



# REPORT

## MULTINATIONAL EXPERT MEETING ON PEACE OPERATIONS

Applicability of International Humanitarian Law and  
International Human Rights Law to UN Mandated Forces

Geneva, 11-12 December 2003

Organized by  
the International  
Committee of  
the Red Cross in  
cooperation with the  
University Centre  
for International  
Humanitarian Law  
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ICRC

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## REPORT

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## Foreword

The applicability of international humanitarian law and international human rights law to UN-mandated forces raises a number of questions that are still open to debate. At the Expert Meeting held in Geneva on 11-12 December 2003, organized by the International Committee of the Red Cross (ICRC) and the Geneva-based University Centre for International Humanitarian Law, these questions were discussed by a panel of academic experts, military legal advisers, representatives of international organizations and ICRC lawyers. The meeting was divided into three sessions. Two were devoted to the applicability of international humanitarian law, and one to the applicability of international human rights law to UN-mandated forces.

### **Applicability of international humanitarian law**

During the meeting, the experts discussed the circumstances in which UN-mandated forces may become a party to a conflict and the rules of international humanitarian law that such forces are bound to respect. New elements introduced by international instruments such as the 1994 Convention on the Safety of United Nations and Associated Personnel, and the 1998 Rome Statute of the International Criminal Court, were considered. Issues relating to the application of the UN Secretary-General's Bulletin on "Observance by United Nations forces of international humanitarian law" were also examined.

Another topic debated during the expert meeting was whether the law of occupation is applicable to a multinational force deployed in a territory pursuant to a UN mandate, but without the consent of the State concerned. Issues relating to the *de facto* use of the law of occupation were also discussed. While the applicability of the 1949 Fourth Geneva Convention has seldom been recognized in the framework of operations carried out pursuant to a UN mandate, the forces involved sometimes comply *de facto* with its provisions.

### **"Beyond international humanitarian law": Aspects of the applicability of international human rights law**

In the absence of an armed confrontation or a situation of occupation, multinational forces may find themselves in a context where international humanitarian law is not – or is no longer – applicable. In this case, only international human rights law, as well as the laws and regulations of the country where the force is deployed, continue to apply.

The implementation of international human rights law in contexts where multinational forces are in control of a territory has sometimes proven difficult in practice. One reason for this is that the framework of international human rights law is designed for States. In addition, the shift in the mandate of peace operations from providing assistance and support to directly exercising varying levels of control over territories has created new challenges, and special issues have been raised by the establishment of international interim administrations in Kosovo and Timor.

### **Contents of the present report**

The present report reproduces the entire contents of the discussions held in Geneva on 11-12 December 2003 and all documents relating to this meeting. Four types of documents are included:

- the **Executive Summary** presents the main points from discussions held during the two-day meeting and the main conclusions. It was previously published in the March 2004 issue of the *International Review of the Red Cross*, No. 853, pp. 207-212;
- the **Report of the Debates** provides an extensive account of the discussions. However, it does not constitute a *verbatim* report, as the debates were not recorded, in the interest of greater freedom of speech;
- the **Participants' Presentations** comprise the speeches delivered by six participants during the meeting to introduce working sessions and various thematic issues;
- the **Background Documents** are four papers written by the organizers and sent to the participants before the meeting. They were intended as a basis for the discussions.

### Questions submitted to the experts

At the end of each Background Document, a set of questions was submitted to the experts. These questions are reproduced below:

#### *Working session I: The applicability of international humanitarian law to UN-mandated forces*

1. If humanitarian law is applicable, is it the law of international or non-international armed conflict that applies to operations under UN command and control?
2. Does this conclusion also apply to cases of multinational forces that are acting pursuant to a UN mandate but are not under UN command and control?
3. How does the 1994 Convention on the Safety of United Nations and Associated Personnel interact with international humanitarian law?
4. What are the implications when multinational forces take part in the fighting? When do peacekeepers and their premises lose the protection "given to civilians or civilian objects under the international law of armed conflict" as provided for in Articles 8.2(b)(iii) and 8.2(e)(iii) of the Rome Statute?
5. Is the loss of protection temporary or definitive? What is the impact of the mandate entrusted to multinational forces by the Security Council? Are the implications similar when they act in self-defence?

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

1. In what cases is the law of occupation applicable to a UN-mandated force?
2. In what cases is the law of occupation applicable to an operation under UN command and control?
3. What circumstances would trigger the end of applicability of the law of occupation?
4. Does the establishment of a UN administration fall within the conditions of an occupation?
5. Can a legal basis be provided for a *de facto* use of the Fourth Geneva Convention? Is it conceivable and desirable that the Security Council should require the application of

the relevant provisions of the Fourth Geneva Convention as minimum standards when it adopts a resolution?

6. In situations where the law of occupation is not applicable, which rules govern the detention of persons arrested and detained by multinational forces?

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

1. Is human rights law applicable to UN-mandated operations (whether under national control or under UN command and control)?
2. Are individual States contributing troops to a UN operation (under national control or under UN command and control) responsible for human rights violations committed by their respective contingents? If yes, what is the legal basis for this responsibility?
3. Is a UN force (whether under national control or under UN command and control) as a whole responsible for human rights violations committed by troops belonging to national contingents? If yes, what is the legal basis for this responsibility?
4. In both situations above, does the responsibility of the contributing State(s) and the UN, respectively, depend on the degree of control exercised by the UN force over a territory? What criteria may be used to establish the degree of control over a territory?
5. What are the means by which victims of human rights violations can seek justice or reparation for harm suffered as the result of actions by UN troops? From contributing States, from the UN? How should the principle of exhaustion of domestic remedies be applied?
6. Is the extension of human rights treaty mechanisms to UN organs, such as transitional civil administrations, desirable and possible? Could such an extension be achieved by way of special agreements with human rights monitoring bodies? Should a role for the Security Council be considered?
7. To what extent could UN non-treaty mechanisms be allowed to monitor UN transitional civil administrations?

***The views expressed in the various documents are those of the experts or authors, and do not necessarily reflect the views of the ICRC.***

# Programme of the Meeting

Thursday 11 December 2003

- 10:00-11:00**     **Registration and coffee**
- 11:00-11:30**     **Introductory remarks by the meeting chairman**  
Mr Jean-Philippe Lavoyer, Head of the Legal Division, ICRC
- Introductory remarks on behalf of the University Centre for International Humanitarian Law**  
Professor Robert Kolb, Universities of Bern and Neuchâtel, Research Director at the University Centre for International Humanitarian Law
- 11:30-12:30**     **Overview of protection issues in contexts of multinational peace operations**  
Mr Alain Aeschlimann, Head of the Central Tracing Agency and Protection Division, ICRC
- Discussions
- 12:30-14:00**     **Lunch in Chavannes-de-Bogis Hotel**
- 14:00-15:30**     **Working session I. The applicability of international humanitarian law to UN-mandated forces**  
Introduction by Professor Robert Kolb
- Discussions
- 15:30-16:00**     **Coffee break**
- 16:00-17:30**     **Working session I, continued**  
Discussions
- 18:30**             **Departure for the Beau-Rivage Hotel in Nyon**
- 19:00**             **Welcome drink followed by informal dinner**

**Friday 12 December 2003**

- 9:00-10:30**      **Working session II. The applicability of the law of occupation to UN-mandated forces**  
Introduction by Professor Marco Sassòli, Université du Québec à Montréal, Canada  
  
Discussions
- 10:30-11:00**      **Coffee break**
- 11:00-12:30**      **Working session II, continued**  
Discussions
- 12:30-14:00**      **Lunch in Chavannes-de-Bogis Hotel**
- 14:00-15:30**      **Working session III. “Beyond international humanitarian law”:  
Aspects of the applicability of international human rights law**  
Introduction by Ms Sonia Parayre, Lawyer, Public Law Department,  
Directorate General of Legal Affairs, Council of Europe  
  
Discussions
- 15:30-16:00**      **Coffee break**
- 16:00-17:00**      **Working session III, continued**  
Introduction by Ms Margaret Cordial, Legal Analyst, OSCE Mission in  
Kosovo, Department of Human Rights  
  
Discussions
- 17:00**              **Concluding remarks by the meeting chairman**
- 17:30**              **Farewell drink**

# LIST OF PARTICIPANTS

The 33 participants in the Expert Meeting on Multinational Peace Operations were the following:

- **AESCHLIMANN, Alain**, Head of the Central Tracing Agency and Protection Division, ICRC.
- **CONDORELLI, Luigi**, Professor, University of Florence, Italy.
- **CORDIAL, Margaret**, Legal Analyst, OSCE Mission in Kosovo, Department of Human Rights.
- **DAMAJ, Oussama**, Brigadier General (retired), Lebanon.
- **DOSWALD-BECK, Louise**, Professor, Director, University Centre for International Humanitarian Law, Geneva.
- **FAITE, Alexandre**, Legal Adviser, Legal Division, ICRC.
- **FLECK, Dieter**, Dr. iur., Director, International Agreements and Policy, Federal Ministry of Defence, Germany.
- **FOESSL, Wolfram**, Colonel, Legal Expert, European Union Military Staff.
- **GARRAWAY, Charles**, Colonel (retired), Independent United Kingdom Expert.
- **GILLARD, Emanuela-Chiara**, Legal Adviser, Legal Division, ICRC.
- **GITHIORA, Titus**, Brigadier General, Department of Defence of Kenya.
- **HAMPSON, Françoise**, Professor, University of Essex, England.
- **JORAM, Frédéric**, Legal Adviser, Ministry of Defence of France.
- **KOLANOWSKI, Stéphane**, Legal Adviser, ICRC Brussels.
- **KOLB, Robert**, Professor, Universities of Bern and Neuchâtel, Research Director at the University Centre for International Humanitarian Law, Geneva.
- **KUMAR, Nilendra**, Major-General, Judge-Advocate General, India.
- **LABBÉ GRENIER, Jérémie**, Legal Researcher, Legal Division, ICRC.
- **LAVOYER, Jean-Philippe**, Head of the Legal Division, ICRC.
- **OSWALD, Bruce**, Lecturer in Law and Acting Director of the Asia-Pacific Centre for Military Law, University of Melbourne, Australia.
- **PARAYRE, Sonia**, Lawyer, Public Law Department, Directorate General of Legal Affairs, Council of Europe.
- **PEJIC, Jelena**, Legal Adviser, Legal Division, ICRC.
- **PORRETTO, Gabriele**, Researcher, University Centre for International Humanitarian Law, Geneva.
- **ROSE, Vivien**, Deputy Legal Adviser, Ministry of Defence of the United Kingdom.
- **RYNIKER, Anne**, Deputy Head of the Legal Division, ICRC.
- **SANDOZ, Yves**, Professor, Member of the Committee, ICRC.
- **SASSÒLI, Marco**, Professor, Université du Québec à Montréal, Canada.
- **SHRAGA, Daphna**, Senior Legal Officer, Office of Legal Affairs, United Nations.

- **SICILIANOS, Linos-Alexandre**, Professor, University of Athens, Greece.
- **SPOERRI, Philip**, Coordinator, Legal Adviser to the Operations, Legal Division, ICRC.
- **STROHMEYER, Hansjoerg**, Chief, Office of the Under Secretary-General, Office for the Coordination of Humanitarian Affairs, United Nations.
- **Van HEGELSOM, Gert-Jan**, Legal Adviser, General Secretariat of the Council of the European Union.
- **VITÉ, Sylvain**, Researcher, University Centre for International Humanitarian Law, Geneva.
- **ZARD, Monette**, Research Director, International Council on Human Rights Policy, Geneva.

# **Executive Summary**

## Introduction

The application of international humanitarian law and international human rights law to UN-mandated forces raises many questions. Several of these were discussed by a panel of academic experts, military legal advisers, representatives of governments and international organizations, 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: The applicability of international humanitarian law
- Working session II: The applicability of the law of occupation
- Working session III: "Beyond international humanitarian law": Aspects of the applicability 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.

## Outcome of the meeting

A number of concrete proposals emerged focusing 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 and are included on page 3 of this Summary and on page 17 of the Report.

The experts considered that the extraterritorial 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 rules of human rights law apply to UN-mandated forces.

## Working session I: The applicability of international humanitarian law to UN-mandated forces

[Note: This summary refers to the outcome of the debates as they appear in the Report. Page numbers are indicated in brackets.]

Most of the experts agreed that the **application of international humanitarian law should 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 *jus in bello* question.

From the moment that UN forces are involved in combat that reaches the threshold of an armed conflict, international humanitarian law applies (Report, p. 9).

However, although the majority of experts agreed on this point, others expressed the view 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 confrontation, international humanitarian law does not apply unless they take sides against a particular party (Report, p. 9).

The experts also raised the question of the **threshold of an armed conflict** – a subject of fundamental importance – in particular with respect to combat in case of 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 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 (Report, p. 10).

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 UN. 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 are not grounded in treaty-based or customary law, the Bulletin mixed policy and law (Report, pp. 10-11).

Taking it as a starting point that international humanitarian law could possibly apply to UN-mandated operations, the participants discussed whether the law of international armed conflict or the law of non-international armed conflict 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 were of the view that a UN-mandated operation, by definition, "internationalizes" the whole conflict, and those for whom the determination will depend on the status of the other parties to the conflict (Report, pp. 11-12).

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

Two questions arise with regard to 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 international humanitarian law 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 is irrelevant to 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 (Report, pp. 13-14).

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, Article 64) may be contradictory to the very purpose of a peace operation and peace-building measures. On this issue, 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 (Report, p. 14).

The experts noted that international humanitarian law, 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, humanitarian law offers lower standards of protection than human rights law. Adopting these lower standards would not be acceptable for UN-mandated forces (Report, p. 14).

Turning to the relationship between humanitarian law and Article 103 of the UN Charter, the experts envisaged the possibility that a clear mandate from the UN Security Council relying on Article 103 could supersede, or even end, the application of the law of occupation (Report, pp. 14-15). According to some experts, the UN can help in identifying the exact moment when the occupation ends. However, other experts stressed the potential risk involved in 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 on 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 (Report, p.16).

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. Therefore, it might 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 (Report, p. 17).

This proposal was followed by another and more specific one, based on the need for troops in the field to have a set of no more than 15 to 20 guidelines, which would direct military forces in their efforts to restore and maintain public order and security, and regulate searches and seizures and the arrest and detention of people. Such a document would go beyond international humanitarian law by incorporating some rules of human rights law and elements of criminal procedure (Report, p. 17).

In the same vein, another expert suggested the idea 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. These model provisions would set standards that must be respected as a minimum when multinational forces and international police deploy during a peace operation (Report, p.17).

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

The aftermath of the Bankovic decision (European Court of Human Rights, 12 December 2001) was discussed. Some experts regretted that the concept of extraterritorial application of human rights obligations had been applied more restrictively in this case than in the previous case law (Report, p. 18).

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 humanitarian law 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 impractical to apply them (Report, p. 18).

Regarding the notion of **effective control** as a basis for extraterritorial 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 European Court of Human Rights, 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 expressed doubts about the universal acceptance of the extraterritorial applicability of human rights treaties. They stressed that these developments are supported by a few cases, most of them determined solely by the European Court of Human Rights, in a strictly European context. By way of example, it was noted that European Convention on Human Rights is of no relevance for Australia acting in East Timor. Furthermore, the International Covenant on Civil and Political Rights is far from universal and has not been ratified by all States (151 parties as of 2 November 2003), which somewhat diminishes the import of the jurisprudence of the Human Rights Committee on this issue.

According to these experts, the question of extraterritoriality 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.

# **Report of the Debates**

## Foreword

*In the interest of greater freedom of speech, the debates were not recorded during the meeting. As a result, the following document is not an exact transcript of the discussions but attempts to give an overview of the main topics raised by the experts.*

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Following a brief introduction of the participants, the chairman recalled that this event was not the first to be organized by the International Committee of the Red Cross (ICRC) on this topic. The ICRC had convened a Symposium in 1994 and two meetings of experts in 1995 on the theme: “International Humanitarian Law for Forces Undertaking United Nations (UN) Peace Operations.”

These meetings had, to some extent, been the starting point of an exercise which led to the adoption of the UN Secretary-General’s Bulletin on “Observance by United Nations forces of international humanitarian law,” 6 August 1999 (document ST/SGB/1999/13, hereinafter “the Bulletin”). However, a number of issues relating to the application of international humanitarian law to UN-mandated operations remain unresolved.

The chairman also stated that, for the ICRC, this meeting occurs in the broader framework of the project entitled “Reaffirmation and Development of International Humanitarian Law”, aimed, among others things, on generating debate on current challenges to international humanitarian law.

Regarding follow-up to the meeting, the chairman indicated that the ICRC would assess different possibilities in view of the conclusions reached by the experts. This could lead to a new process of reflection.

It was decided to adopt the following terminology:

- “UN-mandated forces, troops or operations” and “multinational forces”: generic term for multinational forces, whether they are under UN, national or regional command. The expression “multinational forces” refers to an operation acting pursuant to a UN mandate, unless stated otherwise.
- “Forces (or operations) under UN command and control”: to designate “blue helmets” and United Nations forces acting in the framework of either a peace-keeping or peace-enforcement operation.
- “Forces under national (or regional) command”: forces acting pursuant to a UN mandate but not under UN command.

The chairman then gave the floor to Mr Alain Aeschlimann, Head of the ICRC Central Tracing Agency and Protection Division, to briefly share his insights on the protection issues faced by the ICRC in the context of UN-mandated operations.

## **Overview of protection issues in the context of multinational peace operations**

(See the presentation on p. 23.)

This presentation gave rise to a first general exchange of views among the experts.

Most experts were in general agreement that the main problem encountered by UN-mandated operations is the lack of clarity regarding which rules to apply, although some experts considered that some progress had been achieved. The United Nations, for example, has acknowledged its obligation to comply with the “fundamental principles and rules of international humanitarian law” (as stated in Section 1 of the Secretary-General’s Bulletin), instead of the “spirit and principles,” as stated in earlier regulations. This change in formulation clearly represented progress, although experts agreed that a number of issues remained unsettled.

According to experts, many problems are also caused by lack of clarity in mandates conferred by the UN Security Council. For example, in Srebrenica, the concept of “safe area” was not clear and the means adequate to ensure its protection were not provided. As a result, this prevented blue helmets from knowing how to conduct themselves. The same is true with regard to detention: a mandate may declare the right to detain without prescribing any further rules. Some experts emphasized that such mandates created a great deal of uncertainty for the troops on the ground.

Other experts agreed, adding that this problem is much exacerbated in the case of multinational forces, especially when they are not under UN command and control, because there is no homogeneous approach to the law among the various contingents. It indeed seldom happens that the rules of engagement are the same for all contingents (ISAF, the International Security Assistance Force in Afghanistan, constitutes one of the few exceptions, according to one expert). It is much more frequently the case that, within a single operation, contingents have rules that are inconsistent with each other.

One expert pointed out that, as far as international humanitarian law is concerned, the ICRC usually attempts to clarify the applicable rules, notably by means of *memoranda* sent to the parties to an armed conflict and to UN-mandated forces. These documents do not create new legal obligations but specify all applicable rules of international humanitarian law.

Finally, one expert drew attention to his own country’s experience to make the point that it is possible for States to address a number of protection issues by making domestic law applicable to contingents operating abroad. For example, in case of custodial violence, it is the responsibility of the sending States to compensate for any wrong suffered and to engage criminal proceedings against the offender.

## ***Working session I: The applicability of international humanitarian law to UN-mandated forces***

### PRESENTATION

The first working session was introduced by Professor Robert Kolb of the Universities of Bern and Neuchâtel and Research Director at the University Centre for International Humanitarian Law in Geneva.

Professor Kolb highlighted a number of questions regarding the application of international humanitarian law to UN-mandated forces and suggested other questions that would help determine what branch of international humanitarian law is applicable to forces acting pursuant to a UN mandate.

(See the presentation on p. 31.)

### GENERAL DEBATE

Most of the experts agreed that the **applicability of international humanitarian law** to UN-mandated operations is a matter of fact. Indeed, as in any field of general international law, an international organization is bound to comply with existing law: therefore, when the UN becomes a party to a conflict, it has to comply with international humanitarian law. According to most experts, the mandate or the legitimacy of the mission entrusted to the force is irrelevant. From the moment UN forces resort to a use of force that reaches the threshold of an armed conflict, international humanitarian law applies to them.

However, although the majority of experts agreed on this point, others expressed an opposing view according to which, in a peace-keeping or peace-enforcement operation, troops are in the field to discharge a mandate that puts them in a situation similar to that of international policemen. Accordingly, when they use force, they are not party to a conflict, but just exercise police powers. Therefore, even when they resort to force, their adversary has no right to target them.

Similarly, according to one expert, in a peace-enforcement context, UN-mandated forces under attack respond on the basis of their mandate, because they have a task to perform. On this expert's view, they are definitely not party to the conflict, and international humanitarian law is not applicable to them as long as they carry out their mandate impartially. Humanitarian law would become applicable were the force to take sides and become party to the conflict within the meaning of the Geneva Conventions. This was the case in Somalia where UNITAF was clearly targeting a warlord, Mr Aideed.

In response to this argument, some experts claimed that it confused *jus ad bellum* and *jus in bello*. A distinction between UN forces and their enemies may exist from a *jus ad bellum* perspective, but must not exist under *jus in bello*. They agreed that the **probability** of fighting may be implied by the mandate. But the applicability of international humanitarian law is determined by the facts, not the mandate. Indeed, even a traditional peace-keeping operation may *de facto* enter into combat and consequently be bound by international humanitarian law. An expert gave the example of the applicability of humanitarian law in an incident opposing UNPROFOR French troops and Serb forces even though UNPROFOR was a peace-keeping operation mandated under Chapter VI of the UN Charter. Conversely, it was perfectly possible that an operation entrusted with peace-enforcement power might never be engaged in an armed conflict situation and, thus, never be subject to international humanitarian law.

The debates turned to the question of the **threshold of an armed conflict**, which all participants agreed was of fundamental importance. However, they could not reach an agreement on the threshold that triggers applicability of international humanitarian law. It was pointed out that this issue was especially delicate with respect to Article 3 common to the four Geneva Conventions.

Some experts took the view that the fighting in Bunia, Democratic Republic of the Congo, during the summer of 2003 did not reach the threshold of an armed conflict, even though the mandate expressly authorized the use of force.

Another expert concurred: in a peace-keeping operation, isolated skirmishes do not imply that there is an armed conflict. Peacekeepers remain civilians, carrying out a law-enforcement mission. This being said, the same expert added that governments always have a tendency to claim that their forces face only sporadic fighting, and to deny that there is an armed conflict.

Discussing the threshold, the issue of **use of force in self-defence** was raised. According to Section 1.1 of the Bulletin, the fundamental principles and rules of international humanitarian law are applicable "when the use of force is permitted in self-defence." Some experts deduced from this provision that international humanitarian law is deemed to be applicable in these circumstances. However, some of the participants clearly refused to accept that mere self-defence necessarily reaches the threshold of an armed conflict or that peacekeepers become combatants in such cases. One expert considered that in Bosnia, for instance, the peacekeepers, although attacked, did not become party to the conflict. When some were captured, this expert considered their status under international humanitarian law to be that of civilians taken hostage by one party to the conflict.

Another expert responded that the fact that a UN force arrives in a country where an armed conflict is under way does not imply that it automatically becomes a party to that conflict. On the issue of self-defence, this expert agreed with the previous speakers but maintained that the possibility of the use of force in self-defence developing into armed conflict could not be ruled out if the violence went on for a long time.

One expert added that this was indeed reflected in the wording of Article 8 of the Rome Statute, which makes it a war crime to attack personnel involved in a peace-keeping mission "as long as they are entitled to the protection given to civilians or civilian objects under the international law of armed conflict" (Statute of the International Criminal Court, Articles 8.2(b)(iii) and 8.2(e)(iii)). Once they become combatants, peacekeepers may become legitimate targets. Until such time, they are civilians, even if they are attacked and are obliged to use force to protect themselves.

Turning to the question of the **legal status of the Bulletin**, the experts agreed that it is an internal document of the UN. The Bulletin is binding upon troops under UN command and control, but does not constitute a legal obligation *stricto sensu* upon States.

One expert strongly affirmed that the Bulletin is a policy statement. While the Secretary-General was entitled to promulgate standing regulations applicable to UN forces, the expert felt that the Bulletin mixed policy and law and that this was unfortunate. The Bulletin reflects existing rules of international humanitarian law, but also lays down prohibitions that do not exist under treaty-based or customary law (in particular, the absolute prohibition in Section 6.2 on booby traps and incendiary weapons, the use of which is merely restricted under humanitarian law).

According to another participant, the Bulletin's logic is as follows: not all peace-keeping forces necessarily come from States that comply with international humanitarian law;

therefore, it is important to set up guidelines applicable to all forces, without exception, taking part in UN operations. Consequently, in its very essence, the Bulletin does not even have the pretension of being a faithful reflection of international humanitarian law.

Some participants expressed the view that there is a need to clarify the status of the Bulletin. If it is a policy statement and binding only on the UN, it should nevertheless be approved by a resolution of the UN Security Council, which authorizes the operations. If it is intended to reflect actual international humanitarian law, it should be approved by States.

On the assumption that international humanitarian law may in principle be applicable to UN-mandated operations, the participants discussed **which part of humanitarian law** – the law of international armed conflict or that of non-international armed conflict – **would apply**.

Obviously, the answer to this question must take different kinds of situations into account. Where UN-mandated forces take action against a State's forces, the experts agreed that the law of international armed conflict would apply. Where a UN-mandated operation uses force (alongside the government of the host State or independently) against organized armed groups, however, the question remains unsettled. As shown by an informal vote at the end of the working session, opinions were almost equally divided between those contending that a UN-mandated operation "internationalizes" the whole conflict and those holding otherwise.

Some experts noted that for the most part the rules embodied by the Bulletin regulate international armed conflict. However, others noted that the Bulletin cannot give guidance on this issue. The Bulletin is the law that UN troops must respect, but it does not qualify a situation as being an international or non-international conflict.

Some experts proposed that the test devised by the International Court of Justice in the Nicaragua case (*Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Merits, ICJ Reports, 1986) be used to determine the individual body of law applicable to each bilateral relationship: the law of non-international armed conflict for the relationship between the receiving State and rebels, and the law of international armed conflict for that between UN forces and the rebels.

Certain experts expressed the view that the law applicable to UN troops could be a merger of the law of international armed conflict and that of non-international armed conflict. Other experts objected to this proposal, however, on the grounds that international humanitarian law is a carefully crafted body of law and that it is of fundamental importance that the existing categories be maintained.

One expert wondered whether it mattered to soldiers in the field whether it was the rules of international or of non-international armed conflict that should apply. Soldiers look for "black and white situations," and concrete rules to apply, in order to know what they may and may not do.

In response, it was stated that even if this question does not matter for soldiers, it nevertheless does matter for commanders. An expert pointed out that this question is of fundamental importance for complying with international humanitarian law. Indeed, Article 8 of the Rome Statute defines many more war crimes in international than in non-international armed conflict and, therefore, it is important to know what the situation is in order to know what rules apply.

The experts in favour of an automatic "internationalization" of the conflict – in other words the application of the law of international armed conflict – recognized that their view does pose some problems, especially since it would confer **prisoner-of-war status** on captured rebels.

It is unlikely that the receiving State would recognize this, as rebels are usually considered mere criminals under domestic law.

One expert expressed the view that UN-mandated troops should never be given prisoner-of-war status. He thought that they should be released immediately if captured. On this point, however, another expert argued that the nature of their involvement in the conflict should be taken into account. If UN-mandated troops were not party to the conflict, then they were civilians and should be released. If, however, they were party to the conflict, they could be given prisoner-of-war status upon capture.

Some experts went on to point out that the distinction between the law of international armed conflict and that of non-international armed conflict is perhaps less relevant now than it was some years ago. There have been important developments in international customary law applicable to non-international armed conflicts. However, the experts agreed that the "prisoner-of-war question" remains a particular difficulty, unsettled by international law.

