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International Organisations' Involvement in Peace Operations: Applicable Legal Framework and the Issue of Responsibility

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L'implication des organisations internationales dans les missions de paix : le cadre juridique applicable et la question de la responsabilité

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College of Europe
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CICR

Delegation of the ICRC to the EU, NATO, and the Kingdom of Belgium

Délégation du CICR auprès de l'UE, de l'OTAN, et du Royaume de Belgique

Chloé Cébron

Laura de Jong

Sous la direction de

Stéphane Kolanowski

DISCOURS DE BIENVENUE

François Bellon
Chef de la délégation du CICR auprès de l'Union européenne, de l'OTAN
et du Royaume de Belgique

Mesdames et Messieurs,

J'ai l'honneur et le plaisir, au nom du Comité international de la Croix-Rouge (CICR), de vous accueillir pour ce 12ème Colloque de Bruges, qui sera consacré à l'étude du cadre juridique applicable aux opérations de paix menées par des organisations internationales, et en particulier à l'étude de la question de la responsabilité.

Avec le Collège d'Europe, nous avons organisé de nombreux Colloques de Bruges en droit international humanitaire qui ont traité de sujets importants et d'actualité. L'an dernier, par exemple, nous avions eu un Colloque d'une très grande qualité sur les défis que posent les nouvelles technologies au droit international humanitaire. Ce Colloque en a inspiré d'autres depuis. Le sujet qui nous occupera ces deux jours est également d'un grand intérêt tant juridique qu'opérationnel.

En effet, le cadre juridique applicable aux organisations internationales impliquées dans des opérations de paix et en particulier la question de la responsabilité n'est pas qu'un sujet académique intéressant quelques juristes spécialisés. Derrière ces questions se cachent, parfois, des manquements graves qui ont coûté la vie à des milliers de personnes. Bien sûr la responsabilité première des violations du droit international humanitaire incombent avant tout à ceux qui les commettent ou les commanditent. Mais il y a également une responsabilité morale, politique et juridique des organisations internationales qui ont, dans certains cas, manqué à leur devoir.

En novembre 1999, M. Kofi Annan en sa capacité de Secrétaire Général des Nations unies a présenté un rapport dans lequel il mettait en lumière les manquements des Nations unies dans la protection des civils pris au piège dans des zones dites protégées telles qu'à Srebrenica ou Tuzla par exemple. De même, les événements dramatiques qui se sont déroulés au Rwanda entre avril et juillet 1994 ont démontré l'incapacité de la Communauté internationale à réagir

de manière appropriée face à un génocide, laissant passivement des centaines de milliers de personnes se faire assassiner, y compris dix casques bleus belges de la MINUAR.

Il est vrai que ces 20 dernières années beaucoup de progrès ont été accompli en terme de lutte contre l'impunité, que cela soit devant les tribunaux nationaux, les tribunaux *ad hoc* ou encore la Cour pénale internationale. Par contre, les développements ont été beaucoup plus lents et plus ambigus en ce qui concerne l'engagement de la responsabilité des organisations internationales.

Il faut cependant relever l'importance qu'a prise cette question avec l'implication croissante des organisations internationales dans des missions de paix et ce, principalement dans le cadre d'une résolution du Conseil de sécurité des Nations unies.

Des conflits en ex-Yougoslavie déjà mentionnés, à la Libye d'aujourd'hui en passant par l'Afghanistan au cours de ces dix dernières années, les Nations unies et d'autres acteurs tels que, en particulier, l'OTAN, se sont impliqués à des degrés divers, sur des terrains de conflits armés. Se posent alors nombre de questions relatives à leurs actions, ou parfois inactions face à des violations du droit international humanitaire et au problème de la responsabilité qui y est lié.

Plusieurs leçons peuvent être tirées de l'expérience de ces 20 dernières années dans le domaine des missions de paix. Dans son rapport de novembre 1999 déjà cité, M. Koffi Annan a pointé quelques erreurs commises, dont le problème de l'adéquation de la réaction politique à la réalité du terrain. Il indique à cet égard que *« we tried to keep peace and apply the rules of peacekeeping when there was no peace to keep»*. Il s'agit là d'un point important. L'on voit trop souvent des organisations ou des Etats qui, pour des raisons politiques, refusent de reconnaître que leur action s'inscrit dans le cadre d'un conflit armé et les impliquent eux-mêmes comme parties à ce conflit armé. Cela ne remet pas en cause l'applicabilité du droit international humanitaire, qui est une question de faits, mais entoure de confusion l'action des Etats ou de l'organisation en question. Cela peut aussi pousser certains acteurs à refuser de reconnaître leur responsabilité, le cas échéant.

