her rank, must make decisions and often in situations of urgency. This obviously entails risks, but also represents the importance of the job which is, after all, more than just a job.

The actions carried out must be legally irreproachable: liberation, interrogation and detention are, of course, conducted in a military manner but must nevertheless possess an irrefutable and recognizable judicial base. Detention and internment are not synonyms, nor are the terms 'captured persons' and 'prisoners of war'. *Nevertheless, this does not change anything substantial in the treatment that must be afforded by the French military.* This necessary result, which is in conformity with both national law and international humanitarian law certainly gives immediate 'moral force' to the decision-maker on the ground and also makes his or her decisions seem all the more legitimate. It is not only so that following combat action or the treatment of prisoners will be more straightforward. It is also necessary to determine the history of events and to know who did what before discriminating between captured persons. In choosing between persons there is a choice, a responsibility: why free one detained person and hand over another? Who guarantees that the population will not find such a 'freed' person in one month and then massacre them? Who can say that the forces will not hand over this poor soul to what is probably a very strict governmental justice?

And yet, it is indeed the military chief who is ultimately in charge of making such decisions. Taking into account conscience, culture and military rules, it is the military chief who 'says' the law and who 'is' the law. In other words, *"the law does not always have the last word"*. In this respect the military chief is something of an 'ambassador of values', humanists as it happens. To take a moral stance means a choice between the *"absolute good and the absolute rule"*, being theoretically the ideal choice, and the will to *"strive towards the good"*. This is the reality of a military chief on the ground.

Treatment of a captured person or of a prisoner.

The issue of whether a person is a 'prisoner' must be taken into consideration by every tier of command and in every aspect of the process of planning. It is regarding this conduct that the commander holds the greatest responsibility. In fact, it is his or her duty to respect and to ensure respect for the rules in operations. To respond to these demands, the commander must know what his or her exact responsibilities are as regards captured persons or prisoners under their control.

The principle responsibilities of the commander towards captured persons are the following:²⁴⁶

- every member of the armed forces must conform to the rules of the Geneva Conventions and the First Additional Protocol;
- the prisoners and the detainees who are captured by force must be treated in conformity with the rules of international humanitarian law and with the limitations of the rules of engagement.
- an structure or institution for the treatment of prisoners must be created, with the necessary supplies and of a size corresponding to the expected or possible number of prisoners.
- prisoners must be evacuated as soon as possible from combat zones without being exposed to danger during the lead-up to evacuation.

Although it is the commander who holds responsibility for the overall treatment of prisoners, he or she must delegate certain aspects of procedural responsibility to subordinates. This principle applies at all levels.²⁴⁷

Conclusion

Today, one may ask what remains of importance as regards the rules relating to prisoners of war. Indeed, these rules only exist because the combatant accepts the risk of being killed. This risk is real as combatants must distinguish themselves from civilians. It is not enough to simply say one is a combatant, he or she must also visibly be a combatant. This is, in any case, what is anticipated in the rules of the Third Geneva Convention.

Even if the evolution of armed conflicts has influenced the evolution of these rules, this does not change the fact that this visible distinction must be effective at least during every military engagement and during the period immediately preceding an attack.

This requirement is one of the conditions that permits a combatant

²⁴⁶ See Annexe No. 1

²⁴⁷ See Annexe No. 2

to benefit from prisoner of war status. The other fundamental and primary condition is that the armed conflict be international. These two requirements significantly limit the situations in which the Third Geneva Convention will be applicable. Indeed, the vast majority of contemporary armed conflicts take the form of internal armed conflicts. In other words, most conflicts now take place in the territory of one sole State between the regular armed forces and dissident armed forces or between two or more dissident forces. For such conflicts, States clearly do not wish to be obliged to respect the protected status of individuals who have taken up arms against the regular armed forces and, instead, consider them to be criminals.

During non-international armed conflicts, detained persons nevertheless remain under the ambit of Article 3 common to the four Geneva Conventions and to the Second Protocol additional to the Geneva Conventions. This 'mini-convention' spells out the minimum guarantees for the treatment of detained persons. Even during the rare cases of international armed conflicts, the application of the Third Geneva Convention is undermined. The notions of 'terrorists' and 'unlawful combatants' are invoked in order to deny persons the benefit of protected status. But this goes against the very rules of the Third Geneva Convention. If prisoner of war status is contested, the rules nevertheless apply until a competent tribunal is established. If prisoner of war status is refused by such a tribunal, these persons do not fall into a grey-zone in which humanitarian law no longer applies, but fall instead under the protection of the Fourth Geneva Convention relating to the civilian population.

It is, therefore, essential to reaffirm the applicability of these rules and to come up with an exact interpretation. Given the occurrence of new forms of conflict, it is equally feasible that these rules will be questioned in the future. Until now, however, there is nothing to indicate that the current judicial system (being the Geneva Conventions and national and international legislation) cannot deal with even the most complex situations.

And if the forces are not able to hand apprehended individuals to local judicial authorities, it is absolutely necessary that a 'competent tribunal' is established which is recognized and accepted both by the States which make up the multinational Force and by the host State. This is a political responsibility that the military commander must absolutely fulfil either at the international level or at the national level.

After all, it is only by way of a precise knowledge of the rules pertaining to captured persons, and the political and military will to apply them, that crimes and homicides may be avoided.

"...Those who think that the laws of armed conflicts should be a subject for deliberation while action itself attaches to concrete realities are extremely misguided and are following the wrong path."

General of the Army, Bruno CUCHE, former CEMAT.

The Copenhagen Process on the handling of detainees in international military operations

Thomas WINKLER

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Yesterday, Dr. Kellenberger, President of the ICRC, in his excellent and thought-provoking keynote address, mentioned the importance of addressing the issue of detainees. In this connection he mentioned the Copenhagen Process. And today I have the pleasure of giving you a presentation on this subject.

I would like to thank the International Institute of Humanitarian Law and the ICRC for this opportunity to brief you on this initiative by the Danish Government on the handling of detainees in international military operations, which we have called the Copenhagen Process.

I would also like to thank the other speakers this afternoon. Firstly, because they clearly have demonstrated the challenges we all face – both in legal and practical terms. And secondly, because the Copenhagen Process may be compared to an empty water jar which we must fill with the help, thoughts and experiences of experts such as Oz, Jelena, Jérôme and Giorgio.

You have listened to the legal experts and the military. Now the diplomats steps in – whether you like it or not.

I will start by explaining why Denmark in 2007 decided to launch the Copenhagen Process. This was no coincidence.

Denmark has for decades contributed troops to the traditional UN peacekeeping operations, for example, the classic ‘blue helmets’ in Cyprus. As we all know a new kind of international peacekeeping and – not least - peace-enforcing military operations has emerged in the last decade, and Denmark has actively participated in these operations. We have had or have troops on the ground in Bosnia-Herzegovina, in Kosovo, in Iraq and in Afghanistan.

These operations are in a number of ways very different from previous peace-keeping operations. Where the main risk for our troops in Cyprus for many years was to get sunburn, we have in 2008 alone lost seven Danish soldiers to hostile fire in Afghanistan.

Furthermore, in many of these operations our troops work very closely together with both local authorities and with allies in different kinds of legal and operational frameworks, which are new for Denmark.

This influences both the political and military thinking in Denmark, and has forced us to address issues, which we had previously not

considered very relevant.

For Denmark this is no longer just theory. In February 2002, Danish special forces in Afghanistan captured 31 Afghan citizens, who were handed over to US troops. Years later – in 2006 – a documentary on this episode led to widespread criticism of the government and one of the Afghan citizens has now sued the Danish government for damages. The main point, however, is, that at the time of the transfer, nobody thought about the implications of what was taking place on the ground.

Today, Denmark has a transfer-agreement with Afghanistan. In early June this year, the Danish forces in Helmand detained two individuals who posed a security threat to the Danish forces and our allies. These two detainees were transferred to the Afghan National Directorate of Security in accordance with our transfer agreement. Then they disappeared. Following an intensive search by Danish forces, they were relocated - in good shape - in a local prison serving a 5-year prison term. This is a very clear illustration of some of the difficulties we face when assisting other States in maintaining security.

Finally, in the past year, the Danish Navy has been operating in the waters of the Horn of Africa, both as part of Task Force 150 and as part of an operation protecting food transports from pirates. The most difficult challenge in these operations has not been to identify the legal basis for the operation, to obtain parliamentary approval or to get the necessary armed forces in place many thousands of kilometres away from Denmark. No, the single most difficult legal, political and practical challenge has been – and still is – to firmly and clearly answer questions arising from the potential detention by Danish naval forces of pirates. This illustrates how far-reaching the issue of detention is today.

These examples are illustrations of the day-to-day challenges which soldiers – and military lawyers – face. And they exemplify the challenges faced by the countries wishing to contribute to international military efforts to ensure peace and stability while at the same time respecting and implementing in good faith their international legal obligations. There is no choice between one or the other. We have to do both.

Today, military forces deployed in international operations are often acting in support of governments that need assistance to stabilise their countries. In these operations international military forces may have to perform tasks, which would normally be performed by national authorities. These include detaining people in the context of both military operations and law enforcement. At the same time the transfer of detainees to local authorities is often not possible as it may contradict the legal commitment of the troop-contributing countries.

This fosters a number of fundamental challenges which take a

variety of shapes and forms. What is the legal basis for detention in international military operations? Which regime of treatment and conditions of detention apply to the detainees? What legal standards and procedures apply to transfers between States in a military coalition and the host State or internally between coalition partners? What exactly do we mean when we talk about 'detention'? And not the least, do the answers to all these questions change when the situation in which the military operations take place changes from an international to a non-international conflict or to a situation of no conflict?

The reply from the Danish military to these questions and challenges has been loud and clear: we need clarity. It cannot be for the individual soldier to answer questions like these when he is facing an armed opponent on the battle-field.

Without clarity soldiers will either hesitate, or make mistakes. Both seriously hamper the efficiency of our military efforts, and thus may prevent us from reaching the goals that we set out to reach. Some of you may find this a very cynical and calculating approach. And to some extent it is. It is, however, also part of reality. One side of the coin.

The other side, of course, is the plight of the detained individuals. Lack of clarity and unsure soldiers are no benefit to anybody - including the detainees. And the present situation, where the handling of detainees to a large extent is left to *ad hoc* solutions thought up by the individual troop-contributing State, is not satisfactory to anybody. It should not be so, that the situation for an individual detainee, depends on who he was detained by. But - unfortunately - it is to a certain extent exactly so.

It is these challenges that the Copenhagen Process seeks to address. The overall objective is to ensure that the issue is dealt with horizontally and multilaterally. Our ambition is to establish a common framework for all troop-contributing States in a given operation, and, when appropriate, also for the host State. With the Copenhagen Process we aim to bridge the gap of understanding and practice which currently leaves it to individual troop-contributing countries to deal with the challenges involved on a bilateral or an *ad hoc* basis. We want to bridge the gaps between legal theory and reality on the ground, which the NATO Deputy Secretary-General so vividly described yesterday.

It is very important for my Government and I to make one thing absolutely clear: the Copenhagen Process seeks in no way to shortcut, devalue or in any other way undermine the already existing legal framework related to the protection of persons detained in - or outside of - an armed conflict.

We have heard concerns raised to this effect, and we have listened. I would like to emphasize that the objective is exactly the opposite. We are

not seeking to establish new rules of international law based on the lowest common denominator. On the contrary, Denmark is a dedicated State party to all relevant international humanitarian law and human rights instruments. What we are seeking is an improved international common understanding and acceptance of the legal considerations involved, and to identify, within this existing legal framework, practical solutions to the challenges which our soldiers and the detainees face. A key ambition for any future outcome of the Copenhagen Process is to improve the protection of detainees – regardless of the status of the individual and the circumstances of the detention. The Process will not and cannot lead to a result which is not in full conformity with existing levels of legal protection.

The Copenhagen Process has been developed through a progressive number of events. Based on our hard-won initial experience with the challenges of handling detainees in Iraq and Afghanistan, Denmark, in October 2007, convened the first conference in ‘the Copenhagen Process on the Handling of Detainees’. The aim was to identify the key challenges on the handling of detainees in international military operations.

The conference was attended by representatives from 17 States, and by international organisations with experience in international military operations, including the ICRC. It confirmed that detention is a necessary and legitimate means in the conducting of military operations. But the Copenhagen Conference also confirmed that the handling of detainees is a challenge which all the States and organisations present struggled to tackle.

The discussions during the First Copenhagen Conference clearly underlined that the challenge is not to elaborate new rules on detention, but to reach a common understanding of the specific content of the existing legal framework, and to make it more comprehensible, well-known and feasible to apply in practice.

The second step in the Process was the convening of an international seminar in May of this year in Copenhagen on “Best Practices in a National, Regional and International Perspective”. The intention of the seminar was to identify best practice elements for the development of a common platform and a functional checklist relevant to peace-keeping operations in the broad sense. We are still digesting the outcome of the seminar, and in particular the very useful contributions related to the African experiences in the field and the general role of teaching of international humanitarian law as a very important best practice related to the handling of detainees.

The next step will be an event in New York this autumn, to which

all member States of the United Nations and all relevant international organisations and non-governmental organisations will be invited. The aim of this event will be to present to as many interested parties as possible the results of the first two meetings in Copenhagen. This will be followed by a Second Copenhagen Conference in the early part of 2009.

The outcome of the Process will be a document setting out a common platform for the handling of detainees. Our ambition is for this document to be the basis of the actions and cooperation of troop-contributing States and host States with regard to detainees in any future international military operation. The Danish Ministry of Foreign Affairs has conducted extensive outreach activities to discuss and promote the existing legal framework for the protection of detainees.

I would, in particular, like to mention a highly inspiring seminar convened in cooperation with the African Union in Addis Ababa in March 2008. The seminar underlined that the challenges faced are not an issue only facing some parts of the world. It is an issue of great concern for all troop-contributing States everywhere. This is not the least true in relation to the extensive and difficult operations conducted in Africa

It would be a mistake to consider the Copenhagen Process as an effort solely focussed on developing common standards. The process itself is an objective of the Copenhagen Process. The Process is a forum for exchanges of experiences, ideas and best practices. It sharpens our understanding of the legal and practical concerns involved. In turn, this shapes our national policies to ensure full respect of the fundamental guarantees of detained persons in all situations where military operations are conducted. In this way, the Copenhagen Process should also be regarded as an element in the dissemination of international humanitarian law.

The Copenhagen Process is an initiative by the Danish Government, and we will continue to pursue our objectives. This is, however, not a one-State project. We would never have come as far as we have without encouragement and support from many other States, and from international organisations including the UN and NATO. We also greatly appreciate the frank exchanges we have had – and will continue to have – with the ICRC. I am personally looking forward to continuing to work with the Copenhagen Process, and I look forward to continuing cooperation with everybody with an interest in this subject. The Danish Ministry of Foreign Affairs has produced a paper describing the challenges and the process in greater detail. This paper has recently been published in “The Military Law and the Law of War Review” and for those interested I have brought some copies with me here to San Remo.

Thank you.

Working Group 3: Peace operations and the repression of international humanitarian law violations

Introduction

Fausto POCAR

President, International Criminal Tribunal for the former Yugoslavia,
The Hague; Vice-President, IIHL

I wish to welcome you all to this Working Group on the issue of *Peace Operations and the Repression of International Humanitarian Law Violations*.

Let me first express my gratitude to all of the participants, and to our excellent speakers, for having agreed to participate in our discussion in the course of these three days, on a cutting-edge topic within the current discourse among international scholars. It is a topic that in the past few years has gained more and more attention by public opinion, but nevertheless—I believe—is still far from being fully explored and understood, let alone settled. The programme for these three days addresses a large range of perspectives through which peace operations, international humanitarian law and human rights can be considered. Each of these complementary perspectives is meant to benefit, and to gain benefit from, the analysis of the others. If it is still true that posing the right questions is the best way to obtaining the right answers, the structure of this conference is probably to be regarded as a good first step.

I have the honour to introduce you today to three of the most competent and experienced colleagues that could have been chosen to address the issues to be dealt with in our Working Group. Our first speaker is Theodor Meron, Professor of International Law, my predecessor as a President of the International Criminal Tribunal for the former Yugoslavia (ICTY), current Judge in the ICTY Appeals Chamber, and a dear friend. Ms Olivia Swaak-Goldman, International Cooperation Adviser at the Office of the Prosecutor of the International Criminal Court (ICC) will take the floor right after Judge Meron. The third speaker of today is, finally, Professor William Taft, former Permanent Representative for the United States at the North American Treaty Organization (NATO), and member of the Council of the International Institute of Humanitarian Law (IIHL). Time will be certainly left, after that, for your questions and for the debate.

That said, I understand that my main purpose here is not to steal too much time from the presentations of my learned colleagues, but rather to welcome them with some brief introductory thoughts.

I believe that one of the central issues of our conversation—at least in the chronological order of the exposition—will be the role played (or to be played) by peace forces in cooperating with international criminal

tribunals.

I am sure that you will not hear anything new if I say that, for international criminal tribunals, the question of cooperation is *crucial* to the effectiveness of the judicial process. Having ‘jurisdiction without territory’, neither the *ad hoc* tribunals nor the ICC have been endowed by their Statutes with an apparatus enabling them to implement their decisions in the territories of States. State sovereignty is, in this sense, still a cornerstone of the international community. International courts and tribunals cannot themselves arrest persons in a State’s territory and transfer them before the bench entrusted with trying them. Nor are they, in principle, in a position (but these considerations are subject to significant clarification) to perform searches and seizures on a State’s territory if individual persons refuse to cooperate, or to compel reluctant witnesses to appear before the Courts. In these and other respects, international criminal tribunals significantly depend on the cooperation of States. As my colleague Antonio Cassese has pointed out, the ICC and *ad hoc* tribunals may be compared in this respect with “giants without arms and legs” who “need artificial limbs to walk and work”.²⁴⁸

Despite the common expression “*jurisdiction without territory*”, one might actually say the opposite of the ICC and *ad hoc* tribunals: that international tribunals have jurisdictions that are routinely forced to interact with too many territories. Elaborations and debates on the issue of State cooperation with international criminal tribunals are usually framed by reference to the so-called ‘horizontal’ and ‘vertical’ models. As used by the ICTY Appeals Chamber in the *Blaškić* case, these terms describe the consensual and reciprocal legal framework governing interstate legal assistance in criminal matters, distinguished from the hierarchical and supranational relationship of an international court endowed with Chapter VII authority.

The system envisaged for the ICTY and the International Criminal Tribunal for Rwanda (ICTR) reflects the coercive ‘supra-State’ or ‘vertical’ model, and is fundamentally different from the ordinary system of State cooperation. A general duty to cooperate with the Tribunals has been imposed by decisions of the Security Council acting under Chapter VII of the United Nations Charter, and laid down in Articles 29 and 28 of the ICTY and ICTR Statutes respectively, which provide in general terms that “States shall cooperate with the International Tribunal” and “shall comply without undue delay with any request for assistance or an order issued by a Trial

²⁴⁸ A. CASSESE, “On the Current Trends towards Criminal Prosecution and Punishment of Breaches of International Humanitarian Law”, 9 *EJIL* 1, 1998, at p. 13.

Chamber". Thus, a member State is not left the choice of not cooperating: the duty to cooperate prevails over any impediment to the surrender of an accused or the rendering of assistance which may exist under national law or under treaties to which the State is a party.

The ICC Statute has created a regime of cooperation that is a mixture of the 'vertical' and 'horizontal' model. Of course, its ability to reach results within the aims of the Court is still to be tested in all its implications. The basic difference between the *ad hoc* tribunals and the ICC is that the latter's Statute rests on a consensual basis. This implies, first of all, that the obligations arising out of the Statute are obligations for States parties only; thus, in principle, cooperation cannot be imposed upon other States. In particular, for States which are not parties to the treaty, the Statute expressly provides for the possibility of either accepting the jurisdiction of the Court with respect to a specific case or undertaking to provide assistance to the Court on the basis of an *ad hoc* agreement. Only a decision by the Security Council to defer a situation to the Court places all member States of the UN, whether or not parties to the Statute, in the same position with respect to the Court, binding them with the duty to cooperate.

If this is the conceptual framework of the cooperation between international criminal courts and States, the focus of our attention is now to be shifted to whether the same legal framework applies to cooperation by non-State actors, and peace forces in particular.

In the experience of the ICTY and the ICTR, this issue has been addressed: peace forces have indeed cooperated with the ICTY in Bosnia-Herzegovina and Kosovo. However, in the context of the ICC jurisdiction, their role is not so clear. My belief is that peace forces will be necessarily entrusted with a more significant role than that exercised in the *ad hoc* tribunals. I bear in mind the fact that the ICC acts on the principle of complementarity, only adjudicating cases where national prosecutorial or judicial authorities are unable or unwilling to deal with a case. Whenever this is so, it follows that those national authorities are most unlikely to be prepared to cooperate with the ICC, for instance, in the collection of evidence, service of documents, and execution of searches and seizures. What room is left, particularly in these cases, for the ICC to cooperate with peace forces present on the territory? And, further, are there any disadvantages in relying on this kind of cooperation, for example, difficulties in using at trial the evidence collected through cooperation with peace forces? We certainly look forward to this and other issues, in Ms. Swaak-Goldman's presentation.

The contribution of Judge Meron, to whom I shall leave the floor in one minute, will focus on a certainly related but more specific issue than

Ms. Swaak-Goldman's presentation. He will draw our attention to a particular aspect of the cooperation which may be provided by peace forces to a judicial system: that is, the cooperation necessary in the delicate and crucial stage of searching for persons charged with war crimes. This is a question that surely deserves special attention, considering that the functioning of the whole system of international criminal justice depends upon the smooth and efficient functioning of this phase of cooperation. Where trials *in absentia* are impermissible, and this is so in the applicable law of almost all of the international criminal tribunals created up to now, the fact that the accused remain at large renders any other effort meaningless and exacerbates an already frustrating sense of impunity within the international community. I am sure that all of us will greatly benefit from Judge Meron's reflections on this topic.

Professor Taft's presentation, finally, will provide us with a different perspective on the significance of peace forces in halting and prosecuting violations of international humanitarian law. Sometimes I probably forget this, but not everything is international criminal justice. Peace forces' tasks also include reporting violations of international humanitarian law. The steps to be taken following the gathering of the necessary information by the competent authorities does not necessarily involve international criminal law, but can be identified in political solutions: the creation of a truth commission, for example, or forms of lawful reprisal.

Besides illustrating the features of the reporting role peace forces are tasked with, Professor Taft will also focus on their mission of prevention. It has been said, not without a certain spirit of provocation, that "*the best system of criminal law is the one which never needs to be applied*". Paraphrasing this old paradox, we could argue that "*the most desirable peace forces are those which will never need to report violations of international humanitarian law*" (and certainly, at minimum, those which do not commit any). What means are available to peace forces to accomplish this desirable and challenging, task? What are the difficulties they face on a daily basis? Professor Taft will lead us to better identify these problems which are usually ignored, or underestimated.

The role of peace forces in searching for persons charged with war crimes

Theodor MERON

Judge, Appeal Chamber, International Criminal Tribunal for the former Yugoslavia, The Hague; former President, ICTY; Member, IIHL

Thank you for inviting me to speak at this Roundtable. My topic today is the use of peacekeepers to arrest suspects who have been indicted by an international court for international crimes—war crimes, crimes against humanity, or genocide. As you know, international courts lack the police powers that characterize their domestic counterparts. As a result, establishing custody over indictees has always been a major challenge for international criminal courts, from the International Criminal Tribunal for the former Yugoslavia (ICTY) to the International Criminal Court (ICC). The possibility of using international peacekeepers to arrest suspects offers the promise of increasing the effectiveness of these courts, especially in cases where the custodial State is uncooperative or hostile. I will focus my remarks today on the history of using international forces to make arrests, then discuss the future potential for this practice, particularly for the ICC. Along the way, I will also reflect on the legal basis for this practice.

I. The History of Using Peacekeepers to Carry Out Arrests

International criminal law has its roots in the post-World War II trials in occupied Germany and Japan. In these early days, securing custody over the accused was not particularly problematic. Because most of the suspects were located in territories that were occupied by the Allies, the international military tribunals had police powers similar to those exercised by most national courts. Allied soldiers were able to execute arrest and seizure warrants issued by the tribunals.

In stark contrast, the more recent international criminal courts have not been established in situations of total occupation. Perhaps the closest parallels to the post-World War II situation are Kosovo and East Timor, where the UN established transitional administrations that temporarily exercised full police powers in the geographic areas within their mandates.

The UN Transitional Administration in East Timor (UNTAET), established in 1999, had a general mandate of providing security and maintaining law and order throughout the territory.²⁴⁹ Acting under this mandate, UNTAET established a Special Crimes Unit to investigate and

²⁴⁹ S.C. Res. 1272 (25 Oct. 1999).

prosecute “*serious criminal offenses*,” including war crimes, genocide, crimes against humanity, murder, torture, and sexual offenses, as well as a Special Panels for Serious Crimes to hear and judge the cases.²⁵⁰ Despite UNTAET’s broad police powers, however, the Special Panel’s jurisdiction was limited to East Timor and thus did not extend to Indonesia, where the great majority of the suspects indicted—especially the high-ranking leaders—had fled. This undermined the effectiveness of the Panel, despite its broad police powers.

In Kosovo, also in 1999, the Security Council established a similar interim international administration composed of both a military component (known as the Kosovo Force, or KFOR) and a civil component (called the United Nations Mission in Kosovo, or UNMIK). Attempts by the interim administration to set up a Kosovo War and Ethnic Crimes Court (KWECC) were subject to repeated delays. Ultimately, UNMIK authorities issued a series of regulations allowing for the prosecution of international crimes in the local, Kosovar courts, using a mixture of international and local judges and prosecutors and applying both international and local law. In addition, of course, the ICTY had primary jurisdiction over the international crimes committed in Kosovo. Under the terms of its mandate, the Kosovo interim administration was specifically required to cooperate fully with the ICTY.²⁵¹ And, indeed, it did; KFOR arrested several of the suspects who had been indicted by the ICTY.

Both of these UN interim administrations therefore had broad police powers, much like the post-World War II tribunals. Although transitional administrations are necessarily limited geographically in their jurisdictional reach, this is not substantially different from national criminal courts.

The situation has been very different, however, for the ICTY, the ICC and, in the Taylor case, the Special Court for Sierra Leone. Because these courts do not operate as part of a comprehensive UN administration, they lack their own police powers and are therefore largely dependent on State cooperation to secure custody over their accused. In cases where the custodial State is uncooperative or hostile, these courts have been able, in some cases, to look to international peacekeepers to give effect to their warrants. These peacekeepers are acting under Chapter VII authorization from the Security Council and have a mandate which permits, or requires, them to cooperate with the international court in question.

The idea that a Chapter VII peacekeeping mission could be used to arrest someone for international crimes first surfaced with the ill-fated UN

²⁵⁰ UNTAET Regulation 2000/15 (6 June 2000).

²⁵¹ S.C. Res. 1244 (10 June 1999), para.14.

mission to Somalia in 1993, UNOSOM II. There, the Security Council had acted under Chapter VII to authorize UN forces to “*take all necessary measures against all those responsible for the armed attacks [that had left twenty-four UN peacekeepers dead] ... including to secure the investigation of their actions and their arrest and detention for prosecution, trial and punishment.*”²⁵² As you know, the operation to detain warlord Mohamed Farrah Aidid failed disastrously, with eighteen United States (U.S.) soldiers killed, prompting the U.S. to withdraw all its forces from Somalia.

Of course, the situation in Somalia was different from the present one, primarily because there was no international court with jurisdiction over the crimes committed there, much less a permanent international criminal court. While it was clear that the Security Council had given UNOSOM II peacekeepers the authority to bring to justice those responsible for killing the peacekeepers, it was not clear where that justice would be administered. Because this was not clear and because there was no outstanding arrest warrant, there was no court to continue to insist on Aidid’s arrest. So, the push to bring him to justice petered out after the American withdrawal.

This was not an auspicious beginning for the practice of using peacekeepers to arrest war criminals. The fear of a repetition of the Somalian situation makes many troop-contributing countries reluctant to have their forces involved in similar arrest operations. This fear may undermine the likelihood that the ICC will ever be able to really rely on peacekeepers for its arrests. Yet, I believe, the situation is not without a glimmer of hope. As you all are no doubt aware, in its early years, the ICTY struggled to gain custody over the suspects it had indicted. NATO forces operating under a Security Council mandate in Bosnia and Herzegovina initially refused to assist the Tribunal by arresting suspects located in the territory under their control. Nevertheless, over time, NATO forces were persuaded to carry out arrests.