**The increasing complexity of UN-mandated operations** was another topic raised by an expert. The different types of forces and function within such operations create confusion as to the status of each of these forces. In Afghanistan, for instance, there are "provincial reconstruction teams" facilitating civilian reconstruction that are also intended to have robust self-defence capabilities. They are composed of both civilian and military personnel. Another example of the complexity of these operations is provided by INTERFET, which became involved in situations nearly amounting to combat when it had to subdue insurgencies in the western part of East Timor and at the same time had to carry out police functions elsewhere.

According to another expert, complexity is further increased when **different multinational forces operate simultaneously** in the same context pursuant to a UN mandate – for instance, when a "coalition of the willing" deploys in a context where peacekeepers are already present.

Finally, regarding the **relationship between international humanitarian law and the 1994 Convention on the Safety of United Nations and Associated Personnel** (hereinafter "the Safety Convention"), an expert expressed the view that, owing to its lack of clarity, the Safety Convention provides very little help in determining what law applies to peace operations. It stands to reason that international humanitarian law and the Safety Convention should be mutually exclusive. The exact meaning of the wording of Article 2.2 of the Safety Convention is open to debate. Conclusions should certainly not be deduced from it.

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

### PRESENTATION

This second working session was introduced by Professor Marco Sassòli of the *Université du Québec à Montréal*, Canada.

In contemporary practice, two questions arise with regard to the law of occupation in the framework of UN-mandated operations when multinational 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, Professor Sassòli tackled three main issues:

1. the principle according to which international humanitarian law and the law of occupation apply independently of the legitimacy of the intervention, and the traditional separation between *jus ad bellum* and *jus in bello*;
2. the question of the consent of the receiving State, especially when obtained by military coercion authorized by the UN Security Council on the basis of Chapter VII of the UN Charter;
3. the limitations, for the occupying power, on introducing legislative and institutional changes, which however may be the very purpose of peace-building operations. On this last point, Professor Sassòli identified three elements relevant to the debate: the role of international human rights law, the role of UN Security Council resolutions, and the issue of the end of occupation.

Regarding the *de facto* application of the law of occupation in situations where it is not *de jure* applicable, Professor Sassòli pointed out that:

1. the law of occupation is an existing legal framework, which is the same for every State and is familiar to all;
2. it is applicable independently of the legitimacy of the intervention, and is therefore not subject to political controversy; and
3. it provides practical solutions to problems that forces usually face in the field.

(See the presentation on p. 33.)

### GENERAL DEBATE

Following this presentation, the experts first discussed ***issues relating to the possibility of applying the law of occupation de jure to UN-mandated forces when they exercise control over or administer a territory.***

An argument sometimes used to rule out the applicability of this body of law is that a force mandated by the UN, because of the very legitimacy stemming from its mandate, cannot be considered as an occupier. However, many experts clearly expressed the view that, in principle, which power is occupying a territory and on what basis is irrelevant to the question of the Fourth Geneva Convention's applicability.

One expert illustrated this by recalling that in the 1991 Gulf War the law of occupation was applied in those parts of Iraq controlled by coalition forces – despite the legitimacy conferred

on them by the UN mandate – in accordance with the classic distinction between *jus in bello* and *jus ad bellum*. This point of view reflects a factual approach: from the moment that a force has *de facto* control over a territory and its inhabitants, the law of occupation should apply. Another expert agreed with this conclusion, stressing that if international humanitarian law is applicable to UN-mandated operations and the forces involved exercise control over a territory, then, in principle, the Fourth Geneva Convention should also apply.

One expert added that States that participate in a UN force remain bound by their individual obligations. Whether occupation is imposed by only one or by several States, or in the framework of a UN mandate, does not matter. States participating in any way in an occupation must comply with the Fourth Geneva Convention. The fact that a State provides troops to the UN does not relieve it of its own obligations under international law.

One expert recalled that, in occupied territories, a number of provisions of the Fourth Geneva Convention cease to apply one year after the general close of military operations (Fourth Geneva Convention, Article 6). However, other experts observed that this rule had been superseded by Article 3 of Additional Protocol I, according to which the applicability of the law of occupation ceases on the termination of the occupation.

Although most of the experts recognized the application of the law of occupation in principle, some of them noted that both the Fourth Geneva Convention and Additional Protocol I offer lower standards of protection than those offered by international human rights law. International humanitarian law, and especially the law of occupation, was drafted at a time when international human rights law was not as developed as it is today. They concluded that there may be gaps in humanitarian law as compared with human rights law, and that these would be particularly unacceptable for UN-mandated forces, which are supposed to "promot[e] and encourag[e] respect for human rights" (UN Charter, Article 1.3). Consequently, it may be necessary to combine both bodies of law in order to achieve an acceptable level of protection.

The participants also underlined the **difficulty of reconciling certain provisions of the law of occupation with the particular nature of UN-mandated operations**. For instance, the prohibition on introducing institutional or legislative changes in an occupied territory (Hague Regulations, Article 43; Fourth Geneva Convention, Article 64) runs counter to what may be taken to be the very purpose of the mandates given by the Security Council, namely to move towards the introduction of a democratic system. Indeed, the fact that peace-keeping operations traditionally evolve into peace-building operations stands in direct contradiction to the obligation contained in the law of occupation to maintain a country's existing structures.

One expert asserted that the obligation, under the law of occupation, to respect domestic legislation (Fourth Geneva Convention, Article 64; this provision focuses on penal laws but is generally understood to extend to other rules) may hinder the effectiveness of an operation and the development of a transitional administration. In addition, the fact that domestic legislation is often little-known and ill-understood does not facilitate its application.

Another expert disagreed with the idea that the law of occupation is too rigid by pointing out that many of its provisions include a saving clause. Its prohibitions are not absolute and clearly provide for derogations by using expressions such as "if possible," "to the largest possible extent," etc. Therefore, the possibility of adapting the law of occupation to the changing nature of peace operations does exist.

Some experts raised the issue of the **relationship between humanitarian law and Article 103 of the UN Charter** (which states that "in the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail").

Some experts envisaged the possibility that a clear mandate from the UN Security Council relying on Article 103 could supersede, or even end, the application of the law of occupation for the sake of setting up another system distinct from an occupation. According to one participant, the Security Council can help in identifying the exact moment when the occupation ends. This would not constitute a mix of *jus ad bellum* and *jus in bello*.

Another participant argued that it already happens in practice that the Security Council decides which system of law to apply. Resolution 975 of 30 January 1995 on the situation in Haiti is a concrete example. By adopting this resolution, which qualified the situation as a "stable and secure environment," the Council was able to entrust UNMIH (UN Mission in Haiti) with very concrete powers that could not be exercised in an unstable environment.

Another expert stressed the danger of allowing the Security Council to pick and choose which rules it will follow and which not. The Council, as an eminently political organ, may do wrong. The expert cited Security Council Resolutions 1500 and 1511 on the situation in Iraq, dated respectively 14 August 2003 and 16 October 2003, as examples. Through these resolutions, the Security Council recognized the Governing Council as the representative of the Iraqi people and as the embodiment of Iraq's sovereignty, whereas in fact the Governing Council was merely an entity produced by the occupying power. Because this kind of action raises the question of the extent to which the Council may legitimize facts on the ground to the detriment of a population, the expert argued that the law of occupation *stricto sensu* should apply until the end of occupation in actual fact.

Another participant held that the possibility that the Security Council might to some extent overrule the law of occupation could not be totally disregarded. It is therefore of the utmost importance to identify and clarify the fundamental rules that admit no derogation whatsoever, regardless of circumstances. Indeed, according to the International Court of Justice, some humanitarian rules are "intransgressible" (ICJ, *Advisory opinion on the legality of the threat or use of nuclear weapons*, 8 July 1996) and therefore cannot be departed from in any circumstances. There is a need, then, to identify these limits to Security Council derogations.

One expert observed that it would be highly advisable to monitor the application of provisions of the law of occupation designed for strictly humanitarian purposes, while those designed to protect an occupied State's sovereignty could be disregarded, since their aim of maintaining the status quo may be difficult to reconcile with that of building peace.

One expert expressed some doubts on this point, claiming that the distinction is not clear in the texts and that both purposes are in any case always interrelated. It would therefore be risky to make such an artificial distinction. Another expert agreed and considered it dangerous to suggest that the Fourth Geneva Convention or Additional Protocol I are applicable "*à la carte*." He stressed that instead of seeking to determine whether to combine elements drawn from these different treaties, the relevant question was whether the texts should or should not be modified.

Another expert pointed out that UN forces have to deal with three different bodies of law: international humanitarian law, the law of the UN Charter, and international human rights law. These sets of laws are not exclusive but complementary to one another. Because one of the aims of international humanitarian law is to maintain the institutions and legislation of the previous regime, this law cannot offer solutions to problems arising from moves to introduce a more democratic system. The Charter, however, may assist in such a task. It is necessary to go beyond the law of occupation and combine all three systems in order to find satisfactory solutions.

One expert drew attention to the distinction between operations under strict UN command and control and those under a "UN umbrella." Some rules of the law of occupation do not

seem applicable in the case of operations under UN command and control. An example is the prohibition on transfer of the occupier's population into occupied territory, which would not seem to apply to the UN, as it has no population. For operations carried out under a UN mandate but not under UN command and control, the population needs to be protected from the occupying power by means of full application of the law of occupation.

Several experts disagreed with this opinion, however, saying the distinction was not justified. They insisted that either the law of occupation applied *de jure*, or it did not. If it did, the whole *corpus* should be complied with, even by UN forces.

Another feature of the discussion was the question of the **effect of the receiving State's consent**. On this particular point, all participants agreed that when the State gives its consent to the presence of a UN-mandated force, the law of occupation is not applicable *de jure* since there is no occupation *stricto sensu*. Taking the situation in Kosovo as a case in point, one expert asked what would be the applicable legal framework, for example for holding people in detention, if it were not the Fourth Geneva Convention.

Another participant emphasized that, although there seems to be general agreement that the Fourth Geneva Convention is not applicable *de jure* when a State consents to a UN-mandated force, it may nonetheless be useful to apply it *de facto*, as a guideline, particularly during the first phase of an operation, until the Security Council sets up another system.

The discussion then moved to the issue of the ***possibility of a de facto application of the law of occupation to UN-mandated operations when they exercise control over or administer a territory.***

Mr Bruce M. Oswald, Lecturer in Law and Acting Director of the Asia-Pacific Centre for Military Law, University of Melbourne, gave a presentation based on his personal experience as Visiting Officer for INTERFET's Detention Management Unit in East Timor.

Even if the law of occupation is not applicable *de jure*, Mr Oswald deemed from his own experience that it may be useful *de facto*, mostly during the deployment of a force, when there are no other rules to which to refer.

After having outlined the key principles established by the law of occupation, Mr Oswald examined how that law provides an effective mechanism for UN commanders to fulfil their command responsibilities and their forces' mandate, and proposed that the law could be further developed to answer the challenges of peace operations.

However, he also emphasized that although the law of occupation is useful it is not sufficient. For instance, it does not cover environmental issues or how to deal with private companies. Many issues are not dealt with in a sufficiently detailed manner or are not covered at all. That is why, during its involvement in East Timor, INTERFET drew a number of key principles, in particular for dealing with juveniles, from the International Covenant on Civil and Political Rights.

(See the presentation on p. 35.)

Most of the experts agreed that the main difficulty concerning UN-mandated forces that have effective control over a territory and its inhabitants is the **issue of detention by those 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 on the grounds for doing so or on the rules that should govern such detentions. One expert gave the example of Kosovo, where KFOR detained individuals for long periods of time (the so-called "COMKFOR holds") without any clear set of minimum rules for the treatment of detainees.

Another expert expressed the view that it would be useful to determine the basic rules of the law of occupation that should be obeyed in all circumstances where UN-mandated troops exercise *de facto* control over a territory. This could be the object of a specific study. One expert supported this idea, saying that this could be a very useful guide for multinational forces whenever they deploy and exercise effective control in a context where there has been a complete breakdown of law and order.

Another expert added that, relying on the experiences of Kosovo and East Timor, UN-mandated operations exercise functions that look like those of an occupying power but which are probably closer to a trusteeship. Hence, it does not seem necessary to require from the UN all the guarantees required from an occupying power. Based on some specific problems encountered in Kosovo or Timor, it could be useful to prepare a document anticipating situations similar to those faced in these countries. 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 very simple set of rules to refer to. The proposal was to draw up 15 to 20 rules that would direct military forces in their efforts to restore and maintain public order and security, and regulate searches and seizures and the arrest and detention of people. A policy document of this kind would go beyond international humanitarian law by incorporating some rules of human rights law.

In the same vein, another expert suggested that a number of different sets of rules should be drawn up. These "packages," added to Security Council resolutions as annexes, would be very useful in setting standards that must be respected as a minimum when multinational forces and police deploy during peace operations. For instance, they would clearly stipulate the legal authority and basis on which a person could be detained.

### **Working session III: “Beyond international humanitarian law”: Aspects of the applicability of international human rights law**

#### PRESENTATION

To introduce the third working session, two presentations were given.

Ms Sonia Parayre, Lawyer in the Public Law Department, Directorate General of Legal Affairs, Council of Europe, addressed the question of the extraterritorial applicability of human rights treaties, especially the European Convention on Human Rights, to UN-mandated operations, taking as an illustration the situation in Kosovo. Ms Parayre also highlighted measures being considered by the Council of Europe to enhance the protection afforded by the Convention in such situations.

(See the presentation on p. 43.)

Ms Margaret Cordial, Legal Analyst for the OSCE Mission in Kosovo, Department of Human Rights, outlined the difficulties in enforcing human rights faced in Kosovo. After reviewing the applicable human rights law in Kosovo, Ms Cordial pointed out the lack of human rights enforcement mechanisms available at the domestic level – an important problem exacerbated by other important factors such as the absence of civilian oversight over the security presence, the immunity of UNMIK and KFOR personnel, and the limited jurisdiction of the Ombudsperson Institution.

(See the presentation on p. 49.)

#### GENERAL DEBATE

Following these presentations, most of the discussion focused on the **aftermath of the *Bankovic* case**, decided by the European Court of Human Rights on 12 December 2001. The majority of experts agreed that this case, which interpreted and applied somewhat restrictively the Court’s previous case law regarding the extraterritoriality of human rights obligations, should not be overemphasized.

Although many experts viewed the *Bankovic* case negatively, others considered it a correct ruling, on facts as well as in law. One expert held that an increasing overlap between human rights law and humanitarian law might present some risks. Indeed, international humanitarian law is designed for wartime, i.e. for situations where it is impossible to secure the entire range of rights laid down in the European Convention on Human Rights. The main risk would be that combining both bodies of law would make it impractical and unrealistic to implement them.

Another expert answered that this is precisely why there is a derogation clause in most human rights treaties (for example in Article 4 of the International Covenant on Civil and Political Rights, and in Article 15 of the European Convention on Human Rights). This expert stressed in this regard the importance of the General Comment 29, issued by the UN Human Rights Committee in 2001, which confirmed that human rights can be derogated from only in emergency cases and placed the threshold for such emergency situations very high. Indeed, "even during an armed conflict measures derogating from the Covenant are allowed only if and to the extent that the situation constitutes a threat to the life of the nation" (General Comment 29, States of Emergency (Article 4), UN Doc. CCPR/C/21/Rev.1/Add.11 (2001)).

However, another expert pointed out that it was not possible for States that were involved in peace operations overseas to derogate from their obligations under human rights treaties, as these derogations would apply also back home. Besides, it would be difficult to argue that a country that contributes troops to a peace operation faces a danger threatening the life of the nation. The issue of derogation is therefore extremely difficult to consider in the framework of extraterritorial applicability of human rights treaty obligations.

Regarding the **notion of effective control** as a test to establish extraterritorial jurisdiction, some experts agreed that this criterion seems well accepted by the international community and is reflected in well-established case law of the European Court of Human Rights, as well as in the views of the UN Human Rights Committee. With regard to the notion of effective control in particular, the negative impact of the *Bankovic* case must not be exaggerated. Indeed, this decision implicitly confirms the extraterritorial application of the Convention when foreign troops have effective military control over a territory.

One expert insisted that the European Court was embarrassed by the *Bankovic* case, which involves a sensitive political question. That is why the Court departed from well-established case law. The expert, referring to the case law on Cyprus, demonstrated that there is a general trend towards acceptance of the extraterritorial application of human rights obligations.

The *Issa* case, in which Turkish forces operating in northern Iraq allegedly killed a number of Iraqi shepherds, was also mentioned. The case was declared admissible by the European Court of Human Rights on 30 May 2000, even though the victims were allegedly killed without having been formally arrested and placed under the actual control of Turkish authorities. In addition, the alleged killings took place outside the "legal space" of the States party to the European Convention on Human Rights. The expert also noted that cases relating to Kosovo had been lodged against France, Norway and Germany that would illustrate this general trend.

Some participants expressed doubts about universal acceptance of the extraterritorial applicability of human rights treaties, even when based on the notion of effective control. They stressed that these developments are supported by only a few cases, most of them determined solely by the European Court of Human Rights, in a strictly European context. To illustrate the limited scope of these cases, one expert noted that the European Convention on Human Rights is of no relevance for Australia acting in East Timor. Furthermore, the International Covenant on Civil and Political Rights is far from universal (151 States had ratified it as of 2 November 2003) and has not been ratified by such major States as China (which has only signed it), Indonesia, Pakistan and Saudi Arabia, which somewhat diminishes the import of the Human Rights Committee's jurisprudence on this issue.

According to these experts, the extraterritoriality of human rights obligations remains a contentious issue. What is lacking is an instrument similar to the UN Secretary-General's Bulletin in the human rights field.

Another expert emphasized that other cases, not directly linked to the question of extraterritoriality of human rights obligations, may be of particular importance for multinational peace operations. In the *Mahmut Kaya v. Turkey* case, the European Court of Human Rights stated in its judgment delivered on 28 March 2000 that authorities have a positive obligation under Article 2 of the European Convention on Human Rights to carry out proper investigations and autopsies in cases involving death, even in situations where there is a state of emergency. These kinds of human rights obligations are particularly important, and multinational peace operations should comply with them. Experience shows that lack of impunity and avenues of redress are seen as crucial by the population wherever there is a multinational presence.

According to another participant, discussions of the *Bankovic* case and other issues pertaining to human rights must tackle three questions in particular:

- (1) The exact scope of international humanitarian law as *lex specialis* in relation to human rights law is still not resolved: when a situation is clearly within the framework of humanitarian law, this body of law is the *lex specialis*, and human rights law should be disregarded. That is the case, for instance, wherever there are prisoners of war, i.e. the human rights procedure of *habeas corpus* is then clearly excluded. However, beyond these clear situations, where does the boundary lie between humanitarian and human rights law? For instance, should children or civilian internees who benefit from special protection under humanitarian law be entitled to further protection under human rights law? Such questions are still not settled. That is why it is important to determine which human rights rules could be usefully applied in times of occupation and to inform military commanders about them.
- (2) Attention should be paid to State practice regarding declarations in cases of emergency, under either Article 4 of the International Covenant on Civil and Political Rights or Article 15 of the European Convention on Human Rights. Such declarations, which are rare, could undoubtedly be improved.
- (3) The question of remedies for violations of international humanitarian law should be tackled and analysed more deeply. Existing remedies in the field of human rights could prove to be a source of inspiration.

Regarding the particular **situation of the transitional administration in Kosovo**, the experts expressed concerns about the lack of respect for certain established rights. For instance, one expert pointed out that the right to challenge the lawfulness of one's detention, embodied in Article 3 common to the four Geneva Conventions, had *de facto* not always been respected in Kosovo. In addition, the need for detentions – even of individuals suspected of taking part in terrorist activities – to be subject to review by an independent body was already affirmed in the judgment delivered by the European Court of Human Rights in the *Lawless* case on 1 July 1961. This has been constantly confirmed by the subsequent case law (e.g. *Aksoy v. Turkey*, 18 December 1996).

Another expert pointed out the risk of double standards resulting from immunities in Kosovo: whereas there could be remedies against UNMIK personnel, subject to the waiving of immunity by the UN Secretary-General, remedies against KFOR personnel would be subject to the goodwill of each State contributing troops.

Another participant reacted to this statement by recalling that the immunity of UN and associated personnel is a traditional principle of customary law. This expert admitted, however, that the question of accountability and compensation for wrongful acts is dealt with in an unsatisfactory manner. Recalling that UNMIK is a subsidiary organ of the UN, this expert also called for reflection on the sharing of responsibilities between the UN and UNMIK. In concrete terms, should it be UNMIK or the UN that is liable to pay compensation?

CONCLUDING REMARKS BY JEAN-PHILIPPE LAVOYER ON BEHALF OF THE ICRC AND LOUISE DOSWALD-BECK ON BEHALF OF THE UNIVERSITY CENTRE FOR INTERNATIONAL HUMANITARIAN LAW

# **Oral Presentations of the Participants**

# Overview of protection issues in contexts of multinational peace operations

By Alain Aeschlimann, Head of the Central Tracing Agency  
and Protection Division, ICRC

Ladies and gentlemen,

The topic I have been invited to introduce is rather complex, as are many of the issues regarding international peace operations. The diversity of situations and mandates concerned and the division of protection issues into several categories and sub-categories make it challenging to give an overview in a short time.

## I. Definitions

In this presentation, I will use a number of terms that I would like to define clearly from the outset. I will use the term "protection" in the meaning agreed upon in the workshops organized by the International Committee of the Red Cross (ICRC) between 1996 and 2000 for human rights and humanitarian organizations. Consequently, protection refers to "all activities aimed at ensuring full respect for the rights of the individual in accordance with the letter and the spirit of the relevant bodies of law, i.e. human rights law, international humanitarian law, and refugee law."

I shall speak, on the one hand, about protection activities carried out by the ICRC with a view to ensuring that international peace operations respect the rights of the individuals, but also, on the other hand, about protection activities carried out within the framework of the international peace operations themselves.

We have to distinguish between international peace operations acting under UN control and command (hereinafter "UN forces"), multinational operations under national command but authorized by the UN Security Council (hereinafter "multinational forces") and multinational operations acting under the aegis of regional organizations, in general with UN backing or authorization (hereinafter "regional forces").

The majority of cases that I will mention are *UN forces* (Cambodia: UNTAC; Somalia: UNOSOM II; Bosnia-Herzegovina: UNPROFOR; Rwanda: UNAMIR II; Haiti: UNMIH; Kosovo: UNMIK; Timor: UNTAET; Sierra Leone: UNAMSIL; Ethiopia and Eritrea: UNMEE; Democratic Republic of the Congo: MONUC; Ivory Coast: MINUCI; Liberia: UNMIL).

I will also shortly speak of some *multinational forces* (Somalia: UNITAF; Rwanda: Opération Turquoise; Haiti: MNF; Bosnia-Herzegovina: IFOR and later SFOR; Kosovo: KFOR; Timor: INTERFET; Afghanistan: ISAF; Ivory Coast: Opération Licorne). Some of these multinational forces were replaced by a UN force (UNITAF, Opération Turquoise, INTERFET). Others were deployed alongside a UN force or mission (MNF, KFOR, Opération Licorne) or alone (ISAF).

Finally, reference will be made, when relevant, to *regional forces* (Liberia: ECOMOG in the 1990s and ECOMIL in 2003; Sierra Leone: ECOMOG; Burundi: AMIB). Some of these

regional forces were replaced by a UN force (ECOMIL in Liberia and ECOMOG in Sierra Leone). Others operated on their own, sometimes under the observation of a UN force or mission (ECOMOG Liberia, AMIB).

These forces, in particular UN forces, often have mixed mandates, which are developed and adapted over time by different resolutions of the UN Security Council. The majority of forces have mandates that are partly peace-keeping, partly peace-enforcement and partly peace-building. To simplify matters, I shall speak of "peace-keeping" when the force operates under Chapter VI or VIII of the UN Charter and "peace-enforcement" when it operates under Chapter VII.

With regard to purely peace-keeping forces (whose duties are limited to observation and monitoring of the implementation of and respect for a ceasefire or peace agreement), I will mention only one operation: UNMEE. Concerning peace-enforcement, there is a variety of different situations to take into account. These range from an expanded notion of self-defence, which includes not only the protection of UN personnel and facilities but also the enforcement of freedom of movement for UN personnel, to securing the environment. I will not speak of "extreme" peace-enforcement operations such as *Desert Storm* – which was in fact an authorization to start an international armed conflict, where many protection issues were obviously at stake.

## II. Applicable law

For the ICRC, the first thing to do when a peace operation is established, in particular when force is used and military confrontations take place, is to specify the applicable law, especially with regard to international humanitarian law. A clear legal framework, including a common understanding of the applicable law between the international peace operation and the ICRC, is important in order to carry out efficient and relevant protection-related activities.

Sometimes, when a force is set up or its mandate modified, the ICRC reminds it in a preventive way of the applicable rules of international humanitarian law. Sometimes, when force is used or when representations are made following violations, the ICRC issues reminders in a reactive way. Preventive reminders were submitted to both the UN and the States providing troops in connection with UNITAF, Opération Turquoise, MNF and INTERFET. Reactive reminders were issued in connection with UNOSOM, UNPROFOR, NATO forces in support of UNPROFOR, ECOMOG Liberia, ECOMOG Sierra Leone and KFOR.

These reminders have usually been considered necessary owing to the *sui generis* aspect of situations created by the deployment of several international peace operations and discussions on the applicable law (international humanitarian law relative to international armed conflicts or relative to non-international armed conflicts). For example, several memoranda concerned the treatment that captured combatants are entitled to under the Third Geneva Convention, but did not mention prisoner-of-war status. There was generally no disagreement expressed about the contents of these reminders and, in most cases, no formal reply was received either from the UN or from contributor States. The following replies were made, however:

- In 1992, with regard to UNPROFOR, a letter from the UN stated that the principles of international humanitarian law must, whenever possible, be applied in UN operations and that the UN had the intention of inserting a provision on respect for humanitarian law not only in agreements with troop-contributing countries, but also in status-of-forces agreements.

- In 1992, with regard to UNITAF, the United States issued instructions to comply with the principles of Article 3 common to the Geneva Conventions.
- From 1994 to 1996, with regard to NATO forces deployed in support of UNPROFOR, NATO confirmed several times that it considered it a fundamental principle that international humanitarian law had to be respected in undertaking any military action.
- In 1994, with regard to Opération Turquoise, France gave assurances concerning its forces' compliance with international humanitarian law in Rwanda and elsewhere.
- In 1994, with regard to MNF in Haiti, the United States confirmed its readiness, upon any engagement of forces, to apply all provisions of the Geneva Conventions and related customary international law and to treat any detained member of the Haitian armed forces in accordance with the norms for prisoners of war.
- In 1999, KFOR gave assurances that the detention of any person was reviewed in accordance with the principles of international humanitarian law.
- In 1999, Australia, in the framework of INTERFET, committed itself to applying *de facto* the Fourth Geneva Convention.

The promulgation by the UN Secretary-General of his Bulletin on *Observance by United Nations forces of international humanitarian law* (Document ST/SGB/1999/13) in August 1999 made such reminders from the ICRC less necessary. In addition, the UN agreed in 1992 to insert a provision on the applicability of international humanitarian law to UN forces in the status-of-forces agreements concluded with States in the territories of which UN forces were going to be deployed.

Furthermore, Article 28 of the 1991 *Model Agreement between the UN and Member States contributing personnel and equipment to UN peace-keeping operations* (Doc. A/46/185) provides that: "[The United Nations peacekeeping operation] shall observe and respect the principles and spirit of the general international conventions applicable to the conduct of military personnel. These international conventions referred to above include the four Geneva Conventions of 12 August 1949 and their Additional Protocols of 8 June 1977 and the UNESCO Convention of 14 May 1954 on the Protection of Cultural Property in the Event of Armed Conflict."