Les questions du partage des responsabilités, voire de dilution des responsabilités est également un élément important de cette confusion. L'attribution des responsabilités entre les Etats contributeurs de troupes et l'organisation internationale elle-même est un facteur important. A celui-ci vient s'ajouter un autre élément compliqué, à savoir les relations entre l'organisation internationale qui mandate et celle qui rempli la mission. Malheureusement la jurisprudence de la Cour européenne des Droits de l'Homme dans les affaires Behrami et Saramati n'a pas

apporté des réponses satisfaisantes quant à l'articulation de la responsabilité entre les Nations unies, desquelles émanaient les mandats de la KFOR et de la MINUK, l'OTAN et les Etats contributeurs de troupes de ces missions respectives.

Les guerres des Balkans des années 1990 ont très clairement mis en lumière l'importance de ces questions. Cette importance n'a certainement fait que croître au regard du développement de la pratique des Nations unies, mais également d'autres organisations que cela soit l'OTAN en Afghanistan ou en Libye, l'Union africaine au Soudan ou en Somalie, voire l'Union européenne dans certaines de ses missions militaires.

En dehors des règles d'attribution de la responsabilité, il est également important pour le CICR de savoir, en cas de démarches liées à un conflit dans lequel une organisation internationale est impliquée, à qui nous devons nous adresser. A qui devons-nous, par exemple, remettre un rapport sur la conduite des hostilités ou sur la détention? Ces rapports étant confidentiels, la question peut vite devenir très délicate.

Le CICR a pour mandat de veiller à la bonne application du droit international humanitaire, à sa clarification, ainsi qu'à son développement. Il s'agit d'une tâche permanente du CICR à laquelle nous accordons une très grande importance. Les questions qui seront débattues ces deux jours nous permettrons de mieux comprendre la manière dont les questions d'applicabilité du droit international humanitaire et de responsabilité doivent être appréhendées lorsque des missions de paix sont menées par des organisations internationales.

Il s'agit par ailleurs d'un des thèmes que le CICR a identifiés dans son rapport sur les défis au droit international humanitaire qui sera présenté dans un peu plus d'un mois à la 31e Conférence internationale de la Croix-Rouge et du Croissant-Rouge.

A côté de ce thème important, d'autres défis y sont présentés, dont certains ont fait l'objet d'un Colloque de Bruges, tels que la notion et la typologie des conflits armés, le droit de l'occupation, les compagnies privées militaire et de sécurité, ou encore les nouvelles technologies utilisées dans les conflits armés. En plus de ces thèmes là, l'interaction entre les droits de l'Homme et le droit international humanitaire, l'accès humanitaire et le droit à l'assistance, l'utilisation d'armes explosives dans des zones densément peuplées, la participation directe aux hostilités, le futur traité sur le commerce des armes, ou encore la lutte contre le terrorisme sont autant de domaines dans lesquels des défis se posent à la bonne application du droit international humanitaire, et dès lors, à la protection des victimes des conflits armés.

Par ailleurs, comme vous le savez probablement, le CICR est impliqué dans une étude visant à renforcer la protection juridique des victimes des conflits armés. Bien que nous soyons convaincus que le droit international humanitaire reste, dans son ensemble, tout à fait pertinent, certaines notions méritent cependant d'être clarifiées voire, peut-être, développées. Suite à une large consultation des Etats, le CICR va approfondir sa réflexion dans deux domaines particuliers, à savoir la protection des personnes privées de liberté et la mise en œuvre du droit international humanitaire. D'autres sujets d'importance resteront également bien présents dans le travail juridique du CICR, telles que les réparations pour les victimes des conflits armés, la protection de l'environnement naturel ainsi que la protection des personnes déplacées.