Some of the difficulty in securing NATO assistance for arrests in the former Yugoslavia resulted from the vagueness of the mandate of the multinational implementation force IFOR (later replaced by a ‘stabilization’ force known as SFOR) in Bosnia and Herzegovina. IFOR was under NATO leadership and had been mandated by the Security Council to maintain the peace following the signing of the Dayton Accords in 1995. The Dayton Accords provided that all parties were required to cooperate fully with the ICTY and, specifically, to “*comply with any order or request of the [ICTY] for the arrest, detention, surrender of or access to persons ...*

²⁵² S.C. Res. 837 (6 June 1993), para. 5.

who are accused of violations within the jurisdiction of the Tribunal."²⁵³ Acting under Chapter VII of the UN Charter, the Security Council had given IFOR a mandate to take all necessary actions, including the use of force, to ensure compliance by the parties with the terms of the Dayton Accords, including their obligation to cooperate with the ICTY and detain and transfer indictees.²⁵⁴

But these provisions were critically vague. Neither the Dayton Accords nor the relevant Security Council resolutions explicitly *required* that IFOR detain ICTY indictees. They merely gave IFOR the authority to do so. Early on, therefore, IFOR construed its mandate narrowly, determining to only arrest indictees that it encountered in the course of its normal duties and only if the circumstances permitted. In practice, IFOR forces managed to avoid encountering high-profile indicted suspects, such as Radovan Karadzic and Ratko Mladic, whom journalists and non-government organization reported were living and moving about openly in IFOR-controlled territory.

IFOR's reluctance to carry out arrests was based in large part, it appears, on a fear that this would expose its soldiers to unacceptably high risks of attack—as had happened in Somalia. Whether or not these concerns were well-founded, I believe that this was an unacceptably narrow interpretation of IFOR's mandate.

Not only was IFOR mandated by the Security Council to use force to ensure the parties' compliance with the Dayton Accords, but, in addition, the ICTY's orders—including arrest warrants—are directly binding on all States. Under Article 29 of the ICTY's Statute, states are required to "*comply without undue delay with any request for assistance or an order issued by a Trial Chamber, including ... the arrest and detention of persons [and] the surrender or transfer of the accused to the [ICTY].*" Because the ICTY is a subsidiary organ of the Security Council (under Art. 29 of the Charter), it has delegated enforcement powers and all States are under an obligation to cooperate with the ICTY and to give effect to its orders, including arrest warrants, which are "*considered to be the application of an enforcement measure under Chapter VII of the Charter.*"²⁵⁵ As a result, all States, including NATO members, are required to cooperate with the Tribunal and to execute its arrest warrants.

Despite all of this, IFOR clung to its narrow reading of its mandate

²⁵³ General Framework Agreement for Peace in Bosnia and Herzegovina [Dayton Accords], initialed in Dayton on 21 November 1995 and signed in Paris on 14 December 1995, Annex 1-A, Art. X & Art. IX(1)(g).

²⁵⁴ S.C. Res. 1031 (15 Dec. 1995), paras 5, 15.

²⁵⁵ *Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993)*, S/25704 (3 May 1993), paras 125-26.

for the first two years of its existence. Then, in July 1997, UN forces operating in the Eastern Slovenia region of Croatia (UNTAES) arrested indictee Slavko Dokmanovic and transferred him to the ICTY. A month later, perhaps spurred by this example or shamed into action by rising criticism from within the Tribunal and from the broader international community, IFOR finally carried out an arrest. It detained Milan Kovacevic in his home in Republika Srpska and killed Simo Drjaca after he resisted arrest and shot an IFOR soldier. Other arrests followed. While IFOR and later SFOR still refused to arrest the really high-profile indictees Karadzic and Mladic, they did arrest some high-ranking indictees, including General Stanislav Galic who led Bosnian Serb forces during the siege of Sarajevo and Momcilo Krajisnik, another senior member of the Bosnian Serb leadership. Importantly, IFOR arrests also spurred many indictees to voluntarily surrender themselves to the ICTY.

My hope that the ICC might be able to similarly rely on peacekeepers to effectuate arrests is also grounded in more recent examples. Most prominently, the UN Mission in Liberia (UNMIL) was given an explicit mandate *“to apprehend and detain former President Charles Taylor in the event of a return to Liberia and to transfer him or facilitate his transfer to Sierra Leone for prosecution before the Special Court for Sierra Leone.”*²⁵⁶ Acting in accordance with this mandate, UNMIL apprehended Taylor when he returned to Liberia from Nigeria on 29 March 2006 and transferred him to the custody of the Special Court for Sierra Leone.

In another example, the Security Council has authorized the UN mission in the Democratic Republic of the Congo (MONUC) to *“cooperate in national and international efforts to bring to justice perpetrators of grave violations of human rights and international humanitarian law.”*²⁵⁷ This is particularly relevant because of the ICC’s investigation into the situation in the Democratic Republic of the Congo. Indeed, this Spring, when the ICC made public an arrest warrant for Bosco Ntaganda, MONUC indicated its readiness to assist the Congolese Government in arresting him.

To the extent that the Congolese Government has so far proven willing and able to arrest and transfer indictees to the ICC, MONUC’s mandate allowing it to cooperate with the government in making these arrests may be sufficient, insofar as the ICC is concerned. The real problem arises in a situation like that in the Darfur region of Sudan, where the government has not been cooperating with the ICC’s request to arrest

²⁵⁶ S.C. Res. 1638 (11 Nov. 2005), para. 2.

²⁵⁷ S.C. Res. 1756 (15 May 2007), para. 3(c); *see also* S.C. Res.1565 (1 Oct. 2004), para. 5(g); *Twenty-third report of the Secretary-General on the United Nations Organization Mission in the Democratic Republic of the Congo*, S/2007/156 (20 March 2007), para. 59.

indictees Ahmad Harun and Ali Kushayb; it is unlikely to become any more cooperative in the future, especially if the Pre-Trial Chamber grants the Prosecution's request for an arrest warrant for President Al-Bashir.

As it presently stands, the UN Mission in Darfur (UNAMID) does not have a mandate that allows it to forcibly arrest persons indicted by the ICC. UNAMID is only authorized "to take the necessary action" to protect its personnel and facilities and to protect civilians under imminent threat of violence.²⁵⁸ Given the current political climate, it is extremely unlikely that an attempt to expand UNAMID's mandate to include arrest powers would survive a veto in the Security Council from one of the permanent members.

Nevertheless, it is intriguing to reflect further on whether the Security Council *could* authorize such a mandate, should the necessary political will exist. Of course, as we have just seen, there are precedents for such a mandate, most clearly in Liberia. But the situation in the Sudan is different from the Liberian case, primarily because UNMIL was operating with Liberia's consent when it arrested Taylor. Such consent is not likely to be forthcoming in Sudan. So, if you will allow me, I want to spend a few minutes reflecting in a little more detail on the scope and nature of the Security Council's power to draw up such a mandate.

II. The Legal Basis for Peacekeepers' Arrest Powers

First, it is important to note that without such a mandate from the Security Council, only States party to the Rome Statute of the ICC have an obligation to assist the Court in effecting arrests. This is a significant difference from the ICTY which, as I've discussed already, is a subsidiary organ of the Security Council, whose orders are directly binding on all States. Of course, it is possible that when the Security Council refers a case to the ICC, as it did with Darfur, it could impose a binding obligation on all States, under Chapter VII, to cooperate with the ICC. But, in the case of Darfur—the only Security Council referral to the ICC so far—the Council appears to have done the exact opposite. The referral resolution imposed a cooperation obligation on the Government of Sudan, but otherwise expressly recognized that States not party to the Rome Statute had no obligations under the Statute and only "urged" them to cooperate with the ICC.²⁵⁹

So, the only remaining option is for the Security Council to pass a

²⁵⁸ S.C. Res. 1769 (31 July 2007), para. 15 (UNAMID mandate) (referring to *Letter dated 5 June 2007 from the Secretary-General to the President of the Security Council*, S/2007/307/Rev.1 (5 June 2007), paras 54-55) (proposing UNAMID mandate)).

²⁵⁹ S.C. Res. 1593 (31 Mar. 2005).

Chapter VII resolution extending UNAMID's mandate to include the power to arrest persons indicted by the ICC.

As you all know, Chapter VII allows the Council to use force to restore or maintain international peace and security. The Council has interpreted this power to allow it to deploy peacekeeping missions to a State without the consent of that State. These so-called 'enforcement' missions differ from the traditional peacekeeping missions under Chapter VI of the Charter, which were strictly impartial, could use force only in self-defence, and could only be deployed with the consent of the territorial State. Since Chapter VII peacekeeping operations can be authorized to use 'all necessary means' - including deadly force - to carry out their missions, there is no inherent reason why they should not also be allowed to use force to carry out arrests and transfers to an international court.

The ICTY has already upheld the capacity of an international peacekeeping force, UNTAES, to detain and transfer an indictee to an international court.²⁶⁰ Of course, UNTAES was a transitional administration similar to those established in Kosovo and East Timor, so in some respects it differs from what we are discussing here. Nevertheless, the Trial Chamber interpreted UNTAES's mandate broadly, finding that because the Security Council required that UNTAES cooperate with the Tribunal, it had the power to arrest Slavko Dokmanović.²⁶¹ The Trial Chamber also emphasized that Rule 59*bis* of the Rules of Procedure and Evidence allows a Judge to direct an arrest warrant to an international body.²⁶² The ICC has a similar capacity: under Art. 54 of the Rome Statute, the Prosecutor is empowered to "[s]eek the cooperation of any State or intergovernmental organization or arrangement in accordance with its respective competence and/or mandate" and to "[e]nter into such arrangements or agreements, not inconsistent with this Statute, as may be necessary to facilitate the cooperation of a State, intergovernmental organization or person."

If the Security Council is empowered under Chapter VII, as I suggest, to authorize a peacekeeping force to carry out arrests for the ICC, then it is theoretically possible that such a mandate could be given to UNAMID in Darfur. The biggest hurdle in this case is political. Unlike UNOSOM II, both IFOR and UNMIL were acting with the consent of their respective host States. This is typical of contemporary, 'multidimensional'

²⁶⁰ *Prosecutor v. Mrksić et al.*, Case No. IT-95-13a-PT, Decision on the Motion for Release by the Accused Slavko Dokmanović, 22 October 1997.

²⁶¹ *Id.*, para. 46 (referring to S.C. Res. 1037 (15 Jan. 1996), para. 21 ("UNTAES shall cooperate with the International Tribunal in the performance of its mandate, including with regard to the protection of the sites identified by the Prosecutor and persons conducting investigations for the International Tribunal"))).

²⁶² *Id.*, para. 49.

peacekeeping operations that are authorized under Chapter VII but nevertheless have the consent of territorial State. While a Chapter VII mission does not require the consent of the host State, having such consent is likely to reduce the fears of troop-contributing countries. Since consent is extremely unlikely from Sudan, such a mandate is politically unlikely at this point.

There is one further issue that I want to touch upon briefly. Even if the Security Council has the authority, under Chapter VII, to give a peacekeeping mission a mandate to arrest on behalf of an international court, the next question we must ask is whether that authority is unlimited. The issue of whether the Security Council and its subsidiary organs are bound by international law, including international humanitarian and human rights law, is clearly contentious. But the issue has already come up specifically in relation to the arrest and detention powers of UN forces. In Kosovo, UNMIK was headed by a special representative of the Secretary-General, while KFOR was headed by a commander, known as COMFOR. Both declared that they had the executive power to unilaterally detain a person, for an indefinite period of time, even if a judicial order had been issued for that person's release. This practice resulted in significant criticism and finally came before the European Court of Human Rights last year, in the *Behrami & Saramati* case.

Saramati was accused of attempted murder. After being released pending his trial by the local Kosovar court, he was re-arrested and detained for nearly a year and a half by KFOR, on the basis of executive orders by two successive COMKFORs, one from France and one from Norway. Saramati challenged his detention as a violation of France's and Norway's obligations under the European Convention on Human Rights. The Court held that KFOR was exercising delegated Chapter VII powers and, therefore, its actions were attributable to the UN.²⁶³ Consequently, the Court concluded that it was not competent *ratione personae* to examine the legality of the detention, reasoning: "*the [European Convention on Human Rights] cannot be interpreted in a manner which would subject the acts and omissions of Contracting Parties which are covered by UNSC Resolutions and occur prior to or in the course of such missions, to the scrutiny of the Court.*"²⁶⁴ This holding leaves it unclear to what extent UN peacekeepers are bound by international human rights law.

²⁶³ App. No. 71412/01 *Agim Behrami and Bekir Behrami v. France*, and App. No. 78166/01 *Ruzhdi Saramati v. France, Germany and Norway*, Grand Chamber Decision on Admissibility (2 May 2007), para. 141.

²⁶⁴ *Id.*, para. 149.

Clearly, however, if the Security Council were to make a practice of issuing mandates to UN forces to detain and transfer suspects to the ICC or any other international court, there should be some limitations on the peacekeepers' detention powers. One solution may be for the Secretary-General to issue a directive, similar to the Bulletin he issued on the "Observance by United Nations Forces of International Humanitarian Law," which clarifies that the fundamental principles of international humanitarian law apply to UN peacekeepers. A similar directive might be developed for the application of fundamental human rights principles, particularly with respect to detention.

III. The Future: Peacekeepers Making Arrests for the ICC?

So, where does all this leave us with respect to the future use of peacekeepers to make arrests for international courts, particularly the ICC? In some respects, the *tour d'horizon* is not too encouraging. The ICC, like the ICTY before it, lacks police powers and is thus completely dependent on government cooperation to secure custody over the persons it indicts. This is not a satisfactory situation, as both the ICTY's and the ICC's experiences suggest that this often leads to a failure to arrest of war criminals. Yet, if the ICC is to be effective in ending impunity for the most serious crimes known to humanity, it must at the very least be able to gain custody over its suspects.

Like the ICTY and the Special Court for Sierra Leone before it, therefore, the ICC must be able to rely on international peacekeepers operating under a clear mandate to gain custody over some of its indictees. It is essential that this mandate be very clear, in order to avoid the problems that the ICTY initially encountered with IFOR and the on-going reality that commanders are likely to resist arrest missions that could endanger their soldiers, unless explicitly required to carry out such operations.

As I have discussed with you today, I believe that there is a solid legal basis for such a mandate from the Security Council. The real question, therefore, is whether its member States, particularly the permanent members, have the political will necessary to make such a mandate a reality. This mandate must not be confined to only certain cases such as the Democratic Republic of the Congo or Liberia, but be used as a matter of practice in all cases where there are UN peacekeepers on the ground.

Thank you very much.

Peacekeeping operations and the International Criminal Court²⁶⁵

Olivia SWAAK-GOLDMAN

Office of the Prosecutor, International Criminal Court

I. Introduction

The achievements of the International Criminal Court (ICC) in the past ten years have been remarkable. There are now 108 States party to its Statute, and the Judges have issued 12 arrest warrants, resulting in 4 individuals in custody. The Office of the Prosecutor ('OTP') has opened investigations in 4 situations: the Democratic Republic of the Congo, Uganda, Darfur in the Sudan, and the Central African Republic. The OTP is also monitoring situations across 3 continents, including Afghanistan, Georgia, Kenya, Côte d'Ivoire, Colombia and Chad. However, we believe that the next ten years will be even more interesting. The Rome Statute is an innovative legal design modelled to address the threats and challenges of the new century.

In Rome in 1998, participants (including civil society organizations and States with varying legal traditions) debated the creation of the Rome Statute from very different perspectives, but all shared the same sense that their efforts were not just an exercise in putting ideas on paper. They knew that the new legal design would profoundly impact the way international relations are governed. Accountability and the rule of law would be the framework.

Under the Rome Statute, substantive law has been codified into one detailed text. States have reaffirmed their duty to prosecute those accused of the most heinous crimes. An independent, impartial and permanent International Criminal Court has been established; and authority has been vested in the Court to intervene if States fail to carry out their own responsibility to conduct genuine proceedings, while at the same time providing an incentive to States to assert their own responsibilities in the cause of international justice.

The Rome Statute creates a global criminal justice system based on interaction between States, a permanent International Criminal Court, international organizations and civil society institutions; this is a system of interaction based on the two key concepts of complementarity and cooperation.

²⁶⁵ The author thanks Rod Rastan and Antonia Pereira DeSousa for their invaluable help in preparing this speech.

Let me spend just a minute on the issue of cooperation. It is essential to understand that the ability of the ICC to rely on strong and effective forms of cooperation from all of its partners will be critical for the successful execution of its mandate. As the Court's President, Mr. Philippe Kirsch, has noted, the Court has been established on two pillars: a judicial pillar, represented by the Court itself, and an enforcement pillar, which in turn belongs to its member States.

As you know, the Court does not rely on an international enforcement agency to implement its mandate and execute its judicial decisions. Therefore, the Court's mandate needs to be implemented *indirectly* by all States party, which accepted the mandate and recognized a series of obligations towards international criminal justice.

In this regard, one could say that the enforcement of the Rome Statute is dependant on national support (including through international organizations), for all matters pertaining to, for example, the collection of evidence, the security of witnesses, the conduct of searches and seizures, the execution of arrest warrants, and the surrender of persons. In all of these crucial matters for the enforcement of the Court's mandate, we rely on the cooperation of member States.

One of the most significant aspects of the ICC is that, given the temporal jurisdiction of the Court, we have to investigate in the middle of ongoing conflicts. We have to do so in compliance with Article 68(1) of the Statute, which requires that the safety and wellbeing of victims and witnesses is protected during the investigation. In order to carry out expeditious investigations and prosecutions of massive crimes in this context of violence, we have come to rely on the cooperation and the support of international agencies in the field, and in particular of peacekeeping operations. Given the exponential development of the number and the mandates of these missions all around the world, they have become crucial partners of the Court in some investigations, while respecting their own mandate.

For the rest of my time this afternoon I would first like to discuss the general cooperation framework as established in the Rome Statute and how it applied to the Relationship Agreement between the ICC and the United Nations. Then I would like to discuss the Memorandum of Understanding with the UN Mission in the Democratic Republic of the Congo (MONUC) as an example of how peacekeeping operations and the Court can work together, before turning to the challenges facing cooperation. Finally I would like to touch briefly on investigations concerning crimes against peacekeepers.

II. Part IX Cooperation and the ICC-UN Agreement

Part 9 of the ICC Statute establishes the basis for cooperation in that it lays out the obligations of States party to cooperate with the Court, while also allowing the Court to invite cooperation from non-States party and international organizations. Additionally, under Article 54 of the Statute the Prosecutor can enter into specific agreements with international organizations and others to facilitate cooperation.

The regime for cooperation established under Part 9 touches upon some of the most critical aspects of interaction between the Court and national authorities. What is interesting is that the Rome Statute, which is a treaty arising out of four years of negotiations between States, attempts to arrive at a unique balance between what has often been referred to as the 'vertical' regime of the *ad hoc* tribunals and the 'horizontal' regime of inter-State mutual legal assistance.

One of the clearest places we can see this is in the provision stating that requests for cooperation by the Court are to be executed "*in accordance with the relevant procedure under the law of the requested State and, unless prohibited by such law, in the manner specified in the request, including following any procedure outlined therein or permitting persons specified in the request to be present at and assist in the execution process*". This has obviously proved particularly relevant for the Office of the Prosecutor, since the ability of the Prosecutor to control the manner in which evidence is gathered will often prove critical for the effectiveness of the investigation.

Priority areas have been identified in support of our investigations and prosecutions. Member States have been asked to put in place procedures for the screening of witnesses, especially in refugee communities. They have also been asked to set up emergency procedures for issuing visas for threatened witnesses, and some States have agreed to establish a 'hotline' ensuring speedy visa processing.

Other priority areas of cooperation include: public and diplomatic support; arrest and surrender; information regarding the identification and whereabouts of persons or the location of items; protection of staff, victims and witnesses and preservation of evidence; facilitating voluntary appearance of witnesses; providing forensic expertise and examination of sites; service of documents and notification; operational support; and identification, tracing and freezing of assets.

For all these forms of cooperation, it is important to highlight that even though States party have a general obligation to cooperate with the Court (Article 86), intergovernmental organizations such as the UN are not obliged to do so (Article 87.6). However, in many of the situations before the ICC, field missions of international organizations or peacekeeping operations may have unique access to a particular territory.

In order for the Office of the Prosecutor to seek the cooperation of these organizations and missions, as it falls outside of the regime established by Part 9, it needs to enter into a separate agreement. Thus, by voluntarily signing the ICC-UN Relationship Agreement on 4 October 2004, the UN accepted a general “*obligation of cooperation and coordination*” with the Court (Article 3). Part III of the Agreement clearly established the general rules and obligations on cooperation and judicial assistance between the Court and the UN.

III. A case study of cooperation between the ICC and a peacekeeping operation: the MONUC Memorandum of Understanding

A year later, on 8 November 2005, these general provisions would help to give shape to the Memorandum of Understanding between the ICC and the UN on cooperation from MONUC, the UN Mission in the Democratic Republic of the Congo.

The experience of the ICTY with the NATO-led peace enforcement operation in Bosnia-Herzegovina has shown that the conclusion of such agreements will be particularly important where an international organisation is exercising military or law enforcement powers in the territory subject to the Prosecutor’s investigations.

In the case of MONUC, the mandate of the mission was specifically revised to enable the possibility for ICC cooperation. After lengthy discussions resulting in the deletion of explicit reference to the ICC, the Security Council adopted a provision in Resolution 1565 (2004) which authorises MONUC 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*”.

As a result of compromise discussions, however, the provision was excluded from the categories of tasks in respect of which the use of force is permitted. Therefore, it cannot be relied upon for ICC requests that would require the exercise of enforcement powers.

The Memorandum of Understanding (MoU) between the ICC and the UN on cooperation in MONUC arrived at a creative solution to this restriction by cross referencing other provisions of MONUC’s mandate in which the use of force is permitted. Paragraph 4 of Resolution 1565, for example, authorises MONUC to use all means necessary under a broad heading enabling assistance to the Democratic Republic of the Congo (DRC) authorities in re-establishing confidence, discouraging violence, and deterring use of force threatening the “*political process*”, and to enable free movement of UN personnel. Also of relevance, paragraph 5(c) authorises use of force for the disarming of “*foreign combatants*”.

Moreover, Security Council Resolution 1493 (2003) “authorizes MONUC to use all necessary means to fulfil its mandate in the Ituri district and, as it deems it within its capabilities, in North and South Kivu”. MONUC has implemented such provisions to assist the DRC authorities in the arrest and detention of combatants and militia leaders located in its areas of deployment. In a similar vein, the MONUC MoU provides that MONUC may agree to a request from the DRC Government in carrying out the arrest of persons sought by the Court in the areas where it is deployed, where this would be consistent with its mandate. Other enforcement powers made available under similar arrangements include MONUC’s preparedness to assist in search and seizure operations, the securing of crime scenes, the transportation of suspects, security support, and emergency temporary refuge for ICC staff and witnesses.

At the same time, the MoU reserves ample flexibility for MONUC to consider such requests on a case by case basis, taking into consideration issues of security, operational priorities, consistency of the requested measure with its mandate and rules of engagement, as well as the capacity of the DRC authorities themselves to render the assistance sought. The enforcement powers of MONUC are thus made available at the request of the DRC Government, rather than that of the ICC.

Thanks to such a broad and robust cooperation agreement, the OTP was able to request MONUC’s cooperation regarding the transmission of various documents, as well as their assistance with the transportation and the security of suspects and witnesses. Additional forms of cooperation include the use of MONUC’s facilities in the field by OTP staff members, including information technology facilities, work places, etc. The UN also agreed to take such steps as are within its powers to make available for interview members of MONUC whom there is good reason to believe have information that is likely to assist an investigation and that cannot be reasonably obtained elsewhere. There are also provisions regarding testimony, and in fact the first witness to appear before the ICC is a former MONUC child protection officer.

Importantly, these forms of cooperation are also available to the Defence upon order of the Judges. In short, the MoU between the OTP and MONUC made all the compulsory powers of the mission available to the Office. Its provisions were consistent with MONUC’s mandate and the sovereignty of the DRC, and allowed the DRC authorities to fulfil their cooperation obligations towards the ICC.

Before I turn to the challenges and future possibilities, for the sake of completeness I would like to note that the ICC also has a cooperation agreement with the European Union. This agreement provides for certain forms of cooperation, mostly in headquarters, but also in the field.

IV. Challenges and future possibilities

1. *The protection of confidential information*

An issue which can have considerable impact on the provision of cooperation by peacekeepers and others is the assurance of confidentiality that the Prosecutor and the Court in general can offer to information providers. In many instances, without such guarantees, cooperation will simply not be forthcoming.

Clearly, since the Court is guided by principles of transparency and procedural fairness, the presumption is that information obtained during the course of an investigation will be gathered for its potential use as evidence in open court. There may be compelling circumstances, however, where an information provider, such as an intergovernmental organization or a peacekeeping mission, may fear that the disclosure of information it has provided could endanger the personal safety of staff or other individuals.

In certain circumstances, disclosure or even the fact that cooperation has been rendered could compromise the security and proper conduct of the operations and activities on the ground of the source. It may, moreover, violate a duty of confidentiality the information provider owes to a third party.

Accordingly, article 54(3)(e) of the ICC Statute, much like its predecessor Rule 70 under the ICTY/R RPE, grants the Prosecutor the power to accept documents or information, either in whole or in part, on the condition of confidentiality and subject to non-disclosure without the consent of the information provider. Materials so obtained are to be used solely for the purpose of generating new evidence and, therefore, cannot be admitted before Chambers as evidence *per se* without the provider's prior consent. Rule 82, also borrowing from ICTY/R Rule 70, deals with the situation where an information provider lifts the restrictions on materials that have been previously provided under article 54(3)(e). In order to instil confidence and to encourage cooperation from providers to assist in-court proceedings, the provision clarifies that the Chamber is barred from inquiring into the materials presented beyond the scope which the information provider has agreed to disclose.

Perhaps the most complex issue related to the promotion of cooperation under the promise of confidentiality is how this interest should be balanced *vis-à-vis* the rights of the accused and, in particular the duty of the Prosecutor to provide prompt disclosure of potentially exonerating information.

The Rome Statute is silent on where the balance lies. In the *ad hoc* tribunals, after considerable litigation and diverging jurisprudence, the matter was finally resolved by amendment of the Rules in July 2004 to

clarify that Rule 68 (on exculpatory disclosure) is “*subject to the provisions of Rule 70*”; meaning that the duty of the prosecutor to disclose exonerating information cannot override an agreement on non-disclosure.

This amendment came too late to influence the drafting of the ICC’s Statute and Rules, thus the issue will have to be settled by the Chambers. It has already arisen in the context of the Lubanga case, our first trial, resulting in a stay in the proceedings.

The OTP with the Chambers are establishing procedures to respect the confidentiality required by information providers to protect the security of their staff and procedures to disclose all the relevant information to the defence. We are confident that we will harmonise the requirements for fair trials and the respect we owe to all those who are providing assistance to the Court: the witnesses, the victims, the NGOs and the United Nations. What is important is that the Court is building the foundations of an international criminal system for centuries, based on the highest standards.

2. *The relationship between conflict resolution initiatives and justice*

The cooperation between the ICC and peacekeeping operations is done on a case-by-case basis. The successful and robust agreement we reached with MONUC was the result of UN Member States and the DRC authorities agreeing to provide the Court with the manner and modalities for cooperation and judicial assistance in the DRC situation. In the Darfur situation, the UN/African Union peacekeeping operation, the UN Assistance Mission in Darfur (UNAMID), does not have the mandate to assist us; it can also be inferred by the non-cooperation of the Government of Sudan that they would not accept cooperating with the Court in this sense. We have thus not asked UNAMID to assist us nor do we intend to.

As a result, there is still a discrepancy between the Court’s mandate and the enforcement of the mandate by State parties and partners in the field. We can do more with States and multilateral institutions to find better solutions to arrest, to update and harmonize old conflict management strategies with the new reality created by the Rome Statute.

The drafters of the Rome Statute clearly recognized the intrinsic link between justice and peace. As stated in the Preamble of the Rome Statute, by putting an end to impunity for the perpetrators of the most serious crimes, the Court can contribute to the prevention of such crimes, thus having a deterrent effect.

We believe that international justice, national justice, the search for the truth and peace negotiations can and must work together; they are not alternative ways to achieve a goal; they can be integrated into one comprehensive solution.

Peace negotiations and operations must respect our judicial mandate, just as we have to respect their independent mandates. Peace and justice can work together to bring real and sustainable peace.

3. *Jurisdiction of the Court over crimes against peacekeepers*

Since the 1990s, the issue of attacks on UN peacekeeping and humanitarian personnel has become the object of increased international concern. The adoption of the Convention on the Safety of UN and Associated Personnel in 1994 was a milestone in this regard with its inclusion of criminalization of these attacks and the principle of prosecute or extradite.

Subsequent Security Council resolutions have repeatedly condemned attacks on UN and associated personnel and called on States to prosecute persons responsible for such attacks. Security Council Presidential Statement S/PRST/2000/4, in particular, “welcomes the inclusion [of such attacks] as a war crime in the Rome Statute of the International Criminal Court”. Later statements and resolutions have called more generally on States to end impunity for such attacks.

Article 8(2)(b)(iii) and article 8(2)(e)(iii) of the Rome Statute characterizes as war crimes attacks intentionally directed at “*personnel, installations, material, units or vehicles involved in a humanitarian assistance or peacekeeping mission in accordance with the Charter of the United Nations,*” provided that they are entitled to the protection given to civilians and civilian objects under IHL.

