Application of international humanitarian law and international human rights law to UN-mandated forces

Report on the Expert meeting on multinational peace operations*

Summary

The application of international humanitarian law (IHL) and international human rights law to UN-mandated forces raises many questions. Several of these were discussed by a panel of academic experts, representatives of governments and international organizations, military legal advisors and ICRC lawyers in Geneva on 11-12 December 2003.

The meeting was divided into three sessions. Two were devoted to the application of international humanitarian law, and one to the application of international human rights law to UN-mandated forces, according to the following framework:

– Working session I: General application of international humanitarian law;
– Working session II: Application of the law of occupation;
– Working session III: Beyond IHL: Aspects of the application of international human rights law.

The meeting only addressed the case of UN-mandated operations, whether under UN, national or regional command and control. Multinational forces acting *without* a mandate from the UN Security Council were not a focus of the discussions.

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Outcome of the meeting

A number of concrete proposals emerged, centred on situations in which UN-mandated troops exercise a *de facto* control over a territory.

It was observed that when a UN-mandated force is *de facto* in control of territory, the Fourth Geneva Convention would be applicable *de jure* in a minority of cases, although this could not be excluded.

Consequently, the experts agreed on the usefulness of identifying rules that should be respected in all circumstances by UN-mandated troops when they deploy on a territory and exercise *de facto* control over it. A number of different proposals were suggested by participants.

The experts considered that the extra-territorial application of human rights treaty obligations was an increasingly important issue where multinational forces exercise control over a territory. Some experts also expressed the view that there could be a need to clarify which human rights rules apply to UN-mandated forces. This could be done by adopting a specific document to that effect.

Working session I: General application of international humanitarian law to UN-mandated forces

Most of the experts agreed that the application of IHL must be determined in accordance with the facts on the ground. The question of the mandate entrusted to the force by the Security Council may have *jus ad bellum* consequences, but is irrelevant in determining the applicability of humanitarian law, which is a question of *jus in bello*. From the moment that UN forces are involved in combat that reaches the threshold of an armed conflict, IHL applies.

However, although the majority of experts agreed on this point, others voiced the opinion that troops taking part in a peace operation are in the field to discharge a mandate. When they use force, they just exercise police powers. Therefore, even when they are involved in armed clashes, IHL does not apply unless they take sides against a particular party.

The experts also raised the question as to the threshold of an armed conflict, which was a subject of fundamental importance. One moot point discussed was that of combat in self-defence. Some experts insisted that the use of force in self-defence, especially in isolated events, does not turn peacekeepers into combatants. It was noted, however, that self-defence can progressively lead to a situation where multinational forces do become party to a conflict. According to some experts, although it does not solve the question

of when peacekeepers become combatants, Article 8 of the Rome Statute has clarified matters to some extent.

The experts also shared their views on the content and legal status of the Secretary General's Bulletin. They agreed that it is an internal document of the United Nations. As such, it is binding upon troops under UN command and control, but does not constitute a legal obligation *stricto sensu* upon States. Some experts regretted the fact that, in their view, inasmuch as it contains some prohibitions that do not exist in conventional or customary law, the Bulletin mixed policy and law.

Taking the possible applicability of IHL to UN-mandated operations as a starting point, the participants discussed whether the law of international armed conflicts or the law of non-international armed conflicts should apply. On this issue they disagreed with regard to cases where a UN-mandated operation uses force against organized armed groups that are not members of the armed forces of a State. Opinions were equally divided between experts who held that a UN-mandated operation, by definition, "internationalizes" the whole conflict, and those for whom the latter's qualification will depend on the status of the other parties to the conflict.

Working session II: The applicability of the law of occupation to UN-mandated forces

Two questions arise concerning the application of the law of occupation when UN forces exercise control over or administer a territory: first, its applicability *de jure* and, secondly, its *de facto* application by peacekeepers in situations where it is not applicable as a matter of law.

Regarding *de jure* applicability, the experts pointed out that IHL and the law of occupation apply independently of the legitimacy of the intervention, and drew attention to the traditional separation between *jus ad bellum* and *jus in bello*. In principle, therefore, the legal basis for the occupation has no bearing on the question of applicability of the Fourth Geneva Convention. It does not matter whether occupation takes place by only one or several States, or within the framework of a UN mandate.