Si le CICR a décidé d'organiser le Colloque 2011 sur le cadre juridique applicable aux opérations de paix menées par des organisations internationales et en particulier sur les questions de responsabilité, c'est à la fois en raison de l'importance croissante de l'implication des organisations internationales sur le théâtre des conflits armés, mais également parce que nous n'avons pas toutes les réponses aux questions qui se posent dans ce domaine. Les nombreux experts que nous avons réunis nous apporteront leur lecture de la problématique, leur position personnelle ou celle de l'organisation pour laquelle ils travaillent, et, nous le verrons, celles-ci ne sont pas toujours aisément conciliables. Nous sommes pleinement conscients que ce Colloque va susciter d'intenses débats, mais il est important que ces débats aient lieu pour aboutir, espérons-le dans un avenir pas trop éloigné, à une clarification de ces questions. Laisser le doute n'est certainement pas au bénéfice ni des victimes des conflits, ni du droit international humanitaire, ni même des organisations internationales elles-mêmes, et ce d'autant plus que toutes défendent la bonne mise en œuvre du droit international, le principe de l'Etat de droit, ou «Rule of Law», et dès lors, en fin de compte, la responsabilité.

Le CICR est impatient de vous écouter et de pouvoir échanger, avec vous, points de vue et idées sur cette problématique importante. C'est là tout l'intérêt de ce Colloque.

Je ne saurais terminer sans remercier les participants d'avoir été si nombreux à répondre favorablement à notre invitation à participer à ce 12ème Colloque de Bruges.

Mesdames et Messieurs, je me réjouis d'avance des débats que nous allons avoir pendant ces deux jours qui s'annoncent très stimulants et je vous remercie de votre attention.

KEYNOTE ADDRESS

Ms Christine Beerli
Vice-President, ICRC

Mesdames, Messieurs,

Les tâches incombant aux forces armées participant à des opérations de paix sous les auspices d'une organisation internationale ont grandement évoluées ces dernières années et outrepassent désormais les missions traditionnelles de contrôle d'un cessez-le-feu ou d'observation du respect d'un accord de paix. Aujourd'hui, l'avènement du concept de mission intégrée – qui consacre le caractère multidimensionnel de ces opérations de paix – leur permet de revêtir différents aspects incluant la prévention des conflits armés, le maintien de la paix, son rétablissement, sa consolidation ou même, le cas échéant, son imposition par des moyens coercitifs.

L'extension du champ d'activité de ces opérations de paix n'est pas la seule évolution marquante de ces dernières années; il faut également souligner qu'elles sont désormais conduites dans des contextes de plus en plus complexes, instables et dangereux. Les opérations en Afghanistan, en République Démocratique du Congo, en Côte d'Ivoire, ou encore en Somalie suffisent à illustrer ce constat. La complexité, l'instabilité et la dangerosité de ces contextes influencent naturellement la manière dont ces opérations de paix sont menées en particulier du fait que le recours à la force armée est de plus en plus fréquent dans le cadre de leur mise en oeuvre.

Compte tenu de ces évolutions, la nécessité se fait toujours plus pressante pour la communauté internationale de développer un cadre opérationnel, politique, mais aussi juridique, cohérent et précis qui permette de répondre de manière pratique et concrète aux enjeux posés par les opérations de paix contemporaines. Il me semble que le Droit International Humanitaire (DIH), mais aussi le droit international des droits de l'homme ont un rôle crucial à jouer dans la définition de ce cadre directeur et j'espère que les deux jours de colloque à venir permettront de confirmer cette appréciation.

Ce colloque permettra d'aborder deux thèmes centraux. Le premier touche à l'application et à l'impact du DIH et du droit international des droits de l'homme sur les opérations contemporaines de paix. Le second s'attache à examiner les conséquences des violations de ces corps de droit en abordant les questions délicates de la responsabilité internationale des États et/ou des organisations internationales impliqués, mais aussi de la responsabilité des individus agissant dans le cadre de ces opérations de paix. Permettez-moi, en introduction de ce Colloque, de faire quelques remarques liminaires sur chacun de ces deux thèmes.

En ce qui concerne le premier thème, on pourrait penser que tout a déjà été dit au sujet de l'application du DIH aux opérations de paix, notamment suite à la participation des forces des Nations Unies dans les conflits armés en Somalie ou en ex-Yougoslavie il y a presque 20 ans. Toutefois, certaines problématiques restent toujours en suspens et d'autres sont apparues entre-temps. Par exemple, l'implication dans certains contextes conflictuels de nouveaux acteurs supra étatiques comme l'OTAN, l'Union africaine ou l'Union européenne – pour ne citer que les principaux – ont mis en perspective de nouveaux enjeux et replacé au centre des débats juridiques les questions liées à l'applicabilité et l'application du DIH aux nouvelles formes d'opérations de paix conduites sous les auspices d'organisations internationales.