Given the exceptionally serious gravity of such crimes and given the serious consequences they can have not only for the victims, but also for the international community, the OTP has agreed with commentators such as the International Law Commission concerning the gravity of such offences. We decided that the gravity criterion - which is one of the key factors which the OTP uses to decide in which of the many situations under our jurisdiction we will open an investigation - in relation to such attacks will be weighed in qualitative, and not only quantitative, terms.

As the Prosecutor indicated in his reports to the UN Security Council in December 2007 and June 2008, the OTP is currently investigating the 29 October 2007 attack on the African Union Mission in Sudan Haskanita base, where 10 soldiers were killed, 8 injured and 1 remains unaccounted for. Additionally, attacks on humanitarian convoys have a devastating effect, and the Prosecutor clearly indicated that such attacks or threats of attack on peacekeepers and aid personnel will be investigated by his Office.

V. Conclusion

I would like to note that in the end, the successful implementation of the Rome Statute provisions will require that all States Parties respect their obligations and ensure, as individual States and as members of international and regional organizations, that the judicial mandate of the Court is respected.

Preventing and reporting violations of international humanitarian law

William H. TAFT IV

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Thank you very much President Pocar. I think that we have been very fortunate here to have the two previous presentations we have had, the first one from Ted Meron about the experience of a court and not just his own court but he was good enough to tell us about other courts which have been supportive and creative pursuant to the United Nations mandate. Then also, to add to that the understanding, we have heard from Ms Swaak-Goldman's presentation about the operation of a court that is a voluntary creation of the States and the issues that are presented there. Some of them are the same but some are very different. I would just like to add to this, of course, and I will in a moment get to it, that these international courts whether created by the United Nations for specific issues or created by States for their own purposes are supplementary courts in the area of preventing and punishing the very crimes that they are directed at.

The integral principal responsibility for the investigation, prosecution, punishment and prevention of these crimes lies at the national State level and the creation of these international courts in the case of the ICC acknowledges this responsibility very directly and less so in the case of the UN-mandated courts, because these are usually created in a case where the voluntary co-operation or effectiveness of the nation State principally concerned has stopped operating.

So, I will say just a word about the national judicial systems and law enforcement capabilities that are directed towards the prevention of and the investigation of crimes violating international humanitarian law. Let me just say first one comment on the two presentations that have been made with regard to the ICTY and its sister courts created by the mandates of the Security Council. I think Ted Meron was right to say, and perhaps he might have even been a little bit stronger in saying, that to the extent that there is a failure of co-operation in nation States with these courts it is often to be found in the politics that gave rise to the mandate and that it could be clarified if the political will were there to make those courts work and to assure that peacekeeping forces and national governments co-operate and assist in the law enforcement part of the Court's business more effectively than they have done. He mentioned the failure of the IFOR and the EUFOR in some instances to carry out what were their duties

as prescribed in the mandate and the Court's requests and orders to assist the Court. He was kind enough not to mention UNPROFOR which had of course preceded it and whose mandate at least as it was read by those who were carrying it out was utterly without assistance to the Court in any way and this was a failure not of the Court and not, although one could argue this, mainly of UNPROFOR, but of the political process in the Security Council to decide what later they said they wanted, at least in IFOR and EUFOR, to assist the Court. These are necessary features and, I think, should definitely be a part of our thinking as we go about looking at these specific courts. With regard to the ICC obviously the need for the cooperation of States in these matters is even more difficult to obtain because there is not the capacity to enforce the duty which the States have undertaken in signing up to the Statute. Also, not all States are parties to the Statute, and there is not the ability to require the cooperation of those States in the investigation. Yet, arrests are very necessary before a court proceeding can get on its way.

I think we have well set out the difficulties there. It is interesting that it can be to a degree solved and has been solved in the case of the Congo at least by going back to the Security Council and obtaining the support there, although not as much as would be the case probably with a UN Security Council court and certainly not as much as was obtained in the case of the ICTY.

The principal obligation on States under the Rome Statute is, as it has always been, to investigate, report, prosecute and punish violations of IHL. The test of the ICC is whether States will comply with that obligation. One such test will be in Sudan. The Congo is a good place to start, but I think it is clear that what you actually have there is a cooperative government and so the question presents itself: well, if the Government tries to cooperate with the ICC and its prosecution of international crimes, then why does the Government not itself prosecute these crimes as it should under the Statute? Of course, the Congolese Government has the authority to delegate the prosecution to the ICC, and it is probably a good place for the ICC to start its work; we will see how it does. However, I was disappointed, as I think most people were, in the original business about the evidence. But if we have a success there that would be a good start, but the real test will be of course in a situation where the government of the subject State is not cooperating and we will see that if the UN Security Council has to some extent offered its assistance. That would be the test case, and my own hope, I was involved in the decision taken in the State Department in 2004 maybe even in 2003, I can't recall, when we originally designated the Darfur situation as one involving the act of genocide. So I would very much like to see an effective prosecution and if the ICC can do

it that will be a real signal to the world that this Court is an extremely valuable asset for us. It will only be able to do this with the cooperation of the United Nations and I hope it gets that. Then of course with many other States but that is the comment I would make on that. In a way it is the same question raised earlier, but it is more difficult for the ICC because of the mixed enthusiasm on the part of the Security Council for the ICC, a problem which the ICTY at least did not have.

I would like just briefly to bring to the table the point of the national rules regarding the reporting, the prevention, and one should include in that not just the prevention – prevention has two aspects both a law enforcement feature that would actually stop them from occurring in the first place but also the deterrent feature that a judicial system to back up the law enforcement system would have to impose penalties effectively on the violators of IHL. The national systems of course have the advantage that they are in place. Virtually all the major States, I think, have criminal statutes on the books that criminalise violations of IHL and, in the case of the United States and virtually every party to the ICC track the same crimes as the ICC has jurisdiction of. There are some very small deviations in US law but not on significant points that would be violations.

As to the reporting of violations of IHL I can say, at least in the United States, and I know in Canada and in most armed forces, and I am thinking here of armed forces that are not necessarily a part of an international peacekeeping operation but any *ad hoc* group or perhaps a single State, there is a clear requirement that if a violation of IHL is known to occur and comes to the attention of a soldier there is an obligation to report such violation up the chain of command for consideration and whatever action is appropriate. There is no exception to that obligation that is imposed on common members of the force. In terms of prevention – actually there was an interesting episode at the Pentagon at one of the press conferences they had during the Iraq war with Secretary of Defence Rumsfeld and the Chairman of the Joint Chiefs of Staff who was then General Pace. The question was asked if a soldier sees a violation of IHL occurring, an abuse occurring can he, should he prevent it? And the answer to the question by the Chairman of the Joint Chiefs of Staff was: yes, in that event he has an obligation to step in and to prevent that from happening, to stop it. The Secretary of Defence was right there and it was a little bit difficult because he said: *Well, report yes always report!* But he wasn't sure about preventing and actually taking action to prevent the violation. There was a huddle afterwards. The Chairman was asked again right there I should say: *Now that you have heard what the Secretary of Defence has just said do you still say what you just said?* And he said: *Yes, I do! That's the rule I would go on.* Later on it came out that they talked and the

Secretary of Defence was able to muddle the situation a little bit and he said that it was hard to know whether he could prevent it because different cultures, different environments, different situations surrounding what looked to be a violation of IHL made it too difficult to answer the question categorically and it was left unresolved. So there we are on preventing. In the absolute sense of getting in the way of a violation that you see occurring, that is the way that it has been left. My guess is that the Chairman of the Joint Chiefs of Staff position, although he is no longer there and Secretary Rumsfeld is no longer there, that there will be a commitment on the part of US soldiers at least and I know that the Canadian Chief of Defence Staff was asked specifically the same question and he was unambiguous in his response to the Parliament that yes a soldier would have the obligation and would take steps to prevent. That's at the most immediate level but I think it is important to raise it. As to the question of what judicial system is available, for the prosecution and ultimate punishment of crimes, I think it is clear that the States have at their disposal these systems. As I said, virtually all of the violations against IHL are crimes against each State individually and prosecutable and in the United States, at least, I think it is fair to say that the process is vibrant and capable and is available, and not only to investigate, arrest, and prosecute and punish offences by members of opposing forces, but also members of our own forces who maybe violating IHL. That, of course, has been done by the United States.

Just one other practical point of interest I should mention here, regards the armed forces, although it may not be true in all cases. The case of the Chinese armed forces, for example. Actually, the uniform services there are expanding into all sorts of activities including businesses, but in the United States at least, and in many European countries, it is the opposite. The uniformed services are narrowing their activities and contracting out many activities that traditionally have been part of the armed forces. This has resulted, particularly in Iraq, but this was also the case of Bosnia where US forces were deployed, in many contractors, civilians accompanying the force and being part of its mission. There has been a gap in the United States in the ability to investigate, prosecute and punish violations of IHL, or indeed plain garden-variety crimes that these people have been charged with or suspected of committing. This has been of concern in the United States, and Congress a couple of years ago, passed a statute amaking such persons who are accompanying the force subject to martial law for violations of IHL and other crimes. This is a significant step. It remains to be seen whether there will be any prosecutions under this provision or whether some other arrangements will be made to prosecute the crimes of these people domestically in the normal criminal

law enforcement court system. The military is very reluctant to undertake such prosecutions because of the differences between martial law and the civilian law enforcement system where some of the rights that a civilian would have in a normal criminal case, are not available in martial law. If ever they had to prosecute such a case I think they would be looking for one of the most heinous situations and they would probably want to afford perhaps even more rights than martial law would normally afford to these people. There is a line of cases at the Supreme Court which make it rather difficult to know how far one can go in applying the Court martial law system to civilians. But I just mentioned that as another area that has come up in our law.

But, having said that, I would close simply by emphasising that in addition to these UN Security Council created courts and in addition to the courts that are created voluntarily by groups which wish to pool their resources and combine to create the International Criminal Court, the national systems remain, and I think we need them to be, and we will always need them to be, the most commonly used form for prosecuting violations of IHL. Moreover, I think we have seen in the discussion we have already had - of the varying nature of States' cooperation with the international tribunals - that, given that variability, you will not get to where you need to be in terms of prosecuting violations of IHL without strong national systems. Of course, if you have those, it is obvious there is little need for international courts, excepting cases such as with the ICTY, where the State has absolutely declined to be party to the prosecution and has possibly also been committing the breaches of IHL itself. I suspect this is the case in Sudan - certainly I expect that what will be coming out there is that the State itself is not prosecuting violations of IHL because it is itself committing them.

**Working Group 4: Responsibility and compensation for damages
caused during peace operations**

Introduction

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Welcome to this working group in which we will be discussing the broad scope of issues falling within the title "*Responsibility and compensation for damages caused during peace operations*".

Will start by hearing our three speakers, Admiral Ferdinando Sanfelice di Monteforte, Professor Pierre Klien and Ms Maria Telalian address different aspects of this theme, and will then open up for discussion.

I expect that the presentations of our speakers will take about 1 hour. Then there will be the discussion. The last half hour will try to bring together some of the threads of the debate. Tomorrow, we are asked to briefly present the results of our work in the plenary session.

On a practical note, I invite you to turn in written questions which the panelists will then be able to respond to. As in previous sessions, priority will be given to responses to written questions. We have the privilege of working with English-French simultaneous translators.

Discussion is topical and raises a number of concrete issues facing peace operations today. As was said yesterday, this round table takes place against the backdrop of important developments in the area of peacekeeping:

- from traditional peacekeeping to more robust roles;
- increasingly complex operations: multifunctional in mandate and composition, encompassing military and a variety of civilian components - side by side or closely integrated;
- more complicated range of tasks and mandates;
- new and broader mandates, including explicit references to human rights, gender etc.;
- a number of complicated legal issues brought to the fore, not least in the area of responsibility - troop-contributing nations (TCNs) increasingly realize the need to clarify some international legal issues which may not be new as such, but where lack of clarity is legally and politically not sustainable.

Our discussion will range from the overriding perspective of the nature of responsibility during peace operations - who is in charge, where international responsibility lies for violations of IHL, and where individual criminal responsibility lies for such violations. Speakers are invited to

reflect on the consequences of the different variants of peacekeeping today - who is responsible in these different forms of peace operations, under UN Command and control, and in other cases.

As part of a broader debate, which of course has also touched on responsibility for the respect for human rights during peace operations, you may recall last year' s decision by the European Court of Human Rights in the *Behrami and Saramati* case.

In that decision, the Court ruled that the applicants' claims against a number of troop contributors to the NATO-led Kosovo Force (KFOR) were inadmissible *ratione personae*, having found that the actions of both KFOR and the United Nations Mission in Kosovo (UNMIK) were attributable to the UN. The Court made the point, to which our speakers may wish to return, that since operations established by a United Nations Security Council (UNSC) resolutions under Chapter VII of the Charter are fundamental to the mission of the UN to secure international peace and security, and since they rely for their effectiveness on support from member States, the Convention could not be interpreted in a manner which would subject the acts and omissions of contracting parties, covered by UNSC resolutions and occurring prior to or during such missions, to the scrutiny of the Court. The Court studied the chain of command, finding that the UNSC exercise overall authority and control, with NATO exercising operational control.

This has led to comparisons *inter alia* with the criteria adopted in the relevant draft articles of the International Law Commission, in its work of on the responsibility of international organisations. As many of you know, Draft Article 5 states that the conduct of an organ of a state or an organ or agent of an international organisation that is placed at the disposal of another international organisation, shall be considered under international law an act of the latter organisation, if the organisation exercises effective control over that conduct.

The *Behrami and Saramati* decision also raises issues related to the practice of TCNs when it comes to the extraterritorial application of human rights obligations.

We will be hearing about the issues related to individual criminal responsibility. As was mentioned yesterday, the accountability of peacekeeping personnel for criminal acts has been given increasing attention. Here the different rules applying to different categories of personnel, military and other, are of interest. I believe our third speaker will be addressing issues of accountability and immunity for individual peacekeepers.

With these words, I hand over the floor to Admiral Sanfelice di Monteforte.

Operational command *versus* organic command: who is in charge?

Ferdinando SANFELICE DI MONTEFORTE
Former Italian Military Representative to the EU and NATO;
Professor of Military Strategy

In multi-national operations, the division of responsibilities, between 'providing nations' and the multi-national command structure appears to be, at first glance, extremely clear-cut. As we will see, though, this clarity exists only in theory.

Let's start with the term 'providing nation': it refers to those sovereign entities which recruit, educate, train and equip, and often also sustain, the forces, which they have provided to the multi-national organization. In theory, they should, therefore, bear responsibility before any international court for any mishaps related to these five activities. So, any harm caused by insufficient proficiency or misbehaviour by their personnel, or by bad equipment performance – be it a failure of the equipment or an excess of collateral damage caused by the weapons' characteristics – should apparently be charged to them. By contrast, the multi-national organization should bear collective responsibility only for whatever occurs in the application of the Operation's Plan (OPLAN), and its connected Rules of Engagement (ROE).

As the liability of multi-national organizations goes up to the top command level, you may well imagine how lively the discussions are in these bodies, among national representatives, to try to find a common way ahead that is acceptable for everybody. As perfect consensus cannot always be fully achieved, nations have two ways to protect themselves from being involved in activities of which they disapprove: the first is to establish the so-called, and much contentious 'national caveats', which show that a disagreement exists on the approach being followed for the operation. It is no surprise that the organization concerned will often press these nations to reduce these caveats, if not cancel them entirely.

The other self-protection system for the nations involved in a multi-national operation, is to limit the extent of the 'transfer of authority' for their forces, so that the organization will use these forces only for those tasks which are not disapproved of by the nation. In practice, this means handing over 'operational' or 'tactical' control, instead of transferring to the organization the full extent of 'operational command'. This approach, mostly used for air and maritime forces, is proportionally more frequent, the more the latter are essential for the mission. This approach is used due to a fear of dire effects caused by orders given by an operational

commander in the field (who is, by the way, also personally liable for them, together with his/her subordinates). It is worth noting that even the upper layers of the military chain of command may be involved, due to deficient supervision, in such a case.

The issue of responsibility for acts of multi-national operations is not only applicable to the domain of international humanitarian law (IHL), because the most frequent instances of contention concern civilian lawsuits, which are more numerous. The outcome of many of these lawsuits may, in fact, be a useful guide in today's discussion: those who pay compensation in these lawsuits accept *de facto* a sort of responsibility in the affair.

Division of responsibilities between nations, multi-national organizations and individuals is becoming increasingly blurred, in practice. A number of examples will explain this point. In Afghanistan, the commander of the International Security Assistance Force (ISAF) has available to him a sum of money, the so-called 'post-operation quick relief fund', which was collected from voluntary contributions made by nations over and above their annual contributions to the common budget of the international organization, and paid into a separate trust. The purpose of the fund is to restore damage done and compensate those who have suffered as a consequence of an operation. Therefore, to a certain extent the organization 'covers' the collateral damage caused by national weapons; this is largely because the mostly urban land environment in which ISAF operates often makes it very difficult to split responsibility between participating nations and the multi-national organization. It will be interesting to see whether the multi-national organization will continue to accept *de facto* responsibility (through the payment of compensation), should the most contentious weapons be used by the national forces.

A similar split of responsibilities was acknowledged in a 'riot control' situation in Kosovo last year, where a police unit, equipped with rubber bullets, was hurriedly deployed to deal with the riot and caused the deaths of two demonstrators. As it was well known how this force was equipped, the blame fell both on the providing nation and on the commander who had ordered the deployment.

More interesting is the case of the crash of a UN-leased transport aircraft, near Pristina. Initially, blame for the incident was laid on the air traffic controller, and so also on his/her parent nation; but as a later enquiry showed, the accident was caused by a complicated mix of factors, ranging from the fatigue of the operators, to the imperfect location of the tracking radars or the radio antennas. Eventually, financial compensation to the relatives of the victims was provided by the UN, NATO and the air traffic controller's nation, according to an agreement between those

parties. Therefore, it may be said that all parties involved shared *de facto* blame for the crash.

There are, of course, clearer situations, mostly on land, when units are responsible for civilian killings in situations where the force members had gone well beyond their instructions.

It is worth noting that the increasing level of violence in some theatres of operation, is encouraging nations to reconsider, as much as possible, the indirect approach, which proved so useful in the 1990s, and less damaging than today's widespread use of 'boots on the ground', something which is proving to be as contentious and counterproductive as in the past.

The last example is taken from a lawsuit which was threatened but never filed. During Operation SHARP GUARD in 1995, a very large container carrier of a kind which never enters the Adriatic Sea for commercial reasons, tried to get through the straits of Otranto. An inspection on board raised suspicions, as of the 780 containers on board, the few containers which were accessible to the boarding party were laden with cotton bales kept together by metal straps; this was a system abandoned many years before, as it spoiled the bales with rust. Clearly, this appeared to be an attempt to foil the metal detectors used by the boarding parties, by saturating them with the presence of metal. The vessel was diverted to a nearby harbour, whereupon the master fell sick and was repatriated. The *Chargé d'Affaires* of the ship's flag nation joined the ship and delivered a number of hot statements, threatening a lawsuit. Unfortunately for him, the containers on the lowest layer were found to be laden with Kalashnikovs, mortars and plenty of ammunition. The ship was duly confiscated, and the lawsuit was forgotten.

This example shows you how complicated the maritime environment is, and how careful both nations and multi-national organizations must be when undertaking any act of force, lest the ship-owner file a lawsuit for compensation for time lost and other inconveniences endured by his vessel.

The final remark concerns individual training in NATO. Until a few years ago, nations bore full responsibility for training the forces they provided – even if the force standards set forth by the Alliance had to be respected. NATO undertook only exercises dealing with force integration, namely with activities enabling a number of national units to operate together and to become a cohesive force. Little by little, though, the situation has changed. First, some years ago the Supreme Allied Command, Transformation (SAC-T) was established. Also, staff integration training was introduced as an Alliance activity, to the full benefit of the operational and tactical conduct of NATO's ongoing

operations. A limited facility for training units has been established in Poland. Further steps in this field are presently being considered in the Alliance.

It is clear, and not only to me, that whatever mishap may stem from a faulty teaching delivered in a collective training centre, the liability would mostly fall on the collective body. So far, though, no nation has yet objected to these collective training programs from a liability standpoint. I am sure that, as soon as the ongoing study is finalized, such a concern will be raised.

To sum up, multi-national organizations are assuming an increasing amount of responsibilities on their own. Can they relieve nations participating in their operations from such a burden? Personally, I doubt it, as the sharing of responsibilities, as you may have noted, is increasingly applied in practice. The blame, therefore, will in most cases be shared by the two actors. Thank you.

Violations of international humanitarian law committed during peace operations and individual criminal responsibility

Maria TELALIAN

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Allow me to start by saying that the very academic and thorough analysis that was made earlier about the responsibility of the international organizations is also relevant to the question of individual criminal responsibility, which is a concept that has been developed through the statutes of *ad hoc* tribunals, and also through the new, permanent, International Criminal Court (ICC).

However, I would like to focus my presentation on more practical measures, and in particular on what the UN is doing at present in order to confront the question of individual criminal responsibility. This being the case, I will focus mainly on peace operations in the large sense, with special attention of United Nations (UN) led operations and those which are controlled by the UN itself.

Now, with this introduction, I'd like to say that the previous analysis by Professor Klein allows us to agree that international organizations are responsible for wrongful acts committed by their organs much in the same way as States are. Of course the rules on the international responsibility of international organizations have not yet been defined, although there is an ongoing process before the UN's International Law Commission to do so. However, I feel safe in saying that we can apply by analogy the rules of State responsibility to international organisations. One of the consequences of the responsibility of international organizations, and hence of the UN, is the question of criminal reparation for violations of international humanitarian law (IHL) committed by their agents during peace operations. Of course, if both the UN and the States participating in a force both share control over the relevant military operation, then they should be jointly responsible. And here I agree with the analysis made earlier, concerning the criteria of effective control for determining whether both States and international organizations should be held internationally responsible.

It is important to note, however, that whereas violations of international humanitarian law (IHL) committed by UN agents during peace operations should be attributed to the UN, criminal reparation for these violations should, as a general rule, be guaranteed by States. As Dr. Shraga mentioned yesterday, this is because the UN does not have the necessary legal and material capacity to provide criminal reparations. This

means that the UN can not hold the responsible agent accountable and does not have the legal capacity to conduct any criminal investigations. The UN, as the organization that manages and is responsible for peacekeeping personnel, can only conduct administrative investigations as part of the disciplinary process. Of course, the organization cannot exercise executive powers as we call them, except if such executive mandate is given to it by the Security Council. This was the case in Timor Leste and in Kosovo, where the Security Council explicitly gave the UN the capacity to exercise enforcement powers and prosecutorial powers. Usually, however, the exercise of criminal jurisdiction over criminal acts committed by peacekeepers at their duty station remains the responsibility of member States. As to which State is entitled to exercise such jurisdiction, the prevailing rule is that where the alleged offender is a national, and particularly a member of the security or armed forces of the State participating in the UN force, he will be exempt from the criminal jurisdiction of the State where the criminal act was committed and will be subject to the exclusive jurisdiction of the sending State. Only the latter can investigate and prosecute that person, either through *ad hoc* action of its military judicial organs, or through action of its normal national tribunals. Likewise, the sending State also has the ability to exercise law enforcement functions including arrest, search and seizure and conducting interviews for the said conduct. Alternatively, of course, the sending State can refer the offence to an international penal court.

All the above rules regarding exemption from the criminal jurisdiction of the host State are clearly reflected in status of forces agreements (SOFAs) and status of nations agreements (SOMA). According to these agreements, military personnel are subject to the exclusive jurisdiction of the State of their nationality, pursuant to the criminal laws and regulations of that State. It is important to note that these agreements - the SOFAs and SOMAs - also specify that the exercise of jurisdiction is entirely at the discretion of the authorities of the sending State, including the military commander of the national contingents. It is also important to note that these SOMAs and SOFAs are codified by the UN in a Model Status of Forces Agreement, which was drafted under mandate of the General Assembly.

However, not all the members of a peacekeeping force enjoy the same immunity. A distinction is made between members of the military contingents who enjoy personal immunity - that is immunity from the criminal jurisdiction of the host State - for any kind of criminal act and regardless of the circumstances under which this act was committed; and the civilian personnel allocated to a UN force either by the sending State or by local recruitment, who enjoy only functional immunity - immunity for

crimes or offences that are committed by them in the exercise of their official duties. This category of civilians is also subject to different accountability regimes. According to Article 47 of the Model Status of Forces Agreement, if an allegation of criminal conduct is made against the civilian personnel accompanying a force, a representative or the commander of the force shall conduct any necessary supplementary inquiry and then reach an agreement with the government whether or not criminal proceedings should be instituted.

A serious problem that can arise in respect of the absolute immunity of military personnel concerns the relationship between these rules of exemption and the obligations of third States to repress international crimes according to general law or to international conventions such as the Geneva Conventions. Does absolute immunity mean that a third State, that is entitled to exercise international criminal jurisdiction for a grave breach committed by a peacekeeper during a UN peace operation, is prevented from doing so? In the absence of State practice with respect to this question, one solution would be to give priority to the jurisdiction of the sending State. Only if the latter is not willing or is not in a position to exercise jurisdiction, then third States may choose to exercise jurisdiction. This corresponds to the idea underlying immunity, which is to facilitate peacekeepers in effectively discharging their duties in the host country with the understanding, of course, that the sending State should effectively exercise jurisdiction over the alleged offenders. Any other solution would lead to impunity for wrongdoing peacekeepers, and thus a denial of justice to their victims.

In practice, national courts have a very poor record when it comes to prosecution of war crimes or other crimes committed in armed conflict. This is due to both legal and political reasons. For example, the sending State might not have extended its criminal jurisdiction to crimes committed by its nationals in a foreign country; the crime committed by the person might not have been characterised as serious crime by the laws of that country; or the military courts might lack competence for crimes committed during peace times. One of the few cases where violations of international humanitarian law were prosecuted by national courts is Somalia, where members of the Belgian military troops were tried by the Military Court in Brussels. In the same situation, Canada and Italy set up commissions of inquiry and initiated internal judicial procedures to investigate allegations against their troops. In most of these cases, however, the individuals responsible for such conduct have either been acquitted, or the relevant tribunals have made a very doubtful interpretation of the applicability of international humanitarian law in peacekeeping operations.

Likewise, States are often reluctant for political reasons to prosecute the members of their security or armed forces. There are regimes, for example, that prefer reconciliation or amnesty for crimes committed by peacekeepers, despite the dubious validity under international law of these actions. In addition, although domestic statutes may permit prosecution of non-nationals for crimes committed abroad, there is little political incentive for such action and in practice I would say it is rare.

Problems also exist in relation to functional immunity. In particular, the meaning of the term 'during the course of their duties' is quite unclear. For example, within the UN Mission in Kosovo, it was declared on the one hand that a peacekeeper who had committed rape was not entitled to immunity, and on the other hand, that a murder suspect was entitled to immunity – although in the latter case, the immunity of the peacekeeper was waived. Another problem with immunities arises in cases when the United Nations is not simply present in a territory, but also exercises an executive mandate and thus acts with governmental powers. In these cases, granting immunity to the UN is severely criticised as governments do not ordinarily have impunity for committing crimes but should rather be called to account for their behaviour. These questions became more pressing in the last few years with disturbing revelations concerning incidents of sexual exploitation and abuse by UN peacekeepers, which seriously damaged the reputation of the peacekeepers and the UN as a whole. The then Secretary-General, Kofi Annan, acknowledged publicly that acts of gross misconduct had been committed by personnel serving in a UN mission in the Democratic Republic of the Congo.

Disturbingly enough these revelations came a year after the Secretary-General issued a bulletin on special measures for protection from sexual exploitation and sexual abuse, and the UN's 'zero tolerance' policy. This 'zero tolerance' policy was reflected also in a set of standards which are contained in the bulletin, which defined the behaviour required of the military personnel of national contingents as well as of UN officials, experts on mission, consultants, military observers and volunteers. The report of the special advisor to the Secretary-General on sexual exploitation and abuse by the UN peacekeeping personnel, known as the "Z Report", which was issued subsequently, sheds light on the problem of sexual exploitation and abuse by UN peacekeeping personnel and noted, among other things, that holding the UN staff and experts on mission accountable for crimes committed during peace operations was problematic. This latter point was considered as requiring further consideration and the General Assembly recommended that a group of

legal experts be appointed to undertake this task. The group of legal experts focused its report on the question of ensuring the accountability of UN personnel and experts on mission with respect to criminal acts committed in peacekeeping operations. It made a number of useful recommendations designed to overcome obstacles that exist in holding such personnel accountable for crimes committed during peacekeeping operations.

It is clear that this report does not concern the military contingents of member States, but concerns only the UN staff and experts on mission. It should be clarified that experts on mission include UN military observers, police and civilians and others who are afforded the status of an expert on mission. These individuals enjoy functional immunity, and of course the immunity can be waived by the UN. One of the principal reasons for distinction between military observers and military members of national contingents is the relationship between such persons and the UN. Military observers are military officers assigned by the UN to perform missions and tasks of the UN. Although nominated by their governments following a request by the Secretary-General, they serve the United Nations in their personal capacity and not as a representative of their State. This explains the different accountability regime that this group is subject to. The basic premise of the report of the legal experts is that if a crime is committed in a host State where the peace operation is deployed, and that State is unable to prosecute an alleged offender, third States must be able to do so. However, if other States have not extended the operation of the criminal laws to apply to crimes committed in a host State, then there is a jurisdictional gap and the alleged offender is likely to escape prosecution.