Later, the status-of-forces agreements were amended so that, in referring to international humanitarian law, "principles and spirit" was replaced by "principles and rules." For example, the 1998 status-of-forces agreement for MINURCA in the Central African Republic (the same text was used in 1999 for MINURSO, the UN mission for the referendum in Western Sahara) states in its Article 6 that:

"Without prejudice to the mandate of MINURCA and its international status: a) The United Nations shall ensure that MINURCA shall conduct its operations in the Central African Republic with full respect for the principles and rules of the general international conventions applicable to the conduct of military personnel. These international conventions referred to above include the four Geneva Conventions of 12 August 1949 and their Additional Protocols of 8 June 1977 and the UNESCO Convention of 14 May 1954 on the Protection of Cultural Property in the Event of Armed Conflict [...]."

A similar wording was used in the 2003 status-of-forces agreement for the African Mission in Burundi (AMIB). Rules of engagement – in particular, those for NATO operations in support

of UNPROFOR and AMIB – frequently also refer expressly to respect for international humanitarian law.

### **III. Protection issues**

Let me now come to concrete protection issues. I will successively discuss detention-related issues, promotion and dissemination of international humanitarian law, protection activities carried out to ensure respect for the civilian population and persons no longer taking part in hostilities, missing persons and mortal remains, mine action and, finally, the protection of independent humanitarian organizations.

#### *A. Detention*

##### *- The legal basis for detention and the situation of detainees held by an international force*

The ICRC is aware of persons deprived of their freedom having been held by the following forces at least: ECOMOG Liberia, UNTAC, UNOSOM II, MNF, SFOR, KFOR, UNMIK, INTERFET, UNTAET, UNAMSIL, ECOMOG Sierra Leone, UNMEE, MONUC, MINUCI and Opération Licorne.

Since the beginning of the 1990s, the legal framework for detention has clearly improved. When UNOSOM II started holding detainees in 1993, nothing had really been planned: so far as the ICRC is aware, there was no proper regulation and no budget, and there were no proper facilities. Later, rules and regulations were introduced, usually in status-of-forces agreements, rules of engagement, standard operating procedures, special directives and ordinances. The ICRC did not have systematic access to status-of-forces agreements and rules of engagement, and is thus not in a position to give an exhaustive overview. The documents examined by the ICRC (rules of engagement, standard operating procedures and directives) usually mention the categories of people a force can arrest and detain, besides referring to the rights of detainees (under the UN minimum standards and/or the Fourth Geneva Convention) and/or providing a list of their main rights and of guidelines for detention (which in the case of rules of engagement is very concise, as these deal more with search and seizure procedures). Special regulations for the handling of detainees were adopted by KFOR and by INTERFET (which issued a “Detainee Ordinance”). The UNMEE force commander also issued directives on procedures for the custody and handover of persons held. ISAF, which usually detains people only for short periods, apparently still lacks standard operating procedures for arrest and detention.

Except in the cases of ECOMOG in Liberia, UNMIK, INTERFET and UNTAET, the basic principle is that an international force must hand over detainees as quickly as possible to the State on the territory of which the force is deployed. In addition to authorizing the arrest of military members of an international force, the 1990 model status-of-forces agreement (UN General Assembly Document A/45/594, 9 October 1990) authorizes the arrest of any other person in areas where a peace-keeping operation is under way. Such persons must be handed over immediately to the government of the host country.

The ICRC noted that UNTAC, UNMEE, ISAF and UNAMSIL had such a policy of brief detention. The status-of-forces agreement and rules of engagement for the AMIB state that detainees should be handed over “as soon as possible”; draft standard operating procedures for UNMIK specify “ideally 48 hours” as the timescale for the handover. This kind of practice is referred to as a temporary detention regime. Detaining persons from the host country is clearly a very sensitive matter.

For KFOR and INTERFET, the maximum detention period is 30 days, which can be extended by the KFOR force commander, but in the case of INTERFET only by a reviewing authority. Both systems appear to be based on, or at least inspired by, the internment system provided for by the Fourth Geneva Convention.

- *ICRC activities*

The ICRC received authorization to visit detainees held by all forces mentioned above. The first such visit was to detainees held by ECOMOG in Liberia at the end of 1990. ECOMOG had actually become a party to the Liberian conflict and the ICRC had sometimes been requested to act as a neutral intermediary when detainees held by the peace-keeping force were released and allowed to return to their places of origin.

I cannot think of any force or mission that denied access to the ICRC. However, in some cases access to detainees was delayed. This happened, for example, in the framework of ECOMOG Liberia and UNOSOM operations. In other situations, such as in Sierra Leone where ECOMOG was operating and, nowadays, in Bunia, Democratic Republic of the Congo where MONUC is on the ground, the ICRC has been unable to go to detention places for security reasons.

Authorization for a visit is usually given orally by the force commander or the head of mission, sometimes after previous contacts by the ICRC in New York. However, UNTAET, KFOR and UNMIK issued authorizations in writing and even included them in the various detention directives and regulations.

The ICRC visited detainees held by ECOMOG in Liberia and Sierra Leone, UNTAC, UNOSOM II, SFOR, KFOR, UNMIK, INTERFET, UNTAET, Opération Licorne, MNF, UNMEE, ISAF. Oral representations were made to detaining officers after all visits. In addition, written reports were submitted to ECOMOG Liberia, UNOSOM II, KFOR, INTERFET, MNF and possibly others.

The main problem with regard to reports has always been to identify the appropriate addressee: the force commander and/or head of mission, UN headquarters in New York or the regional organization's headquarters? ICRC practice has not been homogeneous; it has depended on the structure of the force, the relationship between the various contingents, and the relationship between the detaining contingents and the force commander and/or the organization's headquarters.

In addition to problems encountered with some forces relating to the living conditions or treatment of detainees, the ICRC has discussed the issue of notification of arrest and difficulties involved in receiving such notifications, particularly with forces such as UNOSOM II or UNMEE. Notifications are important as a basis for determining where to visit detainees, in particular when they are held for only a couple of days.

It is worth noting that the ICRC also visited UNOSOM II personnel detained in Somalia by General Aidid's faction (USC/SNA) and arranged for ECOMOG personnel held by the Revolutionary United Front (RUF) in Sierra Leone to exchange messages with their relatives.

A recent trend that we welcome involves the ICRC being consulted during the process of drafting force commander's instructions concerning detention (as UNMEE did) or standard operating procedures for detention in the field (as UNAMSIL did), or on the general subject of detention as in New York in November 2003 in connection with MONUC.

I know of two cases where the ICRC disagreed with an international force concerning the status of detainees. First, it disagreed with INTERFET's decision not to grant prisoner-of-war

status to captured members of militias in Timor as having an insufficient structure and chain of command. It is unclear whether the ICRC argued the matter very much in the field. However, one of its legal advisers wrote on the subject in the *International Review of the Red Cross* in 2001 (No. 841, pp. 77-100).

The second case of disagreement concerned UNMEE, which had arrested or captured members of the Ethiopian Defence Forces in the Temporary Security Zone (TSZ) established on Eritrean territory, and then quickly handed them over to the Eritrean authorities in accordance with agreements already in place. The Ethiopian military personnel were either deserters, or on a mission in the TSZ, or guilty of criminal acts such as robbery, etc., committed in the TSZ. Upon capture, all claimed for obvious reasons to be deserters. The ICRC position was that all had to be presumed to be prisoners of war until a competent court decided otherwise, because their capture – being in itself a hostile act – had made the Third Geneva Convention applicable. For the ICRC, it was important to establish the applicability of the Third Geneva Convention so as to be granted the right to visit those captured after they were handed over to the Eritrean authorities, and to establish the joint responsibility of UNMEE with regard to the treatment given detainees by Eritrea on the basis of Article 12 of the Convention. For practical and political reasons, it was difficult for UNMEE to accept the existence of new prisoners of war only months after signing a peace treaty and during implementation of a difficult peace process; therefore, neither UNMEE nor Eritrea recognized those captured as prisoners of war.

It should be pointed out that international forces also have human rights responsibilities that benefit persons held by either side in a conflict. For example, MONUC officials visit detainees. The ICRC's concern is mainly to avoid duplication, misunderstanding, lower standards in its procedures for visits and negative effects on its activities. Personal relations between ICRC delegates and human rights officers or force commanders and heads of mission have proven to be more effective in solving problems than contacts at the New York level.

Another sensitive issue is the release and repatriation of prisoners of war, for instance in the Democratic Republic of the Congo or between Ethiopia and Eritrea. The involvement of the head of an international force or mission may provide leverage but may also raise political issues. Sometimes, it is much more efficient for the ICRC to maintain a parallel channel of humanitarian dialogue while keeping the head of international force or mission regularly informed about progress in its negotiations, and for the head of force or mission to take action only after consultation with or at the request of the ICRC. This way of proceeding proved to be successful with the UN Secretary-General's Special Representative for Ethiopia and Eritrea.

The right of non-refoulement must be upheld whenever detainees or surrendered combatants are repatriated. This involves interviewing detainees in private, providing them with the facts needed to give fully informed consent, and being aware of possible attitudes of the receiving authorities concerning repatriated detainees. Recent repatriations of Rwandans and Burundians involving MONUC showed that the mission had not considered all the issues at stake and that it was important that the ICRC play an advocacy or advisory role.

## *B. Promotion and dissemination of international humanitarian law*

Since the beginning of the 1990s, the ICRC has carried out dissemination and training sessions with international contingents on the basic rules of international humanitarian law and on its own activities. These sessions have been held for personnel of nearly all forces either in the deployment area or before the troops' departure from their home country. It should be noted that UN Security Council Resolution 1270 (1999), which established UNAMSIL, underlined "the importance of including in UNAMSIL personnel with appropriate training in international humanitarian, human rights and refugee law [...]."

Similar sessions on other topics, such as the rights of the child, are also carried out by other organizations.

## *C. Protection activities carried out to ensure respect for the civilian population and persons no longer taking part in hostilities*

ICRC activities aiming to improve compliance with international humanitarian law by an international force, in particular regarding the conduct of hostilities, need to be distinguished from protection-related activities carried out by such a force.

Whenever the ICRC is told that there has been misconduct and disregard for the rules and principles of international humanitarian law by members of an international force, it investigates – just as it does when allegations of this kind are made against any bearers of weapons – and, should the violation be confirmed, makes representations (with the same dilemma with regard to the addressee as in the case of reports on visits to places of detention). The ICRC has made representations in particular in connection with UNOSOM II (several representations concerning indiscriminate attacks and attacks against medical facilities), NATO air operations in support of UNPROFOR (indiscriminate attacks), ECOMOG in Liberia (repeated indiscriminate attacks, ill-treatment of civilians and lootings), Opération Turquoise (advising the force to increase security around a camp near Cyangugu where Tutsis took refuge).

International forces' protection activities and concerns fall into three main areas.

First, nearly all recent UN Security Council resolutions establishing new international forces have authorized the forces to contribute to efforts aimed at ensuring respect for human rights and humanitarian law. These contributions have taken various forms. A large part of the information collected on this subject is published in the Secretary-General's periodic situation reports. In this context, it is worth mentioning the mandate for demobilization, rehabilitation and reintegration of former fighters – including child soldiers – given to the recent UN forces in Africa.

Second, many forces, in particular the multinational forces (Opération Turquoise, Opération Licorne, UNOMIC, UNAMSIL, UNMIL, MONUC), are mandated to protect civilians under imminent threat of physical violence. In implementing this mandate, the forces substitute for the authorities of the receiving State, as physical protection is one of the main duties of any State. Opération Turquoise and then UNAMIR II were even requested to create and maintain areas where humanitarian activities can be carried out safely ("zones humanitaires sûres").

Third, in Bosnia-Herzegovina, the UN Security Council created under Chapter VII of the UN Charter so-called "safe areas" imposed on the parties and monitored by UNPROFOR (Security Council resolution 824, 6 May 1993). However, owing to the complicated system in place for using deterrent force and the limited resources available, UNPROFOR did not have the mandate or the means to really ensure safety in the designated areas as the plight of Sarajevo and the subsequent Srebrenica massacre showed.

#### *D. Missing persons and mortal remains*

Several international forces or missions, including SFOR in the former Yugoslavia and, more explicitly, UNMIK in Kosovo, confirmed the ICRC's role as the lead agency with regard to missing persons. In such contexts, a sharing of tasks between the ICRC and the international mission was discussed and agreed upon. The ICRC set up mechanisms for the parties actively participating in the process of tracing and in retrieving and identifying mortal remains. The force and mission participated in some meetings regarding these mechanisms and were kept up to date about progress.

In addition, with ICRC advice UNMEE established standard operating procedures, which were agreed by the parties, for retrieval, identification and burial of mortal remains. The ICRC participated in one retrieval operation as a witness and technical adviser, and was in charge of monitoring the handover and burial of the remains.

#### *E. Mine action*

Starting with UNTAC, international forces or missions have been regularly mandated to develop mine-action activities. Coordination of the mine-action activities of NGOs and humanitarian agencies (UNAMSIL) or development of a mine-action plan (UNMIK) are the descriptions used in recent UN Security Council resolutions. The ICRC did its best to keep international forces or missions informed of its own activities, and participated in numerous coordination meetings. However, the ICRC always made it clear that it would not allow its independence to be infringed upon in this area as in others.

#### *F. Protection of independent humanitarian organizations*

Being independent, neutral and impartial, and being perceived to be so by all parties to a conflict, have always been of fundamental importance for the ICRC. Since UNITAF operations in 1992 and the development of the integrated approach, more and more forces have been mandated to facilitate humanitarian aid (UNMIL, UNAMSIL), in particular by improving security conditions (MONUC) and ensuring a secure environment (UNOSOM II, UNMIL).

The ICRC has been one of the main advocates of maintaining a neutral and independent environment in which humanitarian work can take place, and of making clear distinctions between humanitarian work, political activities and military operations. The situation has continuously deteriorated, however, as more and more contingents and new international forces have sought to do "something positive" and to be seen to be useful by the civilian population. As an exception to its standard procedures, and with the agreement of the parties, when risks of confusion of military and humanitarian roles were deemed to be limited and when no other solution was possible, the ICRC accepted UN escorts in Bosnia-Herzegovina to ensure the security of convoys of prisoners who had just been released and were on their way to their home areas.

The events following 11 September 2001 increased the trend towards direct military involvement in humanitarian activities. Almost every day, the situation is becoming more confusing in some contexts owing to the new CIMIC (civil military cooperation) concept and, more strikingly, the PRT (Provincial Reconstruction Team) concept in Afghanistan. In totally polarized contexts, this unavoidably leads to security risks and incidents for humanitarian organizations.

I thank you for your attention.

# Questions relating to the applicability of international humanitarian law to United Nations-mandated forces

By Professor Robert Kolb, Universities of Bern and Neuchâtel, Research Director at the University Centre for International Humanitarian Law, Geneva

[Transcript from an oral presentation.]

Instead of giving a presentation on the issue of the applicability of international humanitarian law to UN-mandated operations, which would be redundant (such a presentation was already given in the background paper preparatory to this working session), Professor Robert Kolb raised a number of questions that should be addressed regarding both international humanitarian law *stricto sensu* and issues of protection under international criminal law.

Regarding the applicability of international humanitarian law *stricto sensu*, Professor Kolb highlighted eight issues that should be addressed during the debates:

- Should international humanitarian law be considered applicable to UN-mandated operations in principle, for fundamental reasons, or should one decide its applicability on an *ad hoc* basis, in view of practical considerations?
- If international humanitarian law is applicable, are we bound to apply a body of law such as the law of international armed conflict or the law of non-international armed conflict in its entirety, or can we split it and combine the different rules? In the latter case, which rules could be combined?
- Is the distinction between international and non-international armed conflict still relevant? In international customary law, this distinction appears more and more blurry. What are the likely consequences?
- What policy considerations are relevant in this regard?
- What are the consequences of different levels of command and control (national / international)?
- What is the relevance of texts such as the Convention on the Safety of United Nations and Associated Personnel, or the Secretary-General's Bulletin?
- As a matter of reciprocity and according to the principle of equality of the belligerents, if the law of international armed conflict is applicable to UN forces is it also applicable to the other parties?
- Can a person's status be changed more than once? For instance, if the UN captures a person and recognizes him as a prisoner of war, can his status change when he is handed over to the territorial State, which might treat him as a mere criminal?

Further questions could be raised concerning how criminal law relates to the protection of UN and associated personnel:

- With regard to Articles 8.2(b)(iii) and 8.2(e)(iii) of the Statute of the International Criminal Court, when does one pass from a state of peace to a state of war, from a peacekeeper to a combatant? Can one make this more precise, e.g. with respect to actions taken by forces in self-defence?
- Can one impose geographical or temporal bounds on the law applicable in relation to the status of forces? For example, can a territory be considered occupied only in part – where, for example, UN forces under national command are still present – and in

part unoccupied, but under international control? Does this have an impact on issues of protection under international criminal law?

- Does the mandate given by the UN Security Council have an impact on the protection accorded to forces in a criminal law perspective?

# Outline of *de jure* and *de facto* applicability of the law of occupation to United Nations-mandated forces

By Professor Marco Sassòli, Université du Québec à Montréal, Canada

[Transcript from an oral presentation.]

Professor Marco Sassòli introduced the working session by pointing out that one way of recognizing that international humanitarian law is applicable to UN-mandated operations is to note that each contributing State is required individually to apply the law. However, regarding the law of occupation, the collective responsibility of States involved in UN-mandated operations represents a complication, since the operations are carried out by a number of national forces acting together, none of them controlling the territory.

In contemporary practice, the main question is the *de facto* applicability of the law of occupation. However, one first needs to see whether the law of occupation may apply *de jure* to the particular situation of peace-building operations.

## ***De jure* applicability**

The starting point for this contribution is the proposition that international humanitarian law applies to armed conflict and to occupation independently of questions of legitimacy, in accordance with the traditional distinction between *jus in bello* and *jus ad bellum*.

Another important *de jure* element is the question of the consent of the receiving State. Indeed, if a State gives its consent to an intervention, then the law of occupation cannot apply. This is precisely why that law did not apply in Kosovo and East Timor. Although consent was arguably obtained by coercion, the coercion was approved by the UN Security Council and therefore is not contrary to the UN Charter.

Another problem is the difficulty of making legislative and institutional changes under the law of occupation, despite such changes being, by definition, the very purpose of peace-building operations. Indeed, Article 43 of the Hague Regulations states that the occupying power must respect, "unless absolutely prevented, the laws in force in the country." Although Article 64 of the Fourth Geneva Convention spells out more clearly and in a less restrictive manner what should be understood as "unless absolutely prevented," many of the changes that may be introduced as part of peace-building efforts cannot be justified under the law of occupation. The law of occupation appears to be more flexible regarding institutional changes. However, Article 47 of the Fourth Geneva Convention lays down that protected persons "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 territory. Yet, any creation of new institutions entails *a fortiori* the enactment of new legislation.

How, then, can peace-building efforts be justified under the law of occupation? Professor Sassòli identified three different ways.

- International human rights law: assuming, given UN practice and judicial decisions, that international human rights law is binding on an occupying power with respect to the population of an occupied territory, the occupying power has the obligation to abolish legislation and institutions which are contrary to international standards.

Therefore, an occupying power has a strong argument that it is "absolutely prevented" from applying local legislation when that legislation is contrary to international law.

- UN Security Council resolutions: institutional or legislative changes prescribed or authorized by a Security Council resolution may be justified under Article 103 of the UN Charter, which specifies that obligations under the Charter prevail over obligations under any other international agreement. This line of argument, however, risks blurring the distinction between *jus in bello* and *jus ad bellum*.
- End of occupation: Article 47 of the Fourth Geneva Convention implies that a government installed by the occupying power has the same obligations as the occupying power itself. Therefore, the devolution of governmental powers to a national authority does not relieve the occupying power from its obligations under the Convention. However, one may argue that a democratic election, recognized by the international community, cannot be considered to be a change introduced by the occupying power and may therefore end the occupation. It nevertheless could introduce an element of legitimacy that once again risks blurring the distinction between *jus in bello* and *jus ad bellum*.

### **De facto applicability**

Even if the *de jure* applicability of the law of occupation to UN-mandated operations and especially to peace-building operations is not clear, the UN nevertheless has an interest in referring *de facto* to this body of law, for three reasons:

- It is an existing legal framework, which is the same for every State and familiar to all.
- The law of occupation is applicable independently of the legitimacy of an intervention, and is therefore not subject to political controversy.
- It provides practical solutions to problems that armed forces will necessarily have to face in the field.

In conclusion, the whole debate on whether international humanitarian law applies to UN-occupied territories is important because of a certain "spillover effect": the risk is that, if we accept that UN forces are not bound by the law of occupation, then other regional organizations, intervening in similar contexts, will also be considered not to be bound by international humanitarian law.

# The law of occupation and United Nations peace operations: an effective mechanism to fulfil command and responsibility?

By Bruce M. Oswald, Lecturer in Law and Acting Director of the Asia-Pacific Centre for Military Law, University of Melbourne, former Visiting Officer for INTERFET's Detention Management Unit in East Timor

*The law of belligerent occupation is a kind of legal paradise, in the sense that its propositions, as they stood in 1907, seem to be able to maintain themselves despite the unanswered challenge of the facts of contemporary international life.*<sup>1</sup>

## Introduction

On UN peace operations, commanders will often find themselves trying to find an appropriate balance between maintaining security and administering to the welfare of the local population.

Achieving this balance will sometimes require UN military forces to exercise law-and-order functions in the host nation because the local authorities are unwilling or unable to maintain law and order.

The purpose of this presentation is to examine how the law of occupation<sup>2</sup> can assist UN military forces to achieve the appropriate balance between maintaining security and administering to the welfare of the local population.

This presentation does not seek to resolve when the law of occupation applies *de jure*. It accepts that because the law of occupation is designed to meet the challenge of balancing the interests of a military force and the needs of the local population, it is therefore a useful mechanism for establishing best practice standards on UN peace operations.

This presentation is divided into three parts: Part I outlines some key principles established by the law of occupation. Part II examines how the law of occupation provides an effective mechanism for UN commanders to fulfil their command responsibilities. Part III proposes how the law of occupation can be further developed and applied to answer the challenges of contemporary international life.

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<sup>1</sup> Julius Stone, *Legal Controls of International Conflict*, 1954, p. 727.

<sup>2</sup> The law of occupation is generally considered a subset of the laws of armed conflict. The principal sources of the law of occupation are the *Hague Regulations concerning the Laws and Customs of War on Land, 1907, No. IV* (hereinafter referred to as the "Hague Regulations"); *Geneva Convention Relative to the Protection of Civilian Persons in the Time of War of 12 August 1949*, (hereinafter "GC IV"); and *Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts of 8 June 1977* (hereinafter "P I").

## **Part I General Principles arising from the Law of Occupation**

A territory is considered occupied when it is actually placed under the authority of the hostile army and the law of occupation extends only to the territory where such authority has been established and can be exercised.<sup>3</sup>

The aim of the law of occupation is to substitute for chaos some kind of order, however harsh it may be<sup>4</sup> and consequently, the occupier shall take all 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.<sup>5</sup>

The phrase "unless absolutely prevented" has been interpreted by Michael Kelly to incorporate the concept of military necessity<sup>6</sup> which would require the balancing of the principles of proportionality and humanity.

The law of occupation is based on four fundamental principles: (1) that sovereignty does not pass to the occupier; (2) that the occupier's powers are only provisional; (3) that the occupier has responsibility to maintain law and order; and (4) that the occupier takes reasonable and necessary steps to ensure the welfare of the local population.

The application of these four principles provides a useful mechanism for maintaining the military imperative with the need to ensure that the administration of the local population accords with acceptable international standards.

## **Part II The Law of Occupation and Fulfilling Command Responsibility on UN Peace Operations**

UN military forces conducting peace operations have been mandated to undertake a wide variety of tasks including: maintaining cease-fires; election monitoring; conducting humanitarian assistance; maintaining law and order; providing protection to safe areas and civilians, displaced persons and refugees at risk; and conducting disarmament of former combatants and warring factions.

Regardless of the mandate however, such forces are sometimes called upon to protect themselves and others or to maintain law and order because the local authorities either cannot or will not carry out such functions.

Even if they do not have to maintain law and order they may be required to look after the welfare of the local population in other areas such as education, relief work, health assistance and protecting members of the local population who seek sanctuary with the UN.

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<sup>3</sup> Hague Regulations, Art. 42.

<sup>4</sup> Sir Arnold Duncan McNair, *Legal Effects of War* (2nd ed., 1944), p. 323.

<sup>5</sup> Hague Regulations, Art. 43.

<sup>6</sup> Michael Kelly, *Restoring and Maintaining Order in Complex Peace Operations: The Search for a Legal Framework*, 1999, pp. 191-192.

While it is acknowledged that the host nation bears primary responsibility for maintaining law and order and administering welfare to the local population, the reality is that the UN has, since its earliest peace operations, undertaken law-and-order functions when necessary in order to fulfil their mandates and meet the needs of the local population. For example, the United Nations Emergency Force (UNEF I) took responsibility for maintaining order in certain areas, in cooperation with local authorities, and temporarily undertook certain essential administrative functions, such as security, with the cooperation of the governor and police inspector of Port Said. Furthermore, the force took steps to protect civilian life and public and private property and, with the sanction of the local authorities, it also undertook administrative functions with respect to public services and utilities and exercised a limited power of detention.<sup>7</sup>

Other operations where the UN has found itself conducting law-and-order tasks to varying degrees include: West Irian,<sup>8</sup> Congo,<sup>9</sup> Cambodia,<sup>10</sup> Kosovo<sup>11</sup> and East Timor.<sup>12</sup>

It is now accepted as a matter of law and practice that military commanders have a responsibility to ensure that their subordinates comply with the rule of law on military operations. In military terms this responsibility is a fundamental facet of command responsibility.

Command responsibility includes professionalism in the sense of planning and achieving the mandate effectively and efficiently. It includes giving direction to, coordinating and controlling military forces and extends to all phases of a military operation. It creates responsibilities to ensure not only that the rule of law is adhered to but also that the military force is politically accountable in the way it conducts its operations. It requires commanders to take all action necessary and reasonable to achieve the mandate and to ensure overall success of the mission.

Command responsibility on UN peace operations therefore extends to being accountable to the local population, international society, the troops-contributing nation, and last but not least, the commander's own troops.

UN military commanders must always keep in mind that they are administering the territory in trust for the local population and therefore they do not have sovereign powers in that territory; that their powers are only provisional; that they have a responsibility to provide security and protection for the local population; and that they must take reasonable and necessary steps to ensure the welfare of the local population. These basic principles enshrined in the law of occupation should form the bedrock of any planning for UN military operations.

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<sup>7</sup> See Report of the Secretary-General, United Nations Emergency Force: Summary Study of the Experience Derived from the Establishment and Operation of the Force, A/3943, 9 October 1958, paragraphs 53-54.

<sup>8</sup> See Rosalyn Higgins, *United Nations Peacekeeping 1946-1967 - Documents and Commentary, Vol.II Asia* (1970), pp. 116-117.

<sup>9</sup> See Derek Bowett, *United Nations Forces*, 1964, pp. 187-191.

<sup>10</sup> See General Assembly resolution on the situation of human rights in Cambodia, A/RES/48/154, 20 December 1993, and Vishakan Krishnadasan, A Legal Perspective on UNTAC An Overview, *The United Nations Transitional Authority in Cambodia (UNTAC): Debriefing and Lessons Report and Recommendations of the International Conference Singapore, August 1994* (1995), p. 196.

<sup>11</sup> See Hansjorg Strohmeyer, "Collapse and Reconstruction of a Judicial System: The United Nations Mission in Kosovo and East Timor," *American Journal of International Law* (2001), pp. 46-63; and Centre for Law and Military Operations (CLAMO), *Law and Military Operations in Kosovo: 1999-2001* (2001), pp. 98-115.

<sup>12</sup> *Ibid.* See also Bruce Oswald, "The INTERFET Detainee Management Unit in East Timor" (2003) 3 *Yearbook of International Humanitarian Law*, p. 347, for details of how the law of occupation was applied de facto to INTERFET's deployment in East Timor.

The need to balance military security, which extends to providing security and protection for military personnel and civilians at risk, with administering to the welfare of the local population is of fundamental importance to fulfilling command responsibility.