However, the participants underlined the difficulty of reconciling certain provisions of the law of occupation with the particular nature of UN-mandated operations that are in control of a given territory. For instance, the prohibition on introducing institutional or legislative changes in an occupied territory (Hague Regulations, Article 43; Fourth Geneva Convention, Articles 47 and 64) may be contradictory to the very purpose of a peace oper-

ation and peace-building measures. In this connection, the experts discussed the possibility that changes may be justified on the basis of international human rights law and the mandate entrusted to the force by the Security Council resolution.

The experts noted that IHL, and especially the law of occupation, was drafted at a time when international human rights law was not as developed as it is today. On some issues, IHL offers lower standards of protection than human rights law. To adopt these lower standards would not be acceptable for UN-mandated forces.

Turning to the relationship between humanitarian law and Article 103 of the UN Charter, the panel envisaged the possibility that a clear mandate from the UN Security Council based on Article 103 could supersede, or even end, the application of the law of occupation. According to some experts, the United Nations can help in identifying the exact moment at which the occupation ends. However, other experts stressed the potential risk of allowing the Security Council, which is an essentially political organ, to do away with the law of occupation simply by deciding to create a new situation.

Experts also commented on the *de facto* application of the law of occupation by multinational forces in situations where it is not applicable as a matter of law.

When the Fourth Geneva Convention is not applicable *de jure*, multinational forces may nevertheless be confronted with a situation where there is a complete breakdown of law and order. When UN-mandated forces have effective control over a territory and its inhabitants, a recurring issue is the arrest and detention of individuals by these forces. This issue is made more complex by the lack of clarity of the mandate, which often authorizes forces to detain some persons but without giving any guidance as to permissible grounds for and methods of detention.

It was noted that the law of occupation is an existing legal framework which is the same for every State, and is familiar to all. It can provide some practical solutions to problems that forces usually face in the field. On the other hand, it was pointed out that the law of occupation is useful, but not enough. Many issues are not dealt with in a sufficiently detailed manner or are not covered at all.

One expert expressed the view that in most cases when they exercise effective control over a territory, multinational forces under UN command and control are in a situation that appears to be an occupation but is, in fact, rather closer to the idea of trusteeship. It might therefore not be necessary to

require from the UN all the guarantees required from an occupying power. It was suggested that it could be useful to prepare an *ad hoc* document that would deal with such situations. This document could be similar in form to the Secretary General's Bulletin or even be a second part to it.

This proposal was followed by another and more specific one, based on the need for troops in the field to have a simple set of fifteen to twenty guidelines, which would direct military forces in their efforts to restore and maintain law, order and security, and would regulate searches/seizures and arrest/detention of people. Such a document would go beyond IHL by incorporating some rules of human rights law and elements of criminal procedure.

In the same vein, another expert suggested that the UN should explore the use of "packages" or model provisions that could be inserted into every UN mission mandate as an annex. These packages could address issues such as arrest and detention or even the administration of justice in situations where no courts are functioning locally. Such model provisions would set standards that must be respected as a minimum when multinational forces and international police deploy during a peace operation.

Working session III: Aspects of the applicability of international human rights law

The aftermath of the *Bankovic* case, held by the European Court of Human Rights (ECtHR) on 12 December 2001, was discussed. Some experts regretted that the concept of extra-territorial application of human rights obligations had been applied more restrictively in this case than in the previous case law.

Other experts, however, considered the *Bankovic* case to be a correct ruling, on facts as well as in law, because too much of an overlap between human rights law and IHL might be dangerous. The main danger, according to this view, would be that the two bodies of law might merge to such an extent that it would become unpractical to apply them.

Regarding the notion of effective control as a basis for extra-territorial application of human rights, some experts agreed that this criterion seems well accepted by the international community and not only constitutes well-established case law of the ECtHR, but is also the position of the UN Human Rights Committee. This principle could be applied to multinational forces when they have effective military control over a territory.

However, some participants voiced doubts about universal acceptance of the extra-territorial applicability of human rights treaties. They stressed

that these developments are supported by only a few cases, most of them determined solely by the ECtHR, in a strictly European context. By way of example, it was pointed out that the European Convention on Human Rights is of no relevance for Australia acting in East Timor. Furthermore, assuming that the Human Rights Committee were to apply this jurisprudence, the International Covenant on Civil and Political Rights is nonetheless far from universal and has not been ratified by all States (151 States on 2 November 2003).

According to these experts, the question of extra-territoriality of human rights obligations remains a contentious issue. What is lacking is an instrument similar to the UN Secretary General's Bulletin, bringing together human rights obligations.