In order to close these jurisdictional gaps, it was suggested that as many States as possible assert and exercise criminal jurisdiction over these kinds of offences. The group also recommended the development of a new international instrument – a convention – that would enable States to establish jurisdiction in circumstances as wide as possible, and provide legal certainty with respect both to the personnel covered for the exercise of such jurisdiction, and the crimes that come under its scope. The convention would also deal with questions of investigation, arrest, prosecution and extradition of offenders and mutual assistance. Such a convention, as was already emphasized by the reporting group, would only cover UN officials and experts on mission and would not detract from the applicable immunity regulations which either the UN or any of its officials and experts on mission enjoy. It should be stressed that although the group's report focuses on crimes such as sexual exploitation and abuse, because of its mandate the group itself was in favour of extending this convention or other measures to every serious crime committed in the

territory of the host State including other serious crimes such as trafficking in human beings, drug trafficking etc.

Following both developments, the General Assembly decided to set up an *ad hoc* committee on the criminal accountability of United Nations officials and experts on mission, to examine the report of the legal experts and its recommendations. Unfortunately, in normal UN practice it takes many years for all issues to be thoroughly studied, and only then is there an eventual decision by the General Assembly. The *ad hoc* committee has held some very interesting and thorough discussions on these issues, and what is obvious is that all member States have emphasized their support for the 'zero tolerance' policy of the UN concerning criminal conduct committed by UN personnel and they reassured the need to ensure strict observance of the rule of law. It is interesting to note that many member States have requested more detailed information from the UN Secretariat concerning the extent of criminal activity by peacekeepers, in order to determine how serious the jurisdictional gap is. The answer of the UN Secretariat was that, according to the information available from the Office of Internal Oversight Services and the Department of Field Support within the Department of Peace Keeping Operations (DPKO), the problem is significant. These are the words used by the Secretariat. Indeed, according to statistics from missions led by the DPKO from January 2006 to December 2006 – so, in one year only – a total of 439 allegations of misconduct, other than sexual exploitation and abuse, were reported. Over the same period, 357 allegations of sexual exploitation and abuse were reported. Of these allegations, only 176 allegations came from the UN mission in the Democratic Republic of the Congo. The majority of member States believe that statistics are not important, and certainly that they do not tell the whole story of sexual abuse and exploitation from peacekeepers. In this respect I would like to quote the words of Nicolas Michel, the then legal counsel of the Secretary-General, before the 6th Committee of the General Assembly: *"The UN Secretariat does not and can not condone criminal conduct by its officials and experts on mission. Criminal conduct by UN personnel puts into question the core values of the secretariat and directly affects the world body's activities and essential missions. Although it concerns a very small minority of UN personnel, the problem is significant."*

He also stressed that the failure to prosecute offenders by member States brings about perceptions of impunity which can aggravate the situation. An important development in the *ad hoc* committee is the elaboration of the text of a draft resolution of the General Assembly, which was eventually adopted last year. Resolution 62/63 contains important short-term measures for States to enable them to confront the problem of the jurisdictional gap. Indeed, in this resolution the General Assembly

urges States to establish, to the extent to which they have not done so, jurisdiction over criminal activity committed by their nationals serving with the UN. The resolution also invites States to provide the Secretary-General, by the 1st July 2008, information on their jurisdictional competence as well as on mechanisms put in place for following up allegations of criminal conduct. This information will be reflected in a forthcoming report by the Secretary-General, and will clarify the nature and scope of the procedural and jurisdictional gaps. This will facilitate the decisions to be made in the *ad hoc* Committee regarding the advisability of the elaboration of a special convention that will deal with the jurisdictional gap in this respect.

I will wrap up by saying that the Security Council also adopted a resolution this year - Resolution 1820 - that addresses explicitly the question of sexual exploitation and sexual violence, and affirms that in the future it will consider imposing sanctions on those who violate these standards.

Crimes committed by UN peacekeepers are very significant and they have serious impact on the psychological and the physical integrity of the victims, their families and the society as a whole. Such crimes also cast a dark cloud on UN peacekeeping, and damage the objective of the UN missions and the organization as a whole. Although the Secretariat does not have the legal capacity to conduct criminal investigations, it should improve its administrative investigative capacities because credible and reliable reports concerning the commission of serious crimes can trigger a criminal investigation by the law enforcement authorities of a State that asserts jurisdiction. At the same time, the UN should continue its work on a *comprehensive* response to the problem of serious crimes, and most particularly to the question of sexual violence by its peacekeepers. And of course we should mention here that there is a pressing and urgent need to ensure the compliance with international humanitarian law using the valuable assistance of the International Committee of the Red Cross, the Human Rights Council, and other human rights organisations.

Thank you very much.

**RELATIONS BETWEEN HUMANITARIAN ORGANISATIONS AND PEACE
FORCES**

Civil-military co-operation: common sense or pandora's box?

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Introduction

Humanitarian actors do not form a homogenous entity. Some have a mandate, others have just a mission. The UN Office for the Coordination of Humanitarian Affairs (UN-OCHA) and the UN operational agencies such as the UN High Commissioner for Refugees (UNHCR), the World Food Programme (WFP), the UN International Children's Emergency Fund (UNICEF), and others have been mandated by the international community to offer relief during humanitarian crises. By contrast, non-governmental organizations (NGOs) are driven only by their respective visions and missions. This difference matters: the humanitarian actors entrusted with a formal mandate are bound by a much larger set of rules articulated over the years by nation States. The NGOs, on the other hand, only submit themselves to broad humanitarian principles like those articulated in the Code of Conduct between the Red Cross/Red Crescent Movement and the NGO community.

Some of these principles, in particular independence, impartiality and neutrality, are challenged by any form of civil-military cooperation. But while the first two have been reasonably respected over the past few years, the principle of neutrality has evolved and led to a profound divergence of views in the humanitarian community.

I. The evolving nature of humanitarian response

There is a vast body of literature about the evolution of humanitarian responses since the end of the Cold War. In the past, things were simple: the military and civilian responses to a conflict evolved in separate realms. This parallel universe guaranteed the sanctity of the humanitarian space. Neutrality was to be scrupulously observed by all humanitarian actors, and to ensure the promotion of justice in war, no judgments were passed by humanitarian actors on the justice of a war.

But today's humanitarian environment has changed dramatically. On the one hand, the basic objectives of the international community have been expanded substantially beyond the simple provision of basic services and peacekeeping. On the other hand, the destructive logic of asymmetric warfare is such that civilians are now specifically targeted: rape has become a weapon of war, and even children are forced to become fully-

fledged combatants.

The logic of nation-building has forced international actors to promote the 'coherence' approach, whereby UN integrated missions simultaneously address a multiplicity of encroaching objectives: stability is to be ensured by military action, democracy is to be promoted by free and fair elections, and impunity is challenged through a strong support for human rights and the rule of law. This is, of course, in addition to the life-saving objectives of traditional humanitarian action.

Of course, in such a context assistance is provided while taking into account all the above objectives and not on the basis of needs alone. Some figures are striking: in an appeal organised a few years ago, UN-OCHA requested an amount of \$74 *per capita* for Iraq; this can be contrasted against the meagre \$17 *per capita* requested for the Democratic Republic of Congo, where the lives of hundreds of thousands were at risk. The new reality of differential international responses to crises, clearly presents a major challenge to the fundamental principle of impartiality of humanitarian organizations, and one they can do precious little about.

Another basic trend is the systematic targeting of civilians by certain parties to conflicts. The essence of international humanitarian law has been to remove non-combatants from the field of military operations. Some warring parties, however, are deliberately putting them right back at the centre. Humanitarian workers are no exception, and they too have become targets. Abductions, kidnappings and murders have replaced road accidents as the primary safety and security issue for humanitarian workers in the field. Far too many humanitarian workers have experienced first-hand the ordeal of captivity and even death, and their families and colleagues the long, anxious hours of waiting and not knowing.

II. The end of innocence for humanitarian organizations

The evolving nature of modern warfare and the humanitarian response thereto has marked the end of innocence for many NGOs, and put to the test their common vision of neutrality. How neutral can they be, when the very fact that they uphold humanitarian principles is viewed as an act of aggression by some parties to the conflict, and when their workers become easy targets for abduction and murder? For some, security has redefined neutrality, and the difficult link between these two concepts has created a rift within the humanitarian community.

Each side to this rift is basically right, but perhaps only partially.

The traditionalists argue that neutrality is more relevant than ever, precisely because of the security issue. Following the logic of an 'acceptance approach', even greater efforts should be made to present humanitarian workers as neutral, because of the poisonous belief that they

could be at the service of an occupying force. In that respect, the rhetoric developed a few years ago of NGOs as 'force multipliers' did nothing to help the cause of humanitarian organizations. The entire humanitarian enterprise rests on the informed consent, trust and support of the affected population. This consent will only be provided if humanitarian actors are – and are perceived to be -- truly impartial, independent and neutral. In the final analysis, it is the local population who should guarantee their security, and not an occupying force.

The pragmatists, on the other hand, recognize the tectonic shift that has occurred in the humanitarian environment, and the impact of security concerns on the traditional notion of neutrality. The approach of the pragmatists is perhaps best illustrated in Afghanistan, where some NGOs called for a fully fledged security sector reform, and the direct involvement of the International Security Assistance Force (ISAF) outside of Kabul. There was a realization that without improved security, there would be no effective humanitarian response and ultimately no development in the country. The issue was not so much the security of humanitarian workers, but rather the security of the average Afghan. This security was considered a *sine qua non* for the entire humanitarian enterprise. Interestingly, perhaps, this approach was supported mostly by organizations with a strong development agenda, and whose programmes on the ground were not limited to a short term emergency response alone.

In this context, the civil sector and the military were no longer two parallel universes. An overlap was inevitable. Hence, the concept of civil-military cooperation was born.

III. Some pre-conditions for progress

The new reality of humanitarian assistance has produced an abundant literature. Much effort has gone into the articulation of operational rules and procedures for coordination in the field. An example of the importance of developing this field, is that UN-OCHA still has a resident adviser at NATO Headquarters in Brussels. Indeed, it is probably worth reflecting pragmatically on a possible convergence of interests on the ground between the multiplicity of humanitarian actors, and even to admit to some shared values between them. After all, most members of the international community believe that girls should go to school and children should not be enlisted as combatants.

One thing is clear, however: coordination works best when each party remains in its intended role. The danger lies in a blurred border between the civil and the military. The Provincial Reconstruction Teams – or PRTs – operating in Afghanistan are a clear example of this blurring of boundaries. If a PRT comes one day to build the local school and returns

the next to pursue the Taliban, should humanitarian workers come on the third day to distribute school supplies, no villagers will understand who they are. The workers will inevitably be associated with a military force. It is essential to keep in mind that the primary purpose of the PRTs should be security in its broadest sense. In the final analysis, NATO's success in Afghanistan will not be judged by the number of primary schools it has re-roofed, but rather by the degree of enhanced security it has managed to bring to the average Afghan.

Accountability to intended beneficiaries and affected communities is also a fundamental principle that cannot be over-emphasized, and would help us to move beyond the traditional debate about coordination alone. The implementation by all actors, whether civil or military, of mutually agreed humanitarian standards and principles, as articulated by important initiatives such as SPHERE or the Humanitarian Accountability Partnership (HAP), would go a long way in better defining what constitutes proper humanitarian action and how it should be monitored and assessed by those it intends to serve and protect.

It is critical, therefore, for the civil and military sectors to continue to build dialogue with each other. The two cultures have to know each other in greater depth to be able to define a mode of coordination that truly respects the fundamental principles, humanitarian or military, under which each side operates. The IIHL would be uniquely positioned to articulate such a dialogue and build it into its regular curriculum.

La médiatisation des opérations de paix sert-elle le respect du DIH ?

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La problématique de la relation, de nature politique, entre la mise en œuvre effective des dispositions du droit international humanitaire (DIH) et l'attitude des opinions, telle qu'elles sont informées, orientées voire manipulées par les médias est aussi ancienne que le droit humanitaire lui-même.

La nécessaire complémentarité entre le DIH et le droit à l'information de l'opinion est considérée comme un acquis et une évidence. Toutefois, le développement du contexte médiatique globalisé dans lequel s'inscrivent désormais les conflits est en passe de modifier les enjeux.

Il était en effet jusqu'ici généralement considéré que la mise en œuvre des dispositions du DIH était d'autant mieux assurée qu'une relative transparence des opérations des forces en présence permettait de décourager les agissements et comportements condamnables. La force de l'opinion dans les pays démocratiques était du côté du droit. Le risque d'exposition ou de dénonciation des crimes de guerre valait dissuasion.

Or, l'explosion de la médiatisation des conflits multiplie de manière exponentielle les possibilités et donc les tentations d'instrumentalisation et de manipulation de l'information. Elle brouille les repères, multiplie les acteurs, raccourcit drastiquement les séquences de temps en imposant la tyrannie de l'instant. D'une manière générale, elle rend donc beaucoup plus aléatoire le décryptage des situations sur le terrain.

Le paradoxe est qu'on sait davantage, plus rapidement mais qu'il est beaucoup plus difficile d'établir la réalité des faits. L'une des raisons réside dans le fait que la maîtrise de l'information échappe désormais à ceux qui, traditionnellement, en étaient les intermédiaires obligés : correspondants de guerre, observateurs des ONG, institutions internationales et les forces armées, elles-mêmes.

En effet, dans les conflits asymétriques, la recherche de l'effet médiatique devient un objectif en soi : marquer des points décisifs vis-à-vis des opinions dans les pays démocratiques est perçu comme aussi - voire plus important - que d'obtenir des succès militaires sur les théâtres d'opérations. La difficulté du DIH à prendre en compte ces nouveaux

aspects n'en est que davantage accrue.

L'action des ONG d'une part, le soutien des gouvernements et des Parlements aux Opérations de Maintien de la Paix (OMP) d'autre part, sont, en plus, dépendantes d'une médiatisation adéquate des enjeux humanitaires et politiques des conflits.

Pour les gouvernements des pays démocratiques engagés dans des opérations extérieures, c'est un élément important – voire décisif – du processus de décision (cf. par exemple l'attentat sur le marché de Sarajevo ou la situation au Darfour) – et un aspect déterminant de la légitimation de l'engagement dans une intervention extérieure aux yeux de l'opinion.

Pour les ONG, désormais plus professionnelles et donc nécessitant davantage de ressources, c'est devenu un élément déterminant de la collecte de ressources.

La médiatisation des conflits n'avait évidemment pas été absente dans le passé : ses effets ont largement servi le DIH, y compris à ses origines. La question nouvelle est l'incidence du changement de nature de la médiatisation qui est en cours.

Il convient donc d'évoquer les *nouvelles formes de la médiatisation des conflits, leurs implications sur les différents acteurs humanitaires en particulier les ONG* et, enfin, les *difficultés croissantes que pose la protection juridique des journalistes* couvrant les conflits.

1) Les nouvelles formes de la médiatisation des conflits

L'« effacement » des contraintes techniques (notamment la capacité de la bande de transmission numérique) et des limites géographiques dans un monde de communication globale et instantanée changent radicalement la donne, d'autant que les demandes d'information de l'opinion publique et des représentants des médias ont également évoluées à la hausse. L'ubiquité et l'instantanéité des médias modernes ont, en 10 ans, modifiés la nature de l'« info sphère ».

Chacun avait mesuré « l'effet CNN » dans les conflits des années 80 et 90. Aujourd'hui, il se trouve lui-même multiplié en raison du nombre et de la diversification des chaînes disponibles. L'influence de CNN, qui avait été particulièrement importante lors des opérations de la première guerre du Golfe et de Bosnie est désormais battue en brèche par la multiplication de réseaux internationaux ou régionaux concurrents (ainsi le Moyen Orient est désormais couvert par 7 chaînes arabes).

Internet et les téléphones portables, même dans des sociétés où la diffusion de l'information demeure archaïque et parcellaire, défient les sources officielles et créent leur propre réseau d'information concurrent, rendant largement obsolètes les techniques plus anciennes comme la diffusion de tracts (encore utilisée au début de la guerre de Bosnie) ou les

émissions de radio et de télévision de la part des forces armées.

Trois effets de cette nouvelle médiatisation des conflits paraissent avoir une incidence particulière sur la mise en œuvre du DIH.

a) L'image, prévaut désormais sur l'écrit, en raison de la révolution des technologies numérique. Entre le « choc des photos » et le « poids des mots », c'est désormais les premières qui dominent.

La diffusion des images prises sur le théâtre par des soldats, et notamment l'affaire *Abu Graib* montrent qu'avec n'importe quel téléphone portable et Internet, celles-ci acquièrent potentiellement une diffusion mondiale. Or l'image a un impact immédiat et sans nuance, elle souffre difficilement l'explication et le commentaire circonstanciés; en d'autres termes, elle est plus aisément manipulable.

Le constat des observateurs sur place, qu'il s'agisse des observateurs internationaux ou des ONG, est donc d'une certaine manière concurrencé, relativisé et parfois ignoré.

Eux-mêmes sont placés dans une situation de porte à faux dans la mesure où c'est l'événement local amplifié et déformé par la médiatisation qui est susceptible de devenir le fait politique de référence, souvent au détriment de la présentation d'une séquence plus complexe des événements à partir de la vision d'ensemble d'un théâtre.

Certaines ONG vont, elles mêmes, souvent être tentés de se mettre au diapason pour valoriser leur contribution.

b) du côté des forces armées au conflit, la distinction entre gestion médiatique des opérations et la politique d'information « opérationnelle », visant à peser sur l'environnement local devient de plus en plus difficile à gérer dans un contexte médiatique globalisé.

Autrefois, deux formes de communication des armées coexistaient : celle en direction des médias nationaux et internationaux d'une part, et d'autre part, celle, locale, qui relevait de ce que l'on appelait alors « l'action psychologique », désormais rebaptisée « conquête des cœurs et des esprits »: plus qu'informer, il s'agit de légitimer la présence des forces étrangères, de valoriser leur rôle dans la stabilisation et les actions civilo-militaires qu'elles mènent, d'obtenir la collaboration des populations, de rallier les opposants et de stigmatiser le comportement de l'adversaire.

Cette distinction tend désormais à s'estomper pour plusieurs raisons:

- dans les conflits asymétriques, la bataille de l'information est globale et constitue un élément de la guerre elle-même et il ne se conçoit plus de plan d'opération militaire sans son accompagnement au niveau du plan médias. L'Afghanistan ou le récent conflit en Géorgie en sont une illustration.
- davantage que dans le passé, l'évolution des technologies militaires

ouvre davantage la voie à la contestation sur l'origine, la cause et la nature des dommages infligés: on le constate avec les bombes à sous munition ou à effet de souffle, les attaques effectuées à partir de drones, les effets des bombardements de précision, ou des actions d'appui-feu au sol. Au point que les enregistrements filmés des engagements, au départ simples éléments techniques de compte-rendu de mission, sont susceptibles de devenir des éléments public de preuve dans des débats sur les effets collatéraux. Dans une affaire concernant un accident fratricide entre appareils américains et britanniques lors du conflit irakien, le juge britannique a exigé la production des enregistrements de la camera de tir de l'avion. Du côté des forces armées, on a perçu le danger de la multiplication des précédents.

c) Le militaire devient lui-même, à tous les niveaux, acteur de sa propre médiatisation.

Le soutien du moral des personnels engagés en opérations et de leur famille, restée à l'arrière, implique un accès à Internet qu'il est de plus en plus difficile de contrôler. Cette accessibilité s'est généralisée au point d'apparaître comme un droit individuel du soldat dans les armées occidentales. Elle ouvre la voie à la multiplication des «blogs » individuels ou collectifs. Or, la diffusion de ces informations, en principe destinées à une audience restreinte est aujourd'hui difficilement contrôlable.

Il est difficile de dénombrier le nombre de blogs, mais en 2008, il était évalué à plus de 2.000 dans une quarantaine de pays. La guerre d'Irak et les opérations en Afghanistan ont conduit à un développement considérable de ces derniers au sein des forces américaines et alliées. Le conflit entre Israël et le Hezbollah en 2006 a suscité l'apparition de très nombreux blogs au sein de l'armée israélienne. Les blogs existent également en France, en Allemagne et en Italie. Le phénomène des sites internet du type « Facebook », « You Tube » ou « MySpace », permettant de créer des pages personnelles sur sa vie privée et le partage d'information et de vidéos avec des personnes affiliées, va également dans ce sens.

Les autorités militaires sont partagées entre la nécessité de permettre un exutoire aux tensions engendrées par les prolongations du maintien des unités sur le terrain, le respect du droit à la libre expression du citoyen-soldat et le contrôle de ce nouveau canal d'information spontané, très suivi par la presse nationale et internationale, car il informe sur les conditions réelles prévalant sur le théâtre.

La directive de l'armée américaine du 17 avril 2007 visant à redéfinir, à la lumière du conflit irakien, « la politique et les procédures de

*sécurité pour les opérations (OPSEC)*²⁶⁶ » oblige les soldats à enregistrer au préalable leurs « blogs » et à consulter leurs officiers sur son contenu. Une autre directive du 14 mai 2007 autorise également le blocage de sites sur le réseau militaire. Bien que les responsables du Pentagone aient nié toute volonté de censure, le sentiment d'un resserrement des contrôles prévaut.

En France, la loi du 1^{er} juillet 2005 définit ainsi la liberté d'expression des militaires français. Selon l'article 4 de la loi n°2005-270 du 24 mars 2005 portant statut général des militaires :

« Les opinions ou croyances, notamment philosophiques, religieuses ou politiques, sont libres. Elles ne peuvent cependant être exprimées qu'en dehors du service et avec la réserve exigée par l'état militaire. Cette règle s'applique à tous les moyens d'expression. Elle ne fait pas obstacle au libre exercice des cultes dans les enceintes militaires et à bord des bâtiments de la flotte.

Indépendamment des dispositions du code pénal relatives à la violation du secret de la Défense nationale et du secret professionnel, les militaires doivent faire preuve de discrétion pour tous les faits, informations ou documents dont ils ont connaissance dans l'exercice ou à l'occasion de l'exercice de leurs fonctions. En dehors des cas expressément prévus par la loi, les militaires ne peuvent être déliés de cette obligation que par décision expresse de l'autorité dont ils dépendent.

L'usage de moyens de communication et d'information, quels qu'ils soient, peut être restreint ou interdit pour assurer la protection des militaires en opération, l'exécution de leur mission ou la sécurité des activités militaires. »

Le statut général des militaires et notamment les décrets du 15 juillet 2005 laissent la possibilité au commandement de restreindre ou de définir les conditions dans lesquelles les images produites ou acquises par les personnels sur les théâtres pourraient être diffusées. A ceci s'ajoutent les dispositions d'un arrêté du 15 septembre 2006 visant à protéger l'identité de certains personnels civils et militaires. D'une manière générale, tout ce qui concerne l'identité et les circonstances des décès ou blessures des personnels en opération fait l'objet de restrictions. Les éléments qui pourraient compromettre la sécurité des forces, leur activité ou révéler leur localisation sont également protégés. Ces dispositions viennent, s'agissant spécifiquement des blogs, d'être renforcées par une directive du Chef d'État Major de l'Armée de Terre.

Si, comme le note la directive américaine, « 80 % des informations sur les opérations peuvent être obtenues ouvertement et légalement », il est clair que toutes les informations n'offrent pas le même potentiel d'exploitation politique et d'utilisation juridique.

La question se pose d'ailleurs pour les juristes de savoir dans quelles mesures des faits, révélés par le canal des blogs, peuvent être

²⁶⁶ Cette directive de l'OSD de 70 pages n°AR 530-1 OPSEC en date du 10 avril 2007 est consultable sur internet.

considérés comme assimilables à des témoignages de la part de leurs auteurs, alors que leur intention était toute autre. Par ailleurs, la diffusion d'images de victimes ou de prisonniers peut apparaître, dans certains cas, aller à l'encontre des Conventions de Genève.

2) Les ONG, à la fois otages et bénéficiaires de la médiatisation

C'est une évidence : les ONG ont désormais un besoin vital de la médiatisation des enjeux humanitaires afin de solliciter les contributions financières privées ou publiques et nécessaires à leur action. Leur développement a été incontestablement servi par la possibilité de rendre compte dans des délais quasi immédiats de la détérioration des situations sur le terrain, avant même que les gouvernements y soient sensibilisés. Toutefois, il existe une contrepartie : la stratégie des organisations internationales humanitaires est elle-même influencée par la pression médiatique.

Comme le rappellent régulièrement les rapports annuels du CICR, les « conflits oubliés » ou « *beyond the radar screen* », du seul fait qu'ils bénéficient d'une moindre couverture médiatique, sont défavorisés en termes d'aide internationale : les victimes ne sont pas toutes égales dans la nouvelle « info sphère » globalisée.

La médiatisation est également un facteur additionnel de la perte de l'immunité des humanitaires dans les conflits. Elle n'est évidemment pas seule responsable de cette évolution **gravissim**: le rejet d'interventions extérieures, les fanatismes religieux et politiques ont une part essentielle. Il est évident toutefois que la possibilité, par le biais de prise, en otage ou du massacre d'humanitaires, expatriés ou locaux, d'atteindre une audience mondiale est un élément clé dans une stratégie de conflit asymétrique.

Il en est de même des journalistes sur les lieux du conflit.

3) L'ambiguïté nouvelle de la situation du correspondant dans les conflits

La protection des journalistes correspondants de guerre est une préoccupation ancienne du DIH, qui les assimile à des civils, même lorsqu'ils accompagnent les forces armées dans une zone de combat.

Dans le cadre de conflits internationaux, la 3ème Convention relative au traitement des prisonniers de guerre couvre les correspondants de presse. Le Protocole additionnel n° 1 de 1977 traite spécifiquement des journalistes accrédités correspondants de guerre en particulier en son article 79 relatif à la protection des journalistes en mission professionnelle périlleuse dans les zones de conflit armé. En revanche, dans le cas de conflits internes, il n'existe pas de protection spécifique des journalistes en dehors des dispositions générales applicables aux civils non participants à

des actions hostiles.

Un cas particulier est celui des correspondants qui sont insérés dans les unités des forces armées, utilisant leurs logistiques et les suivant dans leurs opérations. L'insertion de journalistes au sein d'unités combattantes est une pratique ancienne qui remonte à la deuxième guerre mondiale. Elle a été largement utilisée lors du conflit vietnamien. Cette formule a été également utilisée en juin 1999 lors de l'entrée des forces françaises au Kosovo.

C'est cependant avec le conflit irakien qu'elle a connu toute son ampleur (plus de 500 de journalistes ont été déployés au sein des unités de combat américaines et britanniques tandis que 2 000 de leurs confrères étaient accrédités auprès des Etats majors de la coalition au Koweït) ainsi qu'à sa consécration doctrinale.

La directive du Secrétaire américain à la défense de février 2003, à la veille de l'engagement des opérations,²⁶⁷ constate que la « *couverture médiatique des opérations aura désormais dans les années qui viennent un impact majeur et durable sur les opérations, qu'il s'agisse de l'opinion aux Etats-Unis, de celle des alliés de la coalition, conditionnant leur participation, et sur l'opinion des populations du pays dans lequel nous conduisons les opérations. La perception de ces dernières peut affecter le coût et la durée de notre engagement* ».

Elle poursuit : « *nous avons besoin de présenter les faits – positifs ou négatifs – avant que d'autres s'informent dans des médias où figurent désinformation et déformation, comme ils continueront certainement de le poursuivre. Nos soldats sur le terrain doivent faire état de notre version des faits et seuls les commandants sur le théâtre peuvent faire en sorte que les médias aient accès aux faits en même temps que nos troupes. Il faut donc faciliter l'accès des médias nationaux et internationaux auprès de nos forces y compris celles d'entre elles engagées au sol. A cette fin, il convient d'insérer les médias au sein des unités. Ils vivront, travailleront, et se déplaceront en tant qu'éléments des unités où ils sont assignés afin de faciliter au maximum une couverture en profondeur de l'action de nos forces* ».

Au-delà de ces principes généraux figurent un certain nombre de restrictions : le commandement doit maintenir un équilibre entre la nécessité d'accès des médias et la sécurité de l'opération, les journalistes ne pourront pas utiliser de moyens de transports propres mais bénéficieront au maximum des moyens militaires, l'utilisation de véhicules autres que ceux des forces et de moyens de communication électronique individuels devra être approuvée au préalable dans les zones de combat. Enfin et surtout, car c'est là la clé du dispositif, les possibilités de couverture des

²⁶⁷ Instruction du Secrétaire à la Défense (PA) déclassifiée: "public affairs guidance on embedding media during possible future opérations/deployments in the US Central Command (CENTOM) area of responsibility".

opérations seront attribuées non à des journalistes individuellement mais à leur organisation.