To achieve this balance the law of occupation provides a useful basis for developing doctrine, training UN peacekeepers, and for planning and conducting UN peace operations. For example, the law of occupation provides, among other things, best practice standards such as the following:

- Family honours and rights, individual lives and private property, as well as religious convictions and practice must be respected (Hague Regulations, Art. 46).
- Private property cannot be confiscated (Hague Regulations, Art. 46).
- Pillage is forbidden (Hague Regulations, Art. 47).
- The circumstances in which a military force will be required to look after the welfare of the local population (Hague Regulations, Arts 42 and 43).
- A military force must safeguard the interests of the local population and, in the territory in which it is conducting operations, sovereignty will not be transferred to the military force (Hague Regulations, Arts 52-56; GC IV, Art. 47).
- The destruction of property is prohibited unless rendered absolutely necessary by military operations (GC IV, Art. 53). "Absolutely necessary," in this context, requires a balancing between the law of armed conflict's principles of proportionality, necessity and humanity.
- A military force has a responsibility to assist with ensuring that relief supplies reach the vulnerable (GC IV, Arts 59-61).
- A military force, in cooperation with the local authorities and international organizations, should consider where possible the need to facilitate the proper working of all institutions, and the availability of food and medical supplies in the territory in which it is operating (GC IV, Arts 50, 55, 56, 59).
- The penal laws of the territory in which the military force is conducting operations shall remain in force unless those provisions violate fundamental international humanitarian law (GC IV, Art. 64).
- Specific conditions for the treatment of detainees (GC IV, Art. 76).
- Civilians arrested or detained by a military force shall be treated humanely in all circumstances and shall enjoy, as a minimum, protection from such acts, or from threats to commit such acts, as violence to life, health, or physical or mental well-being of persons; outrages upon personal dignity; the taking of hostages; and collective punishments (P I, Art. 75.2).
- Any person arrested or detained by a military force shall be informed promptly, in a language he or she understands, of the reasons why these measures have been taken (P I, Art. 75.3).

- Except in cases of arrest or detention for criminal offences, such persons shall be released with the minimum delay possible and in any event as soon as the circumstances justifying the arrest or detention have ceased (P I, Art. 75.3).
- Where a military force provides protection for persons seeking sanctuary or protection, it should as a minimum comply with the provisions laid down in GC IV, Section IV and P I, Section III.

### **Part III Future Challenges and Developments to the Law of Occupation**

If it is accepted that the law of occupation, or at least some aspects of it, may assist commanders serving on UN peace operations to achieve an appropriate balance between achieving and maintaining security on the one hand, and administering to the welfare of the local population on the other, then it is necessary to consider the challenges facing its application in UN peace operations. In this context, I offer the following suggestions.

#### *A. Updating the law of occupation*

While the law of occupation provides an effective mechanism for military commanders to fulfil their command responsibilities on UN peace operations, it is clear that it cannot be relied upon solely, because it has failed to keep up with the challenges facing contemporary military and UN peace operations.

The law of occupation has failed to keep pace with developments in:

- international human rights law;
- international criminal law;
- expansion of governmental functions and techniques;<sup>13</sup>
- economic globalization;
- increasing use of international organizations, contractors and other and non-State entities on contemporary military operations.

Consequently, it requires urgent updating.

Notwithstanding the fact that the law of occupation requires updating, it should be recognized and applied as best practice on UN peace operations by the UN and States contributing forces to such operations.

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<sup>13</sup> Julius Stone, *op. cit.*, p. 728.

## *B. Enhancing the application of the law of occupation on UN peace operations*

The UN, the ICRC, States and non-State entities can play an important role in enhancing the application of the law of occupation in UN peace operations.

### *- The UN*

There are many examples of the UN passing resolutions or making statements regarding best legal practice on peace operations. Examples of Security Council resolutions setting best practice standards for military operations, including peace operations, are Resolution 1261 (international humanitarian law and armed conflict) and Resolution 1325 (gender and peace operations). The Secretary-General has issued a Bulletin on observance by UN forces of international humanitarian law.<sup>14</sup>

Section 8 of the Secretary-General's Bulletin is useful, but other aspects of the law of occupation dealt with above could be developed further.<sup>15</sup>

Some Security Council resolutions also mandate UN peace operations to utilize relevant aspects of the law of occupation. Resolution 1483 in the context of the recent war against Iraq serves as a useful precedent.

Further, the UN could:

- draw up a treaty dealing specifically with the application of an extended and updated law of occupation;
- develop doctrine and training consistent with the law of occupation and international human rights law in such areas as the handling of detainees.

### *- The ICRC*

The ICRC could enhance or develop the following activities:

- assisting the UN and other interested parties (including non-State entities) in drawing up a treaty dealing specifically with the application of an extended and updated law of occupation;
- developing and clarifying principles regarding the *de jure* and *de facto* application of the law of occupation to peace operations generally;
- conducting dissemination and training on the application of the law of occupation in UN peace operations.

### *- States and non-State entities*

States should clarify when they will apply the law of occupation to their operations. Australia, for example, has stated that it regards the Fourth Geneva Convention:

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<sup>14</sup> Secretary-General's Bulletin on Observance by United Nations forces of international humanitarian law, ST/SGB/1999/13, 6 August 1999.

<sup>15</sup> There is of course the fundamental issue of how binding the Secretary-General's Bulletin is.

"as applying to a wider range of circumstances than international armed conflicts. This means the Convention applies not only in international armed conflicts but also wherever foreign forces find themselves in control of the territory of another state where there is no consent from a state government apparatus for them to be there."<sup>16</sup>

States should strengthen the application of the law of occupation by using their domestic law to punish breaches of the key provisions of the law of occupation. In the context of Australian domestic law, for example, the *Criminal Code Act 1995* (Cth) lays down that the following are offences:

- Art. 268.29 destruction and appropriation of property; Art. 268.30 compelling service in hostile forces;
- Art. 268.31 denying a fair trial; Art. 268.32 unlawful deportation or transfer; Art. 268.33 unlawful confinement;
- Art. 268.45 transfer of population; Art. 268.51 destroying or seizing the enemy's property;
- Art. 268.52 depriving nationals of the adverse power of rights or actions;
- Art. 268.53 compelling participation in military operations;
- Art. 268.54 pillaging.<sup>17</sup>

States and non-State entities (for instance non-governmental organizations and commercial organizations that are contracted to work on peace operations) should develop doctrine and train their peacekeepers and employees on the law of occupation.

## Conclusion

The law of occupation is an effective tool for commanders serving on UN peace operations to fulfil their command responsibilities, particularly in situations where local authorities are unwilling or unable to maintain law and order or to provide for the general welfare of the local population.

However, the law of occupation (1) must be updated to reflect contemporary international military operations, and (2) should be recognized and applied as best practice by the UN, States and non-State entities when developing doctrine and when training for, planning and conducting UN peace operations.

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<sup>16</sup> Australian government statement for the Meeting of Contracting Parties to the Fourth Geneva Convention, Geneva, 27-29 October 1998, reprinted in *Yearbook of International Humanitarian Law* (1999), p. 451.

<sup>17</sup> These criminal offences are based on the Statute of the International Criminal Court.

# Beyond international humanitarian law: Aspects of the applicability of international human rights law

By Sonia Parayre, Lawyer, Public Law Department,  
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## INTRODUCTION

There is an ongoing discussion within the Council of Europe on the broad issue of “applicability and implementation of human rights,” either within the territory of member States (High Contracting Parties to the European Convention on Human Rights) or outside it, as reflected *inter alia* in the work carried out by Mr McBride for the Council on the principles governing the application of the European Convention on Human Rights during armed conflict, internal disturbances and tensions, and its possible use in the future.<sup>2</sup>

Several situations that may lead to the non-applicability of human rights treaties have been addressed on various occasions and, very recently, in the framework of the Parliamentary Assembly of the Council of Europe when it adopted Recommendation 1606 on “Areas where the European Convention on Human Rights cannot be implemented.”<sup>3</sup> The Recommendation lists obstacles to the Convention’s applicability (see below) which can take various forms: they can be the result of armed conflicts or emergency situations; occupation of part of a State’s territory or intervention by one State on the territory of another; or even the effective absence of control by a State over part of its territory.

Roughly speaking, there are at least two approaches to the notion of “applicability” of human rights treaties, according to whether it concerns the treaty itself or its effective implementation and supervision by an international supervisory mechanism. It has to be recalled, as was underlined yesterday<sup>4</sup> – and I think we all agree – that the main problem is not so much the lack of applicable standards but rather their

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<sup>1</sup> I would like to thank J. Labbé Grenier for his fruitful background paper which, together with this contribution, should lead to further discussions on some much-debated issues, and help participants to come up, if not with proposals, maybe with answers to some of the questions that may be raised in this context. For obvious practical reasons, the scope of this presentation is limited to some aspects of the applicability of human rights treaties and in particular the applicability of European standards, in order to reflect the work carried out by the Council of Europe. For a comprehensive overview of this complex and broad topic, see the list of references which appears in the various background documents, and the forthcoming publication on *Extraterritorial jurisdiction and human rights treaties* to be published by Maastricht University Press.

<sup>2</sup> This study was examined by the Steering Committee for Human Rights, which adopted a draft declaration of the Committee of Ministers on the protection of human rights during armed conflict. This declaration was adopted by the Committee of Ministers on 21 January 2004 (available at <http://www.coe.int/cm>). See in particular paragraph 13: “Agrees to contribute, through the elaboration of appropriate information and training materials, to efforts to ensure better awareness of human rights standards as laid down in relevant Council of Europe instruments: - among all relevant civil and military authorities of the member States; - among persons protected by such standards, so as to promote compliance with those standards also in situations of armed conflict or internal disturbances and tensions.”

<sup>3</sup> This document can be found on the internet at <http://assembly.coe.int> referring to Doc. 9730, Report of the Committee on Legal Affairs and Human Rights, Rapporteur: Mr Pourgourides. The title of the previous report, drafted in 2001, was slightly different: “*Lawless areas*” within the territory of Council of Europe member States (Doc. 8993, 8 March 2001). It was felt appropriate to change this title to the current one, as it is more an “implementation issue” than a normative one.

<sup>4</sup> In Working session I: The applicability of international humanitarian law to UN-mandated forces. For more information, see the Report of the Debates.

implementation and supervision by a monitoring system. It is therefore of the utmost importance to focus on ensuring the applicability of human rights through different channels (complaints before domestic tribunals, or complaints before the European Court of Human Rights, compensation, “national” reports, fact-finding mechanisms, etc.) and thus to strengthen the effectiveness and implementation of human rights instruments.

We are here today to address – beyond international humanitarian norms – the issue of applicability of human rights law to peace-keeping operations (acting pursuant to a UN mandate, whether they are under UN, national or regional command) and more specifically to territories under UN administration. This is a field mainly related to the “extraterritorial” applicability of human rights treaties. Accordingly, and in order to define the concept of “extraterritoriality” with regard to European human rights treaties, I will first give a brief overview of the case law of the European Court of Human Rights (hereinafter “the Court”) which determines the scope of “jurisdiction” of High Contracting Parties. The case of Kosovo, as a territory under UNMIK administration, will then be examined very succinctly, given that our colleague from the OSCE will be making a presentation on this specific issue.<sup>5</sup> Finally, I will present some pragmatic solutions proposed by the Council of Europe.

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## **1. The concept of extraterritorial applicability of the Council of Europe's human rights treaties: the scope of “jurisdiction” of High Contracting Parties**

As indicated in the background paper, extraterritorial applicability of human rights treaties is a subject that has developed in recent years. According to the case law of the Court, the applicant must establish that the State Party failed to secure one or several rights enshrined in the European Convention on Human Rights to someone within “its jurisdiction” (as provided for by Article 1 of the Convention), to recognize the responsibility of the member State concerned. The Court can examine a State’s responsibility either at the admissibility stage or when considering the merits of a case only once it has been established that the subject matter falls under the “jurisdiction” of the State concerned.

Article 1 states that “The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention.” This article plays a central role in the Convention system in that it sets out the limits within which States are to assume obligations under the Convention. It is determinative of the very scope of the Contracting Parties’ positive obligations and, as such, of the scope and reach of the entire Convention system.<sup>6</sup>

In the *Bankovic* case<sup>7</sup>, the Court was asked to consider, in the context of an application against 17 NATO States, the lawfulness under the Convention of the bombing in 1999 of a Serbian radio and television station in Belgrade during a NATO campaign against the Federal Republic of Yugoslavia. The Court had to examine in the first place whether the matter at issue fell within the “jurisdiction” of the respondent States within the meaning of Article 1 of the Convention. The Court was not persuaded “that there was any jurisdictional link between the persons who were victims of the act complained of and the respondent States” and therefore rejected

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<sup>5</sup> See presentation made by Margaret Cordial, “Outline of presentation on the situation in Kosovo”, p. 49.

<sup>6</sup> For a comprehensive analysis, see M. O’Boyle, “Comments on Life After Bankovic,” Seminar on Extraterritorial jurisdiction and human rights treaties, to be published by Maastricht University Press.

<sup>7</sup> European Court of Human Rights, *Bankovic a.o. v. Belgium and 16 other Contracting States*, 12 Dec. 2001, Application No. 52207/99, admissibility decision (rejected).

the application as incompatible with the provisions of the Convention. To reach this conclusion, the Court held that the notion of jurisdiction cannot “be divided and tailored in accordance with the particular circumstances of the extra-territorial act in question.” It also referred to the “*travaux préparatoires*” of the European Convention on Human Rights and stated that if the drafters of the Convention had “wished to ensure jurisdiction as extensive as that advocated by the applicants, they could have adopted a text the same as or similar to the contemporaneous Articles 1 of the four Geneva Conventions of 1949.” Therefore, the Court was not required to examine the issue of whether the actions of NATO itself could be attributed to its individual members.

Many considered that this decision constituted a departure from previous case law.<sup>8</sup> The background paper refers to the *Issa* case concerning some Iraqi shepherds arrested and killed by Turkish forces in northern Iraq, and the applicants mentioned other cases such as *Stocké*, *Xhavara*, *Öcalan* and *Ilascu*. In paragraph 81 of its decision, the Court disposed of this argument, explaining why the decision on admissibility was silent on the issue of “jurisdiction.” Indeed, in the *Issa* and *Öcalan* cases, the Turkish government did not raise this issue at all at this stage but rather at the merits stage, and after the *Bankovic* decision had been issued. Given that jurisdiction is a “prerequisite to the consideration of State responsibility,”<sup>9</sup> it may in fact arise only at the merits stage. In its judgment of 12 March 2003 in *Öcalan v Turkey*, after recalling that jurisdiction was essentially territorial in nature – as held in the *Bankovic* case – the Court distinguished the facts of this case from those in *Bankovic* and applied the “authority and control” test, pointing out that Öcalan had been handed over to members of the Turkish security forces and was physically forced by them to return to Turkey after his arrest.<sup>10</sup>

This obviously will be very much used in the near future, and still needs to be given a specific shape.<sup>11</sup> In fact, there are several cases currently pending before both national tribunals<sup>12</sup> and the Court. As for the latter, there are cases pending concerning the NATO bombing, such as *Markovic v Italy*,<sup>13</sup> and concerning KFOR

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<sup>8</sup> R. Lawson “Life After Bankovic: on extra-territorial reach of the ECHR,” unpublished article, available at the ICRC Legal Division.

<sup>9</sup> See M. O’Boyle, *op. cit.*

<sup>10</sup> The Court mentioned the *Stocké* decision and referred to paragraph 67 of *Bankovic*: “In keeping with the essentially territorial notion of jurisdiction, the Court has accepted only in exceptional cases that acts of the Contracting States performed, or producing effects, outside their territories can constitute an exercise of jurisdiction by them within the meaning of Article 1 of the Convention.”

<sup>11</sup> It is also worth recalling the case law of the Court – mentioned by Professor Sassòli during the previous session – regarding the broader issue of immunities of international organizations. The Court previously considered that there were implicit limitations to the right to a fair trial, including immunities of jurisdiction of international organizations. In two cases against Germany, *Waite and Kennedy* (Application No. 26083/94 – judgment of 18 February 1999) and *Beer and Regan* (Application No. 28934/95 – judgment of 18 February 1999), the Court applied the test of proportionality and considered “that where States established international organisations in order to pursue or strengthen their cooperation in certain fields of activities, and where they attribute to these organisations certain competences and accord them immunities, there may be implications as to the protection of fundamental rights. It would be incompatible with the purpose and object of the Convention, however, if the Contracting States were thereby absolved from their responsibility under the Convention in relation to the field of activity covered by such attribution.”

<sup>12</sup> In the Netherlands and in the UK, as well as in Germany: “Lawyers for victims of a NATO air raid on a Serbian town in the 1999 Kosovo war demanded \$1.17 million in compensation from the German government Wednesday, claiming the country was guilty of war crimes”, in Deutsche Welle Germany website /www.dw-world.de/, 15.10.2003. “Kosovars fired on by British peacekeepers win damages”, by Clare Dyer and Richard Norton-Taylor, in the Guardian, 8.04.2004 <http://www.guardian.co.uk/>

<sup>13</sup> Application No. 1398/03. The facts of the *Markovic* case are similar to those of *Bankovic* (see paragraph 1). However, in that case, the Court declared the application partly admissible. The applicant did introduce complaints on “civil liability” before domestic jurisdiction against the Presidency of the Council of Ministers, the Italian Defence Ministry and the NATO Commander of Allied Forces in South

troops in Kosovo (France and Germany). I will not address the domestic proceedings but they have to be kept in mind since applicants should seek remedies at national level in the first place (according to the subsidiarity principle and the rule of exhaustion of local remedies).

Finally, it should be said that between two extreme cases, namely the *Cyprus* case against Turkey on the one hand and the *Bankovic* case on the other hand, there is still room for the application of the “effective control test” by the Court. There are still issues to be resolved in this area today. There are also more questions than answers concerning extraterritorial actions, for instance relating to United Nations peace-keeping or peace-building forces such as the forces in Kosovo. The Court has not yet drawn any conclusions or principles in that respect.

## **2. A case of non-applicability of human rights treaties: Kosovo**

As far as Kosovo is concerned, and to keep it short, the normative framework established by UNMIK through regulations does provide very limited access to justice and modest guarantees of a fair trial. The far-reaching immunities granted to UNMIK and KFOR and the lack of judicial institutions<sup>14</sup> competent to review whether action taken by UNMIK or KFOR is in conformity with international standards (such as those on detention), contrast with the precedence of international human rights standards, including those enshrined in the European Convention on Human Rights, over other regulations. For this very reason, some institutions such as that of the Kosovo Ombudsperson have stated that Kosovo can be considered a “black hole” in terms of human rights protection.<sup>15</sup> And, quoting the Ombudsperson, “while Yugoslavia’s integration into Europe would give its people access to the European Court for Human Rights, this did not apply to the people of Kosovo because an international protectorate could not be part of the Council of Europe.” It is indeed true that ratification by Serbia-Montenegro of Council of Europe Conventions will not in itself bring full applicability of the norms enshrined in the Convention, nor the full applicability of the supervisory mechanism.<sup>16</sup> However, the tragic events that occurred in Kosovo on 17 March 2004 and the serious human rights violations committed on that occasion underline the necessity for human rights and minority rights treaties, including their supervisory mechanisms, to be applied.

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Europe (“AFSOUTH”). The Supreme Court (*Cour de Cassation*) declared absolute “lack of jurisdiction” for cases related to this military operation. The European Court of Human Rights applied the *Bankovic* principles to the part of the application related to Articles 1, 2, 10 and 17, whereas it declared admissible and asked the government to present its observations concerning the allegation of violation of Article 6 (right to a fair trial) in connection with Article 1, since the judgment of the Supreme Court disregards any concrete implementation of the provision of the European Convention on Human Rights in domestic law.

<sup>14</sup> The Ombudsperson Institution has a merely advisory role. For more details on this institution, cf. the presentation made by Margaret Cordial, *op. cit.*, and the background paper by Sylvain Vité, “Case study: the applicability of international human rights law in Kosovo”, p. 87.

<sup>15</sup> See also the concerns expressed by the Commissioner for Human Rights of the Council of Europe in his report on “Kosovo: The human rights situation and the fate of persons displaced from their homes,” 16 October 2002, in particular pp. 11-12 (Part III – The human rights situation in Kosovo, paragraphs 30-43) and pp. 48-49 (Part V – Main findings and conclusions, paragraphs 1-7).

<sup>16</sup> For a more extensive study of the human rights situation in Kosovo, see presentation by M. Cordial, *op. cit.* The Parliamentary Assembly of the Council of Europe held a hearing on the human rights situation in Kosovo on 16 March 2004 in Paris. The issue of the applicability of the European Convention on Human Rights was raised and several proposals and options have been discussed (it was ratified by Serbia-Montenegro on 3 March 2004). Nevertheless, given the complex situation at stake from a legal perspective, further examination of the issue has been postponed.

### 3. Possible solutions to ensure applicability of human rights provisions and the monitoring system

The main objective of the Council of Europe is obviously to ensure the same level of protection for the population of the entire territory of the former Yugoslavia (including Kosovo), as that guaranteed to other Europeans, without awaiting a definitive status for Kosovo and without prejudicing this status in any way. Accordingly, several options were discussed concerning two human rights conventions: the Framework Convention for the Protection of National Minorities and the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment. It was finally decided that a pragmatic solution would be to conclude agreements between the different organizations concerned – UNMIK for the first convention and UNMIK and NATO for the second. These ad hoc and technical agreements reflect a step-by-step approach, providing an application *mutatis mutandis* of the conventions to the international organizations concerned, including, whenever possible and appropriate, the aspects of reporting or the ways in which control mechanisms could apply.

Finally, allow me to turn to other solutions envisaged to ensure an effective protection of human rights in situations where the events take place within the jurisdiction of a State, but where for some reason the convention is not implemented. Françoise Hampson might wish to comment on that, since she made a proposal to the Council of Europe's Steering Committee for Human Rights a year ago, to provide a fact-finding mechanism in the context of armed conflict or internal disturbances and tensions. The Steering Committee considered that the office of the Commissioner for Human Rights was the most appropriate body within the Council of Europe machinery to carry out fact-finding in those situations.<sup>17</sup> In order to allow it to carry out this activity efficiently, the Committee considered the possibility of creating a "list" or "pool" of experts (medical, forensic, legal, military, police, etc.) which could be drawn upon at short notice for fact-finding work.<sup>18</sup>

In the framework of the current reform proposals aiming at guaranteeing the long-term effectiveness of the Court, the Steering Committee examined a proposal of the Commissioner which would allow him, in exceptional circumstances, "to lodge with the Court an application against one or more High Contracting Parties raising a serious issue of a general nature." The Steering Committee agreed that "in the current Convention system, defence of the general interest is not given the importance it deserves and that the Commissioner's proposal deserved its full attention" and took a positive view of the proposal to give the Commissioner the right of intervention as a third party (within the meaning of Article 36 of the European Convention on Human Rights) in proceedings before the Court, granting him a right that he does not currently enjoy since in the present system he may only intervene at the request of the Court's president.<sup>19</sup>

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<sup>17</sup> Committee of Experts for the Development of Human Rights DH-DEV, DH DEV(2002)008, 30th meeting, Strasbourg, 18-20 December 2002, paragraphs 11 and 20; and CDDH(2003)026 Addendum II, Final Activity Report on the protection of human rights during armed conflict as well as during internal disturbances and tension, 26 November 2003, paragraph 15.

<sup>18</sup> A reserve fund would also be at the disposal of the Commissioner to cover logistical and other costs involved. CDDH(2003)026 Addendum II, Final activity Report on the protection of human rights during armed conflict as well as during internal disturbances and tension, 26 November 2003, paragraph 15. and also DH-DEV, DH DEV(2002)008, 30th meeting, Strasbourg, 18 - 20 December 2002, paragraph 20.

<sup>19</sup> The Steering Committee considered it necessary to examine this issue further.

## **CONCLUSION**

These examples show, if needed, that it is of the utmost importance to concentrate on strengthening the effectiveness and implementation of human rights instruments in different situations both within the territory of the High Contracting Parties and beyond. The main goal of the Council of Europe, now as ever, is to ensure the protection of human rights to the greatest extent possible. The complementary roles of human rights law and international humanitarian law, and the synergies between them, should prove to be constructive as well as fruitful.

# Outline of presentation on the situation in Kosovo

By Margaret Cordial, Legal Analyst for the OSCE Mission in Kosovo,  
Department of Human Rights

## Introduction

Promoting and encouraging respect for human rights and fundamental freedoms is one of the main purposes at the very basis of the UN organization's system.<sup>1</sup> Further, Security Council Resolution 1244 which authorized the establishment of an international civil presence in Kosovo (UNMIK) in order to provide an interim administration,<sup>2</sup> prescribes that one of the main responsibilities of UNMIK is to protect and promote human rights.<sup>3</sup>

This document, which is an outline of the presentation on the situation in Kosovo (on Friday 12 December 2003), sets out the following:

- (i) the applicable law in Kosovo and the application of international human rights standards;
- (ii) the human rights enforcement mechanisms that are available at the domestic level;
- (iii) the relevance of other important factors: the absence of civilian oversight over the security presence (KFOR); the immunity of UNMIK and KFOR personnel; and the limited jurisdiction of the Ombudsperson Institution.

## The applicable law and the implementation of human rights law at the international level

The current basis of the law in Kosovo is UN Security Council Resolution 1244 as expressed through UNMIK Regulation 1999/24 (as amended by UNMIK Regulation 2000/59), which provides that the applicable law is the regulations promulgated by the Special Representative of the Secretary-General (SRSG) and the law in force in Kosovo on 22 March 1989.<sup>4</sup>

International human rights standards are part of the applicable law through, *inter alia*, UNMIK Regulation 1999/24 (as amended by 2000/59), which obliges those holding public office in Kosovo to uphold internationally recognized human rights standards as reflected in:

- (a) the Universal Declaration of Human Rights;
- (b) the European Convention for the Protection of Human Rights and Fundamental Freedoms and the Protocols thereto;

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<sup>1</sup> Article 1.3 Charter of the United Nations.

<sup>2</sup> See UN Security Council Resolution 1244 adopted by the Security Council at its 4011th meeting, on 10 June 1999, S/RES/1244 (1999), para. 11.

<sup>3</sup> See para. 11(j), *ibid*.

<sup>4</sup> Note however that where a court of competent jurisdiction, or a body or person required to implement a provision of the law, determines that a subject matter or situation is not covered by the laws set out in Section 1 of the present regulation but is covered by another law in force in Kosovo after 22 March 1989, which is not discriminatory and which complies with section 3 of the present regulation, the court, body or person shall, as an exception, apply that law.

- (c) the International Covenant on Civil and Political Rights and the Protocols thereto;
- (d) the International Covenant on Economic, Social and Cultural Rights;
- (e) the International Convention on the Elimination of All Forms of Racial Discrimination;
- (f) the Convention on Elimination of All Forms of Discrimination against Women;
- (g) the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment;
- (h) the Convention on the Rights of the Child of 20 November 1989.

Furthermore, UNMIK Regulation 2001/9, "On a Constitutional Framework for Provisional Self-Government in Kosovo," contains a number of references to international human rights law. Chapter 2(b) obliges the Provisional Institutions of Self-Government and their officials to "promote and fully respect the rule of law, human rights and freedoms, democratic principles and reconciliation." Chapter 3, entitled "Human Rights," prescribes as follows:

3.1 All persons in Kosovo shall enjoy, without discrimination on any ground and in full equality, human rights and fundamental freedoms.

3.2 The Provisional Institutions of Self-Government shall observe and ensure internationally recognized human rights and fundamental freedoms, including those rights and freedoms set forth in:

- (a) The Universal Declaration on Human Rights;
- (b) The European Convention for the Protection of Human Rights and Fundamental Freedoms and its Protocols;
- (c) The International Covenant on Civil and Political Rights and the Protocols thereto;
- (d) The Convention on the Elimination of All Forms of Racial Discrimination;
- (e) The Convention on the Elimination of All Forms of Discrimination Against Women;
- (f) The Convention on the Rights of the Child;
- (g) The European Charter for Regional or Minority Languages; and
- (h) The Council of Europe's Framework Convention for the Protection of National Minorities.

Section 3.3 prescribes that the provisions on rights and freedoms set forth in the instruments listed above shall be *directly applicable* in Kosovo as part of this Constitutional Framework.

However the above formulation does not render the relevant human rights instruments directly applicable in Kosovo.<sup>5</sup> As a result, the list of norms encapsulated in the applicable law merely comprises a catalogue of human rights norms whose effect is limited to the domestic sphere. One of the implications of this limited applicability is the fact that individuals cannot seek to avail of the claims procedures provided for in some of these instruments. Thus the administration of Kosovo by the United Nations falls to a large extent outside the human rights implementation mechanisms that exist at an international level.<sup>6</sup>

<sup>5</sup> It does not take into account the fundamental distinction between self-executing and non-self-executing international norms.

<sup>6</sup> See Background Document 3, entitled "Extraterritorial applicability of human rights treaty obligations to United Nations-mandated forces." Note however that there are two cases being brought against KFOR contingents in Strasbourg by citizens of Kosovo.

A further problem is that the mission has failed to clearly establish the supremacy of international human rights standards as the framework within which KFOR and UNMIK should determine the extent and quality of their actions. The constitutional framework document does not address the status of human rights protections vis-à-vis UNMIK or KFOR. Within this legal vacuum, UNMIK and KFOR have violated international human rights principles, most notably by detaining individuals in contravention of judicial orders for release and without any mechanisms for detainees to challenge the lawfulness of their detention. As a result of the unclear legal framework, their actions remain to date beyond any legal challenge.

Thus the obligation to uphold internationally recognized standards and not to discriminate is practically rendered meaningless because there is no framework within which citizens of Kosovo can enforce these rights at an international level.

Further, at the domestic level, remedies for redress for violations of human rights are very limited.

## **The implementation of human rights at the domestic level**

### **(i) Absence of a habeas corpus mechanism**

The right to challenge the lawfulness of one's detention before a judicial body (*habeas corpus*) is a fundamental principle of international law.<sup>7</sup> Notwithstanding numerous calls from the OSCE,<sup>8</sup> the Ombudsperson Institution in Kosovo<sup>9</sup> and non-governmental organizations, a *habeas corpus* mechanism to cover all detentions carried out by the authorities in Kosovo has not yet been implemented.<sup>10</sup>

It should be noted, however, that the new Criminal Procedure Code for Kosovo contains a *habeas corpus* mechanism and this new code will come into effect on 6 April 2004.<sup>11</sup>

### **(ii) The Compensation Commission**

Chapter XXXII of the Federal Republic of Yugoslavia Criminal Procedure Code (FRY CPC) contains a procedure for claiming compensation for damage, rehabilitation and exercise of other rights of persons convicted without justification and imprisoned without due cause.<sup>12</sup> In early 2001, the UNMIK Department of Justice established a Compensation Commission pursuant to Chapter XXXII FRY CPC, consisting of three Supreme Court judges who accept, review and decide on petitions for compensation.

In relation to the Compensation Commission, the following must be noted:

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<sup>7</sup> See Article 5.4 of the European Convention on Human Rights and Article 9.4 of the International Covenant on Civil and Political Rights.

<sup>8</sup> See OSCE Mission in Kosovo, the First, Second, Third, Fourth and Fifth Reviews of the Criminal Justice System, available at: <http://www.osce.org/kosovo/documents/reports/>

<sup>9</sup> The reports of the Ombudsperson Institution are available at: <http://www.ombudspersonkosovo.org/>

<sup>10</sup> In a recent decision of the Supreme Court of Kosovo, the court when dealing with a sentencing issue referred to and classified KFOR detention as an extrajudicial illegal detention which contravened local applicable law and Article 5.1 of the European Convention on Human Rights. See *Morina, Mazreku and Morina*, Supreme Court of Kosovo, 2 June 2003, PN. 135/2003.

<sup>11</sup> See Article 286.6 of the Criminal Procedure Code for Kosovo. Note also that the new Criminal Code for Kosovo will come into effect on the same date.

<sup>12</sup> See Articles 541-549 FRY CPC.

- (i) The Compensation Commission does not offer compensation for time spent in KFOR detention or pursuant to an executive order of the Special Representative of the Secretary-General (SRSG).
- (ii) The amount of money that may be awarded is very low.<sup>13</sup>
- (iii) There is no right of appeal from the decision of the Compensation Commission. While persons who are dissatisfied with the amount of compensation awarded may institute proceedings before the court, there are difficulties in doing so. In one case in which a claimant instituted proceedings before the municipal court, the case was dismissed because the court held that “The Ministry of Public Services”, which was named as the defendant in the proceedings, was an inappropriate defendant.<sup>14</sup> The case is still under appeal.

**(iii) *The KFOR Claims Commission and the Kosovo Claims Appeals Commission***

UNMIK Regulation 2000/47, “On the Status, Privileges and Immunities of KFOR, UNMIK and their Personnel in Kosovo,” provides that KFOR and UNMIK shall be “immune from any legal process.”<sup>15</sup> Notwithstanding the general immunity granted to KFOR under the Regulation, Section 7 prescribes that third-party claims for property loss or damage and for personal injury, illness or death arising from or directly attributed to KFOR or its personnel and which do not arise from “operational necessity” of their international presence shall be settled by a claims commission established by KFOR “in a manner to be provided for.”

Despite this provision, KFOR has not established the claims commissions envisioned under the Regulation in any meaningful form, nor has it established or implemented a consistent policy for investigating, processing and paying claims that arise out of KFOR operations in Kosovo.

In an attempt to provide a guiding framework within which claims can be adjudicated, HQKFOR<sup>16</sup> issued a standard operating procedure.<sup>17</sup> The procedure states that it provides a guide to claims within the KFOR area of responsibility.<sup>18</sup> However, while it sets out the procedures to be followed by HQKFOR in processing claims, it also makes it clear that troop-contributing nations themselves are responsible for adjudicating claims that arise from their own activities in accordance with their own claims rules, regulations and procedures.<sup>19</sup> As a consequence, the claims-handling procedures adopted by troop-contributing nations are many and varied. The following examples are illustrative of this:

<sup>13</sup> 72.42 euros per day for material damage (loss of income); 86.70 euros per day for moral damage plus vouched legal costs and expenses.

<sup>14</sup> It is the Ministry of Public Services which deals with the day-to-day running of the Compensation Commission and pays out compensation awards. It should be noted also that persons must bring their claim before the Compensation Commission before instituting court proceedings.

<sup>15</sup> The question of the non-compatibility of the immunity granted to KFOR under UNMIK Regulation 2000/47 with recognized international human rights standards is analysed in the report of the Ombudsperson Institution in Kosovo, see “Special Report Number 1: On the Compatibility with Recognised International Standards of UNMIK Regulation No. 2000/47.”

<sup>16</sup> HQKFOR essentially comprises those elements of KFOR based at the “KFOR Main” base in Prishtinë/Priština which carry out overall command, control and support functions for the various multi-national brigades of KFOR.

<sup>17</sup> HQKFOR, standard operating procedure No. 3023 – Claims.

<sup>18</sup> Standard operating procedure, para. 1.

<sup>19</sup> Standard operating procedure, para. 6.

- Claims against US KFOR are investigated, processed, adjudicated and paid by US KFOR claims attorneys under the provisions of the Foreign Claims Act.<sup>20</sup> Claims can only be made in writing, there is no basis on which a decision can be appealed, and claims can only be re-submitted if new evidence emerges. In any event, all real estate claims against US KFOR are currently on hold, as the procedure for determining compensation has yet to be decided by the US Army European Command.
- Claims against German KFOR are determined under German Civil Law. The claimant is required to submit his claim at an investigative hearing in Kosovo, during which he may be legally represented, but the decision on whether to award compensation is made by the Federal Armed Forces Administration in Germany. If the claimant wishes to lodge an appeal, the case must be heard before the competent court in Bonn, Germany.
- The claims procedures followed by French KFOR are less formal, with no set claims procedure or investigative hearing. However, French KFOR claims officers are authorized to settle any claims for material damage, and most claims for personal injury once liability is established. However, decisions by French KFOR claims officers cannot be appealed.
- Swedish KFOR claims procedures allow for an investigative hearing if requested by the claimant. However, once the claim is presented, it is reviewed and adjudicated in private by the Swedish KFOR legal adviser in consultation with the contingent commander. Any appeal must be heard in Sweden under Swedish law.
- Claims against Russian KFOR are investigated, processed and adjudicated by the Russian KFOR legal adviser according to the Russian Federation Military Disciplinary Code, and the Russian Federation Criminal Code. However, Russian KFOR claims officers may only adjudicate on claims not exceeding the average monthly salary of the individual who allegedly caused the damage. A Russian court must review claims in excess of this amount, and any right of appeal lies only to a higher Russian court or the Russian military command.

Given that decisions on KFOR's liability are being made by KFOR claims officers in consultation with KFOR contingent commanders, it would appear that international standards governing the independence and impartiality of the various tribunals deciding on KFOR third-party liability claims are not being met.<sup>21</sup>

### ***The Kosovo Claims Appeals Commission***

Notwithstanding the fact that the initial responsibility for deciding claims lies with the troop-contributing nations, the standard operating procedure also establishes the Kosovo Claims Appeal Commission (KCAC), which can adjudicate on appeals from decisions of both the HQKFOR Claims Office and those troop-contributing nations that wish to participate in the KCAC process. However, given that the standard operating procedure is framed as a set of *advisory guidelines*, not as a policy

<sup>20</sup> United States Code Title 10, Subtitle A, Part IV, Chapter 163. Military Claims Section 2734.

<sup>21</sup> In determining whether a body can be considered "independent" under Article 6.1 of the European Convention on Human Rights, the manner of appointment of its members, the existence of guarantees against outside pressures, and whether the body presents an appearance of independence, must *inter alia* be taken into consideration. See *Campbell and Fell v. UK*, A 80 para. 78 (1984); *Hauschildt v. Denmark*, 24 May 1989 at para. 48; *Fey v. Austria*, 24 February 1993 at para. 30; *De Cubber v. Belgium*, 26 October 1984 at para. 26 and *Piersack v. Belgium*, 1 October 1982.

document, the procedure explicitly states that KCAC's decisions are *not legally binding* on either the troop-contributing nations or HQKFOR.<sup>22</sup> The procedure therefore states that claimants should be advised that their only right of appeal against a troop-contributing nation lies in an action against the ministry of defence, or equivalent within the domestic courts of the nation concerned.<sup>23</sup>

Within the context of Kosovo, however, referral to the domestic courts or authorities of the troop-contributing nation meets neither the obligations placed upon such nations, some of which are Contracting Parties to the European Convention on Human Rights, nor the requirements of the Convention as applied in Kosovo itself. The European Court of Human Rights has held that Article 6.1 of the Convention guarantees the right of access to a court in the determination of civil rights and obligations.<sup>24</sup> Although the right of access to a court is not absolute with a certain margin of appreciation provided to impose restrictions, restrictions on access must not be such that the essence of this right is impaired.<sup>25</sup> The right of access to a court means access in fact, as well as in law.<sup>26</sup> Yet, residents in Kosovo do not appear to have adequate access to an appellate court to pursue appeals of the Claims Commission awards. Any resident of Kosovo wishing to pursue a civil claim before a foreign court will, almost inevitably, be prohibited from doing so in view of the excessive costs of bringing such a case.

As such, neither claimants' rights to a fair hearing by an independent and impartial tribunal nor their right to an effective remedy are effectively protected under the KFOR Claims Compensation Commission or under its Appeals Commission procedures.<sup>27</sup>

#### **(iv) The SRSB's Detention Review Commission**

##### *Nature of SRSB Executive Orders*

Cases have arisen in Kosovo in which the courts have not ordered custody at all or alternatively have ordered that a person be released from custody, but the person has remained in detention, owing to an Executive Order issued by the SRSB, without any mechanism to challenge the lawfulness of their detention.<sup>28</sup>

As already stated, the right to challenge the lawfulness of any detention before a judicial body with the power to order release (*habeas corpus*) is a fundamental principle of international law. There was an attempt to remedy this human rights concern through the promulgation of UNMIK Regulation 2001/18 in August 2001, establishing a Detention Review Commission charged with the task of reviewing Executive Orders. However, the Regulation does not provide for the independent judicial review of detentions that is required by international law.<sup>29</sup>

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<sup>22</sup> In this context, the HQKFOR legal adviser has informed the OSCE that the French, Swedish, Russian, and US KFOR contingents will not accept the jurisdiction of the KCAC.

<sup>23</sup> Standard operating procedure, para. 8.

<sup>24</sup> *Golder v. UK*, A 18 (1975).

<sup>25</sup> *Ashingdane v. UK*, A 93 para. 57.

<sup>26</sup> *Golder v. UK*, A 18 (1975).

<sup>27</sup> The Ombudsperson Report previously concluded that the practical and effective protection of claimants' rights of access under Article 6.1 demands that proceedings be conducted in the jurisdiction in which the facts arise in order to ensure a balance is struck between the common interest and the individual's rights, *op. cit.*, note 9.

<sup>28</sup> While the SRSB has not issued an Executive Order for detention since 19 December 2001, he still has not renounced his authority to do so.

<sup>29</sup> UNMIK Regulation 2001/18 was drafted without any involvement from the OSCE Mission in Kosovo.

The Detention Review Commission is a body set up outside the judiciary. It consists of three members appointed directly by the SRSG for a limited period, who only come to Kosovo specially to deal with the limited number of cases. The members of the Commission are therefore dependent on the SRSG, who is a party to all disputes they consider.<sup>30</sup>

The constant case law of the European Court of Human Rights stresses the importance of independence, particularly from the executive, as one of the fundamental underlying principles of a court.<sup>31</sup> This notion of independence also conforms to the democratic principles of the separation of powers, and in particular, respect for the rule of law.<sup>32</sup>

## **Other important factors to be taken into account**

### **(i) No civilian oversight over armed forces**

In Kosovo, KFOR troops are not subject to control by civilian bodies *in situ* where KFOR is the sole official armed force. Instead, civilian democratic control is exerted by the respective governments of troop-contributing countries that have responsibility only for their respective national contingents.

Security Council Resolution 1244 and UNMIK Regulation 2001/9 on a constitutional framework for provisional self-government in Kosovo prescribe that UNMIK “coordinates” with, as opposed to controlling KFOR.<sup>33</sup> This situation was highlighted by the Commissioner for Human Rights of the Council of Europe who characterized the situation as one which “does not amount to the required democratic control over the armed forces” and called for UN Security Council Resolution 1244 “to be interpreted in conformity with the essential requirement of democracy according to which the military is subject to civilian control.”<sup>34</sup> He went on to say that “the lack of civilian control over the armed forces in Kosovo is particularly incongruous if one considers that the Parliamentary Assembly of the Council of Europe has requested the FRY as one of the conditions for its admission to the Organisation, a commitment ‘to enact legislation or, preferably, to include provisions in the Constitutional Charter to bring the army under civilian control.’”<sup>35</sup>

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<sup>30</sup> The European Court of Human Rights has frequently held that such apparent dependency on the executive disqualifies a body from being independent, see *Ringeisen v. Austria*, European Court of Human Rights, Judgment of 16 July 1971; *Langborger v. Sweden*, European Court of Human Rights, Judgment of 22 June 1989, especially para. 32; *Belilos v. Switzerland*, European Court of Human Rights, Judgment of 29 April 1988; and *Findlay v. the United Kingdom*, European Court of Human Rights, Judgment of 25 February 1997, para. 73.

<sup>31</sup> *Belilos v. Switzerland*, 29 April 1988.

<sup>32</sup> Note that the Ombudsperson issued a special report on Regulation 2001/18 on 12 September 2001 stating that the regulation does not bring Executive Orders into compliance with international human rights standards, *op. cit.*, note 9.

<sup>33</sup> See para. 9(f) of Security Council Resolution 1244, which lists KFOR’s responsibilities as including supporting, as appropriate, and coordinating closely with the work of the international civil presence. See also Article 8.2 of UNMIK Regulation 2001/9 “On a Constitutional Framework for Provisional Self-Government in Kosovo,” which prescribes that the SRSG shall coordinate closely with KFOR. Note also that the former Commander of KFOR, General Reinhardt, in correspondence dated 20 January 2000 to Amnesty stated that UNMIK has neither legal jurisdiction nor mandate to conduct investigations into KFOR activities.

<sup>34</sup> Council of Europe: Office of the Commissioner for Human Rights, Kosovo: “The Human Rights Situation and the Fate of Persons Displaced from their Homes,” 16 October 2002, p. 20, para. 85.

<sup>35</sup> *Ibid.*, note 35, at p. 21, para. 87.

(ii) **Immunity**

**UNMIK personnel and immunity from prosecution**

As already highlighted, UNMIK Regulation 2000/47<sup>36</sup> on the status, privileges and immunities of KFOR and UNMIK and their personnel in Kosovo prescribes that UNMIK, its property, funds, and assets, shall be immune from any legal process, and furthermore that its representatives, officials, and personnel shall be immune from local jurisdiction in respect of any civil or criminal act performed or committed by them in their official capacity within the territory of Kosovo.<sup>37</sup> UNMIK personnel therefore enjoy the right to immunity from any form of arrest or detention, with respect to words and actions performed in an “official capacity.”

There are, however, provisions in the Regulation that lay down limitations and conditions on this immunity.

- Section 3.5 of the Regulation obliges UNMIK personnel to respect the laws of Kosovo and to refrain from any action incompatible with that law.
- The Regulation prescribes that immunity from legal process can be waived by the UN Secretary-General, as immunity is considered to be for the benefit of UNMIK and KFOR and not for the individual. Thus, Section 6 prescribes that the Secretary-General has “the right and duty” to waive the immunity where it would impede the course of justice and can be waived without prejudice to the interest of the UN.

Traditionally, the justice system in Kosovo, in terms of both its independence and its authority to enforce the rule of law, did not have a positive experience with regard to the exercise of the immunity privilege, especially when it was related to criminal cases.<sup>38</sup> However, the OSCE has monitored two cases this year in which UNMIK police officers have been prosecuted and convicted for criminal offences.<sup>39</sup> Two other cases against UNMIK personnel are currently at the investigative stage of criminal proceedings.<sup>40</sup>

**Immunity of UNMIK in its administrative capacity**

Immunity for UN humanitarian or peace-keeping missions is common, owing to the diplomatic character of missions and the sensitive relationship they have with the local governments of host countries. However, in Kosovo, UNMIK is not just an international presence mandated to monitor or assist the local government; rather, it is the government. This unique position that UNMIK has in Kosovo leads to a collision between the issue of immunity and the independence of the judiciary, as this immunity does nothing else but to protect UNMIK from itself. The immunity established under UNMIK Regulation 2000/47 ensures that, regardless of the character and consequences of the activities or decisions undertaken by UNMIK in its official capacity as a provisional government, courts cannot review the legality of these activities or decisions, nor can they receive and adjudicate private complaints against them.

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<sup>36</sup> UNMIK Regulation 2000/47 “On the Status, Privileges and Immunities of KFOR and UNMIK and their Personnel in Kosovo,” promulgated by the SRSG on 18 August 2000.

<sup>37</sup> Section 3 of UNMIK Regulation 2000/47.

<sup>38</sup> UNMIK police personnel evaded prosecution for offences involving allegations of child abuse. See the OSCE’s Fourth Review of the Criminal Justice System in Kosovo, p. 39.

<sup>39</sup> One of the accused was convicted of a public traffic violation causing death in January 2003. The other, who was convicted *in absentia* for mistreatment and inflicting light bodily injuries on a suspect being held in police custody, was sentenced to two years’ imprisonment in October 2003.

<sup>40</sup> One of the cases involves an allegation of child abuse, the other a public traffic violation causing death.

An essential element of the functional independence of any democratic judicial system comes from the authority that the judiciary has to declare legislative and executive acts illegal and to offer protection and legal remedies to individuals whose rights are infringed by the actions of these executive or administrative authorities. As long as the judiciary in Kosovo does not have the authority to exercise such control over the actions of governmental bodies, the judicial system is not independent.<sup>41</sup>

***KFOR personnel and immunity from prosecution***

Section 2.4 of UNMIK Regulation 2000/47 on the status, privileges and immunities of KFOR and UNMIK and their personnel in Kosovo prescribes as follows:

KFOR personnel other than [locally recruited KFOR personnel] shall be:

- (a) Immune from jurisdiction before courts in Kosovo in respect of any administrative, civil or criminal act committed by them in the territory of Kosovo. Such personnel shall be subject to the exclusive jurisdiction of their respective sending States; and
- (b) Immune from any form of arrest or detention other than by persons acting on behalf of their respective sending States.

While the Secretary-General has the right and the duty to waive immunity from prosecution of any UNMIK personnel in any case where, in his opinion, the immunity would impede the course of justice and can be waived without prejudice to the interest of UNMIK, this is not the case for KFOR personnel. Section 6.2 of the same Regulation states that “Requests to waive jurisdiction over KFOR personnel shall be referred to the respective commander of the national element of such personnel for consideration.” Thus not even the UN Secretary-General has a mandate to waive immunity for KFOR personnel even though they are operating under the aegis of the UN.

***(iii) The Ombudsperson Institution of Kosovo***

UNMIK Regulation 38/2000 establishes the Ombudsperson Institution in Kosovo. Section 1.1 prescribes that “The Ombudsperson shall promote and protect the rights and freedoms of individuals and legal entities and ensure that all persons in Kosovo are able to exercise effectively the human rights and fundamental freedoms safeguarded by international human rights standards, in particular the European Convention on Human Rights and its Protocols and the International Covenant on Civil and Political Rights.”

Section 3 sets out the jurisdiction of the Institution, which is “to receive and investigate complaints from any person or entity in Kosovo concerning human rights violations and actions constituting an abuse of authority by the interim civil administration or any emerging central or local institution.” However it does not have automatic jurisdiction over KFOR. Section 3.4 states that “In order to deal with cases involving the international security presence, the Ombudsperson may enter into an agreement with the Commander of the Kosovo Forces (COMKFOR).” Such an agreement to so investigate alleged abuses by KFOR members has not been forthcoming.

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<sup>41</sup> The most striking example of the effect of UNMIK’s immunity on judicial independence and on the individual human rights of parties involved in the legal process is the case of a Kosovo Albanian woman who contested in court an administrative act issued by Kacanik Municipality and by the former UNMIK Department of Education and Science. See the OSCE’s Fourth Review of the Criminal Justice System in Kosovo, at p. 37. The Ombudsperson also looked into this case and issued a report on 10 December 2001.

Thus actions by KFOR members once more evade scrutiny by human rights bodies, and persons subjected to human rights violations by KFOR cannot seek redress through this mechanism.

## **Conclusion**

- At the outset of UNMIK's mission, there was a need for a stabilizing authority to establish and maintain a safe and secure environment in Kosovo, which from an operational point of view could only have been provided by KFOR. This was reflected in UN Security Council Resolution 1244, which prescribed that one of the functions of KFOR would be to ensure public safety and order until the international civil presence could take responsibility for the task.<sup>42</sup> However, the preservation of KFOR's authority to detain is no longer consistent with developments in Kosovo's criminal justice system. The legislative framework currently in force provides sufficient guarantees that persons whom KFOR assumes responsibility to detain can be effectively prosecuted by the judicial system. Therefore, once an effective judicial system was put in place, KFOR should have renounced its authority to detain. The same holds true for the authority of the SRSG to issue Executive Orders for detention.
  
- The non-existence of international enforcement mechanisms and the limited framework of domestic remedies in Kosovo are inconsistent with one of the main responsibilities of UNMIK, which is to protect and promote human rights.

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<sup>42</sup> See UN Security Council Resolution 1244, para. 9(d).

# **Background Documents**

## **Background Document 1**

### **Applicability of international humanitarian law to forces under the command of an international organization**

**By Robert Kolb, Professor at the Universities of Bern and Neuchâtel,  
Research Director at the University Centre for International Humanitarian Law, Geneva**

#### **I. Distinction between different categories of multinational forces that could be involved in an armed conflict**

##### **A. Forces under national or regional command**

I will first address the situation of forces carrying out an enforcement mission under the command and control of one or more States, i.e. with the task of military combat in a particular area outside their own State. In such cases, if they fight against the local government and/or against local groups connected with the local government, the multinational forces operate in the context of an international armed conflict and thus the law of international armed conflict is applicable.

The situation is different if the forces are invited by the local government to fight rebels on its territory. In such cases, it is not generally accepted that the law of international armed conflict is applicable. The Viet Nam War suggests, however, that the applicability of the law of international armed conflict may in fact be accepted, in some particular instances. Until recently, in such cases, the parallel application of the two parts of the law of armed conflict was supported in practice and by legal opinion according to the particular relations at stake. In relations between governments, the law of international armed conflict was held to be applicable, while in relations between governments and local forces or rebels, the law of non-international armed conflict was said to apply.

Legal opinion allows for a possible exception in cases where the different elements of a conflict become so closely interconnected, and the situation on the ground becomes so serious, that there is in fact a single, general conflict, which is completely internationalized. This view, however, seems not to have been consistently applied in practice.

As long as the forces are under the command and control of a State, no insurmountable difficulties arise, as problems can be resolved in accordance with general international humanitarian law. Forces under national or regional command will therefore not be further analysed below. Beyond the issue of the delegation of military enforcement duties to member States by the Security Council, I will concentrate on the case of forces under the command and control of an international organization such as the UN. Only in such cases does the question of the applicable law pose distinct problems.

## **B. Forces under the command and control of an international organization such as the UN**

The following analysis concerns forces under UN command and control that have been given a Security Council mandate to perform peace-keeping, peace-enforcement, or reconstruction tasks. These forces include the classical “blue helmets,” the “robust peace-keeping” forces and, at the other end of the spectrum, forces sent in the context of a transitional civil administration (as in East Timor and Kosovo). The fact that such forces have no combat mandate (except to some extent those involved in “robust peace-keeping”) is not relevant here. Indeed, the question to be pursued is not whether the law of armed conflict binds these forces by analogy, e.g. if the law of occupation can be partially applied to civil administrations, or the like. The question is more narrow: if, unlike what had been expected, the forces are caught in combat, the situation deteriorating to the point where they will be involved in an armed conflict, what law will be applicable to them? These situations do happen, as shown by the experience of the UN troops in the Congo (1960) or that of the “robust peace-keeping” forces in Somalia (1992).

## **II. Applicability of the law of international or non-international armed conflict**

### **A. The doctrine**

1) For a majority of legal writers,<sup>1</sup> such conflicts between UN troops (or troops of other international organizations) and local forces always trigger the application of the law of international armed conflict. UN operations are by their very nature international: they are decided on the basis of international policy; their mandate is typically international; they are conducted by a subject of international law across the boundaries of a State. Therefore, the armed conflict is internationalized. The aforementioned aspects *ratione materiae* and *ratione personae* trigger the application of the law of international armed conflict.