Il est notamment indiqué (para. 4) « *pour la sécurité des journalistes comme des forces* », les organisations de média devront s'engager préalablement à respecter « *un certain nombre de règles de comportement qui n'impliquent en aucun cas que soient bloquées des commentaires critiques, embarrassant, négatif ou simplement dubitatifs* ». Sont en particulier soumis à restriction un certain nombre d'éléments concernant les descriptions des opérations : sont notamment concernés (para 4 G et ss.) *le détail des forces en deçà du niveau du régiment, le nombre et l'identification des appareils, la localisation précise des unités, les indications concernant de futures opérations ou des opérations annulées, celles concernant les mesures de protection des forces, les règles d'engagement, les méthodes de collectes du renseignement, tout ce qui concerne les activités des forces spéciales, les images et identités des prisonniers ennemis, les précisions concernant les victimes des combats au sein des forces alliées jusqu'à notification officielle. Les responsables militaires devront expliquer les raisons de la sensibilité de certaines informations et en cas de manquements le problème sera évoqué avec l'organisation à laquelle appartient le journaliste inséré, qui pourra accepter son retrait* ».

La pratique de l'insertion des médias dans les unités en opération vise donc à leur offrir de nouvelles garanties d'accès et offre aux responsables des unités la possibilité de maintenir un certain nombre de règles dont le respect est en définitive du ressort de la relation entre les responsables des organisations des médias et le commandement. Elle se fonde sur le principe de base de tout effort de relations publiques : construire une relation entre les deux parties. De fait, la couverture médiatique mondiale des opérations militaires en Irak, a, au moins dans la phase initiale, donné toute satisfaction aux autorités américaines, validant à leurs yeux et aux yeux des britanniques, le concept de journalistes insérés. Il en a été autrement par la suite, lors de la phase post-combat.

Un certain nombre de critiques ont toutefois été exprimées : discrimination dans l'accès entre journalistes de différents pays (en fait, seuls les pays participants à la coalition en ont bénéficié), crainte qu'une proximité trop grande entre média et militaires en opération conduisent à une diminution de l'indépendance des journalistes « insérés », traitement inégal des journalistes suivant que leurs unités participaient ou non à l'action, crainte que le partenariat accepté entre les organismes de presse et les autorités militaires conduise les premiers à limiter a priori la marge d'initiative des journalistes insérés.

L'autre voie explorée a consisté, notamment du côté français, à renforcer le statut juridique des correspondants de guerre.

Ceux-ci sont bénéficiaires des Conventions de Genève et des deux

protocoles additionnels de 1977, qui s'appliquent aux situations de conflits armés y compris d'occupation par des forces étrangères. Le journaliste perd toutefois sa qualité de civil (article 79) et donc sa protection au regard des Conventions s'il participe directement aux opérations. Des règles particulières couvrent les cas d'emprisonnement ou de capture de journalistes (3^{ème} et 4^{ème} Convention).

La nécessité de clarifier la situation du journaliste « inséré » s'impose donc. Il demeure que, sur le plan international, il n'existe pas actuellement de consensus pour conférer aux journalistes dans les conflits une immunité renforcée, même une résolution du Conseil de Sécurité (S/RES/1738(2006) va dans ce sens (tout en notant que « *le Conseil de sécurité examinera la question de la protection des journalistes en période de conflit armé exclusivement au titre de la question intitulée « Protection des civils en période de conflit armé »*)

La non-adhésion d'un certain nombre d'Etats à la Cour Pénale Internationale, qui aurait normalement vocation à assurer le respect de telles dispositions, réduit, pour le moment, la portée des garanties juridiques qui pourraient être apportées.

On ne saurait, enfin, perdre de vue une évidence : dans le contexte des conflits asymétriques d'aujourd'hui, les journalistes sont considérées, tout comme les membres des ONG, non comme des non-combattants dont la sécurité et la liberté de mouvement est à respecter mais plutôt comme des otages potentiels dont l'utilisation politique est possible, voire même, le cas échéant, profitable financièrement. La conciliation de la liberté d'information et de la sécurité du journaliste est donc rendue encore plus délicate.

En conclusion, et s'agissant des incidences de la nouvelle médiatisation des conflits sur le DIH, on peut sans doute retenir deux éléments :

- Les implications des nouvelles formes de communication, y compris internet, agissent comme un facteur d'accélération des mutations affectant les conflits modernes : caractère asymétrique et de moins en moins interétatique des conflits, diversification des acteurs, qui ne sont plus seulement militaires, prise en otage des populations civiles, apparition de nouvelles formes de terrorisme. Le DIH ne saurait être statique. La médiatisation des conflits est donc un élément de la réflexion sur l'adaptation continue du DIH.
- La multiplication exponentielle des acteurs susceptibles de s'exprimer et de diffuser l'information sur les conflits implique un effort correspondant de sensibilisation aux principes et aux règles du DIH. Beaucoup d'initiatives ont été prises en ce sens aussi bien au niveau des ONG, qu'au sein des forces armées et auprès des

journalistes eux mêmes. Il s'agit d'un effort prioritaire, auquel l'Institut International de Droit Humanitaire de San Remo se doit de contribuer pleinement.

**REPORTS OF THE WORKING GROUPS ON THE APPLICABILITY
OF INTERNATIONAL HUMANITARIAN LAW TO PEACE OPERATIONS**

Working Group 1 – Peace operations and protection of civilians

Rapporteur: Prof. Edoardo Greppi, University of Turin; Member IIHL

The first report, by Prof. Edoardo Greppi, offered an outline of the Responsibility to Protect (R2P) as it is described in the International Commission on Intervention and State Sovereignty's (ICISS) Report of 2001, with respect to the so-called 'right of humanitarian intervention', or 'droit d'ingérence': "*the question of when, if ever, it is appropriate for States to take coercive - and in particular military - action, against another State for the purpose of protecting people at risk in that other State*".

The central theme of the ICISS report, reflected in its title, is the idea that sovereign States have a responsibility to protect their own citizens from avoidable catastrophe - from mass murder and rape, from starvation - but that when they are unwilling or unable to do so, that responsibility must be borne by the community of States. The key issue is, therefore, the meaning of sovereignty, which is closely linked to the norm of non-intervention. The critical assumption underlying the R2P is, however, based on a new reading of sovereignty: sovereignty as responsibility.

One crucial idea in the Report is that the so-called right to intervene belongs to any State. On the other hand, the R2P belongs to every State. This element seems to link the concept to obligations *erga omnes*.

The substance of the responsibility to protect is the provision of life-supporting protection and assistance to populations at risk. This responsibility is an 'umbrella concept', embracing three integral and essential components:

- 1) the responsibility to prevent;
- 2) the responsibility to react; and
- 3) the responsibility to rebuild.

The responsibility to react appears to be at the very heart of the Report. Intervention - even in a preventative form - is only acceptable in cases in which peaceful measures are insufficient (§ 4.1 of the Report); that is, when the international community faces violations that "*genuinely shock the conscience of mankind*" (§ 4.13).

The ICISS envisaged some additional precautionary principles that must be satisfied to ensure that the intervention "*remains both defensible in principle and workable and acceptable in practice*": right authority, right intention, last resort, proportional means, and reasonable prospects.

The question of authority is the most sensitive one. The ICISS Report emphasises that the Security Council is the most appropriate body

to authorise military intervention for human protection purposes and that, as a consequence, the key task is not to find alternatives to the Security Council as a source of authority, but to make the Security Council work better. For example, the Permanent Five members of the Security Council should agree not to apply their veto power in matters where their vital State interests are not involved, to obstruct the passage of resolutions authorising military intervention for human protection purposes for which there is otherwise majority support.

The second issue is that of the impact of the concept. In the report of the High-Level Panel on Threats, Challenges and Change, '*A More Secure World: our Shared Responsibility*', and in the Report "*In Larger Freedom: Towards Development, Security and Human Rights for All*", the R2P is described as '*an emerging norm*'. However, the World Summit Outcome Document does not refer to an '*emerging norm*'. States declare that they are "*prepared to take collective action ... through the Security Council*" but "*on a case by case basis*". This formula means that States avoid taking obligations to act systematically. It is also consistent with the nature of the Security Council as a political body.

Even if the Outcome Document is not an agreement concluded in due form, it can be considered an important assessment of the duties of the international community, as far as it indicates a position shared by more than 170 UN member States. The largest gathering of Heads of State and Government the world has seen solemnly declared: "*We accept that responsibility and will act in accordance with it*". The R2P is also clearly stated in Security Council Resolution 1674/2006, which "*reaffirms the provisions 01, paragraphs 138 and 139 of the 2005 World Summit Outcome Document*". This appears to be the beginning of a UN practice.

In its judgment in the *Bosnia and Herzegovina v. Serbia and Montenegro* case (26 February 2007), the International Court of Justice reinforced the R2P as it is conceptualised in the World Summit Outcome of 2005; indeed, it goes even further and elevates the duty to protect to a treaty obligation that is actionable before the International Court of Justice, with respect to States that have ratified the Genocide Convention without reservation to Article IX.

There still is one major problem at stake, closely linked to the issue of legitimacy: in cases of inaction by the United Nations or regional organisations, is there room for unilateral action? This appears as a possible reading of the World Summit Outcome Document of 2005. It seems to allow some kind of legal justification for limited forms of regional and even unilateral action, including military action, in cases in which the United Nations fails to act to protect populations from one of the four accepted and recognised extreme categories of atrocities (genocide, war

crimes, ethnic cleansing and crimes against humanity).

The R2P probably cannot be considered an existing, established and widely accepted new principle and set of rules. The UN documents cited go no further than affirming that there is a kind of trend, an 'emerging norm'. Thanks to the ICISS Report, we can count on a new approach, offering a new path to address this key issue of the relationship between an individual and a State. It is not yet hard law, but it clearly shows a trend towards going beyond the limits of soft law or merely political principle.

The adoption of the concept by the World Summit Outcome Document is an important result, demonstrating that there is a trend away from a rigid conception of sovereignty and towards a more limited notion of it, at least as far as the protection of 'human security' is concerned. This could be included in the more general transformation of international law from a "*State and governing-elite-based system of rules into a framework designed to protect certain human and community interests*".

Prof. Mario Bettati, chairman of the working group, focused on the responsibility to protect, emphasising that, considering the role played by NGOs, the problem is not that alarm bells aren't loud enough, but it is that governments are deaf.

The Honourable Gareth Evans, in his report, recognised the intellectual and political role played by Prof. Mario Bettati and Minister Bernard Kouchner.

The reflex position for the international community must be that atrocities are being committed and that sovereignty is not a licence to kill. The key element of the concept, as Greppi pointed out, is that when a State has failed to protect its own citizens, the international community must step in. This responsibility must be embedded into the international consciousness. The recent events in Kenya in 2008 are an excellent example of the responsibility to protect at work: this was an unexpected situation for which no prevention strategies were really available; yet within days, the international response was focused on the ethnic cleansing taking place, leading to threats of sanctions and expressions of concern.

The UN General Assembly in 2005 undertook a groundbreaking innovation, as it represented the international community embracing the concept of R2P. All the key elements were present – the responsibility of the sovereign State itself, and responsibility on other States to assist and prevent. In particular, responsibility was conferred by §§ 138 and 139 to step in when necessary when a State was 'manifestly failing' to protect its own citizens.

According to Gareth Evans, there are no doubts that the R2P is

already a norm in the proper sense, even if it is not yet well enough operationalised and universally accepted in practice (this is the next big step). The situation is far better than when we were trying to identify what was happening purely from international perceptions.

As far as the possibility of a unilateral action is concerned, the real issue is not to find alternatives to the Security Council, but rather to make the Security Council more effective.

Mr. Evans focused particularly on the operationalisation of the R2P principle. This should be done both at the internal and the international level, and in the context of:

- prevention;
- reaction; and
- post-crisis rebuilding.

Therefore, the measures available are:

- prevention strategies;
- reaction strategies; and
- rebuilding strategies.

Coercive military operations should only be used as a last resort, when the situation satisfies all the criteria and when no other options are available. This is the right thing to do, morally and practically, and it is lawful under UN Charter.

If external force must be used as the only way to protect people from genocide and mass atrocities, then it is far better for this to happen with the consent of the government in question (as occurred in East Timor). But if that consent is not forthcoming, perhaps because the government itself is part of the problem, then - in extreme cases - outside forces will have to take action without governmental consent.

Exercising this responsibility gives rise to problems for military planners, because this isn't a role for which the military are traditionally engaged. What is involved is neither traditional war-fighting (where the object is to beat an enemy), nor traditional peacekeeping (i.e. when there is a peace to keep, and the forces are concerned with monitoring, supervision and verification).

There are two types of coercive protection missions: the 'peacekeeping plus', or 'complex peacekeeping' (which is used more in the context of Chapter VII actions than Chapter VI actions) and the 'fire brigade' response, which occurs in a Rwanda-type case - when the situation has gone out of hand and demands a rapid and forceful response. The fire brigade response is more than just peacekeeping plus but, again is not traditional war-fighting either.

Doctrine and training are gradually evolving in more sophisticated armed forces, to allow them to undertake protective missions. There is still

a long way to go before it is fully developed and sophisticated (ie. has the right structure, number of personnel, effective preparation, appropriate training; also proper and unambiguous mandates and rules of engagement, and civil and military cooperation). There are still not enough militaries with a detailed doctrine that addresses how adherence to international humanitarian law (IHL) is to be achieved in the stress of these operations.

Mr. Evans concluded by saying that *"if we want to ensure that coercive peace operations are, in their conceptualisation, detailed planning and on the ground execution consistent with IHL, we still have a long way to go"*.

Prof. Michael Bothe addressed the issue of the role of IHL (if any) in the context of a responsibility to protect. There are basically two questions:

- what are the rules of conduct for peacekeepers when they are engaged in enforcement type action?
- what are the rights and duties of peacekeepers where they are a third party to an ongoing conflict?

As to the first question, the assumption is that IHL indeed applies to peacekeeping operations (PKOs), but only to a limited extent. Much of the activities of PKOs are much closer to police operations, and are done using a law-enforcement method. They can be either robust law-enforcement, or assistance to other law-enforcement. This type of activity is not covered by IHL but by human rights law. At the same time, there may be situations where peacekeepers are actually engaged in fighting and in these cases, they operate in the conduct of hostilities mode (COH) and so are subject to IHL.

States involved in non-international armed conflicts usually operate in law-enforcement mode, but may have to switch to COH if the situation is somehow exacerbated. On the other hand, in an occupation context, even if usually a law-enforcement mode is required, there are situations when it will be necessary to switch to COH. This dichotomy is well reflected in two basic documents: the Bulletin of the UN Secretary-General concerning the application of IHL by UN forces and the Convention on the safety of UN forces and related personnel; while the Convention applies when UN forces act in law-enforcement mode, the Bulletin applies when UN forces act in the COH.

Prof. Bothe then considered the case of the COH mode, to which IHL applies. He also reflected on the definition of a 'military objective' (ie. an object, the destruction of which provides a military advantage), wondering if it could be compatible with the idea of R2P that protectors are entitled to cause civilian damages that would be permissible by any normal belligerent. The answer, according to Prof. Bothe, should be no:

military advantage is a contextual notion, and means different things in different military situations. We should bring the notion of R2P into any interpretation of what constitutes a military advantage, and what justifies its consequences.

If there is an attack against a military objective and collateral damage is caused, this is permissible under IHL if civilian damage is “*not excessive in relation to the direct military advantage anticipated*”. This involves a balancing process, otherwise called the 'proportionality' equation. What we need to do, therefore, according to Prof. Bothe, is to reinterpret IHL in light of R2P.

The situation where a PKO is undertaken by a third party to an ongoing conflict is dealt with by only a few provisions. These mainly relate to relief operations - which are a necessary part of R2P - to alleviate the suffering of a civilian population.

Prof. Bothe's conclusion is not that IHL conclusively regulates PKOs in the exercise of R2P, but that IHL must be adapted to the necessities of such operations.

During the following debate some participants in the discussion raised issues concerning cases arising from contemporary State and international organisation practice (like Darfur, Georgia, Kenya, Burundi); other important issues, such as the unwillingness of States to act even when resources are available; Darfur as a failure of the R2P norm; the possibility of intervention by regional organisations; the role of NGOs in relation to the norm; the relationship between *jus ad bellum* and *jus in bello*; changes in the attitudes of States after 9/11 (which seems to have given sovereignty a new fillip in counter-trend to the emerging R2P); and the cases of Kosovo and Serbia, and of South Ossetia and Russia (in the first of which in 1999 there was an ethnic cleansing, and in the second there is today no legal ground for R2P). It was mentioned also, that the cases of Kenya and Burundi show a growing acceptance of the legitimacy of R2P.

Working Group 2 – Peace operations and detention

*Rapporteur: Mr Dominique Arpin, First Secretary,
Canadian Joint Delegation to NATO*

The purpose of the working group was to examine the key issues regarding detention during peace operations.

In the first instance, the legal and operational issues relating to the right to detain during peace operations were analysed, in which it was emphasised that detention must be lawful and cannot be arbitrary. Detention may be used during peace operations if necessary for the maintenance of law and order, to ensure the safety of the mission and personnel involved, or to fulfil the operational mandate, which might include the protection of property and freedom of movement within the territory concerned.

Lawful detention was reviewed, noting that deprivation of liberty should only be permissible when it is on solid legal grounds and in accordance with procedures established by law. The question of which law should be applicable is essential and is a complex one. Reference could be made to relevant UN Security Council resolutions, status of forces agreements (SOFAs), host State agreements, *ad hoc* arrangements, and special regimes provided by international law. Only in exceptional cases will Security Council resolutions or agreements expressly authorise detention; the power to detain will mostly be implied. The same principle applies to SOFAs.

Detention cannot be arbitrary. This requirement should be viewed in the light of operational requirements, and the fulfilment of the mandate; therefore, any detention must be appropriate, reasonable and necessary with regard to these factors. There has to exist a factual basis for detention; and it should not to be prolonged without review. Detention cannot be seen as a punishment, retribution or reprisal, and must be used only as a last resort.

The right to detain is subject to certain limitations. Some persons cannot be taken as detainees because they are entitled to privileges and immunities, for example persons enjoying diplomatic status. Detention cannot solely be based on gender, race, religion, age or disability. The right to detain should not affect the principle of sovereignty.

Peacekeepers, in principle, have no authority to arrest, unless a specific express mandate to do so has been given.

The legal framework of detention has to take account of the operational reasons for taking detainees, and the determination of the

applicable law(s). It has to be lawful and not arbitrary, and consequently is limited in its implementation.

Drawing on international humanitarian law (IHL) and on human rights (HR) law and standards, a set of principles and safeguards should be applied, as a matter of law and policy, to all cases of deprivation of liberty for security reasons. Present standards are based on Geneva Convention IV, Additional Protocol I, Article 3 common to the Geneva Conventions, Additional Protocol II, customary rules of IHL, and HR laws.

General principles applicable to detention should be based on the following considerations:

- detention is an exceptional measure and not an alternative to criminal proceedings, that can only be ordered on an individual, case by case basis, and without discrimination of any kind;
- detention should cease as soon as the reasons for it no longer exist; and
- detention must conform to the principle of legality;

As procedural safeguards, the following principles should be respected:

- the right for the detainee to be informed about the reasons for his detention, albeit recognizing the security needs of the detaining power;
- the detainee should have the right to challenge the lawfulness of his detention in front of an independent and impartial body, as well as the right to a periodical review of his detention;
- the detainee should have the right to legal assistance;
- the detainee should have the right to be contacted and visited by members of his family, be entitled to medical care and attention for his condition, and be authorized to make submissions relating to his treatment and the conditions of his detention; and
- the access to detained persons of independent, impartial and neutral humanitarian organizations should be respected by the detaining authority.

During the discussions it became clear that the transfer of detainees by the detaining authority to the local authorities still raises concerns and remains a sensitive issue. While, at present, it might be difficult to elaborate new alternatives to such transfers, there was general agreement that the international responsibilities and obligations of the States concerned should remain.

The working group was presented with practical examples of the extreme complexity of detention in the context of peacekeeping operations. *Inter alia*, specific attention has to be given to determining properly the legal status of individuals who might be subject to detention. For the soldier on the ground, it could be challenging to determine whether he is

dealing with a combatant or a non-combatant. In addition, individuals do not always seem to fit neatly into one of those categories. Peacekeepers feel that there is a lack of clarity to this categorisation. The fulfilment of their mandate should be facilitated by clear, transparent guidance, which would be beneficial both to the detainees themselves and to the military personnel engaged in detention operations.

The examples given are illustrative of the day-to-day challenges which soldiers and military lawyers face. Military forces deployed in multinational operations are often acting in support of governments that need assistance in stabilizing their countries. Military forces consequently may have to perform tasks which normally should be performed by the authorities of the host State. This includes detaining persons in the context of both military operations and law enforcement. The Copenhagen Process, initiated by the Danish Government, seeks to address these concerns and also new challenges. Its overall objective is to ensure that these issues are dealt with horizontally and multilaterally. The goal is to establish a common framework, based on best practices, for all troop-contributing States in a given operation and, where appropriate, also for the host State. The Copenhagen Process aims to bridge the gap of understanding and practice, which currently leaves it to individual troop-contributing States to deal with these challenges on a bilateral or on an *ad hoc* basis. The intent is to overcome the gap between legal theory and the reality on the ground. It is reminded that the Copenhagen Process in no way circumvents, devalues or undermines the already existing legal framework relating to the protection of persons detained in, or outside of, an armed conflict. The key ambitions for the further work of the Copenhagen Process are to improve the protection of detainees, regardless of the status of the individual and the circumstances of the detention, and provide greater clarity for all. It should be in full conformity with already existing levels of legal protection.

The Copenhagen Process will be presented further in New York during the Autumn, with the goal of having a conference in Spring 2009. We are confident that the finalization of this process will contribute significantly in assisting troops on the ground and in improving the protection and the rights of detainees.

Working Group 3 – Peace operations and the repression of international humanitarian law violations

Rapporteur: Prof. Fausto Pocar; President, International Criminal Tribunal for the former Yugoslavia, The Hague; Vice-President IIHL

Working Group Three was composed Judge Meron, who spoke of the role of peacekeepers in searching for persons charged with war crimes; Ms Olivia Swaak-Goldman, who dealt with cooperation between peacekeeping forces and the International Criminal Court (ICC); Professor William Taft, who dealt with preventing and reporting violations of international humanitarian law; and myself.

The working group came to no final solution on these issues, which was, after all, not the task envisaged in the first place. However, with the assistance of the excellent and focused presentations, the working group identified the major issues concerning cooperation with international courts and peacekeeping forces. Attention has been placed on the achievements, shortcomings and limitations of the varied and multi-faceted normative frameworks defined by *ad hoc* Security Council resolutions, fundamental international law principles and various forms of agreements. The Working Group also discussed the influence of major political factors that impact on the ability of courts to carry out their mandates notwithstanding the fact that, at times (as in the case of the self-referral of the Congo to the ICC) they may play in favour of courts as well.

A preliminary consideration for the working group was that international courts lack their own police; they have jurisdiction over crimes but do not have *enforcement* jurisdiction. The contributions highlighted how this limitation can be remedied at least in part by the actions of peacekeepers, as well as by the irreplaceable cooperation of states, although the effectiveness of this remedy varies from one court to another depending upon the degree of effective cooperation between peacekeepers and states on the one hand, and the court on the other hand. In general, the effectiveness of this remedy will depend first and foremost on the scope of the mandate of peacekeeping forces. I will not make a summary of the three presentations that were made but will rather discuss some of the points that were raised.

First, the lack of enforcement jurisdiction of international criminal courts distinguishes these courts (starting with the International Criminal Tribunal for the Former Yugoslavia, or the ICTY, in 1993) from the previous experiences of tribunals in Nuremberg and Tokyo. In the latter case, the tribunals acted in an occupation situation and had a sort of

enforcement jurisdiction, because it was possible for them to order the arrest of individuals and to collect evidence and so on. The situation is different for the current courts. The current exceptions to this difference are, perhaps, the Kosovo panels – which are by definition and by their mandate assisted by United Nations Mission in Kosovo (UNMIK) police – and also, perhaps, the East Timor tribunal.

It is not obvious why it is so difficult to arrest people. Normally, it has been said that the mandate of armed forces has been too vague. It was stressed that, in the beginning, even the ICTY received very little cooperation from States, which was quite detrimental, but nor from security forces starting with UNPROFOR. The situation only started to change at the end of the 1990s. However, the general practice for peacekeeping forces seemed to be that of arresting people – when an arrest warrant has been issued – only if the forces actually met them or came across them by chance. This was clearly insufficient.

Nevertheless, it has been stressed that the achievement of arrests by the ICTY reflects an exemplary record: out of 161 accused, only two remain at large today. Those two individuals are of course high-ranking, but in terms of numbers the achievement is important. In contrast, the role of peacekeeping forces in arresting accused in other situations has also been important. It is sufficient to reflect on the arrest of the former Liberian president, Charles Taylor.

The problem is somewhat different for the ICC, and most of the working group's debate focused on cooperation with the ICC. The ICC itself has no international enforcement agency, and so the role of peacekeepers has been stressed as being very important. As the ICC must normally conduct investigations during ongoing conflicts, the problem of ensuring the protection, safety, and wellbeing of victims and witnesses is exacerbated, unlike those judicial institutions acting after a conflict has concluded. So there is a need to rely on peacekeeping operations and the need to enter into specific agreements with international organisations to facilitate that cooperation.

The agreement between the ICC and the UN was discussed, reflecting on the case study brought by Ms Swaak-Goldman of the cooperation between the ICC and MONUC in the Democratic Republic of Congo. Based on a memorandum of understanding between the ICC and MONUC it has been stressed that although the Security Council authorised MONUC to cooperate with efforts to ensure that those responsible for serious violations of human rights and international humanitarian law are brought to justice, this authorisation does not necessarily include enforcement powers. Under the memorandum of understanding, MONUC *may* agree to a request by the Democratic

Republic of Congo Government that MONUC carry out the arrest of the persons sought by the court. MONUC *may* assist the ICC in search and seizure operations, security, crime scenes, transportation of suspects, and security support—there is certain flexibility on a case-by-case basis. However, the enforcement powers of MONUC are made available more at the request of the government of Congo than at the request of the ICC itself.

Other challenges for the ICC have also been stressed. The problem of balancing the rights of the accused and the duty of the Prosecutor in relation to prompt disclosure of information are issues not addressed specifically by the Statute of the ICC itself.

Additionally, it was stressed that not everything is international criminal justice and not everything has to be done by international criminal courts. The issue of reporting international humanitarian law violations for the purpose of taking steps different from the prosecution of the individual is also an important feature of the repression of violations of international humanitarian law, with a view to identifying different political solutions, like truth commissions or other means for dealing with a conflict situation. The question of the prevention of human rights violations – which tends at times to be underestimated – was also discussed at length by the working group, with a view to identifying how peacekeeping forces can work in that direction.

It was also stressed that there is an important role to be played by domestic jurisdictions. After all, the primary responsibility to prevent and to repress violations of international humanitarian law is theirs. A number of problems have been raised in this respect, including the scope of peacekeeping forces' obligation to report and intervene in breaches of humanitarian law if they see abuses being committed or about to be committed.

The discussion then reverted to the courts and to the question of the relationship between international and domestic courts: the principle of complementarity. The difficult issue of deciding when a court is unable or unwilling to hear a case was thus considered, in particular whether inability is just a technical inability or if it is a political inability—as appears to be the case in many situations.

I will conclude the report here. As you see, many issues were discussed. In general, the lack of sufficient clarity as to the role of peacekeeping forces in this matter has been stressed, although there have been several examples in which peacekeeping forces have played an important role. However, the whole framework is not fully clear and should perhaps have to be defined in the future.

Working Group 4 - Responsibility and compensation for damages caused during peace operations

*Rapporteur: Ms. Maria Telalian,
Legal Advisor, Ministry of Foreign Affairs, Greece.*

The issue was analysed and examined by three speakers, who elaborated on certain of its specific aspects.

The first speaker, Admiral Ferdinando Sanfelice di Monteforte dealt with the question of 'Operational Command Versus Organic Command'. The Admiral made the point that in today's multi-national operations, the division of responsibilities between the 'troop-providing nation' and the multi-national command structure is not clear-cut. The troop-providing State usually bears responsibility for recruiting, educating, training, equipping and sustaining their troops. Any damage that arises from the State's failure to effectively perform these tasks is attributable to the State. The international organization, on the other hand, bears responsibility for the application of the operational plan and the related rules of engagement. It was suggested that, in cases of disagreement about operational issues between the organization and its member States, the member States may use self-protection mechanisms such as 'national caveats'. They can, for example, limit the extent to which they transfer authority over their forces to the organization. That would mean they hand over only 'operational' or 'tactical' control, instead of transferring operational command.

It was finally emphasised that, although multi-national organizations are assuming an increasing amount of responsibilities on their own, in practice there seems to be a division of responsibilities between organizations like NATO and its member States. Examples were given showing that when it comes to liability for damage caused to civilians by the use of national weapons, the organization has in some cases agreed to pay compensation to the victims; while on some other cases, it was the State whose forces caused the harm that assumed the responsibility to compensate.