The scope of the *ratione personae* aspects must be appreciated correctly: it is not only that the UN (or other international organizations) are a subject of international law. Indeed, States are also subjects of international law, yet that does not impede the application of the law of non-international armed conflict in some cases. The difference is rather that the UN (or other international organizations), unlike States, can be subjected only to international law; the UN is a subject that, by its very nature, is purely international, having no national legal dimension (whereas States have both). Thus, whereas a confrontation between two subjects of international law (States) is traditionally required to speak of international armed conflict, the presence of a subject of international law merely on one side would be sufficient in conflicts involving the UN (or other international organizations). As suggested, that subject is, to some extent, a qualified subject, whose mere implication triggers the application of the law of

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<sup>1</sup> See e.g. Finn Seyersted, *United Nations Forces in the Law of Peace and War*, Leyden, 1966, p. 209; Daphna Shrager “The UN as an Actor Bound by International Humanitarian Law,” in: Luigi Condorelli et al. (eds), *The United Nations and International Humanitarian Law / Les Nations Unies et le droit international humanitaire*, Paris, 1996, p. 333; Claude Emanuelli, “Les forces des Nations Unies et le droit international humanitaire,” in: Condorelli, *op. cit.*, pp. 357ff.; Paolo Benvenuti, “The Implementation of International Humanitarian Law in the Framework of UN Peace-Keeping,” in: European Commission (ed.), *Law in Humanitarian Crises*, vol. I, Brussels, 1995, pp. 96f.; Toni Pfanner, “L’application du droit international humanitaire et les opérations militaires organisées en vertu de la Charte des Nations Unies,” in: Umesh Palwankar (ed.), *Symposium sur l’action humanitaire et les opérations de maintien de la paix*, CICR, 1994, Geneva, 1995, p. 58; Eric David, *Principes de droit des conflits armés*, 3e éd., Bruxelles, 2002, p. 152. For further references, see Robert Kolb, *Droit humanitaire et opérations de paix internationales*, Basel / Bruxelles, 2002, pp. 56ff.

international armed conflict. For similar reasons, one author suggested the term of an "international armed conflict *sui generis*."<sup>2</sup>

To the foregoing it could be objected that the law of non-international armed conflict is also a body of international law. Therefore, the fact that the organization is only a subject of international law would have no relevance as to the determination of the applicable law. However, the law of non-international armed conflict is essentially predicated upon the protection of the sovereignty of the internal legal order of a State. It is traditionally much more limited in scope precisely with the aim of leaving the State free to treat its subjects on its territory as it may wish, i.e. as "criminals," "rebels," etc. The international organization has no such sovereignty and no such internal legal order to protect against the intrusion of international law – precisely since it is always on the level of international law. Thus, the law of international armed conflict, developed for international relations, seems more in tune with the legal nature and practical reality of an international organization.

There are practical and policy arguments in addition to the more conceptual ones just mentioned. It has been said, for instance, that when international organizations are involved, everything possible should be done to avoid lowering the standard of protection. It would indeed be odd if the UN, with its constitutional commitment to international law, human rights and social principles, argued in favour of applying the lower standards of non-international armed conflict instead of honouring the higher international humanitarian standards.

Moreover, everything should be done to avoid the double standards which would otherwise arise: according to the specific action taken by the UN and the governmental or non-governmental nature of the forces targeted, one would have to distinguish the applicable law, which would involve considerable complexity in the context of interrelated and unstructured modern conflicts.

It must be added that if the UN itself is *not* bound by the law of international armed conflict, the obligations of each national contingent under international law must then be reviewed to determine which conventions their home State ratified or acceded to. Many unwelcome inequalities and difficulties would thus be imported into the law.

2) A minority of authors hold that it is the law of non-international armed conflict that is applicable in these cases. Thus, for example, it is said that "there is no reason to think that the involvement of a UN force in a situation of armed conflict will of itself render the conflict 'international' for the purpose of the application of the *ius in bello*."<sup>3</sup> These authors resolve the problem according to the classical criteria valid also for the States. Therefore, if the UN forces (or those of another international organization) confront the forces of a local government, it is the law of international armed conflict that is applicable. Conversely, if the UN forces (or those of another international organization) confront rebels or other local non-governmental factions, it is the law of non-international armed conflict that applies, in particular Article 3 common to the four Geneva Conventions.<sup>4</sup> Such a division of applicable law was envisaged by the International Court of Justice in the *Nicaragua* case (1986)<sup>5</sup> – but it must be said that the Court was not confronted there with a case involving the forces of an international organization.

In addition to the foregoing general arguments, there are also practical ones. In particular, it is politically and legally hardly appropriate to subject the UN (or any other international organization) to the duty to treat any captured rebels as prisoners of war under the Third

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<sup>2</sup> Claude Emanuelli, *op. cit.*, p. 358.

<sup>3</sup> Hilaire McCoubrey, Nigel D. White, *The Blue Helmets: Legal Regulation of United Nations Military Operations*, Aldershot (etc.), Dartmouth, 1996, p. 172.

<sup>4</sup> Brian D. Tittmore, "Belligerents in Blue Helmets: Applying International Humanitarian Law to United Nations Peace Operations," *Stanford Journal of International Law*, vol. 33, 1997, p. 110.

<sup>5</sup> ICJ, Rep., 1986, p. 114, § 219.

Geneva Convention, whereas the same persons, if captured by the local government, would not enjoy any such status and could be treated as mere criminals. If the UN fights against governmental forces, the duty to treat them as prisoners of war if captured, and if the conditions of Article 4 of the Third Geneva Convention and Article 43 of Additional Protocol I of 1977 are fulfilled, seems however to be warranted in any case.

Sometimes, an author admits the application of the law of international armed conflict to some phases of an operation, but denies it with respect to another phase. Thus, for example, Finn Seyersted refuses to consider the law of international armed conflict applicable only in those cases where UN troops establish themselves as the administrative power and there is an insurrection against them (assuming the insurrection crosses the threshold of an armed conflict). In such cases, Seyersted suggests that the law of non-international armed conflict is applicable.

## **B. The practice**

Relevant practice is equally divided. On the level of the legal texts, the internationalist solution is clearly privileged. On the level of material practice, the situation is rather uncertain and confused.

### *1. The legal texts*

The legal texts go a long way towards accepting the applicability of the law of international armed conflict. First, the 1999 Bulletin of the UN Secretary-General on "Observance by United Nations forces of international humanitarian law" is also applicable to peace-keeping forces, and the rules it lays down are based on the law of international armed conflict.

Secondly, Article 2.2 of the UN Convention on the Safety of United Nations and Associated Personnel (1994) provides that: "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."<sup>6</sup> The last part of this sentence, i.e. "to which the law of international armed conflict applies," has been interpreted as implying that only the law of international armed conflict applies to such operations, to the exclusion of the law of non-international armed conflict.

According to Philippe Kirsch, at the time chairman of the ad hoc committee drawing up the Safety Convention, it was the drafters who insisted on that insertion: "il a été généralement admis qu'il était impossible à l'Organisation d'être impliquée dans un conflit armé interne, car une fois qu'elle ou le personnel associé s'engage dans un conflit contre une force locale, le conflit prend, par définition, une envergure 'internationale'."<sup>7</sup> Thus, the scope of that provision is broader than would seem to be the case at the outset: it is not limited to saying that the law of international armed conflict is applicable in the case of Chapter VII-delegated operations, but implies that it is in all cases the law of international armed conflict that applies when forces of an international organization are involved. This reading is buttressed by the material scope of the Convention, which applies in particular to operations for the purpose of maintaining international peace (see Article 1(c)(i)).

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<sup>6</sup> Moreover, the personal scope of application is set out in Article 1, letter a: "(i) Persons engaged or deployed by the Secretary-General of the United Nations as members of the military, police or civilian components of a United Nations operation." And, in letter c: "'United Nations operation' means an operation established by the competent organ of the United Nations in accordance with the Charter of the United Nations and conducted under United Nations authority and control: (i) Where the operation is for the purpose of maintaining or restoring international peace and security; or (ii) Where the Security Council or the General Assembly has declared, for the purposes of this Convention, that there exists an exceptional risk to the safety of the personnel participating in the operation."

<sup>7</sup> Philippe Kirsch, "La Convention sur la sécurité du personnel des Nations Unies et du personnel associé", *Les casques bleus : policiers ou combattants ?*, Claude Emanuelli (éd.), Montréal, 1997, p. 56.

Besides, the savings clauses of Article 20 state that nothing in the Convention shall affect: "(a) The applicability of international humanitarian law and universally recognized standards of human rights as contained in international instruments in relation to the protection of United Nations operations and United Nations and associated personnel or the responsibility of such personnel to respect such law and standards." The generic reference to "international humanitarian law" in this context seems to imply that it is the whole body of that law which is applicable, and not only the exceptional rules applicable also in internal armed conflict.

Thirdly, it may be added that, in the practice of the Security Council, the term "international humanitarian law" has taken on a very broad connotation since the 1990s. The Security Council did not use any restraint in calling for the application of the whole body of "international humanitarian law" (i.e. the law of international armed conflict) even in armed conflicts which were not international in their temporal scope, such as the situation in the former Yugoslavia, or in conflicts which were not international at all. It is submitted that the Council thereby essentially made reference to the broader standards of the law of international armed conflict.

Obviously, one might argue that Article 2.2 of the 1994 Safety Convention is limited to enforcement action under Chapter VII, where the law of international armed conflict is manifestly applicable, and that it does not extend to the UN controlled and commanded operations analysed here. Or, it could also be contended that the mention of the "law of international armed conflict" is only indicative and cannot substantiate any conclusive argument: excluded are those operations where *in fact* the law of international armed conflict applies and, *a contrario*, not those where the law of non-international armed conflict applies; the question of when the one or the other would apply thus remains open.

But this argument does not seem very convincing. The aim of the Convention is to exclude from its scope the whole range of actions performed in the context of an armed conflict. The Convention is limited to times of peace and to the institution of immunities for those times. It does not seem that the distinction between international and non-international armed conflict has much relevance in that context, since both must be ruled out. The narrow reading mentioned above runs counter to this global approach and therefore puts itself at odds with the object and purpose of the Convention. Therefore, it seems that the interpretation must be that the implication was to consider the law of international armed conflict applicable in cases where UN personnel are caught up in an armed struggle.

## 2. State practice

State practice is less certain and, in fact, is to some extent contradictory. In the case of the struggles in the Congo during the secession of Katanga (1960-61), UN forces refused to limit themselves to applying Article 3 common to the four Geneva Conventions. They applied the Geneva Conventions under the broad title of being bound by the "spirit and principles of the international humanitarian Conventions," to use the language that was usual at the time. Thus, it was the law of international armed conflict that was applied, although it is not clear to what extent. Christopher Greenwood argued that this choice was mainly due to the fact that many contingents of different States fought side by side, and that it was easier to apply the rules of the law of international armed conflict to all.<sup>8</sup>

Conversely, in Somalia (1992), the UN forces and the forces of the United States of America did not acknowledge being party to an international armed conflict; it was the law of non-international armed conflict, i.e. mainly Article 3 common to the Geneva Conventions that was applied. This can be interpreted as a denial that the law of international armed conflict

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<sup>8</sup> See Christopher Greenwood, "International Humanitarian Law and UN Military Operations," *Yearbook of International Humanitarian Law*, vol. 1, 1998, p. 26.

was applicable, or perhaps even of the existence of an "armed conflict," possibly in view of the precarious degree of organization of the many warlords (common Article 3 being then applied as a humanitarian minimum under general principles of international law and not because of the formal existence of an internal armed conflict). However interpreted, this precedent is contrary to what happened in the Congo. It seems that the character of the warlords, especially Mr Aideed, and the fact that their forces were akin to criminal bands, prompted that result.

It may be recalled that the practice of the Security Council, briefly mentioned above, goes some way towards adopting a broad reading of the applicable law of armed conflict. The Council has been much less preoccupied with the legal character of conflicts than with protecting the potential victims. It has pursued a policy whereby victims should be protected equally whatever the type of conflict, international or internal. Thus, under the broad heading of "international humanitarian law," it called for respect for all the main principles of that law regardless of the type of conflict. This can be interpreted as an appeal to hold UN forces accountable by those same standards, namely "international humanitarian law" as it ordinarily presents itself, i.e. as the law of international armed conflict. It does not seem that the Council thereby made reference to the law of non-international armed conflict.

### **C. What solution "*de lege ferenda*"?**

The situation described here, for which there is no firm and definitive conclusion in practice concerning the regime to be applied, and for which opposing policy considerations have been developed in legal writings, suggests the need for some creative thinking, including on aspects *de lege ferenda*.

Three different solutions may be considered.

*First*, one could acknowledge the full applicability of the law of international armed conflict. This is the solution preferred by the majority of writers. The arguments in its favour have been mentioned above. This solution mainly makes it possible to avoid lowering the standards of protection, which would be a dubious thing to do in the name of the UN or any other international organization.<sup>9</sup> It also ensures that one and the same regime is applied for all international forces.<sup>10</sup> In order to comply with a fundamental principle of the law of warfare, namely the equality of belligerents, local factions confronting UN forces would have to be reciprocally bound by the law of international armed conflict.

*Secondly*, one may prefer the law of non-international armed conflict and perhaps conclude special agreements making applicable further rules taken from the law of international armed conflict. The main arguments in favour of this solution are that it maintains the equality of the duties of UN forces and the local government with respect to rebels and does not overburden UN troops with duties, such as those of the captor to prisoners of war, which are ill-adapted to the situations considered here.<sup>11</sup>

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<sup>9</sup> Is there a difference if the organization has no rules on respect for and development of international law and human rights in its constitutive statute? What about NATO, for example?

<sup>10</sup> But it is not the only means to achieve that end.

<sup>11</sup> This is also the preferred solution of Sylvain Vité in an as yet unpublished research paper: "On ne peut s'empêcher de douter cependant que le droit des conflits armés internationaux soit automatiquement pertinent dans tous les cas de figure. Dans l'hypothèse où les forces internationales sont confrontées à des groupements armés peu structurés, il paraît difficile par exemple, d'imposer aux parties le respect de la IIIe Convention de Genève de 1949. Il serait sans doute préférable dans ce cas, comme le suggèrent H. Mc Coubrey et N. White, de considérer que le droit des conflits armés non internationaux s'applique, tout en envisageant la conclusion d'accords spéciaux entre les parties en vue d'élargir le cercle des normes applicables dans certains domaines. Cette solution aboutirait ainsi à un résultat normatif mieux adapté à la réalité des conflits opposant des forces internationales et des troupes non gouvernementales. Il serait en outre possible de préserver les règles fondamentales de protection des personnes ne participant pas ou plus aux combats, non pas en plaidant pour

Thirdly, there is the largely unexplored possibility of not applying either regime *en bloc*, but of recognizing that we are in a *sui generis* situation which calls for compromises between the two regimes. One could for example acknowledge that it is the law of international armed conflict that is in principle applicable, but not in all its parts. On the one hand, UN troops could not dispense with respect for the rules on the conduct of hostilities provided for in the law applicable to international armed conflicts.<sup>12</sup> On the other hand, it may not be necessary to oblige the UN forces to treat all captured local rebels as prisoners of war when their own government may treat them as criminals.<sup>13</sup> It is perfectly possible, in this regard, to bring the obligations of the UN into line with the law of non-international armed conflict, for reasons of practicability and of principle.

It is not certain, however, that the UN needs to make such distinctions, precisely since it is not called upon to act as States do. And one does not necessarily see why the treatment of captives in the custody of the UN should not conform to the prisoner-of-war regime, which however would cease as soon as the captives were handed over to a State.

What is clear is that the choice of either the law of international or non-international armed conflict does not necessarily entail very different consequences if there is a readiness to modify the obligations contained in the different parts of the law. One could start with the law of non-international armed conflict and reinforce it through the *addition* of some aspects of the law of international armed conflict, such as the rules on the conduct of hostilities. Alternatively, it is equally possible to start with the law of international armed conflict and modify it by eliminating or weakening some of its rules, such as those concerning prisoners of war. It is even possible to reach the same material result by gradually merging the two positions.

There remains the question of whether it is the law of international armed conflict or that of non-international armed conflict that is the more appropriate starting point. Politically, the second solution might be the easier one to impose on an immediate basis. But even that is not certain. The first solution seems more in tune with the obligations of the UN under its Charter (Preamble, Articles 1 and 55) and with the trend in legal texts and Security Council practice as discussed above.

In our view, it seems more appropriate to affirm that, in principle, the UN is bound by the whole *corpus* of international humanitarian law, as the Secretary-General did in 1999, while making allowances in consideration of the organization's special nature or of policy reasons, than to suggest that the lower standards of non-international armed conflicts are the legally correct starting point (with some gracious concessions based only on goodwill). The presumption must be in favour of the law of international armed conflict, because it is more pertinent to the operations concerned. Each departure from this principle should have to be justified with cogent reasons.

As already pointed out, the actual result achieved might be much the same whatever the starting point; nevertheless, the starting point is indicative of a basic legal regime and therefore the law of international armed conflict should have precedence.

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une internationalisation systématique de ce type de conflits, mais en montrant la convergence toujours plus étroite, quels que soient les acteurs impliqués, entre les droits des conflits internationaux et internes. L'application du droit des conflits armés non internationaux, selon les circonstances, aurait enfin l'avantage de préserver la cohérence du système juridique, puisque l'on aboutirait à des conclusions identiques pour des situations qui ne sont fondamentalement pas différentes, à savoir celles dans lesquelles un mouvement non gouvernemental s'oppose tantôt à une organisation internationale, tantôt à un Etat."

<sup>12</sup> Especially considering the Preamble of the Charter and Articles 1 and 55, in particular on the promotion of human rights.

<sup>13</sup> The UN Secretary-General's Bulletin of 1999 specifies that "Without prejudice to their legal status, they [the detained persons] shall be treated in accordance with the relevant provisions of the Third Geneva Convention of 1949, as may be applicable to them *mutatis mutandis*." A series of rules declared applicable follows.

Two further remarks may be warranted.

First, the legal nature of a conflict may change as soon as an international organization intervenes, but normally only in respect of the relations between the forces of the organization and the local forces. Thus, to the extent that one accepts the applicability of the law of international armed conflict, a conflict which may previously have been purely non-international will become at least partially international, or quasi-international, if one accepts the idea that a modification of duties occurs. This corresponds to the classical position whereby a “foreign” intervention in a conflict will import new legal relationships into it.

Second, it must be stressed that the distinction made in the present paper between the law of international and non-international armed conflict has been strongly weakened in the last decade, under the pressure of events such as the practice of the Security Council or the Statutes and practice of the international criminal tribunals. It is the law of non-international armed conflict that has been enriched and upgraded to the standards of the law of international armed conflict and not the reverse. Thus, the arguments made in this paper in favour of the law of international armed conflict are to some extent also implicit in the development of customary law, which tends to diminish the specificity of the law of non-international armed conflict. There are authors who carry this line of reasoning to an extreme by claiming that the only real difference remaining between the two bodies of law are related to the prisoner-of-war regime and to the law of belligerent occupation. Be that as it may, these developments have rendered somewhat less urgent the question of which body of law applies to international organizations, since the differences may no longer be enormous.

### **III. Protection under the Rome Statute of the International Criminal Court**

A further question arises as to the qualification of members of multinational forces under the command of an international organization: when are they civilians who may not be attacked and when are they combatants who are liable to attack? It will be recalled that Article 8.2(e)(iii) of the Statute of the International Criminal Court protects such members as long as they are civilians. In general terms, the answer to this question seems quite simple: the members of the forces are civilians protected by the law of peace immunities (e.g. under the 1994 Safety Convention) as long as they do not take part in a combat mission, that is, as long as they are not caught up, as participants, in an armed conflict. It is clear that they participate in an armed conflict if such is the mission given to them; the same is true if they are *de facto* involved in a conflict, as was the case in Katanga for the troops sent there by the UN. Conversely, as soon as there is a combat mission, members of the forces become combatants, who are liable to be attacked. They then lose their immunity under the law of peace.

This functional distinction may pose some problems in a series of borderline cases, which may be discussed in our session. Thus, for example, what happens if the multinational forces under the command of an international organization, acting in self-defence, reply to an attack? To the extent that the illegal attacks suffered are merely sporadic, it does not seem warranted to consider the forces as being caught up in an armed conflict. The members of the forces remain civilians, and the attack on them is a crime. Conversely, if the attacks degenerate into a general pattern and the forces start conducting military operations on their own so as to respond to the acts of war of the other side, we would find ourselves in the context of an armed conflict, and the mere fact of attacking a member of the forces would no longer be a crime in itself. Or, if taken captive, could members of the forces again be

considered to be civilians or would they then be considered combatants and thus subject to the prisoner-of-war regime? Or would it be possible to adopt the view that the regime applicable to such personnel is not immutable, i.e. that they could temporarily lose their protected status and obtain it back soon after? These and further questions along these lines should be explored.

## Background Document 2

### Applicability of the law of occupation to United Nations-mandated forces

By Alexandre Faite, Legal Adviser, Legal Division of the ICRC

#### I. INTRODUCTION

Multinational forces acting pursuant to a UN mandate may deploy and exercise *de facto* control over a territory and its inhabitants. In such cases, the issue of the applicability of international law and, in particular, the law of occupation can arise.

In a majority of instances, it must be said, UN-mandated forces have the agreement of the State where they are deployed and the applicability of the law of occupation is not an issue. A force that is characterized as a peace-keeping mission acts pursuant to the mandate conferred upon it by the Security Council, but with the consent of the government and the parties to the conflict concerned. This is generally the case for forces under UN command and control. This consent is often – but not always – reflected in the establishment of a status-of-forces agreement that stipulates the rights and duties of the multinational force in the country.

In the framework of a Chapter VII enforcement action, however, it is conceivable that a multinational force deploys on a territory pursuant to a UN mandate, but without the consent of the government of the country. A first possibility would be that the government of the country of deployment is driven out of power by the multinational force. Absence of formal consent to the deployment may also result from situations where the status of the territory is unclear or any effective government has ceased to exist, a situation that happens in situations often referred to as "failed States."

The main sources of international obligations applicable in the event of belligerent occupation are:

- the Hague Convention (IV) respecting the Laws and Customs of War on Land, and its annexed Regulations concerning the Laws and Customs of War on Land, of 18 October 1907, in particular Articles 42 to 56;
- the Fourth Geneva Convention relative to the Protection of Civilian Persons in Time of War, of 12 August 1949, in particular Articles 13 to 26, 27 to 34, and 47 to 78;
- rules of international customary law.

Article 42 of the Hague Regulations concerning the laws and customs of war on land of 1907 defines as follows the notion of occupation:

"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 was broadened by Article 2 common to the four 1949 Geneva Conventions, to take into account not only cases in which territory is occupied during hostilities, but also cases where the occupation has taken place without armed confrontation.<sup>1</sup> It is therefore immaterial whether an occupation was carried out with or without force.

Belligerent occupation as conceptualized in the Fourth Geneva Convention and the Hague Regulations is intrinsically linked to the notion of international armed conflict. When foreign armed forces exercise control over a territory without the consent of the sovereign, there is occupation irrespective whether this happens in the context of armed confrontation or not. These provisions apply to any occupation, whether resulting from a legitimate use of force, for instance in self-defence, or an illegitimate one. This principle of the law of occupation found a clear expression and reaffirmation in the World War II war crimes trial *United States v List*: "International humanitarian law makes no distinction between a lawful and an unlawful occupant in dealing with the respective duties of occupant and population in occupied territory [...]. Whether the invasion was lawful or criminal is not an important factor in the consideration of this subject."<sup>2</sup>

The sole criterion for deciding on the applicability of the law on belligerent occupation is drawn from facts: the *de facto* control of territory by foreign armed forces coupled with the possibility to enforce their decisions, and the *de facto* absence of the legitimate government or other (e.g. provincial) authorities. If those conditions are met for a given area, the law on belligerent occupation applies. The occupying power cannot avoid its responsibilities as long as a recognized national government is not in a position to carry out its normal tasks.

## II. APPLICABILITY OF THE LAW OF OCCUPATION TO UN-MANDATED FORCES

Considering the strict distinction between *jus ad bellum* and *jus in bello*, it appears that if a multinational force takes control of a territory without the consent of the State, the law of occupation should apply even if it does so pursuant to a mandate conferred upon it by the Security Council as part of a Chapter VII enforcement action.

Confirmation of this legal viewpoint can be found in the legal literature. To cite Adam Roberts, "Forces acting under the aegis of the United Nations could conceivably be in occupation of all or parts of the territory of a State, either in the course of an enforcement, or in the course of an armed peacekeeping operation. In addition, other international peacekeeping forces (perhaps on the line of the multinational force in the Lebanon 1982-4) could theoretically find themselves in the role of occupant if, for example, the government

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<sup>1</sup> Article 2 common to the four Geneva Conventions provides that: "In addition to the provisions which shall be implemented in peace-time, the present Convention shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them. The Convention shall also apply to all cases of partial or total occupation of the territory of a High Contracting Party, even if the said occupation meets with no armed resistance...."

<sup>2</sup> United States Military Tribunal at Nuremberg, *The Hostages Trial, Trial of Wilhelm List and Others*, 8 July 1947–19 February 1948, published in Law Reports of Trials of War Criminals, Selected and prepared by the United Nations War Crimes Commission, Vol. VIII, 1949, p. 34 (59).

which had invited them in collapsed totally without successor, and the force stayed on to maintain order."<sup>3</sup>

### *Forces under UN command and control*

The question may be asked whether the above-mentioned arguments are also applicable to a peace operation under UN command and control. One could indeed argue that the United Nations cannot be seen as a "hostile army," in the sense of the Hague Regulations, or even as an "occupying power," and point out that the Secretary-General's Bulletin on "Observance by United Nations forces of international humanitarian law"<sup>4</sup> does not refer to the law of occupation.

As previously underlined, in a majority of cases, forces under UN command and control tend to be involved in situations where the national authorities have agreed to their deployment. Even as a situation worsens, the UN Security Council may adopt a resolution for enforcement actions to be taken by States or a group of States, rather than the force under UN command that is already deployed. That was the case for UNPROFOR, for instance.<sup>5</sup> However, nothing in the Charter prevents an operation under UN command and control from being entrusted with an enforcement mission, as was done in Somalia.<sup>6</sup> The possibility of such a force deploying on a territory without the consent of the national authorities cannot be ruled out. In such a case, there are good grounds for arguing that they would be bound by the provisions of the law of occupation as they are bound by the rest of international humanitarian law applicable in international armed conflicts.

This view is confirmed by Eyal Benvenisti, who notes that "[the phenomenon of occupation] can be defined as the effective control of a power (be it one or more States *or an international organization, such as the United Nations*) over a territory to which that power has no sovereign title, without the volition of the sovereign."<sup>7</sup>

Also with regard to forces under UN command and control, Daphna Shrager considers that "the possibility that a United Nations enforcement operation ousting a legitimate sovereign and administering a territory in accordance with the Hague Regulations and the Fourth Geneva Convention, should not, in theory, be excluded. In the practice of the last 50 years, however, that has never been the case."<sup>8</sup>

### *State practice*

States have shown a reluctance to recognize the applicability of the law of occupation to a UN-mandated operation. One exception is Australia, which considered that the Fourth Geneva Convention applied to its participation when it deployed in Somalia during Operation

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<sup>3</sup> Adam Roberts, "What is military occupation," *The British Yearbook of International Law*, 1984, Clarendon Press, Oxford, 1985, p. 289.

<sup>4</sup> UN Secretary-General's Bulletin on "Observance by United Nations forces of international humanitarian law," ST/SGB/1999/13, 6 August 1999.

<sup>5</sup> Cf. Michael Bothe, "Peacekeeping," in *The Charter of the United Nations, A commentary*, Volume I, Second edition, Edited by B. Simma, Oxford University Press, 2002, p. 674.

<sup>6</sup> When the deteriorating situation in Somalia prevented the UN force (UNOSOM I) from carrying out its mandate under Resolution 733, a force led by the United States (UNITAF) deployed in Mogadishu and the southern part of Somalia. Subsequently, the UN force, known as UNOSOM II, was given a limited enforcement mandate under Resolution 814. Cf. Bothe, *ibid.*, p. 675.

<sup>7</sup> Eyal Benvenisti, *The International Law of Occupation*, Princeton University Press, 1993, p. 4 (emphasis added).

<sup>8</sup> Daphna Shrager, "The United Nations as an Actor Bound by International Humanitarian Law," *International Peace Keeping*, Volume 5, Summer 98, No. 2, p. 70.

Restore Hope in 1993.<sup>9</sup> This position was subsequently officially adopted by Canberra as a general policy for deployment in complex multilateral operations,<sup>10</sup> but it is unknown if it has been maintained since then.

Other States that deployed in Somalia denied the applicability of the law of occupation, including the United States, which accepted only the application of Article 3 common to the four Geneva Conventions.<sup>11</sup> Belgium<sup>12</sup> and Canada,<sup>13</sup> two other contributing countries, also rejected the applicability of the law of occupation.

### III. THE CASE OF UN-ADMINISTERED TERRITORIES

In 1999, the United Nations was given the mandate to provide interim administrations for Kosovo and East Timor. The United Nations Interim Administration Mission in Kosovo (UNMIK) and the United Nations Transitional Administration in East Timor (UNTAET) are "unprecedented in the history of UN peace-keeping operations with respect to the scope of the responsibilities and the range of the mandate granted to the mission."<sup>14</sup> Because consent was formally given in both instances, the applicability of the law of occupation did not arise.