The second speaker, Professor Pierre Klein, spoke on the subject of 'Violations of International Humanitarian Law Committed during Peacekeeping Operations: Where does International Responsibility Lie?' In introducing this subject, the speaker first delimited his presentation, indicating that he would focus on two types of peace operations: operations for the maintenance of peace and security, where national contingents are placed under the command and control of the UN and are

therefore considered its subsidiary organs; and UN-authorized operations, which are undertaken by multi-national forces authorized by the UN. Whereas in the first type of operation, the question of who bears responsibility for breaches of international humanitarian law is relatively easy to answer (given that today it is widely recognized that international organizations are responsible for the internationally wrongful acts of their organs), things are more complicated regarding the second type of peace operations. In the case of UN-authorized multi-national peace operations, it is not easy to determine which entity bears responsibility breaches of international humanitarian law - is it the organization itself (the UN), or troop-contributing States, or is it both?

The solution that was suggested is based on the approach followed by the International Law Commission in its Draft Article 5 on the Responsibility of International Organizations for the Commission of Internationally Wrongful Acts. In that Draft Article, the Commission uses the test of whether the organization exercised 'effective control', to determine whether the wrongful conduct of a State organ that is placed at its disposal for the exercise of one of that organization's functions, shall be attributable to the organization.

On the basis of the above criteria, it was suggested that breaches committed in the course of peacekeeping operations authorised by the Security Council should be attributed to those who exercise effective control over such operations; whereas breaches committed during peacekeeping operations under the control and command of the UN should be attributed to the latter.

It was pointed out that a different approach was followed by the European Court of Human Rights in the *Behrami and Saramati* case, where the Court assimilated peacekeeping operations with multi-national peace operations authorized by the Security Council. Instead of the criteria of 'effective control', the Court used the criteria of 'ultimate authority and control', thus calling into question a well-established practice in the international community, that is based on fundamental principles of international responsibility. The legal consequences of the decision are still uncertain. It was noted, however, that the law on the responsibility of international organizations is in the process of being developed further by the International Law Commission.

Finally, it was stressed that in today's peacekeeping operations the concurrent responsibility of States that contribute personnel to an operation cannot be excluded whenever the conditions of 'effective control' are satisfied. Thus, where a national contingent is placed at the disposal of the UN, but in fact remains under the effective control of the contributing State, it is this State rather than the UN that will be

responsible for breaches of international humanitarian law committed by the contingent.

The third subject, introduced by Ms Maria Telalian, highlighted the issue of individual criminal responsibility, focusing mainly on developments within the UN aimed at ensuring accountability for serious crimes committed by forces during peacekeeping operations. It was recalled that whereas violations of international humanitarian law committed by the UN's agents could be attributed to it as an international organization, as a general rule the grant of criminal reparations should be guaranteed by States. This means that the exercise of criminal jurisdiction for criminal acts committed by peacekeepers at their duty station remains the responsibility of member States.

It was explained further that the United Nations does not possess the necessary legal and financial capacity to deal with these situations, and it cannot therefore hold a person accountable. Nor does it have the legal capacity to conduct a criminal investigation where it is alleged that the conduct engaged in by its peacekeepers may amount to a crime. The UN can, however, conduct administrative investigations as part of its disciplinary processes, and can use these investigations to provide credible and reliable information that could trigger a criminal investigation by the State concerned.

The problem of the exemption of peacekeepers from the criminal jurisdiction of the host State was highlighted, and the different immunity and accountability regimes that govern the activities of persons participating in UN operations was analysed. It was said that military personnel enjoy absolute immunity from the criminal jurisdiction of the host State, which means that the sending State is under a duty to prosecute and bring to trial such personnel, in order to avoid the problem of impunity for peacekeepers. However, State practice has shown that national courts have a poor record when it comes to the prosecution of such individuals. This is due to legal or political reasons.

It was further said that UN officials and experts on mission enjoyed functional rather than absolute immunity, and the problems related to the waiver of such immunity were also raised.

The point was made that the question of the accountability of peacekeeping personnel has become more pressing in the last few years, when disturbing revelations were made concerning incidents of sexual exploitation and abuse by UN peacekeeping personnel. This damaged the reputation of peacekeepers, and the United Nations as a whole. The UN tried to respond to these challenges through a better dissemination of its zero tolerance policy and the adoption of a series of measures that aim to address these problems.

It was mentioned that, as a result of the report of the Special Adviser to the Secretary-General on Sexual Exploitation and Abuse by the UN Peacekeeping Personnel (known as the Zaid report), and the emphasis put on problems related to holding UN staff and experts on mission accountable for crimes committed during peacekeeping operations, the General Assembly has decided to set up an Ad Hoc Committee on Criminal Accountability of UN Personnel and Experts on Mission. This Commission will examine the report of a group of legal experts which made important recommendations on this subject. The basic problem raised in the report is how to overcome obstacles that exist in holding such personnel accountable for crimes committed during peacekeeping operations.

A major concern in the report is that problems arise when a crime is committed in a host State and that State is unable to prosecute an alleged offender. In that case, as was suggested by the legal experts, there is a need for third States to prosecute. If other States have not extended the operation of their criminal laws to apply to crimes committed in a host State, then there is a jurisdictional gap and the alleged offender is likely to escape prosecution. In order to close this jurisdictional gap, the experts suggested that as many States as possible assert and exercise criminal jurisdiction. The group also recommended the development of a new international instrument (or convention) that would enable States to establish jurisdiction in circumstances as wide as possible. These questions are presently being examined by the Ad Hoc Committee on Criminal Accountability.

The General Assembly, following on from the work of the Committee, has recently adopted a resolution (62/63) which contains important short-term measures enabling States to confront the problem of the jurisdictional gap. In this resolution, the General Assembly urges States to establish jurisdiction over criminal activity committed by their nationals serving with the UN. In addition, it was said that General Assembly Resolution 61/291 revised the draft model memorandum of understanding, which contains standards of behaviour required of peacekeepers based on the rule of law and respect for human rights. Lastly, Security Council Resolution 1820 (2008) was mentioned, which addresses explicitly the question of sexual violence when used as a tactic of war deliberately targeting civilians, or as a part of a widespread or systematic attack against civilian populations. The Resolution expresses the readiness of the Security Council to adopt measures to address such violence.

The discussion also highlighted the need for the UN to continue its work on a comprehensive response to this serious problem, and for States to hold the offenders of such crimes accountable and bring them to trial.

The role of the International Criminal Court in this respect was also emphasized, particularly when the offenders committed serious violations of international humanitarian law.

**IMPLEMENTATION OF INTERNATIONAL HUMANITARIAN LAW IN PEACE
OPERATIONS**

**The teaching, dissemination and implementation
of international humanitarian law in peace operations**

General Introduction

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“The training plan for Operation Cordon [Somalia] did not adequately provide for sufficient and appropriate training in relation to several non-combat skills that are essential for peacekeeping, including the nature of UN peacekeeping and the role of the peacekeeper; the Law of Armed Conflict, including arrest and detention procedures; training in use of force policies, including mission-specific rules of engagement”; (...)

Report of the Somalia Commission of Inquiry, July 2, 1997

The small quote of the Canadian report of inquiry, which was published after the termination of the Canadian engagement in UNOSOM II (the United Nations Operation in Somalia) sheds light on the relevance of international humanitarian law (IHL) training as part of the preparation of modern peace operations. Peace forces engaged in complex and integrated missions need to understand the fundamental importance of conducting the operation with full respect for the applicable rules and principles of international law. A mission to restore law, security and stability is doomed to failure if those who implement it disregard the law. The consequences for the peace force may be disastrous. In the UNOSOM case, misconduct of some individual peace keepers towards detainees led to the disbanding of the Canadian Parachute Regiment, and so had a far deeper impact than commanders of the regiment had ever imagined.

Before entering the core topic of this contribution, let us briefly revisit some general considerations of military training methodology, which are also valid in general for modern adult teaching and training.²⁶⁸

- Training is most effective through personal involvement and activity. Trainees learn more, learn more quickly, and will remember better if they have a chance to directly apply in practice what they learned.

- Training must be focused on clear, realizable objectives. Trainees are more motivated to involve themselves actively, if the objective and the way to reach it is clear, and if progress is measurable at all stages of the training.

²⁶⁸ These general considerations are specified in more detail in the Swiss Armed Forces manual "Ausbildungsmethodik" (Training Methodology), Rgl no 51.018, dated 01.09.2005.

- Training needs to be adapted to the level of knowledge and experience of trainees. As a starting point, the available knowledge level of participants must be taken into account. A trainee who knows a substantial part of the training content is easily bored and does not follow the course, while a trainee who does not bring in the starting knowledge necessary to follow the training will be over-challenged, and so will also not profit greatly from the training.

- Trainees bring a set of physical, mental and social skills with them. Training should build on that. Motivation of trainees is crucial for success.

- The training methodology should reflect the situation in which the acquired knowledge will be used. Field troops will pass considerable time in field training and exercises, while staff officers and higher commanders will be trained in command post exercises.

- Staff officers and senior commanders should be trained in new subjects, through a balanced ratio of general lectures (10-20%), guided class discussions (20-30%), and exercises (up to 50%).

- Individual theoretical knowledge can be built up by the trainee through information technology based modules such as e-Learning or DVDs.

- Trainers in all levels of the hierarchy must be masters of their subject, and they must bring conviction and leadership to the training process. For example, there should be a firm conviction in IHL in all military leaders, from the Chief and Head of Defence down to the corporal.

- Training content must reflect current doctrine and must therefore constantly be updated in accordance with doctrinal changes.

So, it is clear that military personnel who are to be deployed on a peace mission will not simply receive a pocket card without comment. Rather, after a short theoretical introduction with a common reading of the card, all members of the contingent will undergo individual and collective field training modules exposing them to the widest possible range of situations which could be expected to arise during the mission. The sequence must end with an individual and collective test proving that the trainees are now fit for the mission. The above-mentioned Canadian report contains a number of important conclusions, which have since influenced the perception and planning of pre-deployment training for peacekeepers.

Five general considerations should underpin the training process for peacekeepers.

General Consideration 1

The teaching, dissemination and implementation of international humanitarian law must be part of the general training (fit for mission) of armed and security forces as well as of civilian personnel being deployed to peace operations.

This first consideration is confirmed by the Canadian Report. All troops must be able to disseminate and implement IHL at any time. The obligation to disseminate IHL is permanent and applies to all forces engaged in any operations, as specified in Art. 83 of Additional Protocol I: "*The High Contracting Parties undertake, in time of peace as in time of armed conflict, to disseminate the Conventions and this Protocol as widely as possible in their respective countries and, in particular, to include the study thereof in their programmes of military instruction*". The text of Additional Protocol I continues as follows: "*Any military or civilian authorities who, in time of armed conflict, assume responsibilities in respect of the application of the Conventions and this Protocol shall be fully acquainted with the text thereof*". Therefore, training in IHL, in particular for military personnel, may not be considered either a sporadic or a dispensable activity.

As Françoise Hampson stated, "*make the dissemination of international humanitarian law a matter of command responsibility within the armed forces and, as required by international obligations, ensure dissemination of IHL to the civilian population by including it in the educational curriculum*".²⁶⁹

In March 2004, NATO issued STANAG 2449²⁷⁰, '*Training in the Law of Armed Conflict*'. The document recognizes that law of armed conflict (LOAC) training is a national responsibility, but in order to be able to operate multi-nationally it is necessary for NATO to assure a minimum acceptable standard for LOAC training. All NATO personnel are to have a basic knowledge of the law of armed conflict appropriate for their duties and ranks. The STANAG further requires a meaningful input of LOAC issues into training and exercises. A commander's decisions must be consistent with LOAC, and legal advisors are required to support commanders. As a conclusion, the STANAG provides for LOAC dilemmas to be included in training whenever possible.

General Consideration 2

During the preparation for a peace operation, special aspects of the legal

²⁶⁹ Françoise J. HAMPSON, *International Humanitarian Law in Situations of Acute Crisis*, London, 1998; quoted from:

<http://www.essex.ac.uk/rightsinacutecrisis/report/hampson.htm>.

²⁷⁰ NATO Legal desk book, Brussels, 2008, p. 176 ff.

*framework*²⁷¹ must be part of the mission specific preparatory training (fit for the specific mission).

The second general consideration is again echoed in the Canadian report: "*The Chief of the Defence Staff establish mechanisms to ensure that all members of units preparing for deployment on peace support operations receive sufficient and appropriate training on the local culture, history, and politics of the theatre of operations, together with refresher training on negotiation and conflict resolution and the Law of Armed Conflict, as well as basic language training if necessary*".

In a recently published document, Laurie R. Blank and Gregory P.Noone state that "*countries whose militaries frequently participate in international peacekeeping operations will need to have more advanced law of war training to ensure smooth cooperation and coordination with peacekeeping units from other countries*".²⁷²

It is obvious that a multi-national force engaged in peace operations cannot be successful if the standards applied by the various national contingents are fundamentally different. However, multi-national operations will also often not work successfully if they operate on the basis of the legal lowest common denominator. The political end state of any successful peace operation requires exemplary conduct by the international presence, and high standards with regards to the respect of IHL and human rights law. It might therefore be necessary for States participating in such a multi-national operation to adopt higher standards than they would in a national operation. The rules of engagement (RoE) applicable for a specific operation will express the standards with regard to the use of force, with which all participating nations and contingents must comply. Nations may restrict their freedom further than is required by the RoE, but can never expand it.

Nations with lower standards of IHL training should use the opportunity of multi-national operations to improve their standards, rather than to trying to drive down the standards of the other participating nations.

There must be common rules of engagement and a common understanding of their interpretation and application by the peacekeepers. Violations of norms of humanitarian and human rights law by peacekeepers are intolerable, and may have a negative impact on the

²⁷¹ Mandate, applicable law according to the situation on the ground, rules of engagement, status of personnel, law of host nation, CAVEATs of partner nations, etc.

²⁷² Laurie R. BLANK, Gregory P. NOONE, *Law of war Training*, USIP/Washington D.C. 2008, p. 9.

success of the mission. Therefore, considerable investment in LOAC and human rights training is needed to ensure a high standard of performance by the personnel on the ground.

Training must be tailored to the needs of the audience to become effective. In peace operations, preparatory training should be divided into the following categories:

- Senior Staff level (Multi-National Joint Task Force Staff)
- Brigade and Task Force Staff
- Platoon
- Individual
- Specialists (Human Intelligence, Military Police, etc.)

At theatre level, issues of *ius ad bellum* and the applicability of LOAC must be considered, and at times decided. The character of an operation may change in the course of the action, from a generally accepted presence to a partially and, at times, even mostly rejected presence. The execution of the mandate could then require the use of force which exceeds self defence, thus triggering the application of LOAC. For the soldier it is important that we call a cat a cat: artificial legal constructs will not simplify the trainer's task. If troops can find themselves in a combat situation, they should know that the rules and protection mechanisms of LOAC will apply to this situation. Senior commanders and their staff (especially legal advisors), must be trained in those issues. It is their task to inform the organisation and sending States about the changing environment on the ground, in order to receive in return adequate instruction.

On the tactical level, the use of force has become necessary in many modern missions to compel singular dissidents or small resistance groups to accept a broader peace arrangement or to respect the international presence and its mandate. Adequate rules of engagement must provide the necessary framework to ensure full respect of LOAC by the peacekeepers if the use of force becomes necessary in such situations. However, as trainers we should make our trainees aware that in a peacekeeping operation, the use of force is never the central method, but is merely a tool for the primary aim of restoring stability and peace.

Therefore, commanders and staff officers of tactical units must be trained in peacekeeping techniques. They must know the effects of their weapons and the impact their use might have on the further development of a situation. 'Non-violent means first' and 'de-escalation' are key terms of reference for peacekeepers.

At platoon level, the on-scene commanders are often burdened with far-reaching responsibilities. They carry on their shoulders responsibility for decisions such as whether to use firearms or to withdraw

in a given situation. A decision at a low tactical level may have a strategic impact for the entire mission. Often, on-scene commanders barely have time to take such decisions. That is why realistic, mission-oriented and practical training including live fire exercises, are crucial for this level of responsibility. Junior commanders need to be able to apply the rules instantaneously and correctly; sometimes they do not have a second chance.

Finally, at the individual level, the oft-cited quote of the former UN Secretary-General Dag Hammarskjöld, "*peacekeeping is not a job for soldiers, but only a soldier can do it*", poses a real challenge for training of peacekeeping forces. The traditional mindset of a combatant/soldier must be enlarged to that of a multipurpose peacekeeper, having in mind his mandate, mission and the rules of engagement which regulate the successful execution of his tasks. He must overcome precepts of his social and cultural background if they conflict with the peacekeeper's ethos: 'use of force as last resource' instead of 'shoot to kill'; 'readiness to accept certain risks' instead of 'maximised force protection'; 'multi-national environment in a foreign cultural context' instead of 'operations at home'. In such an environment, sufficient time for training and selection of personnel are prerequisites for the successful generation and deployment of peacekeeping forces.

My next thesis focuses on the key contents of pre-deployment training. While a broader focus on rules and principles of LOAC and human rights must be used during general training of military personnel, pre-deployment training should focus on certain key issues which play an important role during every mission.

General consideration 3

The most important topics for pre-deployment training include:

- a. non-violent means of de-escalation (techniques);*
- b. use of force:*
 - i. self defence,*
 - ii. while carrying out the mandate;*
- c. arrest and detention;*
- d. protection of vulnerable groups according to the mandate; and*
- e. violations of international law and duty to sanction.*

The RoE must provide clear guidance on all these issues. They need to be tailored to the specific situations the force is going to meet on the ground.

As peacekeeping units are not always recruited as entire units, but rather are often composed by individuals of different backgrounds, force

integration training might be required. Such training needs to be of sufficient duration to allow for rehearsals if the unit fails the objectives of an exercise partially or completely.

General consideration 4

Training must conform to internationally recognized standards and benchmarks; there is a need for model training modules and training exercises; and due to lack of experienced trainers in certain nations, there is also a need for exchange of senior trainers.

The organisation in charge of a multi-national operation must ensure that training of the forces provided by States conforms to internationally recognized standards. This may be best achieved by exchange of trainers. Nations with well-established competence in military training as specified in the quoted USIP study²⁷³ might provide assistance or offer courses for international attendance.

A multitude of training material is available. Nations like Switzerland, the United States, Canada, and Turkey offer a variety of courses for military and civilian personnel. Within the NATO/Partnerships for Peace framework, Switzerland has introduced a bi-annual course for middle ranked commanders and staff officers on IHL, human rights, and legal aspects of peacekeeping operations. Participants are offered a free e-Learning course for their individual pre-course preparation (www.pfp.ethz.ch).

Last but not least, considerable efforts by the International Institute of Humanitarian Law, the International Committee of the Red Cross (ICRC), and now also the Geneva Centre for Security Policy (GCSP) can be mentioned. Their offers provide valid training opportunities for senior and junior staff, commanders and trainers, at their centres, or (in the case of the ICRC) in the field.

The IIHL in Sanremo still lacks funding for its core activities. Under the auspices of better preparing peacekeepers for their difficult missions, more nations should consider providing the Institute with substantial financial support.

General consideration 5

Training must continue during the mission as far as the operation permits.

²⁷³ See note 3, pp. 36-48.

Training is a never-ending task. Situations in the field have a tendency to evolve rapidly; training must keep pace. This can be done in the form of short refreshers, tests to see whether RoE and soldier cards are known and well understood, or periodic live fire exercises. Military legal advisors must take the lead and make sure that all members of a unit are meeting the standards.

Conclusions

The implementation of IHL in peace operations is based on an adequate doctrine, mission-oriented equipment, specific training, and command responsibility. IHL and human rights training are part of the general military training at any time and for all members of the armed forces. It must be given sufficient space in military training programmes, it needs to be conducted professionally with adequate material such as manuals, case studies or electronic interactive training tools.

Offering and conducting IHL and human rights training is part of the command responsibility. The top-down approach and exemplary conduct of commanders at all levels is crucial for success. Trainees must feel that violations of IHL and human rights will be likely to have negative consequences for perpetrators, and for the entire force.

Pre-deployment training must be tailored to the specific requirements of the mission, the mandate and competences of the force, and potential developments in theatre.

A multitude of training material and courses already exist. Experienced nations should further assist other countries, through institutions such as IIHL, or bilaterally, to become fit for peace missions.

The ICRC perspective

Jacques FORSTER

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I am very grateful for this opportunity to present and discuss the perspective of the International Committee of the Red Cross (ICRC) on the teaching, dissemination and implementation of international humanitarian law (IHL) in peace operations. It is indeed an honour and a pleasure to attend this prestigious Round Table, a key annual event for all those committed to the promotion of IHL and human rights law.

Relevance and Integration of IHL for Peace Support Operations (PSO) Forces

As a promoter and guardian of IHL, the ICRC has a longstanding and recognised expertise in this body of law. In this regard, the ICRC cooperates with armed forces worldwide in order to encourage the effective integration and implementation of IHL and, hence, its respect in the conduct of operations - including, of course, as relevant in the frame of peace support operations.

As has been already mentioned on several occasions during the course of this Round Table, IHL is especially relevant for forces mandated and deployed in the framework of peace support operations, since such forces are often deployed in countries suffering from armed conflict, or may even be themselves drawn into hostilities. In the increasingly difficult and violent environments in which peacekeeping personnel operate, IHL has time and again demonstrated its relevance not only as a protective legal regime, but also as a legal framework regulating peacekeeping activities.

In our experience, the behaviour of arms carriers during operations is shaped by four main factors: (1) doctrine, (2) education, (3) training and (4) sanctions. In order for operations to be conducted in compliance with IHL, the law must become an integral part of all four elements. This is what the ICRC calls the "process of integration."

IHL, as with any body of law, consists of a set of rules, sometimes too general to precisely guide practical behaviour in the conduct of military operations. It is, therefore, necessary to interpret the law, analyse its operational implications, and identify its consequences. Indeed, the ICRC firmly believes that in order for IHL to be respected in the conduct of operations - including during peace support operations - the relevant law

must be translated into concrete measures, means and mechanisms conducive to compliance. Let us examine how this can be achieved in the three areas that constitute the process of integration.

Integration of IHL into Doctrine

Doctrine must provide guidance for lawful behaviour. For the purpose of my discussion, doctrine is understood as all standard principles that guide the action of arms carriers at strategic, operational and tactical levels. It therefore encompasses all guidelines, policies, procedures, codes of conduct and reference manuals - or their equivalents - that constitute the substance of the education and training of weapons carriers throughout their careers, giving them a common vocabulary and shaping the decision-making process, tactics and behaviour in operations.

The principles of IHL, together with the means and mechanisms for ensuring respect for specially protected persons and objects, must become a natural and integral part of every component of doctrine. In the first place, it goes without saying that manuals and procedures related to the decision-making process must comply with the law. Reference manuals for the different specialists and areas of action, at the different levels of the chain of command, must also ensure that orders, procedures and rules of engagement comply with the law in the varied and complex situations encountered during peace support operations.

In peace support operations, it is therefore essential that IHL is adequately integrated into the doctrine of the international or regional organisation leading the operations, as well as into the doctrine of the various Troop-Contributing Countries (TCCs) and Police-Contributing Countries (PCCs). This has been adequately reflected in various doctrinal documents of the United Nations, for example the UN Secretary-General's Bulletin of 6 August 1999, *"Observance by United Nations Forces of International Humanitarian Law"*. Furthermore, the UN's commitment to IHL has been expressed in the new doctrinal document issued by the UN Department of Peacekeeping Operations (DPKO) in January 2008, entitled *"UN Peacekeeping Operations: Principles and Guidelines"*. While recognizing the importance of such developments, the ICRC also feels strongly that any documents deriving from these key publications - such as directives or manuals, standard operating procedures, rules of engagement - should also adequately integrate IHL references, when appropriate.

However, it is also essential that IHL be adequately integrated into the national military doctrine of individual TCCs/PCCs, as UN DPKO doctrine does not override the doctrine of member states participating in UN peace support operations. UN doctrine also does not specifically address military tactics, techniques and procedures. Thus, in order to

ensure adequate implementation of IHL in the frame of peace support operations, both UN and national military doctrine of TCCs/PCCs must adequately integrate IHL.

Integration of IHL into Education and Training

Education focuses on providing personnel with theoretical knowledge on IHL as well as on the means and mechanisms that aim to ensure compliance with that body of law. The structure, as well as the proportion of theory to practice must be tailored to the needs of the audience, according to their rank, service, branch or occupation - including those who may be deployed on peace support operations. Teaching must always be as practical and realistic as possible, but an increasingly academic approach can be adopted the higher the rank and level of responsibility of the audience. But knowledge of IHL alone is not sufficient. The measures, means and mechanisms for compliance with the law - as set out by doctrine and procedures - must permeate all matters taught.

Training must include IHL components in a realistic way. The training of arms carriers aims to provide personnel with practical experience of how to perform their functions while complying with the law. It enables officers, non-commissioned officers and soldiers to acquire skills and experience, and must lead to them acquiring the correct reflexes - compliance with IHL should become second nature. This can only be achieved by repeated practice, and the person best suited and the most effective for inculcating such behaviour is the direct superior.

It is of paramount importance that the principles of IHL are included as realistically as possible in daily training - along with the measures, means and mechanisms for compliance - as provided by doctrine, tactics and procedures. It has been proven that the most effective instruction is through practical exercises .

In the case of personnel assigned to participate in peace support operations, it is essential that IHL be integrated into any educational and training programme that prepares personnel for service or deployment on peace support operations. In this sense, the UN DPKO (and/or concerned regional organisations, such as the African Union) has a key role to play in providing national authorities with the necessary education and training materials, in the form of modules which integrate IHL principles. One example of this is UN DPKO's Standardised Generic Training Modules for UN Peacekeeping. It is then up to the national authorities to ensure that effective education and training - integrating IHL as necessary - is provided for personnel prior to deployment on peace support operations. Such education and training activities often take place at national or

regional peacekeeping centres. Needless to say, a strong synergy between the UN and national authorities is essential to ensure high standards with the adequate integration of IHL into all relevant education and training programmes.

The ICRC also often offers its services to TCCs to assist in the integration of IHL into the preparation of UN or regional forces. In particular, the ICRC offers its expertise in IHL instruction and curriculum design, as well as in the provision of IHL didactic material – generally in national or regional peacekeeping centres. Furthermore, the ICRC often participates in pre-deployment programmes organised by TCCs. In addition to general IHL issues, the ICRC aims to explain its role, mandate and activities in order to ensure a basic knowledge of a key humanitarian actor with whom peacekeeping forces will inevitably interact. As a concrete example, the ICRC has organised pre-deployment briefings for the majority of national contingents deploying to the UN Assistance Mission in Darfur (UNAMID), as well as for UN forces in other contexts.

Effective Sanctions for Violations of IHL

Sanctions for violations of IHL play a key preventive role. They must, therefore, be visible, predictable and effective. Experience shows that the more visible the sanctions are and the more predictable their application, the more dissuasive they will be. They also make it possible to effectively punish those who have failed to obey the law. Sanctions, therefore, offer the force hierarchy a means of enforcing orders and discipline and of showing that the whole chain of command is firm in defending its fundamental values. Sanctions can be enforced both through disciplinary or penal measures. While penal sanctions are necessary, they must be backed by effective disciplinary sanctions at all levels of the chain of command.

The integration of IHL into doctrine, education and training is not enough. It is absolutely necessary to have an effective system of sanctions for violations of IHL committed by forces deployed on peace support operations. Should IHL become applicable, it is absolutely essential that any violations be suppressed and, as appropriate, sanctioned. This often requires a complex process in the frame of multinational peace support operations, as generally, individual national contingents are responsible for pursuing criminal investigations and sanctions against their own troops that may have committed violations of IHL. It is, therefore, essential that TCCs take the necessary steps to ensure that effective and workable systems for the repression of IHL violations are in place - together with a corresponding commitment to investigate and punish violators of IHL.

Worldwide, the ICRC offers national authorities - including the

armed forces - legal and technical assistance in incorporating IHL into national law. This includes, notably, providing model laws for the repression of violations of war crimes and other violations of IHL

Conclusion: ICRC and Peacekeeping Forces - Shared Concerns

At the start of the 21st century, the ICRC is very much aware of the challenges that today's peacekeepers face in the more complex and difficult environments in which peace support operations are launched and maintained. Indeed, the ICRC has an operational presence in 18 of the 20 UN-mandated peacekeeping operations in the world today. The ICRC also shares operational contexts with those peace support operations launched by regional organisations, such as the African Union. In all of these contexts, the ICRC is involved in a regular and multi-faceted dialogue with peacekeeping personnel. It therefore observes clearly the relevance of IHL to peace operations and to the personnel assigned to support such operations.

In order to ensure an effective implementation of IHL in the frame of peace support operations - should IHL become applicable - the ICRC feels strongly that this body of law must be adequately integrated into the doctrine, education and training of peacekeeping personnel; a system of sanctions must also be in place and functioning. For years, the ICRC has worked closely with the UN, regional organisations and national authorities in order to provide support in the IHL integration process. As we look towards the future, the ICRC stands ready to continue to share its expert advice in IHL and in its implementation in the frame of peace support operations.