In the case of Kosovo, the Yugoslav parliament approved the peace plan submitted by M. Ahtisaari and M. Chernomyrdin on 3 June 1999, and a military technical agreement was signed on 9 June 1999. Doubts can be expressed about the validity of this consent which was obtained on the heels of an air campaign that had lasted many months, but it must be noted that Resolution 1244 "welcomes the agreement of the Federal Republic of Yugoslavia to the [international civil and security presences]."<sup>15</sup> With regard to East Timor, the question of consent is also complex because the sovereignty of Indonesia over East Timor had never been recognized internationally, but it seems that all those involved in the East Timorese crisis, i.e. Indonesia, Portugal and the Timorese people themselves, consented to the deployment of INTERFET. Besides, inasmuch as East Timor still appeared on the list of non-autonomous territories, the question may even be raised whether it was not the UN itself that was entitled to express consent.

It is possible, nonetheless, for a UN administration to be put in place without the agreement of the recognized government, or for consent to be withdrawn at a later stage. On a number

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<sup>9</sup> "Australian troops found this to be the case when they were deployed into and given responsibility for, the Bay Province during Operation Restore Hope in 1993. Following a determination that the fourth Convention applied to that intervention, the Australian force relied on the Convention to provide answers to, and a framework for many initiatives." Government statement for the meeting of contracting parties to the Fourth Geneva Convention, Geneva, 27-29 October 1998, *Yearbook of international Humanitarian Law*, Volume 2, 1999, T.M.C. Asser Press, p. 451.

<sup>10</sup> "The approach adopted in Baidoa has now been adopted as official Australian government policy in relation to deployment in complex peace operations without the consent of the 'occupied' State." *Ibid.*, p. 331.

<sup>11</sup> Cf. "Responsibilities and Obligations Applicable to Contacts with the Somali Population during Operation Restore Hope," Department of State/Department of Defense, Washington D.C., December 1992, cited in Claude Emanuelli, *Les actions militaires de l'ONU et le droit international humanitaire*, la Collection bleue, Faculté de droit, Section de droit civil, Université d'Ottawa, 1995, p. 30.

<sup>12</sup> According to the Belgian Military Court, the situation prevailing in 1993 in Somalia could not be characterized as an international armed conflict because UN troops could not be qualified as a party to the conflict nor as an occupying power. Cf. 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.

<sup>13</sup> The Court Martial Appeal Court of Canada held that "The civilian Convention itself [...] did not apply to peacekeeping missions." Court Martial Appeal Court of Canada, *Regina v. Brocklebank*, File No. CMAC-383, 2 April 1996, §237.

<sup>14</sup> Cf. Michael Bothe, *op.cit.*, p. 680.

<sup>15</sup> UN Security Council Resolution 1244, §5.

of points, however, the features of UN-administered territories seem to differ from the situation of occupied territories.

Firstly, there is the fact that interim administrations as in East Timor and Kosovo – unlike occupying powers – can be given far-reaching mandates for institutional reform.<sup>16</sup> Indeed, Article 43 of the Hague Regulations states that the occupant must respect "unless absolutely prevented, the laws in force in the country." Likewise, Article 64 of the Fourth Geneva Convention provides that "The penal laws of the occupied territory shall remain in force, with the exception that they may be repealed or suspended by the Occupying Power in cases where they constitute a threat to its security or an obstacle to the application of the present Convention."

It could perhaps be argued that the mandate of institutional reform given to a UN administration is, from this point of view, not absolutely incompatible with the law of occupation. Such a viewpoint would certainly have to be considered as too restrictive considering the fact that the law of occupation itself does contain a certain degree of flexibility, notwithstanding the fact that the aim of the law of occupation is to maintain the existing situation in the occupied territory, the *status quo ex ante*. Indeed, Article 43 of the Hague Regulations includes the terms "unless absolutely prevented." The point could also be made that Article 64 of the Fourth Geneva Convention should not be construed too narrowly, that this provision does not prevent the occupant from introducing changes that will, for example, enhance respect for human rights law. One could hardly support the view that it is forbidden for an occupant to adopt new regulations that improve previous laws on the freedom of expression for instance. In other words, the preservation of the *status quo* should not be understood as precluding measures taken to develop the territory's infrastructure and economy, especially when the occupation is of long duration, as long as these measures are taken for the sole interest of the population living in the occupied territories.

Secondly, another element that seems to differ from the occupation regime is the fact that the interim administration obtains its authority from the mandate conferred upon it by the Security Council, unlike the belligerent occupant, "whose power is derived from the successful exercise of military power, rather than international law."<sup>17</sup> A multinational force acting pursuant to a UN mandate will occupy a territory only if it exercises effective military control over it. It is conceivable that such a force may be unable to achieve this objective, in which case questions of occupation will not arise. This clearly shows that what triggers the applicability of the law of occupation is occupation itself, not the UN mandate.

Unlike an occupation, an interim administration comes into being through a resolution of the Security Council. The mandate entrusted to the interim administration is based on Chapter VII of the Charter. According to Article 24 of the Charter,<sup>18</sup> it represents indirectly an act of all Member States. It could be argued that the legitimacy of the interim administration is *ipso facto* recognized internationally, unlike that of the occupant. The issue at stake, therefore, is whether an interim administration is to be considered a legitimate – albeit provisional – sovereign.

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<sup>16</sup> Resolution 1244 §11(c) provides that UNMIK has the mandate of "Organizing and overseeing the development of provisional institutions for democratic and autonomous self-government pending a political settlement, including the holding of elections [.]"

<sup>17</sup> Christopher Greenwood, "The Administration of Occupied Territory in International Law," in Emma Playfair, *International Law and the Administration of Occupied Territories; Two Decades of Israeli Occupation of the West Bank and Gaza Strip*, Oxford University Press, 1992, p. 250.

<sup>18</sup> This Article states that "In order to ensure prompt and effective action by the United Nations, its Members confer on the Security Council primary responsibility for the maintenance of international peace and security, and agree that in carrying out its duties under this responsibility the Security Council acts on their behalf."

While the law of occupation might initially be declared applicable following the deployment of a UN-mandated force without the consent of the previous government, the question may be asked whether the setting up of an interim administration by the Security Council means the end of the law of occupation itself or only those provisions thereof that are incompatible with the mandate given to the administration.

In this respect, Christopher Greenwood has written that "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. In such a case, the law of belligerent occupation would apply but only unless and until the Security Council uses its Chapter VII powers to impose a different regime as part of the measures which it considered necessary for the restoration of the peace and security."<sup>19</sup> This raises the issue of Article 103 of the Charter which states that "In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail."

However, one may wonder if the Security Council could institute a regime that falls short of the protection provided for protected persons by the Fourth Geneva Convention and adopt lower standards of protection. This would appear contradictory to the underlying rationale of international humanitarian law, as reflected in Articles 7, 8 and 47 of the Fourth Geneva Convention. Article 47 that states 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."

Similarly, such persons may not themselves renounce the rights guaranteed by international humanitarian law (Fourth Geneva Convention, Art. 8). Any such renunciation would be null and void, irrespective of whether the person has taken that decision of his or her own free will or under coercion by the occupying power.

#### **IV. THE *DE FACTO* USE OF THE PROVISIONS OF THE LAW OF OCCUPATION**

If it is not applicable *de jure*, it is interesting to consider what the implications are of a *de facto* reference to the law of occupation. Indeed, while the applicability of the Fourth Geneva Convention has seldom been recognized in the framework of an operation under UN mandate, it is observed that its provisions are sometimes referred to by analogy by the multinational forces.

This can be explained by the fact that, especially at the beginning of a complex peace operation, troops may find themselves in situations that are very similar to an occupation and carry out duties that are usually those of a classical occupying power. For instance, in the absence of police forces and a judiciary able to cope with breakdown of law and order,

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<sup>19</sup> Christopher Greenwood, "International Humanitarian Law and United Nations Military Operations," *Yearbook of International Humanitarian Law*, Volume 1, 1998, TMC Asser Press, p. 28.

troops may be forced to get involved in a number of tasks such as detention of individuals and judicial review of cases.<sup>20</sup>

In such situations, the law of occupation can be the only relevant yardstick to implement a wide-ranging mandate entrusted upon them by the Security Council. Multinational forces are indeed frequently given very broad missions, such as "detering renewed hostilities, maintaining and where necessary enforcing a ceasefire," or "ensuring public safety and order."<sup>21</sup> Such broad formulations do not provide for a clear line of conduct such as the law of occupation can sometimes offer. Besides, that body of law is quite familiar to the military personnel that are usually more quickly deployed.

The fact that the law of occupation can be a useful tool for drafting military directives dealing with such issues as detention has been acknowledged by a number of authors.<sup>22</sup> Others consider that, to some extent, it can also provide guidance for practical solutions for UN-administered territories.<sup>23</sup> With regard to INTERFET's involvement in East Timor, Bruce Oswald notes that:

"The challenge for the [Detainee Management Unit] was to balance the military imperative – as stated in Security Council Resolution 1264 – to restore peace and security, with the need to ensure that individual detainee rights to natural justice and due process was not abused. This challenge was met by using the framework of [the Fourth Geneva Convention]."<sup>24</sup>

However, reference to the law of occupation when it is not applicable *de jure* raises a number of questions. Without any reference to the Fourth Geneva Convention in the UN Security Council resolution for instance, it lacks any real legal basis. It is also unclear up to what time the application by analogy of the law of occupation should be supported. Indeed, it should be underlined that the Fourth Geneva Convention provides for a number of important derogations such as Article 78 on internment,<sup>25</sup> which allows the authorities to detain individuals "who have not been guilty of any infringement of the penal provisions enacted by

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<sup>20</sup> Cf. Hans-Jörg Strohmeyer, who writes "where there has been a complete breakdown of the judicial sector, the quick deployment of units of military lawyers, as part of either a United Nations peacekeeping force or a regional military arrangement such as KFOR and INTERFET, can fill the vacuum until the United Nations is staffed and able to take over what is ultimately a civilian responsibility. Intuitively, one would hesitate to involve military actors in this sensitive area of civil administration, but in the absence of sufficient and immediately deployable civilian resources, it may be the only appropriate response to avoid the emergence of a law enforcement vacuum." Hans-Jörg Strohmeyer, "Collapse and Reconstruction of a Judicial System: the United Missions in Kosovo and East Timor," *American Journal of International Law*, No. 1, January 2001, p. 61.

<sup>21</sup> UN Security Council Resolution 1244, §9.

<sup>22</sup> Cf. Michael J. Kelly, Timothy L. H. McCormack, Paul Muggleton and Bruce M. Oswald, "The INTERFET deployment drew extensively upon the law of occupation, for example for the establishment of an interim justice system," in their article entitled "Legal aspects of Australia's involvement in the International Force for East Timor," *International Review of the Red Cross*, No. 841, March 2001, p. 115. Cf. also Michael J. Kelly, *Restoring and Maintaining Order in Complex Peace Operations*, The Hague, Kluwer, 1999, pp. 331 ff.

<sup>23</sup> Marco Sassòli, "Droit international pénal et droit pénal interne : le cas des territoires se trouvant sous administration internationale," in Roth/Henzelin (éds), *Le droit pénal à l'épreuve de l'internationalisation*, Bruxelles, Bruylant, 2002, p. 145.

<sup>24</sup> Bruce Oswald, "The INTERFET Detainee Management Unit in East Timor," *Yearbook of International Humanitarian Law*, Volume 3, 2000, p 361.

<sup>25</sup> Article 78 of the Fourth Geneva Convention provides that: "If the Occupying Power considers it necessary, for imperative reasons of security, to take safety measures concerning protected persons, it may, at the most, subject them to assigned residence or to internment. Decisions regarding such assigned residence or internment shall be made according to a regular procedure to be prescribed by the Occupying Power in accordance with the provisions of the present Convention. This procedure shall include the right of appeal for the parties concerned. Appeals shall be decided with the least possible delay. In the event of the decision being upheld, it shall be subject to periodical review, if possible every six months, by a competent body set up by the said Power.[...]"

the Occupying Power, but that Power may, for reasons of its own, consider them dangerous to its security and is consequently entitled to restrict their freedom of action."<sup>26</sup>

For imperative reasons of security, the occupying power may subject individuals to assigned residence or administrative detention (internment), on the basis of a regular procedure which includes the right of appeal and a periodical review of the measure taken (Fourth Geneva Convention, Art. 78). While such a provision may be justified in an emergency period, for instance until a judicial system is set up to review cases, its use for other purposes or longer periods of time may be questionable.

It must be noted that internal military regulations such as the "Detainee Ordinance," adopted by INTERFET,<sup>27</sup> and the "COMKFOR Detention Directive 42," adopted by KFOR,<sup>28</sup> gave them the power to detain persons who were seen as "security risks."<sup>29</sup> While INTERFET involvement lasted only a few months until UNTAET took over, it may be recalled here that KFOR was still detaining individuals on the basis of Directive 42 four years after the adoption of Resolution 1244.

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<sup>26</sup> Commentary to Article 78 of the Fourth Geneva Convention.

<sup>27</sup> Persons shall only be held as detainees where they fall into one or more of the following classes: "[...] d) a person detained as a security risk." Detainee Ordinance, Art. 12. This unpublished document will be distributed to the participants during the meeting. For an analysis of the Detainee Ordinance and INTERFET's Detainee Management Unit, cf. Bruce Oswald, *op.cit.*, p. 354.

<sup>28</sup> "Persons may be detained under the authority of COMKFOR only if they constitute a threat to KFOR or a safe and secure environment in Kosovo and civilian authorities are unable or unwilling to take responsibility for the matter." COMKFOR Detention Directive, KFOR DIR 42, 9 October 2000. This unpublished document will be distributed to the participants during the meeting.

<sup>29</sup> Cf. Bruce Oswald, *ibid.*, p. 358.

## Background Document 3

### Extraterritorial applicability of human rights treaty obligations to United Nations-mandated forces

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#### I. INTRODUCTION

"Promoting and encouraging respect for human rights and for fundamental freedoms" is one of the main purposes at the very basis of the United Nations system.<sup>1</sup> From the outset, one expects that UN-mandated forces must respect international human rights law while carrying out their mandate, and may not violate with impunity the principles that constitute the very essence of the UN.

A number of sources for human rights obligations are considered in Background Document 4, which notes that few human rights enforcement mechanisms seem to be effectively available at the international level when a multinational force is *de facto* in control of a territory. One reason clearly stems from the fact that the framework of international human rights law is mainly designed for States. The evolution that saw the mandate of peace operations shift from providing assistance and support to exercising varying levels of control over a territory has created new challenges.

The present document proposes to consider the extraterritorial applicability of human rights treaties, a subject that has developed in recent years. One question of concern to this expert meeting is whether a troop-contributing country could be held responsible under its human rights treaty obligations for violations committed by its forces taking part in a peace operation abroad.

To be held responsible under the International Covenant on Civil and Political Rights,<sup>2</sup> the European Convention on Human Rights<sup>3</sup> or the American Convention on Human Rights,<sup>4</sup> it must be proven that the State party failed to secure one or several established rights to someone within its jurisdiction. Although the notion of jurisdiction is traditionally understood as being mainly territorial in international law, international human rights bodies have developed a progressive interpretation of this concept which permits, to a certain extent, an extraterritorial application.<sup>5</sup> Some limits and questions remain, particularly in the aftermath of the *Bankovic* decision issued by the European Court of Human Rights in 2001.<sup>6</sup> These will be considered below.

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<sup>1</sup> Article 1.3 Charter of the United Nations, repeated in Article 55(c).

<sup>2</sup> The International Covenant on Civil and Political Rights entered into force on 23 March 1976.

<sup>3</sup> The (European) Convention for the Protection of Human Rights and Fundamental Freedoms entered into force on 3 September 1953.

<sup>4</sup> The American Convention on Human Rights entered into force on 18 July 1978.

<sup>5</sup> Two aspects of extraterritorial application of human rights treaties have been identified by international bodies: obligations in respect of individuals within the territory of a State but relating to violations which may potentially occur in the territory of another State, and obligations in respect of individuals who are not within the territory of the State party. Only the second aspect will be treated in this paper.

<sup>6</sup> European Court of Human Rights, *Bankovic a.o. v. Belgium and 16 Other Contracting States*, 12 December 2001, Application No. 52207/99, admissibility decision (rejected).

With regard to forces under UN command and control, a preliminary question must be addressed: may States be held responsible for acts committed by their troops when the latter are under UN command and control? Unlike forces under national or regional command, the "blue helmets" are placed at the disposal of the UN, and the question arises whether they would still engage the responsibility of their respective States or only that of the UN.

According to a number of authors, States will usually be held responsible for acts of their troops, even when these are placed at the disposal of the UN.<sup>7</sup> The reason is that the UN does not usually exercise *exclusive* command and control over national contingents. In practice, States always keep a certain degree of control, at least through an "organic" command. In this regard, Luigi Condorelli has written that:

"Il y a au contraire une double imputation, et ceci pour deux raisons: la première est que les casques bleus, tout en étant mis à la disposition de l'Organisation par les États, restent soumis de façon continue à l'autorité nationale; la seconde est que par leurs actions s'exprime la puissance publique tant de l'ONU que des États d'envoi."<sup>8</sup>

It seems therefore that the responsibility of States could be engaged by the actions of their troops even if the latter are put at the disposal of an international organization such as the UN.

## II. RELEVANT JURISPRUDENCE ON EXTRATERRITORIAL APPLICABILITY OF HUMAN RIGHTS TREATY OBLIGATIONS

This section examines the development of the case law of three main human rights bodies: the UN Human Rights Committee, the European Commission/Court of Human Rights, and the Inter-American Commission on Human Rights. The jurisprudence of the European organs will be analysed first since their developments are most significant and have inspired, to a large extent, the other bodies' case law.

### 1) The European Commission/Court of Human Rights

Article 1 of the European Convention on Human Rights states that "The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention." Extraterritorial applicability was recognized as early as 1975. While treating an inter-State complaint opposing Cyprus and Turkey, the European Commission of Human Rights considered that:

"the High Contracting Parties are bound to secure the said rights and freedoms *to all persons under their actual authority and responsibility, whether that authority is exercised on its own territory or abroad.*"<sup>9</sup>

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<sup>7</sup> Luigi Condorelli, "Le statut des forces de l'ONU et le droit international humanitaire," *Rivista di diritto internazionale*, 1995, pp. 880-906. This opinion is shared by other authors: Robert Kolb, *Droit humanitaire et opérations de paix internationales : les modalités d'application du droit international humanitaire dans les opérations de maintien ou de rétablissement de la paix auxquelles concourt une organisation internationale (en particulier les Nations Unies)*, Collection de droit international public, Helbing & Lichtenhahn, 2002, Bruylant, Bruxelles; Christopher Greenwood, "International Humanitarian Law and United Nations Military Operations," *Yearbook of International Humanitarian Law*, Vol. 1, 1998, TMC Asser Press, pp. 3-34.

<sup>8</sup> Luigi Condorelli, *op. cit.*, p. 897.

<sup>9</sup> European Commission of Human Rights, *Cyprus v. Turkey*, 26 May 1975, Application No. 6780/74 and 6950/75, *DR* vol. 2, p.136 (emphasis added).

The Court has confirmed the position of the Commission in 1995, still regarding the northern Cyprus situation. In the *Loizidou* case, the Court considered that a State may engage its responsibility on an extraterritorial basis when, as a consequence of a military operation, whether lawful or unlawful, it exercises "effective control" over the relevant territory.<sup>10</sup> The Court stated that:

"Having *effective overall control* over northern Cyprus, its [Turkey's] responsibility cannot be confined to the acts of its own soldiers or officials [...] but must also be engaged by virtue of the acts of the local administration which survives by virtue of Turkish [...] support. [...] Turkey's 'jurisdiction' must be considered to extend to *securing the entire range of substantive rights set out in the Convention* [...]."<sup>11</sup>

However, the recent decision in the *Bankovic* case<sup>12</sup> sets some limits to this case law. On the one hand, the Court considered that as a State's jurisdiction is mainly territorial in international law, extraterritorial application of the Convention must be limited to exceptional circumstances such as that of "effective control" strictly understood.<sup>13</sup> On the other hand, the Court stated that such an extension of a State's jurisdiction under the Convention is limited to the "legal space" of the European Convention on Human Rights, which means to territory that, "for the specific circumstances, would normally be covered by the Convention."<sup>14</sup>

This is a departure from previous jurisprudence: in the earlier *Issa* case concerning Iraqi shepherds arrested and killed by Turkish forces in northern Iraq, the complaint had been declared admissible even though the events occurred outside the Convention's "legal space."<sup>15</sup> Furthermore, it can be questioned whether the military operations conducted by the Turkish army reached the threshold of "effective control" over the territory.

## 2) The Human Rights Committee

Article 2.1 of the International Covenant on Civil and Political Rights is phrased in apparently more restrictive language than that used in the European Convention on Human Rights. Indeed, a State party must secure the rights of the Covenant to individuals "within its territory and subject to its jurisdiction." If these two conditions are to be read in conjunction, they limit *a priori* the application of the Covenant to a State's national territory. However, this is not the interpretation of the Human Rights Committee, which considered that State's responsibility could be engaged in respect of acts of its agents conducted outside its territory.<sup>16</sup>

State responsibility was first recognized in cases of abduction and arrest of individuals by the agents of a State party on the territory of another State.<sup>17</sup> The International Covenant on

<sup>10</sup> European Court of Human Rights, *Loizidou v. Turkey (prel. obj.)*, 23 March 1995, Series A vol. 310, cf. §52.

<sup>11</sup> European Court of Human Rights, *Cyprus v. Turkey*, 10 May 2001, Appl. No. 25781/94, §77 (emphasis added).

<sup>12</sup> European Court of Human Rights, *Bankovic a.o. v. Belgium and 16 Other Contracting States, op. cit.*

<sup>13</sup> The Court considered that the NATO air superiority over Serbia in the context of the Kosovo war did not amount to an effective control over the territory on which was situated the bombed building. Effective control must be understood as when a State "exercises all or some of the public powers normally to be exercised by that Government" (*ibid.*, §71).

<sup>14</sup> *Ibid.*, §80 *in fine*.

<sup>15</sup> European Court of Human Rights, *Issa a.o. v. Turkey*, 30 May 2000, Appl. No. 31821/96. Cf. in this regard the *Öcalan v. Turkey* case (European Court of Human Rights, 14 December 2000, Appl. No. 46222/99) concerning the arrest in Kenya of the leader of the Workers' Party of Kurdistan (the PKK) by Turkish agents. Turkey has not contested the extraterritorial applicability of the Convention in either case.

<sup>16</sup> A literal interpretation would have led to "manifestly absurd" results. For instance, it would not have been possible to secure effectively the right to enter one's own country (Article 12.4 of the International Covenant) since, by its very nature, this implies that the affected individual is not within his or her national territory.

<sup>17</sup> Human Rights Committee, *Sergio Euben Lopez Burgos v. Uruguay*, Communication No. R.12/52 (6 June 1979), UN Doc. Supp. No. 40 (A/36/40) at 176 (1981); *Maria del Carmen Almeida de Quinteros v. Uruguay*, Communication No. 107/1981 (17 September 1981), UN Doc. Supp. No. 40 (A/38/40) at 216 (1983).

Civil and Political Rights was also found to be applicable in cases where military troops were deployed outside the territory of a member State. Regarding the deployment of Belgian forces in Somalia in the framework of UNOSOM II, the Human Rights Committee noted that:

"[it] is concerned about the behaviour of Belgian soldiers in Somalia under the aegis of the United Nations Operation in Somalia (UNOSOM II), and *acknowledges that the State party has recognized the applicability of the Covenant in this respect* and opened 270 files for purposes of investigation."<sup>18</sup>

Likewise, the Committee stated that Israel was bound to respect the Covenant in the occupied territories. It justified this extraterritorial applicability by the fact that Israel exercised "effective control" over these territories and their inhabitants, bringing them within its jurisdiction:

"The Committee is therefore of the view that, under the circumstances, the Covenant must be held applicable to the occupied territories and those areas of Southern Lebanon and West Bekaa *where Israel exercises effective control*."<sup>19</sup>

Moreover, the Human Rights Committee has confirmed most recently the extraterritorial applicability of the Covenant through a General Comment on Article 2. It stated that

"the enjoyment of Covenant rights is not limited to citizens of States Parties but must also be available to all individuals [...] who may find themselves in the territory or subject to the jurisdiction of the State Party. This principle also applies to those within the power or effective control of the forces of a State Party acting outside its territory, regardless of the circumstances in which such power or effective control was obtained, *such as forces constituting a national contingent of a State Party assigned to an international peace-keeping or peace-enforcement operation*."<sup>20</sup>

### 3) The Inter-American Commission on Human Rights

Before the Inter-American Commission, most cases involving questions of extraterritorial applicability have been settled under the American Declaration of the Rights and Duties of Man and not under the American Convention on Human Rights.<sup>21</sup> It must be noted that the Declaration has no "jurisdiction clause" as the Convention does.

Nonetheless, the Commission held on several occasions – even when the applicability was not contested by the respondent State – that the Declaration and the Convention have an extraterritorial scope. For instance, regarding the United States military intervention in Grenada in 1983, the Inter-American Commission stated that:

"While this [the obligation to uphold the rights of persons within a State's jurisdiction] most commonly refers to persons within a State's territory, it may, under given circumstances, refer to conduct with an extraterritorial locus where the person

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<sup>18</sup> Human Rights Committee, *Concluding Observations on Belgium*, 1998, CCPR/C/79/Add.99, §14 (emphasis added).

<sup>19</sup> Human Rights Committee, *Concluding Observations on Israel*, 1998, CCPR/C/79/Add.93, §10 (emphasis added).

<sup>20</sup> Human Rights Committee, *General Comment No. 31 on Article 2 of the Covenant. The Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, CCPR/C/74/CRP.4/Rev.6, 21 April 2004, §10 (emphasis added).

<sup>21</sup> To date, the Inter-American Commission has tackled the question of the extraterritorial applicability of the American Convention on Human Rights in only one single case. Cf. Inter-American Commission on Human Rights, *Victor Saldaño v. Argentina*, 11 March 1999, Report No. 38/99. This case – declared inadmissible – concerned an Argentine citizen, sentenced to death in the United States, who alleged that Argentina's failure to present an inter-State complaint under the American Convention against the United States rendered it responsible for violation of the Declaration.

concerned is present in the territory of one State, *but subject to the control of another State – usually through the acts of the latter's agents abroad.*"<sup>22</sup>

The same reasoning was made in another decision adopted on the same day regarding a Cuban military intervention in international airspace.<sup>23</sup> In both cases, the Commission concluded that the question is not whether the individual was within the State's territory at the relevant time, but whether he was *subject to its authority and control*,<sup>24</sup> which has the effect of bringing the person within its jurisdiction. It must however be noted that these conclusions were made *obiter dictum* as it was not necessary to establish the State's jurisdiction in these cases.

### III. THE EXTRATERRITORIAL APPLICABILITY OF HUMAN RIGHTS TREATY OBLIGATIONS IN THE CONTEXT OF PEACE OPERATIONS

In the context of peace operations, the extraterritorial applicability of human rights treaty obligations raises a number of specific issues. Firstly, according to the mandate conferred upon them, multinational forces may exercise very different levels of authority over a territory where they deploy. Therefore, the condition of effective control may not be fulfilled in all cases of UN-mandated operations. Secondly, as noted above, regional treaties might have limited "legal space" and may not apply to the actions of contingents taking part in a peace operation on another continent. Finally, the principle of exhaustion of domestic remedies might also create further difficulties and questions.