The United Nations perspective

Ben KLAPPE

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It is a great pleasure for me to be back in Sanremo. I have had the pleasure of working with the Institute's military department in organising a course on the law of armed conflict for officers from all over the world, and it is a great pleasure to be back in Sanremo and to contribute once more to this Annual Round Table.

That reminds me of an example of the applicability of the principles of international humanitarian law (IHL) to peacekeeping some fifteen years ago, when I was deployed with the United Nations Protection Force (UNPROFOR) to the former Yugoslavia. At one point in time, an armed patrol of armed personnel carriers and tanks received sniper fire from a cottage up in the hills. The response to the sniper fire was a heavy one. The patrol fired a few dozen tank rounds into that small cottage, effectively destroying it. When the Force Commander came to see the sergeant in control of that patrol the next day, he said, "Sergeant, you effectively destroyed that target there. You obviously acted in self-defence, but why 37 rounds?" And she said, "Sorry sir, it's all I had".

So the issue of proportionality wasn't made quite clear to the lady in charge of that tank patrol. Nevertheless, I will show a few pictures and try to explain the dilemmas and issues that come up when peacekeepers are deployed in the field. I also would like to tell a bit more about the training activities of the Department of Peacekeeping Operations and in particular the Integrated Training Service, as it is called today.

So, you will remember that in the early 90s peacekeepers found, as they said, that the mandate "wasn't good enough and our hands were tied", and that "the rules of engagement are not applicable to situations we find ourselves in today."

Well, times have changed and almost all United Nations Security Council resolutions these days contain the typical phrase: "*the authority to protect civilians under imminent threat of physical violence.*" It authorises the use of force to protect civilians, and basically leaves it up to a Force Commander - and also subordinate commanders or even commanders on scene - to determine if and when there is an imminent threat to civilians. And how imminent is "imminent"? That is the next question a soldier on the ground should answer if he uses force other than in self-defence.

Peacekeepers do use force and are authorised to use force, as is illustrated by the picture of blue helmets in the streets of Cite Soleil, Haiti.

But then, there is the question of the Secretary-General's Bulletin on the applicability of certain principles of international humanitarian law to peacekeeping forces. Is the Bulletin really of relevance for soldiers in a peacekeeping situation? Is it of relevance to the soldiers when the situation has passed over the threshold of an armed conflict?

The Bulletin says that the principles of IHL as laid down in the Bulletin are applicable to the situation of armed conflict, when peacekeepers are engaged therein as combatants. Of relevance in my view here is whether some principles of international humanitarian law could be applied regardless the factual situation on the ground. It is my view that those principles specifically laid down in the Bulletin – namely the distinction between civilians and combatants, the treatment of detainees, the treatment of civilians, the treatment of persons *hors de combat* (this is only a limited summary of the Bulletin) – could apply at all times. So even if the threshold of an armed conflict is not met, the principles can be applied in any case. And these principles are also laid down in the standard operational procedures on the use of force. Also, in the rules of engagement for most peacekeeping missions, you find a reflection of these international humanitarian law principles.

In a questionnaire filled out some time ago, soldiers from the United Nations Interim Force in Lebanon (UNIFIL) were asked if they had ever heard of the Geneva Conventions or the laws of armed conflict. Fortunately, 98% said “yes”. And even more fortunately, 86% said they would like to know more about it. But then, unfortunately, when asked “did you receive adequate instruction from your national army on the meaning and relevance of the Geneva Conventions?”, 71% said “no”. The questionnaire continued and asked: “do you think the Geneva Conventions have any relevance in peacekeeping missions?”. 71% said “yes”. And then another good thing, I would say: in response to “the last time you received military instruction on the Geneva Conventions?”, 67% said “during my UNIFIL training” – the pre-deployment training. Then: “how would you rate your own understanding of the Geneva Conventions?” 65% said poor.

Now this is a questionnaire for soldiers who were deployed in a mission. But if you had asked, “are you aware of your rules of engagement?”, 100% would have said yes, hopefully. If you had asked them, “are you aware of the standard operating procedures (SOP) on detention?”, 100% would've said “yes: detention, there is the SOP, I've been informed about the SOP.” So what I mean is, it's not all the Geneva Conventions and law of armed conflict as it is called, the principles

derived from the treaties and the conventions are also integrated in these instructions.

Let me remind you that IHL training and dissemination is first and foremost the responsibility of the member States - the High Contracting parties, as laid down in the various articles of the conventions.

Peacekeepers do have an important role when it comes to applying human rights and IHL rules during deployments; for example, by monitoring and reporting possible violations of the rules. In addition, peacekeepers have a deterrent effect through their presence, and they have the authority and the capacity to stop abuses of human rights. And in doing so they maintain the credibility of the United Nations as an organisation.

So now to the Integrated Training Service (ITS). This is a team of very well-experienced trainers: national trainers seconded by their government; civilian trainers; specialists in training, military and police trainers working with the Department of Peacekeeping Operations for a number of years. There are some thirty staff and trainers based at the UN Headquarters in New York, and a few are based in Brindisi as their forward operating base - these are the 'executive branch' of the Integrated Training Service. They develop training materials, and distribute the training materials and peacekeeping materials to the various contributing countries. They also conduct pre-deployment training, and send teams to troop-contributing countries to assess whether their troops are up to deployment standards, including international humanitarian law standards and training. This, of course, is a sensitive matter. So the Department of Peacekeeping Operations and the ITS have developed standard generic training modules, which are widely distributed and used for the pre-deployment training of troops; they are also used for in-mission training. In all missions, there is a small skeleton staff of two to four that assists the troop-contributing countries and the units in conducting in-mission training.

I spoke earlier about the relevance of the Secretary-General's Bulletin. The Integrated Training Service is currently developing a generic training package that will be mandatory for all pre-deployment training, to support Security Council Resolution 1296 on the Protection of Civilians in Armed Conflict. Another partner in this training process is the Office of the High Commissioner for Human Rights, which has developed a series of human rights training packages also used partly in pre-deployment training and in-mission training, which contains a module on international humanitarian law. In addition there is the on-line training and e-learning agency the United Nations Institute for Training and Research (UNITAR), which has changed names now.

Training should be practical and should be – and still is – a command responsibility. Here is an example: Mrs. Telalian earlier spoke about the issue sexual exploitation and abuse by peacekeepers, as an example of training material. A poster distributed within the mission in Côte d'Ivoire clearly tries in very simple pictures to illustrate that sexual exploitation and abuse will result in repatriation, dismissal and in jail time. We've seen the problems of proving beyond reasonable doubt that these acts have happened. But the efforts to prevent them are there.

Let me conclude with examples of practical training that could be conducted in the field. A situation in the field leaves the 18 or 19 year old peacekeeper with just a split second to decide: is it a hostile act or was it done with hostile intent? He should have the definitions of these terms clear in his mind. A 'hostile act' is an action that will threaten life or result in the physical disability of a person. So, is this a hostile act or intent? Is it a preparatory action leading to a hostile act? The Secretary-General's Bulletin flashes through his mind in that split second as well. Is it a combatant or a non-combatant? Does it make a difference for the soldier whether the potential threat comes from a child, a woman or an adult?

Children are, I suppose, even more unpredictable and are an even higher threat to the soldier than armed adults. So the basic questions here is: "shoot or hold fire?" Ideally, you would expect the same response to same situations from all peacekeepers of all participating countries. But we've seen cases in the streets of Monrovia where a Nigerian soldier will grab an armed child's ear and say "hand me that weapon", and the child will comply. But at the same time, soldiers from other countries may have fewer patience and their standard response to the same situation would be one shot aimed at he heart, and one at the head. It depends on how countries train the soldiers, their perception of the situation, and their individual response. You cannot simply show the soldier a picture and tell him: "this is the way you must respond." It all depends on the situation the soldier finds himself in on the ground.

I would like to conclude here, because you've already seen an excellent summary by General Dahinden on the red line in training, and I think that that is precisely what the UN and the ITS is trying to achieve.

Thank you very much for your attention.

The NATO perspective

Baldwin de VIDTS

Legal Advisor to the Secretary-General, NATO; Vice-President, IIHL

Within NATO and from the specific way in which NATO-led operations are organised, the preparedness of military forces to undertake their tasks and duties - including their knowledge of applicable international humanitarian law (IHL) - is ensured by a special procedure.

As an intergovernmental organisation, NATO does not have military forces of its own. Such forces are made available by independent, sovereign States willing and able to contribute certain forces and assets. Through a so-called 'force-generating exercise', individual nations are asked to provide certain means and capabilities, which would allow the organisation to conduct an operation that has been approved by all the NATO member States. Before the member States, convening in the North Atlantic Council, approve such an operation, a planning and preparation process involving the Military Authorities of the Alliance must be followed. The process also involves ensuring knowledge of IHL by those military personnel made available by a sovereign State. Hence, with regard to the responsibility to educate and train in IHL the military forces participating in a NATO-led operation, I would like firstly to refer to the introductory remarks made by the NATO Deputy Secretary-General, Ambassador Bisogniero, and in particular his observations about the role NATO nations have to play with regard to the education and training of their own military forces.

As a matter of principle, NATO-led operations are conducted with full respect for public international law, including appropriate rules of international humanitarian law and generally recognised human rights principles. In other words, the 26 nations represented on the North Atlantic Council that have to come to a consensus decision whether to launch an operation or not, will do so with full respect for their legal rights and obligations under public international law.

At the moment when this crucial decision is taken, the NATO member States' decision regards not only the legality of the operation itself, but also requires that the implementation of the operation is done in a legally valid way. To that end, NATO nations approve an operational plan which contains all elements needed and required for a military commander to be able to undertake the mission given. Such an OPLAN will contain not only the rules of engagement (ROE) dealing with, among other things, the use of force, but will also address issues such as how

claims are to be settled, jurisdiction, etc.

Obviously, nations give particular importance to the manner in which the military should conduct itself when implementing a mandate. Special attention will be given to what is allowable under the domestic law governing the military forces of a particular State. From that perspective, certain nations will put special conditions – also called “national caveats” – on the use that can be made of some or all of the military personnel it makes available for a specific NATO operation. Although this creates special problems and, in a given situation, may be cumbersome for a NATO commander in charge of a NATO-led operation, all troop-contributing nations have to come to a common understanding in order for the mandate to be exercised in an operation.

As a result, NATO-led operations are always conducted based on common rules and practices, which are approved by the competent civil and military authorities within NATO. The application of international humanitarian law is also integrated into those rules. Hence, any nation that contributes forces to a NATO-led operation – whether it be a NATO member State or not – accepts common rules and thus at least a minimal common standard of applicable IHL.

You are very well aware that from a formal legal perspective it is not always very clear what law, rule or regulation applies to a given crisis, whether it be international or internal in nature. There are circumstances where it is very clear that the full range of IHL is applicable; it is less clear to what extent IHL may be applicable to peacekeeping or peace support operations, which do not constitute armed conflict. Despite this lack of clarity in the application of IHL, the NATO-approved operational plan will always contain a minimum common level of IHL-type provisions to be applied by all contributing forces.

That minimum level is the result of the reality that not all NATO nations are parties to all of the same humanitarian law treaties. In practice, the difference in IHL applicable to the nations is not profound, because several main principles which lie behind the overall purpose of international humanitarian law are not contested. I cite as examples the principle of military necessity, the need for distinction between combatants and non-combatants, proportionality, and the principle of humanity. In addition, nations will often work out more detailed rules to apply to the conduct of the operations. Over more than a decade of practice now, dealing with quite different types of operations like the Implementation Force (IFOR) and Stabilisation Force (SFOR) in Bosnia Herzegovina; the Kosovo Force (KFOR) in Kosovo, and the International Security Assistance Force (ISAF) in Afghanistan, nations have been able to agree on a common set of rules.

It goes without saying that those rules are based on the ones applicable in the domestic legal system of each of those States. The commonality of many of the principles and rules concerned makes it possible to find a common denominator and, more importantly, means that this common denominator is not something entirely new but something known to the military personnel affected.

I necessarily expanded a little bit on how NATO-led operations come into being, are organised and arrive at a common set of rules, in order to be able to demonstrate where the bulk of the responsibility lies for training and education in those rules, and applicable IHL in particular.

Indeed, considering that the military forces required to operate and implement a NATO-led operation, come from the contribution of those States willing to contribute certain forces and military assets, it is within NATO a standing principle that each of the troop-contributing nations (TCN) is itself responsible for the education and training in IHL of its military personnel. The advantages of such a system are obvious: each nation is fully acquainted with the international legal obligations it has signed up to, and is, therefore, obliged to take the necessary measures for adequately forming and training their own military forces. Therefore, training and education in IHL is first and foremost a national obligation of the NATO member States.

Depending on the legal instruments to which a particular State is a party, many States – and certainly all NATO member States – have already signed up to a broad range of responsibilities under the different humanitarian law treaties. In the first place, certain obligations contracted in that way have direct results in a purely national context. It is up to the authorities of a given State to take necessary measures to adequately organise the dissemination of and education in IHL.

Within NATO and in order to be properly prepared for a common operation under unified NATO command or control but composed of the military forces of different states, NATO member States have agreed on minimum standards for training in IHL. This not only fulfils their legal obligations under international humanitarian legal instruments to which they are a party, but also ensures that NATO-led operations can and will be conducted in accordance with IHL.

Under NATO's standing arrangements the following instruction and training principles are to be applied:

- a. all military personnel are to be trained regularly in IHL; in the event of a NATO-led operation, military forces made available to NATO should, in principle, conduct such training prior to participating in the operation;
- b. whenever possible, matters involving the application of IHL

should be incorporated in military exercises; and

c. although basic knowledge of IHL should be common to all ranks within the military, higher knowledge is required for non-commissioned officers and officers.

Since the overall objective of training in IHL is to ensure in all circumstances an appropriate knowledge of and adherence to IHL, the training objectives under the standing NATO arrangements are:

a. to provide all military personnel with a sufficient knowledge of IHL in order to enable them to apply IHL appropriate to their duties and military ranks;

b. to provide all military personnel with the appropriate training related to the implementation of IHL through the simulation of conflict situations during exercises;

c. to enable commanders to properly address and solve problems inherent to the application of IHL and take decisions accordingly; and

d. to enable commanders and officers to take into account IHL limitations and precautions during the planning, preparation and conduct of operations within a NATO framework.

Hence, as a minimum, all military personnel should know their rights and duties relating to IHL, and be able to apply and enforce the relevant IHL rules. In this way, it can be ensured that military personnel are able to take into account limitations and precautions imposed by IHL during each stage of their assignment, i.e. planning, preparation and conduct.

It is, of course, of particular importance that commanding officers are aware that legal duties may vary in their details, between personnel of different nationalities according to different national legal or IHL obligations. NATO commanders should be able to take such differences into account in multi-national operations.

Within the NATO context, several institutions exist which, to a certain extent, assist the NATO member States to provide or prepare for such training in IHL. Training courses at different levels are available at the NATO school in Oberammergau (Germany), and at the NATO Defence College in Rome (Italy). Further, several NATO training facilities that have been established to better prepare the military from the NATO member States to participate in common NATO-led operations, give attention to IHL principles in their training programmes. In addition, NATO conducts a number of military exercises, ranging from seminars to broad-ranging headquarters and live exercises, which incorporate problems and issues involving the practical application of IHL.

This concludes my presentation and I am certainly willing to

address any further enquiries you may have during the on-going discussion.

The European Union perspective

Frederik NAERT

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Thank you, Judge Owada, and also many thanks to the organisers for inviting me to present a European Union (EU) perspective on the topic of this session. The structure of my short presentation follows that of the title of this session. I will, therefore, address three points: first, training and instruction; second, dissemination; and third, implementation. But let me first add a disclaimer: while I believe this presentation accurately reflects EU practice, I am speaking in a personal capacity and am not presenting a formal or official EU point of view.

1. Instruction/training

In the framework of the EU's European Security and Defence Policy (ESDP), all training, including international humanitarian law (IHL) training, is the responsibility of member States.

While there is some ESDP training at EU level, it is mostly focused on what we call the political and strategic level, which mainly covers the decision-making and crisis management processes at the EU's institutions in Brussels and in member States. This includes especially the main courses run by the European Security and Defence College, which is a network of institutes dealing with security and defence issues with the mission to provide training on ESDP at the strategic level²⁷⁴. However, there are a number of EU training activities in the area of IHL. These, *inter alia*, include an annual in-house seminar on IHL for EU staff and member State delegations (especially working parties in the areas of the Common Foreign and Security Policy and more specifically the ESDP), and ICRC speakers in the margin of relevant working parties (e.g. a presentation on direct participation in hostilities in the margins of the EU Council Working Group on Public International Law (COJUR)).

I would also like to point out that training was stressed in Joint Pledges made by the EU member States at the 28th and 30th International Conferences of the Red Cross and Red Crescent (see respectively pledges P181 and P088).²⁷⁵

²⁷⁴ See generally:

http://www.consilium.eu.int/cms3_fo/showPage.asp?id=1382&lang=en.

²⁷⁵ Available online at:

<http://www.icrc.org/Web/Eng/siteeng0.nsf/htmlall/conf?OpenDocument>.

2. Dissemination

There is no significant dissemination of IHL as such in ESDP operations. However, there is some indirect dissemination via planning documents and rules of engagement (ROE) (see below).

In addition, there is some EU dissemination on specific IHL issues or related matters, such children and armed conflict, human rights and gender issues, *inter alia*, through generic standards of behaviour. In this respect, an excellent compilation of documents on mainstreaming human rights and gender into the ESDP is available at the Council's website²⁷⁶.

Outside the context of operations, it should be noted that the EU supports various weapons treaties (and in particular their universalisation and implementation), mainly through technical and financial support to third States and international organisations. The EU also contributes to the annual ICRC/College of Europe joint introductory seminars on IHL.

3. Implementation

The implementation of IHL in ESDP operations takes place mainly through relevant planning documents and the rules of engagement (ROE). Key documents are the Operational Plan (OPLAN) with its annexes on the use of force and on legal issues, as well as the ROE and relevant implementing documents (e.g. standard operating procedures or directives on detention).

These documents must be consistent with *applicable* law. On the *applicable* law, I would like to refer to the presentation by my colleague Gert-Jan Van Hegelsom and simply stress once again that in ESDP operations IHL will often not apply to the EU-led forces but that IHL is nevertheless usually dealt with, including to cover the possibility of escalation and to take into account the obligation of the parties to an armed conflict.²⁷⁷

The procedures for the adoption of the OPLAN and some other key planning documents in the ESDP are as follows: they are prepared by planners; are then the subject of a military advice by the EU Military Committee and are subsequently approved at the political level by the Council or Political and Security Committee (if it has been delegated this power); they are then implemented.

For the ROE, there is a ROE request by the Operation Commander; a military advice by the EU Military Committee; authorisation by the

²⁷⁶ See:

http://www.consilium.europa.eu/ueDocs/cms_Data/docs/hr/news144.pdf.

²⁷⁷ See also my contribution in the proceedings of 27 March 2008 Rome seminar in preparation for this Round Table.

Council or the Political and Security Committee and then implementation by the Operation Commander and subordinate commanders.

Legal advisors are present in the Council's General Secretariat and in member States, in the Operation Headquarters and in the Force Headquarters. They may be present below these levels in military contingents.

It is also worth mentioning that any violation of IHL – by anyone – must be reported. Reporting is also provided for in the 2005 European Union Guidelines on promoting compliance with international humanitarian law.²⁷⁸

Conclusion

I would like to stress three short points by way of conclusion. First, there are some training activities at EU level, but IHL instruction is mainly a member State responsibility. Second, dissemination of IHL mainly occurs indirectly. Third, IHL is mainly implemented through the relevant planning documents and ROE. These are adopted by the political bodies on the basis of military expertise and with legal advice.

Thank you very much for your attention.

²⁷⁸ *Official Journal* C 327, 23 December 2005, p. 4 <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2005:327:0004:0007:EN:PDF>

CONCLUSIONS OF THE ROUND TABLE

Concluding remarks

Philip SPOERRI

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It is an honour for me again this year to fulfil the difficult task of proposing to this distinguished audience some conclusions of this 31st Round Table. Indeed, the difficulty is all the more enhanced by the variety of subject matters addressed during the Round Table, all raising very interesting legal issues and triggering fruitful discussions. Let me just submit to you the salient points discussed during these three days.

Peace operations, an operational and a legal concept

In the first session, speakers described the evolution of the operational and legal framework under which peace operations have developed recently. They have notably highlighted the variety (Dupo's operations over the past 10 years have increased in a staggering manner to 19 operations, with 110,00 people now serving on missions), but also the increased complexity of the tasks now assigned to peace operations. We have also been made aware that the classical dichotomy between operations conducted under Chapter VI of the Charter and those implemented under Chapter VII are progressively disappearing - or have certainly become more and more blurred - since many peace operations actually contain Chapter VI and Chapter VII UN Charter components in their mandates. These operations have even been defined as an "*objet juridique non identifié*", whose legal framework of reference may also include international humanitarian law (IHL). One speaker called it a legal framework still lacking for robust peace operations.

The applicability of IHL to peace operations: a settled issue?

In this session, speakers have clearly indicated that challenging the applicability of IHL to peace operations - whether conducted under UN command and control or not - is now an issue of the past. As of today, only a minority still seems to argue that troops engaged in peace operations cannot become party to an armed conflict and would thus not be bound by IHL.

There appeared to be wide agreement that peace forces, including UN forces, may indeed become party to an armed conflict, and thus may be bound by IHL when the criteria set by IHL are met. In fact, it was compellingly argued that full respect for IHL by peace forces can be an

important element in reinforcing the legitimacy of their mission.

I should note that speakers have almost unanimously underscored the necessity to assess IHL applicability exclusively on the basis of the facts on the ground – that is, irrespectively of the mandate assigned to peace forces.

On the question of IHL's material field of application, discussions have highlighted two different doctrines.

The first such doctrine consists in the systematic application of IHL to international armed conflict as soon as an international organisation becomes party to the conflict. The other looks into each bilateral belligerent relationship. Under this second doctrine, if the peace forces are fighting a State's forces, the rules governing international armed conflict will apply. If they are opposed to a non-State armed group, the rules of non-international armed conflict will be applicable. In this respect, while it seems undisputed that the law of international armed conflict applies if peace forces fight against a State's armed forces, controversy still persists as to which part of IHL is applicable when multinational forces are engaged against non-State actors. This issue raises important legal issues, notably in relation to the status of captured fighters.

The question of the status of peace forces not involved in an armed conflict also appeared to be controversial – yet it seems more in legal theory than in *de lege lata*. Those who were in the plenary will easily recall Professor Sassoli's example: his son serving as a military border guard in peace time on the Swiss border. The issue at hand concerns the reluctance – or call it counter intuitive – to grant civilian status to "staff in military uniform" even if they are peacekeeping forces. However, and this is why the issue must be described as theoretical, both the 1998 Rome Statute and the International Committee of the Red Cross (ICRC) customary law study have confirmed the civilian status of peacekeepers.

Interaction of the legal regimes in peace operations

In the framework of this session, we have been reminded that international jurisprudence has recognized the parallel application of human rights law and IHL in situations of armed conflict, including occupation. However, it seems that the content of human rights law applicable in times of armed conflict still needs to be fleshed out.

Something that was very much highlighted in the presentations was that being deployed in a situation of armed conflict does not necessarily mean that peace forces are parties to that conflict. If they are not party to the conflict, they will not be bound by IHL norms but rather by other bodies of law, in particular human rights law.

In this respect, a crucial consequence of the evolution of peace

operations has been the increasing breadth of their impact - positive or negative - on the enjoyment of human rights in territories in which they operate. This has, of course, raised numerous questions about the applicability of human rights to peace operations. As mentioned during the discussions, peace operations should not create circumstances beyond the reach of human rights obligations, despite the debates surrounding their extraterritorial scope of application.

In this session, also, the issue of the legal protections afforded to peace operations' personnel was addressed. It was explained that the protection of peace forces' personnel was ensured by a combination of international legal instruments including Status of Forces Agreements (SOFAs), IHL, and the 1994 UN Convention (the so-called Safety Convention), as well as the host State's domestic law. The efficiency of the protection sought relies not on one instrument alone, but on the interplay between these instruments, in particular between IHL and the 1994 UN Convention. In this respect, emphasis was put upon article 2(2) of the 1994 Convention, interpreted as a "switch clause". However, it should be pointed out that this clause does not make the two legal regimes mutually exclusive in situations of non-international armed conflict. This means that actions not prohibited under IHL may still be rendered unlawful under the 1994 Convention's regime.

The law of occupation: a *corpus juris* relevant for peace operations

The question of the applicability of occupation law still raises some points of contention, but it seems that some of the arguments aimed at denying the applicability of occupation law may be overcome in particular by the fact that they find their basis in *jus ad bellum* and not in *jus in bello*.

One speaker summarised the topic very well under the title question "tool or taboo?"

The presentations showed that occupation law could be applicable to peace operations, including those under UN command and control - hence its use should not be a taboo. However, in the presentations we were urged not to overemphasise the focus on occupation law, because it will not apply in most of the peace operations. Indeed, one speaker went so far as to say that although it is possible to imagine cases in which the law of occupation is applicable, they are very unlikely to occur.

The substantive relevance of occupation law was then presented in detail. It was shown that occupation law may be a useful tool for peace forces, in particular as it brings opportunities such as the possibility to take security measures. For instance, occupation law could prove useful in the field of detention, by authorising internment, whereas detention in peace operations is often controversial. In addition, it was emphasised that peace

operations necessitate a clear legal framework and accountability. While occupation law may contribute to the first, it will usually not contribute to the second.

IHL and the administration of territories by the UN

Generally, occupation by States and administration by international organisations have been regarded as distinct legal and political phenomena. However, this distinction may not survive close scrutiny, and various participants emphasised their common traits and challenges. Despite the similarities, IHL and occupation law were identified only as default regimes, as providing "good ideas": *de facto* solutions, as opposed to a *de jure* application. It was once again stressed that their relevance should not be exaggerated and that human rights law remains the main legal framework of reference for internationally administered territories.

On this issue, the point was made – and this also in comparison to the former trusteeship regimes – that international administrations should not be above the law, and that a system of accountability is necessary in order to ensure that individual rights are preserved.

Working groups

WG 1: Peace operations and the protection of civilians:

In this WG, speakers analysed the concept of R2P (the Responsibility to Respect), and examined its relevance in the context of peace operations. If peace operations may be a course of action for the enforcement of R2P, it has been stressed that the use of force should be made as a last resort, notably once other means have been exhausted. It was argued that when R2P involves the use of force, the concept could affect the application of certain IHL rules, in particular those governing the conduct of hostilities (for instance the notion of a military objective, or the principle of proportionality), or those related to relief operations. Potential advantages, and also risks, of the impact of R2P on the application of IHL were discussed.

Working Group (WG) 2 Peace operations and detention:

Today, peace forces are increasingly involved in the detention of individuals. Discussions led to a general agreement that detention in peace operations must be neither unlawful, nor arbitrary. Detention in peace operations raises a number of legal issues, such as the legal basis of the detention, the procedural safeguards afforded to detainees, and the legal regime for transferring detainees. Discussions in this WG also highlighted that the challenges raised by detention in peace operations should be addressed without undermining existing law. Finally, participants

showed great interest in the Copenhagen process aimed at defining a common platform to deal with the challenges raised by detention in peace operations.

WG3: Peace operations and the repression of IHL violations:

In this WG, speakers explained the difficulties encountered by international tribunals in gaining the active support of peace forces to arrest indicted persons. The importance of peace forces having an explicit mandate to arrest indicted person, given by the Security Council (SC), was particularly underlined, as national contingents would otherwise not be obligated to carry out arrest warrants delivered by international tribunals. In order to overcome the absence of a SC resolution authorising arrests, *ad hoc* solutions have been devised in the past between the International Criminal Court (ICC), troop-contributing States, and the State hosting the peace operations. Participants in the WG also underlined the complementary role of international tribunals and peace operations in bringing stability, and ultimately peace, to the region.

WG 4: Responsibility and compensation for damages caused during peace operations:

This WG attempted to better understand the complexity of the structures of peace operations. In this respect, a distinction was made between different forms of command including operational, organic and political command. The legal consequences of such structures for the question of the international responsibility of troop-contributing States, and of international organisations using those troops was also discussed, notably in light of the *Behrami* and *Saramati* cases decided by the European Court of Human Rights in May 2007. Discussions also showed how important it is that violations of IHL committed during peace operations be effectively addressed, in particular at the level of the troop-contributing countries.

Relations between humanitarian organisations and peace forces

In this WG, we learnt how much the environment has changed for humanitarian organisations in terms of security, and the diversity of the actors involved in such operations. In the presentations and discussions, emphasis was put on the impact of the integrated approach on the neutrality – and consequently on the security – of humanitarian actors. There was a strong emphasis on clearly distinguishing between the different types of humanitarian actors on the ground: notably the uniformed actors, the UN, the Red Cross Movement and the multiform non-governmental organisations (NGOs).

A strong reminder was made by two speakers that in situations of armed conflicts, the ICRC and Red Cross/Red Crescent National Societies (NS) enjoy a special role and status under IHL, whereas other NGOs benefit from lesser facilities. In this respect, "privileged" humanitarian actors such as the ICRC and NS were encouraged to be more proactive in promoting their special status under IHL. The example of the operational surface and scope of activities of the Somali Red Crescent Society showed why in most conflict situations the NS, and of course the ICRC, continue to play a central role in the protection and assistance of the populations affected by such situations.