#### 1) The notion of jurisdiction: relevance of the "gradual approach" theory?

Determining whether a national contingent exercises "effective control" can be difficult. On the one hand, national contingents are not always exclusively in charge in a given zone. In some areas, units of different countries may operate together, splitting responsibility. On the other hand, the level of authority entrusted to peace-keepers may vary. A "gradual approach" to the notion of jurisdiction has been developed,<sup>25</sup> notably in the applicants' submissions in the *Bankovic* case.<sup>26</sup> It can be understood as implying that the obligation to secure Convention rights on an extraterritorial basis "would be proportionate to the level of control in fact exercised."<sup>27</sup>

In the *Cyprus v. Turkey* decision in 2001, the European Court of Human Rights considered that, since Turkey exercised effective *overall* control over northern Cyprus, it was bound to secure *the entire range of rights* embodied in the Convention.<sup>28</sup> *A contrario*, when such control was limited temporally and spatially, as in the *Issa* case, one could not expect Turkish forces to ensure the entire range of rights but, *insofar* as they interfered directly with some Iraqi shepherds' lives, they had at least to secure the latter's right to life.<sup>29</sup>

<sup>22</sup> Inter-American Commission, *Coard et al. v. United States*, 29 September 1999, Case 10.951, Report No. 109/99, §37 (emphasis added).

<sup>23</sup> Inter-American Commission, *Armando Alejandro Jr. et al. v. Republic of Cuba*, 29 September 1999, Case 11.589, Report No. 86/99. "The Commission is competent *ratione loci* to apply the American Convention extraterritorially to the Cuban State in connection with the events that took place in international airspace" (§ 25).

<sup>24</sup> Inter-American Commission, *Coard et al., op. cit.*, §37 *in fine*. Reaffirmed recently in a decision on precautionary measures addressed to the United States, *Detainees in Guantanamo Bay, Cuba. Request for Precautionary Measures*, 12 March 2002.

<sup>25</sup> Rick Lawson, "Life after Bankovic. On the Extra-territorial Reach of the ECHR." Unpublished article, available at the ICRC Legal Division. This approach is supported by John Cerone, in "Minding the Gap: Outlining KFOR Accountability in Post-conflict Kosovo," *European Journal of International Law*, Vol. 12, 2001, pp. 469-488, at p. 479.

<sup>26</sup> European Court of Human Rights, *Bankovic*, *op. cit.*, §§46-48.

<sup>27</sup> *Ibid.*, §46.

<sup>28</sup> European Court of Human Rights, *Cyprus v. Turkey*, *op. cit.*

<sup>29</sup> Cf. above, note 15.

In the framework of a UN-mandated operation, such an approach would allow the possibility of engaging the responsibility of countries contributing troops on an extraterritorial basis in a proportionate way. On the one hand, forces entrusted with a limited peace-keeping operation would be bound to respect particular human rights only insofar as they interfere with these specific rights. On the other hand, contributing States would be bound to secure the entire range of rights when they have *de facto* an overall control on a given territory.

It can be objected that this approach is not compatible with the line adopted by the European Court of Human Rights in the *Bankovic* case. The Court held that:

"the wording of Article 1 does not provide any support for the applicants' suggestion that the positive obligation in Article 1 [...] can be divided and tailored in accordance with the particular circumstances of the extra-territorial act in question."<sup>30</sup>

The Court upheld a traditional and essentially territorial notion of jurisdiction, the very few exceptions to which include situations where States exercise effective extraterritorial control. Clearly, the debate between the progressive or conservative interpretation of "jurisdiction" is not yet settled.<sup>31</sup>

## 2) A limitation to the "legal space" of the human rights conventions?

Military units engaged in peace operations on another continent raise the question of whether regional human rights treaties still constitute, in such situations, the legal basis for extraterritorial jurisdiction of the sending State. The European Court of Human Rights in the *Bankovic* case stated that:

"the Convention is a multi-lateral treaty operating [...] in an essentially regional context and notably in the legal space (*espace juridique*) of the Contracting States. [...] The Convention was not designed to be applied throughout the world, even in respect of the conduct of Contracting States."<sup>32</sup>

This may appear inconsistent with the rest of the Court's jurisprudence. Indeed, in the *Issa* and *Öcalan* cases, the Court declared admissible the applicants' requests even though both concerned acts occurred outside the "territory" of the European Convention on Human Rights. Moreover, neither the Court nor the defending country tackled the question of the Convention's extraterritorial applicability, thereby consenting to an extension of State responsibility to acts committed outside the Convention's "legal space."

It is not clear whether this limitation would be taken into account in the case law of other human rights bodies. Although the Inter-American Commission "has never exercised extraterritorial jurisdiction over the acts of a member State, perpetrated in a territory outside that of one of the OAS [Organization of American States] member States,"<sup>33</sup> it is unclear whether the Commission would refrain from doing so. Further, in the case concerning the Cuban military intervention in international airspace, the Commission recognized Cuba's

<sup>30</sup> European Court of Human Rights, *Bankovic*, op.cit., §75.

<sup>31</sup> For instance, in a Report to the Parliamentary Assembly of the Council of Europe, the Rapporteur, Mr Pourgourides, stated that: "It is submitted that the extent to which Contracting Parties must secure the rights and freedoms of individuals outside their borders, is commensurate with the extent of their control." Cf. Parliamentary Assembly, *Area where the European Convention on Human Rights cannot be implemented*, Doc. 9730, 11 March 2003, §45. This report gave rise to Recommendation 1606 (2003), adopted by the Assembly on 23 June 2003. Cf. also Alexander Orakhelashvili, "Restrictive Interpretation of Human Rights Treaties in the Recent Jurisprudence of the European Court of Human Rights," *European Journal of International Law*, Vol.14, 2003, pp. 529-568.

<sup>32</sup> European Court of Human Rights, *Bankovic*, op. cit., §80.

<sup>33</sup> Christina M. Cerna, *The Extra-territorial Scope of Human Rights Treaties. The American Convention on Human Rights*, unpublished article, available at the ICRC Legal Division, p. 2.

extraterritorial responsibility for an act committed formally outside the "legal space" of the Organization of American States.<sup>34</sup>

### 3) Exhaustion of domestic remedies

One of the conditions of admissibility of individual complaints required by the main human rights conventions is the exhaustion of domestic remedies.<sup>35</sup> This condition raises some particular questions regarding its concrete implementation in the special context of a UN-mandated operation. It could be asked, for instance, whether the exhaustion of domestic remedies is to be understood as involving only remedies available in the country where a force is deployed, or also those available in the sending State? It is generally agreed that the exhaustion of domestic remedies only concerns such recourses that are "effective, available to the author without limitation and do not take too long."<sup>36</sup> It is a constant jurisprudence of the European Court of Human Rights that:

"the existence of the remedies in question must be sufficiently certain not only in theory but in practice, failing which they will lack the requisite accessibility and effectiveness."<sup>37</sup>

Assessing the availability of domestic remedies must be done in relation to the existing situation. It has been noted that it is necessary to take into account "the general legal and political context in which [the formal remedies in the legal system] operate, as well as the personal circumstances of the applicant."<sup>38</sup>

It could be argued that, in most cases, it would be unrealistic to consider that persons whose rights were violated in the context of a peace operation could reasonably avail themselves of domestic remedies of the troop-contributing country, owing mainly to practical difficulties such as travel arrangements, the need to obtain a visa and the lack of financial means. Only effective remedies available in the country where the peace operation takes place should be exhausted before a claim can be submitted before treaty-monitoring bodies.

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<sup>34</sup> Cf. note 23 above.

<sup>35</sup> Article 35.1 of the European Convention on Human Rights; Article 46.1(a) of the American Convention on Human Rights; Article 5.2(b) of the first Optional Protocol to the International Covenant on Civil and Political Rights.

<sup>36</sup> Manfred Nowak, *UN Covenant on Civil and Political Rights. CCPR Commentary*, N.P. Engel Publisher, Kehl, Strasbourg, Arlington, 1993, p. 703.

<sup>37</sup> European Court of Human Rights, *Aksoy v. Turkey*, 18 December 1996, Application No. 21987/93, §52. Cf. also *Akdivar a.o. v. Turkey* (Prel. Obj.), 16 September 1996, Application No. 21893/93, and more recently *Issa a.o. v. Turkey*, *op. cit.*

<sup>38</sup> European Court of Human Rights, *Aksoy v. Turkey*, *op. cit.*, §53.

# Background Document 4

## Case study: the applicability of international human rights law in Kosovo

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### I. INTRODUCTION

The aim of this document is to describe the applicability of international human rights law in the particular case of territories administered by the UN. While UN Security Council Resolution 1244 states that the main responsibilities of the United Nations Interim Administration Mission in Kosovo (UNMIK) include, *inter alia*, “protecting and promoting human rights,”<sup>1</sup> the effective implementation of this body of law in Kosovo has raised a number of questions that are addressed below.

### II. SOURCES OF HUMAN RIGHTS LAW IN KOSOVO

Early on, the interim administration enacted regulations meant to outline the relevant human rights instruments applicable in Kosovo. UNMIK Regulations 1999/24 and 2000/59, stated that:

“in exercising their public functions, all persons undertaking public duties or holding public office in Kosovo shall observe internationally recognized human rights standards.”<sup>2</sup>

On 15 May 2001, UNMIK Regulation 2001/9 establishing a “Constitutional Framework” was adopted, which introduced a new stage of provisional self-government in Kosovo. Chapter 3 of the constitutional framework states that:

“the Provisional Institutions of Self-Government shall observe and ensure internationally recognized human rights and fundamental freedoms, including those rights and freedoms set forth in: [a list of instruments follows].”

In addition, Section 3.3 of the “Constitutional Framework” states that:

“the provisions on rights and freedoms set forth in these instruments shall be directly applicable in Kosovo as parts of this Constitutional Framework.”

This wording creates uncertainty. The content of the norms included in UNMIK Regulations reflects international norms as they appear in international treaties, but this formulation does not render the relevant human rights instruments directly applicable in Kosovo. On the one

<sup>1</sup> United Nations, S/RES/1244, 10 June 1999, §11(j).

<sup>2</sup> United Nations, UNMIK/REG/1999/24, 12 December 1999, Section 1.3 and UNMIK/REG/2000/59, 27 October 2000, Section 1.3.

hand, it does not take into account the fundamental distinction between self-executing and non-self-executing international norms. On the other hand, in the absence of any formalization and effective commitment of the interim administration at the international level, this list merely constitutes a model catalogue of human rights norms whose effect is limited to the domestic sphere.

One of the most striking features of this limited applicability is the fact that individuals cannot avail themselves of the claims procedure provided for in some human rights instruments. This is considered below. As it stands, the incorporation of international human rights norms in the legal system of Kosovo and the pledge that “All persons in Kosovo shall enjoy, without discrimination on any ground and in full equality, human rights and fundamental freedoms”<sup>3</sup> could remain an empty shell.

### III. IMPLEMENTATION OF HUMAN RIGHTS LAW AT THE INTERNATIONAL LEVEL

The administration of Kosovo by the UN, which recalls some of the features of an international trusteeship, has created a *sui generis* situation that falls to a large extent outside the human rights implementation mechanisms that exist at the international level.

On the one hand, Kosovo is not currently within the jurisdiction of Serbia and Montenegro and, on the other, it is not an independent State either. This intermediate status does not correspond to the framework of international human rights law, which is mainly designed for sovereign States. This situation is described below with regard to the European human rights system, the UN treaty-based mechanisms and the other UN mechanisms.

#### a) *The European system of human rights*

Under the European Convention on Human Rights, the European Court of Human Rights may receive applications from any person, non-governmental organization or group of individuals claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in the Convention or in the protocols thereto (Art. 34). Any individual who falls “within the jurisdiction” of a State party (Art. 1) may file such an application, regardless of his or her nationality, but only after having exhausted the available domestic remedies (Art. 35.1).

Under UNMIK regulations and the Constitutional Framework, the standards of the European Convention are supposed to be directly applicable in the internal legal order of Kosovo for acts committed by public officials exercising public functions.<sup>4</sup> However, an application against UNMIK or KFOR before the European Court would clearly be inadmissible *ratione personae*, because UNMIK and KFOR are not party to the European Convention on Human Rights and have made no declaration of acceptance of the treaty obligations of the former Republic of Yugoslavia (now Serbia and Montenegro).

Serbia and Montenegro signed the European Convention on Human Rights on 3 April 2003. A number of issues of international law will arise when it ratifies the Convention. Serbia and Montenegro made no reservations concerning the territorial application of any treaty of the Council of Europe,<sup>5</sup> and its responsibility under these treaties for Kosovo is, in theory, not

<sup>3</sup> United Nations, UNMIK/REG/2001/9, 15 May 2001, Section 3.1.

<sup>4</sup> *Ibid.*, Section 3.3.

<sup>5</sup> Serbia and Montenegro is party to the Framework Convention for the Protection of National Minorities (ratified on 11 May 2001), the European Convention on Extradition (ratified on 30 September 2002) and its First and Second Additional Protocols (both ratified on 23 June 2003), the European Convention on the Suppression of Terrorism (ratified on 15 May 2003), the European Convention on the Supervision of Conditionally Sentenced or Conditionally Released Offenders (ratified on 28 February 2001), as well as other human rights treaties.

excluded. However, since the adoption of Resolution 1244 by the Security Council, most of the territory of Kosovo is not under the jurisdiction of Serbia.<sup>6</sup> Inasmuch as it does not have, in practice, jurisdiction over the territory, an application against Serbia and Montenegro for violations committed in Kosovo would not be admissible. This seems to be constant jurisprudence.<sup>7</sup>

As things now stand, an application may be filed only against KFOR-participating States that are party to the European Convention on Human Rights, on account of their participation in the force. This possibility, which requires that "effective control" be exercised, is examined in Background Document 3.

#### *b) The UN treaty-based mechanisms*

Similar questions can also be raised regarding the UN treaty-based mechanisms. The UN Human Rights Committee, for example, is empowered to regularly receive reports presented by States party to the International Covenant on Civil and Political Rights on the measures they have adopted to implement the rights recognized in the Covenant.<sup>8</sup> The reports are subsequently examined by the Human Rights Committee in public meetings, through a dialogue with the State whose report is under consideration. In addition, the Committee may receive and examine individual complaints (communications) against States party to the Protocol presented by victims of violations of the Covenant.<sup>9</sup>

The International Covenant on Civil and Political Rights was ratified by Serbia and Montenegro, but the reporting obligations under the Covenant remain unclear with regard to Kosovo. This obligation is currently fulfilled neither by Serbia and Montenegro nor by the interim administration, and it may be argued that the question of the responsibility of UNMIK and KFOR for the situation of human rights in Kosovo could - and should - be raised before the Human Rights Committee. Besides, as Serbia and Montenegro ratified the Optional Protocol on 6 December 2001, it would also be interesting to determine whether a complaint for a violation of human rights committed in Kosovo could be declared admissible by the Committee. However, the same difficulties would undoubtedly arise as those faced by the European Court of Human Rights, as described above.

It could be argued that monitoring procedures by UN treaty-based mechanisms are not applicable *ratione personae* to UNMIK or KFOR, which are not sovereign States. However, it should be established whether the extension of such procedures to multinational forces that exercise *de facto* control *in lieu* of a government is desirable and possible. In particular, the possible role of the Security Council in this regard should be considered. Is the Council empowered to impose the competence of UN treaty-based mechanisms in such situations regarding both reporting and communication procedures?

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<sup>6</sup> However, the noticeable exception of Serb-populated areas in northern Kosovo should be mentioned. In these enclaves, particularly in the municipality of Mitrovicë/Mitrovica, some parallel structures have developed which involve police, judicial, administrative and social functions. "These institutions operate under the *de facto* authority of the Serbian government" and therefore preclude UNMIK from exercising jurisdiction over these areas. Cf. OSCE report on *Parallel Structures in Kosovo*, October 2003, p. 5.

<sup>7</sup> Regarding the situation in northern Cyprus, the European Court of Human Rights recognized "the applicant Government's [Cyprus] continuing *inability* to exercise their Convention obligations" on this territory, because of the Turkish occupation. Cf. *Cyprus v. Turkey*, 10 May 2001, Appl. No. 25781/94, §78 (emphasis added). Similarly, the UN Human Rights Committee reached the same conclusion in its *Concluding Observations on Cyprus*, 1998, CCPR/C/79/Add.88, §3. For other examples, see CCPR/SR/468 on El Salvador; CCPR/C/42/Add.14 §11 and CCPR/C/79/Add.78 §§4-5 on southern Lebanon. All these cases concern occupation by foreign States but seem, nevertheless, to be applicable by analogy to the UNMIK presence in Kosovo, which prevents Serbia and Montenegro from exercising jurisdiction there.

<sup>8</sup> Article 40.1 of the International Covenant on Civil and Political Rights.

<sup>9</sup> Article 1 of the Optional Protocol to the International Covenant on Civil and Political Rights.

In this respect, the creation of a Human Rights Chamber in the Federation of Bosnia and Herzegovina could be taken as a precedent. Indeed, Annex 6 to the Dayton peace agreement created a Human Rights Chamber and placed it in charge of applying the provisions of the European Convention on Human Rights and 15 other international treaties, even though none of the entities concerned was party to the Convention.<sup>10</sup> The Human Rights Chamber, composed of 14 judges, eight of whom are appointed by the Committee of Ministers of the Council of Europe,<sup>11</sup> was appointed to judge cases on the basis of the European Convention's provisions and in accordance with the European Court's jurisprudence. The experience of the Chamber could be used as a precedent to set up courts empowered expressly to monitor the compliance of UN-mandated operations with instruments such as the International Covenant on Civil and Political Rights.

### *c) Other UN mechanisms*

As regional and universal treaty-based mechanisms are, for the time being, not applied to the international administration in Kosovo, the development of other mechanisms – not based on treaties – must also be considered in this context. Contrary to treaty-based mechanisms, the competence *ratione personae* of these other mechanisms is not strictly defined. It may be argued that this competence is broad enough to include not only States, but also other subjects of international law, such as international organizations. This interpretation is confirmed in practice in Kosovo, as described below.

In this regard, it is worth recalling the role of the UN Special Rapporteur on the situation of human rights in Bosnia and Herzegovina, the Republic of Croatia and the Federal Republic of Yugoslavia. In accordance with the broad definition of his mandate,<sup>12</sup> the Special Rapporteur released, in August 2000 and March 2001, detailed analyses of the implementation of human rights by the authorities of the transitional administration in Kosovo.<sup>13</sup> These reports were endorsed by the UN Commission on Human Rights.

It may also be argued that mechanisms with thematic mandates should be allowed to monitor the activities of the international transitional administration. The Special Rapporteur on torture is an example in this regard. During the last few years, the Special Rapporteur has developed means for taking urgent action with respect to international entities, in particular the international administration in Kosovo.<sup>14</sup>

The special procedures of the Commission on Human Rights may therefore act as monitoring bodies in cases of international transitional administration. However, their scope of action remains limited. Firstly, they can do little beyond submitting reports to the Commission once a year and offering their good offices. Secondly, they are not empowered to receive individual complaints or to take binding decisions. As international organizations such as the UN become increasingly important compared with sovereign States, further developments of these mechanisms should be considered.

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<sup>10</sup> Bosnia and Herzegovina became a member of the Council of Europe on 24 April 2002.

<sup>11</sup> Article VII Annex 6 to the Dayton agreement, signed on 14 December 1995. The text is available on NATO's website: [<http://www.nato.int/ifor/gfa/gfa-home.htm>]

<sup>12</sup> In 2000, the UN General Assembly asked to the Special Rapporteur "to continue to monitor closely the situation of human rights in Kosovo," A/RES/54/183, *Situation of human rights in Kosovo*, 29 February 2000, §24.

<sup>13</sup> Report of the Special Rapporteur of the Commission on Human Rights on the situation of human rights in Bosnia and Herzegovina, the Republic of Croatia and the Federal Republic of Yugoslavia, A/55/282-S/2000/788, 9 August 2000 and E/CN.4/2001/47/Add.1, 22 March 2001.

<sup>14</sup> Report of the Special Rapporteur on the question of torture, submitted pursuant to Commission on Human Rights Resolution 2001/62, Addendum, E/CN.4/2002/76/Add.1, 14 March 2002, §1819ff. Report of the Special Rapporteur on the question of torture, submitted pursuant to Commission Resolution 2002/38, Addendum, E/CN.4/2003/68/Add.1, 27 February 2003, §§2014-16.

#### IV. IMPLEMENTATION OF HUMAN RIGHTS LAW AT THE DOMESTIC LEVEL

In addition to the quasi non-existence of international enforcement mechanisms, it is important to underline that “domestic” remedies are also clearly limited. The main reason stems from the near total immunity from legal process that UNMIK and KFOR enjoy under Regulation 2000/47 and the absence of administrative tribunals where citizens could challenge the administrative decisions that affect them.

##### a) *The issue of immunity*

UNMIK regulation 2000/47 provides for a very wide immunity from any legal process for both UNMIK and KFOR personnel and property. With regard to UNMIK, Regulation 2000/47, Section 3, states that:

“UNMIK, its property, funds and assets shall be immune from any legal process. [...] UNMIK personnel, including locally recruited personnel, shall be immune from legal process in respect of words spoken and all acts performed by them in their official capacity.”

Under Section 2, a similar regime applies to KFOR. The responsibility of KFOR personnel seems even more difficult to establish, since Regulation 2000/47 underlines that KFOR personnel must respect the applicable laws and regulations enacted by UNMIK “insofar as they do not conflict with the fulfilment of the mandate given to KFOR under Security Council Resolution 1244.”<sup>15</sup>

This immunity is extremely broad as it covers both criminal and civil matters. For UNMIK, the immunity can only be waived by the Secretary-General himself. However, this is unlikely to happen except in the most serious criminal cases. Concerning KFOR, Section 6.2 provides that requests to waive immunity of KFOR personnel shall be referred to the respective commander of the national element of such personnel for consideration.

In a “traditional” peace-keeping operation, it is logical that the international presence should enjoy immunity. In such a context, the main purpose of granting immunity to international organizations is to protect them against unilateral interference by the government of the State in which they are located. This is a legitimate means of ensuring that such organizations operate effectively. But in the case of Kosovo, UNMIK is *de facto* the government of the territory. Therefore, Regulation 2000/47 is tantamount to a government granting immunity to itself. As the Ombudsperson<sup>16</sup> and the Council of Europe have pointed out, such blanket immunity, especially four years after Resolution 1244 was adopted, is tantamount to placing the interim administration above the law.<sup>17</sup>

Finally, the impossibility for tribunals to review UNMIK and KFOR activities undermines the independence of the judiciary and the necessary separation of powers.<sup>18</sup> As pointed out by the European Commissioner for Human Rights, it also affects “[t]he fundamental right to

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<sup>15</sup> United Nations, UNMIK/REG/2000/47, 18 August 2000, Section 2.2.

<sup>16</sup> Established by UNMIK Regulation 2000/38, 30 June 2000, the Ombudsperson Institution is an independent institution that receives and investigates complaints concerning alleged human rights violations and actions constituting an abuse of authority by the interim civil administration or any emerging central or local institution.

<sup>17</sup> Ombudsperson’s Special Report No.1 on the Compatibility with Recognized International Standards of UNMIK Regulation No.2000/47 on the Status, Privileges and Immunities of KFOR and UNMIK and Their Personnel in Kosovo, 18 August 2000, §§21-27; Gil-Robles Alvaro, European Commissioner for Human Rights, *Kosovo: The Human Rights Situation and the Fate of Persons Displaced From Their Homes*, CommDH (2002)11, Strasbourg, 16 October 2002, §§37-43.

<sup>18</sup> Ombudsperson’s Special Report No. 1, *op. cit.*, §24.

access to court, an essential element of the rule of law, [which] is seriously curtailed by such immunity."<sup>19</sup>

*b) The absence of administrative tribunals*

This last point is a direct consequence of the immunity regime described above. According to Section 7 of Regulation 2000/47,

"Third party claims for property loss or damage and for personal injury, illness or death arising from or directly attributed to KFOR, UNMIK or their respective personnel and which do not arise from 'operational necessity' of either international presence, shall be settled by Claims Commissions established by KFOR and UNMIK, in the manner to be provided for."

From this wording, it emerges that no real administrative resource is available for an individual whose rights have been violated. Firstly, no compensation is due at all by KFOR or UNMIK if the acts are justified on the basis of "operational necessity." Such a provision should arguably be avoided, since its contents remain unspecified. The notion of "operational necessity" would seem to be even broader than "military necessity" provided for under international humanitarian law.

Secondly, if wrongful activities attributed to UNMIK or KFOR are not justified by "operational necessity," claims must be settled by a commission, which UNMIK and KFOR are free to establish and draw up procedures for in the manner of their choosing.<sup>20</sup> Clearly, these bodies fall short of real administrative tribunals in terms of independence, accountability and publicity given to their proceedings.

By way of illustration, it is worth recalling that KFOR, on the basis of Regulation 2000/47, promulgated a Standard Operating Procedure 3023 for Claims in Kosovo on 22 March 2003. The procedure is binding only upon troops serving at the main KFOR headquarters. Under Section 6, each "[t]roop Contributing Nation [...] is responsible for adjudicating claims that arise from their own activities, in accordance with their own claims rules, regulations and procedures." The complaint is examined by a Claims Officer, who evaluates the veracity of the alleged facts and takes a decision based on the merits of the case. If the complaint is rejected or if the compensation is deemed unsatisfactory, the plaintiff may appeal to a Kosovo Claims Appeal Commission which is "[a] non-binding voluntary appeal system in which [KFOR headquarters] Claims Office and those [Troop Contributing Nations] who wish, will participate in" (Section 7 of the standard operating procedure). In principle, this commission must be composed of two members designated by KFOR and one by the State concerned.

As the description above makes clear, these claims commissions are entirely internal to KFOR. Both stages of the proceedings are managed by KFOR personnel. Moreover, the process is not binding. At the end of the first stage, the Claims Officer may only adopt a "recommendation" of compensation. Similarly, the procedure for appeal to the Kosovo Claims Appeal Commission is explicitly considered as a non-binding voluntary system.

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<sup>19</sup> Gil-Robles Alvaro, *op. cit.*, §43.

<sup>20</sup> Section 7 of UNMIK Regulation 2000/47 states that any individual claim "shall be settled by Claims Commissions established by KFOR and UNMIK, in the manner to be provided for."

## V. CONCLUSION

With regard to applicable law and enforcement mechanisms, Kosovo has become somewhat of a grey zone, where the applicable body of law is unclear and abuses may happen. In some instances these abuses are a result of actions taken by the international presence itself.<sup>21</sup>

As things now stand, anyone needing medical attention owing to ill-treatment suffered at the hands of an UNMIK policeman while in detention may inform the administration, but may not sue the policeman in court unless his immunity is waived. There is no recourse to legal action with regard to medical expenses either; the plaintiff may only submit an application for compensation to the claims commission.

These shortcomings have been denounced by a number of institutions.<sup>22</sup> The most vocal has probably been the Ombudsperson, which has released critical reports and has brought individual cases to the attention of UNMIK.<sup>23</sup> These actions have probably contributed to an improvement of the situation. However, the Ombudsperson's means of intervention remain limited. In particular, he has no jurisdiction to submit individual cases to KFOR.<sup>24</sup>

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<sup>21</sup> Gil-Robles Alvaro, *op. cit.*, §49.

<sup>22</sup> Cf. notes 13, 14 and 17 above.

<sup>23</sup> Pursuant to Sections 4.4 and 4.9 of UNMIK Regulation 2000/38, the Ombudsperson may investigate either in response to a complaint or on his or her own initiative and may make recommendations to the relevant administrative authorities and officials on the appropriate measures to be adopted.

<sup>24</sup> According to Section 3.4 of UNMIK Regulation 2000/38, "[i]n order to deal with cases involving the international security presence, the Ombudsperson may enter into an agreement with the Commander of the Kosovo Forces (COMKFOR)." To our knowledge, no such agreement has been concluded.

## MISSION

The International Committee of the Red Cross (ICRC) is an impartial, neutral and independent organization whose exclusively humanitarian mission is to protect the lives and dignity of victims of war and internal violence and to provide them with assistance. It directs and coordinates the international relief activities conducted by the Movement in situations of conflict. It also endeavours to prevent suffering by promoting and strengthening humanitarian law and universal humanitarian principles. Established in 1863, the ICRC is at the origin of the International Red Cross and Red Crescent Movement.