Besides the changing landscape for NGOs, discussions showed that the past decade was also characterised by the challenges posed by the evolution of the media and others means of disseminating information, such as the internet and blogs, upon popular perceptions of humanitarian agencies, and ultimately their capability to carry out their activities.

Closing address

Maurizio MORENO

President, International Institute of Humanitarian Law

We very much appreciate the extraordinary skills of Philip Spoerri, who has drawn up the conclusions of our debates in such a brilliant manner.

I feel that my task is above all to renew my most sincere thanks to all those who have contributed to the success of this Round Table, jointly organized by the International Institute of Humanitarian Law and the International Committee of the Red Cross, on a topic which is of great importance at the international level today.

May I express my gratitude particularly to the two Co-ordinators of the Round Table – Michel Veuthey and Tristan Ferraro – who assumed the difficult task normally assigned to a much larger organizing committee, who worked so selflessly and with such satisfying results.

The Institute is very grateful to the contributions, however modest, of Governments, International Organisations and Institutions, facilitating the organization of this meeting which has gathered together over 400 people.

A special “thank you” goes to the City of Sanremo and to its Mayor for their warm hospitality and welcome.

My sincere thanks also go to the President of the Casinò of Sanremo who allowed us to organize the opening session in the prestigious Opera Theatre. The moderators, the speakers – experts in law, high-ranking officers, and diplomats with remarkable experience – all gave great depth to the discussions.

Finally, my particularly warm thanks go to the staff of the Institute, to the members of the Secretariat, to external collaborators, to the interpreters who are the real turn pin of this enterprise.

The proceedings of the Round Table will be published as usual. This publication, which completes the recently published proceedings of the Seminar on the same topic organized by the Institute in Rome on 27 March 2008, could be useful to all Institutions and persons who care for the respect and application of international humanitarian law.

Nos réflexions ont mis en exergue un certain nombre d'éléments de fond:

- l'étroite complémentarité qui existe entre droit international humanitaire, droits de l'homme et d'autres branches du droit

international (à commencer par le droit des réfugiés) que nous sommes appelés à appliquer et à faire respecter dans de situations souvent inédites telles que les opérations de maintien ou d'imposition de la paix. Ces disciplines plongent en effet leurs racines dans les mêmes principes et répondent au même objectif: la protection des droits fondamentaux et de la dignité de la personne humaine; la tutelle des plus faibles dans les situations de crise.

- les préoccupations croissantes que suscite, dans l'opinion publique internationale, la multiplication des violations graves de principes bien établis et de règles essentielles du droit international humanitaire, conventionnel et coutumier.
- la nécessité de travailler sans relâche à une meilleure mise en oeuvre et à une plus grande diffusion du droit international humanitaire et des droits de l'homme, en apportant les réponses voulues aux interrogations qui se posent quant à son application dans un contexte international qui ne cesse d'évoluer.
- l'importance qu'acquièrent - sur le plan de la prévention et de la sensibilisation des Gouvernements, des Institutions, de la société civile - les activités de formation et de recherche auxquelles l'Institut International de Droit Humanitaire se consacre depuis près de 40 ans.

Notre réflexion, notre mission doivent se poursuivre en assurant des suites concrètes aux débats de ces trois jours.

Parmi les suites concrètes, je voudrais mentionner:

- les cours militaires qui auront lieu encore cette année, dont le programme a été distribué
- les cours ultérieurs qui, comme suite aux travaux de l'Advisory Board présidé par le Brigadier Dahinden, seront mis à jour et développés selon un nouveau curriculum, en tenant compte des réalités nouvelles;
- la Table Ronde se tiendra en décembre sur le thème « Droit et Migrations » avec la coopération de l'IOM et du Département de l'Immigration du Ministère italien de l'Intérieur;
- l'Institut entretient des relations de partenariat avec plusieurs universités et centres de recherche; nous sommes prêts à développer et élargir davantage, ces partenariats, particulièrement dans le domaine de la formation et de la recherche;
- le Conseil de l'Institut se penchera sur un projet de règles opérationnelles d'engagement (ROE) qui devrait permettre de clarifier la conduite à tenir de la part des forces militaires engagées dans les opérations de paix;
- l'Institut s'efforcera également de sensibiliser l'opinion publique,

que ce soit ici à Sanremo où ailleurs, en particulier par de "Journées des Portes Ouvertes", aux valeurs du droit international humanitaire et des droits de l'homme;

- l'Institut prendra part avec la Croix-Rouge italienne aux célébrations du 150e anniversaire de la Bataille de Solferino. Solferino, ce n'est pas seulement de l'histoire italienne et mondiale, mais c'est un réflexe d'une actualité tragique de tous les jours et de notre obligation à tous d'y remédier, dans la mesure de nos moyens.

MESSAGES

Giorgio NAPOLITANO
Presidente della Repubblica Italiana

Sono lieto di rivolgere, per il tramite del Presidente dell'Istituto Internazionale di Diritto Umanitario, un cordiale saluto ai partecipanti della Tavola Rotonda su "Diritto internazionale umanitario, diritti umani e operazioni di pace.

L'Istituto Internazionale di Diritto Umanitario, inserito nel sistema delle Nazioni Unite e dotato di personalità giuridica nell'ordinamento italiano, svolge una apprezzata azione nel promuovere la diffusione e lo sviluppo delle norme internazionali che tutelano i diritti fondamentali della persona in situazioni di crisi.

L'Italia è pienamente consapevole della crescente rilevanza e cogenza che la tematica dei diritti umani sta assumendo anche nell'ambito del diritto internazionale.

Nell'esprimere vivo apprezzamento per l'iniziativa odierna, che verte su di una questione attuale ed urgente, rivolgo alle autorità presenti agli organizzatori del convegno e a tutti i partecipanti i miei più calorosi auguri di buon lavoro.

Franco FRATTINI
Ministro degli Affari Esteri, Italia

Rispondo alla sua cortese lettera del maggio scorso con la quale mi ha invitato a partecipare alla XXXI Tavola Rotonda internazionale dell'Istituto di Diritto Umanitario di Sanremo, nel settembre 2008, dedicata a "Diritto Internazionale Umanitario, diritti Umani e le Operazioni di Pace"

Il Ministero degli Affari Esteri intende rafforzare e migliorare la collaborazione già esistente con l'Istituto che, sotto la Sua direzione, non potrà che rinnovare lo spirito di cooperazione con le istituzioni italiane maggiormente coinvolte nella concreta attuazione del diritto internazionale umanitario.

Mi spiace doverle comunicare che, a causa di precedenti impegni, non potrò presenziare all'evento. Alla Tavola Rotonda parteciperà comunque il Sottosegretario di Stato con delega per i diritti umani, la cui presenza intenderà testimoniare il forte impegno e la grande attenzione che l'Italia riserva alle attività dell'Istituto di Sanremo e ad un tema di così forte attualità come la relazione tra diritto internazionale umanitario, diritti umani ed operazioni per il mantenimento della pace.

Auguro sin d'ora a lei e a tutti i partecipanti all'evento di settembre il pieno successo dei lavori e con l'occasione le invio i miei migliori saluti.

Ignazio LA RUSSA
Ministro della Difesa, Italia

Caro Ambasciatore,

Ho ricevuto con piacere il Suo cordiale invito ad essere presente all'apertura dei lavori della XXXI Tavola Rotonda Internazionale di Diritto Umanitario che avrà luogo a Sanremo dal 4 al 6 settembre p.v.

Vorrei assicurarLe che sarei stato lieto di intervenire a tale evento, data l'importanza che riveste la materia trattata. Purtroppo impegni precedentemente assunti non mi consentiranno di essere presente.

L'Alto Patronato del Capo dello Stato, la presenza di autorevoli rappresentanti di Organizzazioni Internazionali e di Governi, eminenti esperti del mondo giuridico, diplomatico e militare, rendono il Convegno particolarmente significativo. A ciò si aggiunge l'interesse del tema prescelto nonchè il collegamento con le Operazioni di Pace in cui le nostre Forze Armate sono impegnate. Ricordo, con l'occasione, il Suo contributo personale in tale settore allorché Ella ha rappresentato l'Italia alla NATO.

Colgo l'occasione per inviarLe i miei cordiali saluti e lgi auguri più sinceri di ovni successo per l'importante Convegno.

Claudio SCAJOLA
Ministro dello Sviluppo Economico, Italia

Gentili partecipanti alla XXXI Tavola Rotonda sui Problemi Attuali del Diritto Internazionale Umanitario, tramite il Presidente dell'Istituto, Ambasciatore Maurizio Moreno, desidero farvi pervenire, essendo impossibilitato a farlo personalmente, il mio cordiale messaggio augurale.

Il tema proposto alla riflessione in questo seminario dal benemerito Istituto per il Diritto Umanitario Internazionale, che l'Italia ha l'onore di ospitare, è di straordinaria attualità ed intensità. E ben si prestano l'accogliente terra di Liguria e Sanremo, Città della Pace, a fare da attivo ed interessato sfondo al dibattito che si intreccerà sul tema del diritto umanitario, dei diritti umani e delle operazioni di pace.

Tanto più tale analisi appare urgente in un mondo che, all'inizio di un secolo che dischiude opportunità pressoché illimitate, si confronta anche con conflitti sovente non dichiarati e pertanto ancora più insidiosi per le popolazioni che li subiscono, con odiose trame terroristiche, con il ritorno della malnutrizione, l'impennata del corso delle materie prime, i mutamenti climatici. Nel nostro stesso continente abbiamo appena assistito al ritorno di scene di guerra e alla tragedia dei profughi.

Quella in cui viviamo è l'era della globalizzazione accelerata ed il nostro mondo ha un'urgente necessità di essere governato.

Sono necessarie, dunque, regole precise e condivise, perché la pace non è mai definitivamente acquisita. Così come non lo è il rispetto dei diritti fondamentali.

La pace ed il rispetto della persona rappresentano invero un cammino irrinunciabile, che va percorso con disponibilità, lungimiranza, coraggio: molto possono le coscienze degli individui, la comunità internazionale, dalle organizzazioni universali come le Nazioni Unite a quelle regionali come l'Unione Europea e l'Alleanza Atlantica, l'impegno delle organizzazioni non governative.

Un grato pensiero va a quanti portano avanti questo impegno di umanità e civiltà, e tra essi agli operatori di pace italiani e ai contingenti militari del nostro paese, che collocano l'Italia tra i primi contributori al mondo per le operazioni di mantenimento della pace.

Auguro a tutti i partecipanti buon lavoro.

Giampaolo CREPALDI
Segretario, *Pontificium Consilium de Iustitia et Pace*, Città del Vaticano

A causa di sopraggiunti impegni istituzionali, con mio rammarico, non potrò partecipare alla seduta inaugurale della prossima XXXI Tavola Rotonda organizzata dall'Istituto Internazionale di Diritto Umanitario di Sanremo dedicata al tema "Diritto internazionale umanitario, diritti umani e le operazioni di pace".

Il tema scelto quest'anno dall'Istituto è particolarmente interessante soprattutto se si guarda alla realtà internazionale, dove spesso sfugge il confine tra guerra e pace, così da rendere incerti la sfera di applicazione delle diverse branche del diritto internazionale, e talvolta lo stesso ruolo dei soggetti impegnati nelle operazioni di pace e nell'attività umanitaria.

Il Pontificio Consiglio della Giustizia e della Pace segue con attenzione la riflessione, sempre più articolata, sulla relazione e sulla interdipendenza tra il diritto umanitario e la normativa sui diritti umani, in particolare nel contesto delle missioni per la costruzione, il mantenimento o il consolidamento pace. La dignità umana e i diritti fondamentali dovrebbero costituire l'asse portante dell'organizzazione internazionale. Una risorsa preziosa, a maggior ragione quando la sicurezza e la pace sono in pericolo, precari o addirittura assenti. Senza questo riferimento essenziale, si rischia di perdere il senso del cammino che ha condotto l'umanità a forme di solidarietà inimmaginabili in passato, o di cadere nello smarrimento dinanzi alla sciagura del conflitto o della crisi.

Nel 2007, in attuazione di un impegno assunto dalla Santa Sede con il Comitato internazionale della Croce Rossa, il Pontificio Consiglio della Giustizia e della Pace ha organizzato il 2° Corso internazionale per i Cappellani Militari Cattolici, dedicato al tema "Dignità umana e diritto umanitario, il ruolo delle religioni" a Roma, il 12 ed il 13 ottobre 2007. In quella occasione, esperti, giuristi e rappresentanti delle grandi religioni del mondo si sono incontrati per dialogare e testimoniare come il messaggio delle grandi religioni abbia contribuito allo sviluppo del diritto umanitario e dei diritti umani. Oggi le grandi religioni sono chiamate ad accettare le sfide di questo tempo, a proporre una cultura del diritto e della pace basati sulla dignità dell'uomo, creatura naturale e spirituale, immagine e somiglianza di Dio.

Rivolgendosi ad una delegazione dell'Istituto di Sanremo, Giovanni Paolo II, nel 1982 ricordò lo speciale contributo del Cristianesimo all'affermazione del principio "*inter arma caritas*",

espressione che indica la missione di tutti gli operatori di pace: "*Anche nei secoli passati, la visione cristiana dell'uomo ha ispirato /a tendenza a mitigare la tradizionale ferocia della guerra ... Ha reso un contributo decisivo all'affermazione " delle norme di umanità e giustizia che sono ora, in forma debita mente modernizzata ... il nucleo delle nostre odierne convenzioni internazionali*" (udienza del 18 maggio 1982).

La relazione tra diritto umanitario, diritti umani e pace, rimanda ad un'altra relazione e cioè quella tra disarmo, sviluppo e pace. Troppo spesso i conflitti sono provocati da un livello inadeguato di sviluppo delle persone e dei popoli. la cui condizione di sottosviluppo è talvolta aggravata dalla eccessiva spesa militare degli stati. Come ha ricordato Benedetto XVI in occasione di un seminario internazionale organizzato quest'anno dal Pontificio Consiglio della Giustizia e della Pace, a Roma l'11 ed il 12 aprile 2008, e dedicato al tema: "Disarmo, sviluppo e pace. Prospettive per un disarmo integrale": "*Non è infatti concepibile una pace autentica e duratura senza lo sviluppo di ogni persona e popolo:... "lo sviluppo è il nuovo nome della pace" ... Né è pensabile una riduzione degli armamenti se prima non si elimina la violenza alla radice, se prima, cioè, l'uomo non si orienta decisamente alla ricerca della pace*" (Lettera di Sua Santità Benedetto XVI al Cardinale Renato Raffaele Martino in occasione del Seminario internazionale organizzato dal Pontificio Consiglio della Giustizia e della Pace sul tema "Disarmo, Sviluppo e Pace. Prospettive Per Un Disarmo Integrale", 10 aprile 2008).

Inter arma caritas: questo il mio auspicio, affinché la dignità dell'uomo sia il riferimento costante della Vostra riflessione, difficile e ricca di variabili complesse, sul diritto umanitario e diritti umani nel contesto delle missioni di pace.

Desidero quindi esprimere il mio sincero apprezzamento per l'attività svolta dall'Istituto di Sanremo, con l'augurio del successo della XXXI Tavola Rotonda, e con i più cordiali saluti ad Ella e a tutti i distinti esperti partecipanti.

Buon lavoro!

Alassane TIGRI
Représentant de l'Organisation Internationale de la Francophonie

C'est avec plaisir que l'Organisation Internationale de la Francophonie (OIF) prend de nouveau part à la Table Ronde organisée par l'Institut International de Droit Humanitaire. En effet, l'OIF est heureuse que votre Institution initie ces assises qui permettent aux éminents professeurs et praticiens du Droit de se réunir pour réfléchir sur les problèmes que suscite la mise en œuvre du droit humanitaire dans le contexte actuel. Je voudrais, à cette occasion, vous transmettre les salutations de Son Excellence, le Président Abdou DIOUF, Secrétaire Général de l'Organisation Internationale de la Francophonie.

La 31^{ème} Table Ronde ouvre la réflexion sur le thème «Droit International Humanitaire, Droits de l'Homme et Opérations de Paix». Cette thématique est d'un grand intérêt pour la Francophonie pour laquelle, la promotion et le respect des droits de l'Homme constituent un engagement majeur. La philosophie et les principes qui sous-tendent cet engagement ont été souscrits par les Chefs d'Etat et de Gouvernement de la Francophonie d'abord dans la Déclaration de Bamako puis élargis et approfondis dans la Déclaration de Saint-Boniface. Cette dernière, adoptée le 14 mai 2008, lors de la « Conférence ministérielle de la Francophonie sur la prévention des conflits et la sécurité humaine », consacre l'action de l'OIF dans le domaine du droit international humanitaire et les opérations de paix. Je ne voudrais pas engager la réflexion sur le triptyque pertinent qui constitue le thème de la Table Ronde, je voudrais me limiter à faire le point de l'engagement de la Francophonie dans les opérations de maintien de la paix.

Faisant le point de la situation des Opérations de maintien de la paix courant 2008, l'OIF a constaté:

1. Dix-sept opérations de maintien de la paix (OMP) ont été déployées par l'ONU à travers le monde, totalisant²⁷⁹ un peu plus de 90.000 hommes, fournis par 118 pays, et répartis comme suit:

- 76.351 Soldats
- 2.921 Observateurs militaires
- 11.418 Gendarmes et policiers

2. Plus de 55% de ces effectifs sont déployés dans des pays francophones.

3. 46 pays de l'espace francophone contribuent aux contingents de paix de l'ONU, à hauteur de 23 % du total des effectifs. Ils totalisent 21.134

²⁷⁹ Chiffres actualisés au 29 février 2008.

hommes.

4. Sur les 118 pays fournissant des troupes, les cinq plus gros contributeurs francophones sont le Ghana, en 7^{ème} position avec 3.436 hommes; le Rwanda, en 8^{ème} position avec 2.987 hommes; le Sénégal au 11^{ème} rang avec 2.564 hommes ; la France, en 13^{ème} position avec 1.955 hommes ; et le Maroc en 16^{ème} position avec 1.539 hommes.

Au regard de cette situation, les pays francophones ont appelé, lors de la ministérielle d'Antananarivo, à un renforcement de leur participation aux opérations de paix de l'ONU et donné mandat à l'OIF de les aider à cette fin, notamment à travers des programmes de formation. Quelques mois plus tard, les mêmes pays, réunis à Saint Boniface à l'occasion de la conférence sur la prévention des conflits et la sécurité humaine, ont réitéré cet appel et décidé de renforcer également leurs concertations dans les instances internationales autour des questions de maintien de la paix. Dès lors, l'appui de l'OIF à ces efforts s'organise progressivement autour de deux axes.

A. Le soutien à la sensibilisation, à la mobilisation et aux concertations des pays francophones sur les questions de maintien de la paix. Cet appui se situe à un double niveau: celui des organisations internationales, d'abord, et en particulier l'ONU, où se déroulent les négociations internationales sur le concept, l'architecture et le déploiement des opérations de maintien de la paix. Celui du terrain, ensuite, dans les pays membres, pour les informer de la mécanique onusienne relative au montage des OMP, des normes de recrutement des personnels militaires et civils, de déploiement des effectifs et de remboursement effectués aux pays contributeurs.

B. Les formations constitueraient le deuxième axe d'intervention. Nous les envisageons à travers deux leviers complémentaires. Le premier, dont les résultats ne seraient obtenus que sur les moyen et long termes, est celui des écoles de formation spécialisée, telles que l'Ecole de maintien de la paix Alioune Blondin Beye de Bamako et l'Ecole internationale de formation au maintien de la paix EIFORCES, en cours de mise en place à Awaé, au Cameroun. Le soutien de la Francophonie à ces institutions permettra, à terme, d'accroître la disponibilité de contingents formés selon les normes onusiennes, et par voie de conséquence, une présence plus soutenue des francophones dans les OMP. Le second permettrait de réaliser des résultats à plus court terme et viserait des séminaires *in situ* de formation aux normes SAT des Nations Unies, dans les pays qui offrent des disponibilités immédiates de mise à disposition de contingents, mais dont les troupes auraient besoin d'une formation complémentaire pour se présenter aux examens organisés par l'ONU.

Enfin, et pour compléter le dispositif d'appui, l'OIF a lancé deux

études en 2008 en collaboration avec le Canada et le Réseau francophone de recherche sur les opérations de paix : l'une portant sur le fonctionnement d'une OMP déployée dans un pays francophone, et l'autre sur le processus de recrutement par l'ONU du personnel militaire et civil francophone pour les OMP. Ces études devraient nous fournir une image plus claire de la situation et nous permettre d'ajuster et de renforcer notre stratégie d'appui à nos pays membres pour une présence accrue dans les opérations de maintien de la paix.

Certes, la Francophonie n'est pas un acteur direct en matière de maintien de la paix et il n'est pas dans ses objectifs de le devenir. Mais nous constatons une évolution significative au cours des dernières années qui montre que les missions des forces de maintien de la paix deviennent multidimensionnelles et dépassent la dimension strictement militaire. Ces opérations s'impliquent, en effet, de plus en plus dans des appuis à la restauration de l'Etat de droit, dans les processus électoraux, dans des actions visant à faciliter les transitions et les processus de sortie de crise. A ce titre, il apparaît légitime pour nous, compte tenu de nos spécificités et de nos savoir-faire, de développer nos partenariats avec les grands acteurs directs du maintien de la paix, dans ces domaines absolument nécessaires à l'instauration d'une véritable paix durable fondée sur la consolidation de la démocratie.

Dans cette perspective, l'OIF salue la présente Table Ronde dont les conclusions permettront, sans aucun doute, d'éclairer les actions à mener pour le respect de la dignité humaine sur le champ des affrontements et la consolidation de la paix dans le monde. Je formule au nom de Son Excellence le Président Abdou Diouf, Secrétaire général de l'OIF, mes vœux de plein succès à cette 31^{ème} Table Ronde. Je vous remercie de votre aimable attention.

Albert II de MONACO
Président, Croix-Rouge Monégasque

Je tiens à vous adresser mes sincères remerciements pour votre invitation, que j'ai dû décliner avec regret en raison de mes obligations. Votre invitation m'a d'autant plus touché qu'elle témoigne de l'écho des initiatives de la Principauté de Monaco en faveur du respect des droits de l'Homme.

La Croix-Rouge monégasque, que je préside avec fierté, a été fondée le 3 mars 1948 par mon arrière grand-père, le Prince Louis II. Au cours de ces 60 années, la Croix-Rouge monégasque s'est efforcée de promouvoir les valeurs humanitaires du Mouvement International de la Croix-Rouge et du Croissant-Rouge, non seulement auprès de ses membres, mais également auprès de l'ensemble de la population monégasque.

La communauté internationale est aujourd'hui confrontée à de nombreux défis environnementaux et humains.

La Principauté de Monaco, à son niveau, entend être un acteur exemplaire au coté des grandes nations dans la réponse à ces défis. Comme vous le savez, la Fondation Albert II agit en faveur de l'environnement, pour préserver notre planète, ses ressources et sa biodiversité. Parallèlement, j'ai donné pour consigne à mon Gouvernement d'accroître de manière significative l'aide publique au développement, afin qu'elle atteigne, à l'horizon 2015, 0,7% du Revenu National Brut. Enfin, la Croix-Rouge monégasque a créé, en 2007, une section humanitaire internationale qui a pour vocation de mettre en place des actions de solidarité internationale et de promouvoir le droit humanitaire tant en Principauté que dans les pays dans lesquels elle intervient.

Toutefois, force est de constater que, quelle que soit la portée des actions de la communauté internationale, aujourd'hui encore, une part importante de la population mondiale n'a pas accès de façon satisfaisante aux ressources essentielles telles que l'eau, la nourriture ou l'énergie. Ces difficultés, à l'origine de la plupart des conflits armés actuels, resteront insurmontables si rien n'est fait pour faciliter l'accès à ces ressources.

C'est pour les populations, placées au centre de conflits qu'elles subissent sans y participer, que les travaux d'instituts prestigieux comme le vôtre sont essentiels.

En 2009, seront célébrés les 150 ans de la bataille de Solferino. Depuis, le droit international humanitaire, lorsqu'il a été respecté par les belligérants, a permis une meilleure protection des populations et des combattants. Les conflits aujourd'hui ont changé, le droit doit continuer à

évoluer et il est essentiel que des organismes internationaux continuent, comme le fait le CICR, de veiller à son application et à sa diffusion.

Je suis heureux de soutenir aujourd'hui vos travaux pour faire évoluer le droit international humanitaire, afin qu'il soit toujours le plus adapté possible aux situations de détresse, et je profite de cette occasion pour adresser mes vifs encouragements et mes vœux de réussite à Monsieur l'Ambassadeur Maurizio MORENO, nouveau Président de l'Institut International de Droit Humanitaire.

Jean-Pierre MAZERY
Grand Chancelier, Ordre de Malte

Au nom de S.A.Eme. le Prince et Grand Maître de l'Ordre, Fra' Matthew Festing, qui regrette vivement de ne pas pouvoir participer à cette XXXI^e Table Ronde, et, en mon nom personnel, je voudrais adresser au Président, aux membres du Conseil et à tous les participants, nos vœux de plein succès pour vos réflexions sur ce thème d'une si grande actualité, "Droit International Humanitaire, Droits de l'Homme et Opérations de Paix".

L'Ordre Souverain Militaire Hospitalier de Saint-Jean de Jérusalem de Rhodes et de Malte déploie depuis neuf siècles ses activités humanitaires dans le monde. Il suit avec un vif intérêt les efforts déployés depuis 1970 par l'Institut International de Droit Humanitaire pour la promotion et le respect du droit international humanitaire. Je serais très heureux que notre collaboration puisse se poursuivre et se développer notamment dans le domaine de la formation en droit international humanitaire. Je prendrai connaissance avec la plus grande attention du résultat de vos travaux.

ACRONYMS

AP mines	Anti-personnel mines
AP I	Additional Protocol I to the Geneva Conventions
AP II	Additional Protocol II to the Geneva Conventions
AU	African Union
AVM	Anti-vehicle mines
CAT	Campaign against Terrorism
CCW	Convention on Certain Conventional Weapons
CICR	Comité International de la Croix-Rouge
COH	Conduct of Hostilities
DPKO	Department of Peace-Keeping Operations
DRC	Democratic Republic of Congo
ECHR	European Court on Human Rights
ESDP	European Security and Defence Policy
ERW	Explosive Remnants of War
ESDP	European Security and Defence Policy
EU	European Union
GA	General Assembly
GC I	Geneva Convention I
GC II	Geneva Convention II
GC III	Geneva Convention III
GC IV	Geneva Convention IV
GCSP	Geneva Centre for Security Policy
GWOT	Global War on Terrorism
HRL	Human Rights Law
ICC	International Criminal Court
ICJ	International Court of Justice
ICRC	International Committee of the Red Cross
ICISS	International Commission on Intervention and State Sovereignty
ICTY	International Criminal Tribunal for the former Yugoslavia
ICTR	International Criminal Tribunal for Rwanda
IIHL	International Institute of Humanitarian Law
IHL	International Humanitarian Law
ILC	International Law Commission
INTERFET	International Force for East Timor
ISAF	International Security Assistance Force
ITA	International Territorial Administration
ITS	Integrated Training Service
KFOR	Kosovo Force

KWECC	Kosovo War and Ethnic Crimes Court
LOAC	Law of Armed Conflict
MONUC	United Nations Organisation Mission in Congo
MOTAPM	Mines other than Anti-Personnel Mines
MSU	Multinational Specialised Units
MTA	Military Technical Agreement
NATO	North Atlantic Treaty Organization
NGOs	Non-Governmental Organisations
NIACs	Non-International Armed Conflicts
OCHA	Office for the Coordination of Humanitarian Affairs
OIF	Organisation Internationale de la Francophonie
OMP	Opérations de Maintien de la Paix
OPLAN	Operational Plan
OTP	Office of the Prosecutor
PCCs	Police Contributing Countries
POW	Prisoners of War
PRTs	Provincial Reconstruction Teams
RAF	Royal Air Force
ROE	Rules of Engagement
R2P	Responsibility to Protect
SAC-T	Supreme Allied Command, Transformation
SC	Security Council
SFOR	Stabilisation Force in Bosnia-Herzegovina
SOFA	Status of Forces Agreement
SOMA	Status of Mission Agreement
TCCs	Troop Contributing Countries
TCN	Troop Contributing Nations
UN	United Nations
UNAMID	United Nations African Union Mission in Darfur
UNAMIR	United Nations Assistance Mission for Rwanda
UNEF	United Nations Emergency Force
UNIFIL	United Nations Interim Force in Lebanon
UNITAF	Unified Task Force
UNMIK	United Nations Mission in Kosovo
UNSCR	United Nations Security Council Resolutions
UNOSOM	United Nations Operation in Somalia
UNPROFOR	United Nations Protection Force
UNTAES	United Nations Transitional Administration for Eastern Slavonia, Baranja and Western Sirmium
UNTAET	United Nations Transitional Administration in East Timor

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