Dans ce cadre, le CICR a dû faire face depuis quelques années à la tendance de certains États contributeurs de troupes et/ou Organisations internationales à nier – souvent au prix de constructions juridiques alambiquées – l'applicabilité du DIH aux opérations auxquelles ils participent, alors que la réalité des faits sur le terrain démontre le contraire. Ce refus d'admettre que leurs actions sont soumises aux règles pertinentes du DIH s'explique notamment par la réticence à être perçu comme une partie au conflit ainsi que par la volonté politique de montrer que l'action dans laquelle ils sont impliqués demeure neutre et impartiale. Dans cette perspective, les États contributeurs de troupes ainsi que les Organisations internationales participant aux opérations de paix avancent souvent que le mandat du Conseil de Sécurité sous l'empire duquel ils agissent généralement – combiné aux objectifs de rétablissement et de maintien de la paix et de la sécurité internationales qu'ils poursuivent – leur confèrent un statut particulier au regard du DIH tant en matière de conditions d'applicabilité de ce corps de droit qu'en ce qui concerne l'étendue des obligations qui en découlent.

La position du CICR sur cette question n'a jamais varié : le CICR a toujours considéré que l'existence d'un conflit armé était une question de fait et que la qualification juridique d'une situation comme conflit armé ne peut s'opérer que par l'application objective des critères classiques posés en la matière par le DIH. Les termes du mandat conféré par le Conseil de Sécurité ou le qualificatif donné à ceux opposés aux forces de paix ne jouent donc aucun rôle en la matière. A cet égard, il convient de souligner l'importance de préserver la distinction fondamentale entre le jus ad bellum et le jus in bello qui sous-tend l'ensemble du DIH. Toute tentative de remise en cause de cette distinction pourrait compromettre l'objectif ultime du DIH qui est d'assurer une protection effective de toutes les victimes des conflits armés, quel que soit le camp auquel elles appartiennent.

Ladies and Gentlemen,

Even when the conditions for International Humanitarian Law (IHL) applicability to peace forces are met, it might still be difficult to determine who – among those participating in

the operations – should be considered a party to the conflict and thus bound by IHL. Should it be argued that only the troops contributing countries (TCCs) are party to the conflict for the purposes of IHL? What about the international organisation under whose command and control multinational forces may operate? How should the international organisations' Member States who are not participating in the military action be considered under IHL? Unfortunately, despite the essential nature of these issues, they have not been thoroughly studied. Presumably, this results from the already mentioned reluctance to acknowledge that international organisations and/or TCCs acting or claiming to act on behalf of the international community are themselves parties to an armed conflict. Nonetheless, these questions need to be carefully examined because of their serious implications, particularly in terms of IHL's scope of application.

Another question raised by the application of IHL to multinational forces is that of IHL's material field of application. Indeed, it has been often argued that the involvement of peace forces in an armed conflict necessarily internationalises the latter and triggers the application of the law governing international armed conflict. However, this opinion is not unanimously supported. While it is attractive in terms of protection, since it means that victims of the armed conflict would benefit from the more detailed provisions of the law governing international armed conflicts, it may however be inconsistent with the operational and legal realities. In particular, it would require the assignment of duties to parties that are unwilling or unable to comply with some of those duties; to give just one example, there is nothing to suggest that international forces involved in a non-international armed conflict (NIAC) would be willing to grant prisoner of war status to captured members of organised non-State armed groups, as would be required under IHL applicable in international armed conflict (IAC).

This clearly demonstrates that there is an enduring controversy regarding the material field of application of IHL in relation to peace operations and that certain questions in relation to this topic have not yet received clear-cut answers. This issue is unlikely to result in any real differences in practice regarding the rules regulating conduct of hostilities. This is because many of the treaty-based rules on the conduct of hostilities that apply during international armed conflict are also generally accepted as applying in NIACs as a matter of customary law. However, the issue does become important when, for instance, it comes to the status of persons deprived of their liberty. On this issue, the law governing IAC differs from the law regulating NIAC. Along the same lines, the legal basis for the ICRC's activities with respect to persons deprived of their liberty is not the same for IAC and NIAC. I am confident that the forthcoming discussions on these issues will be fruitful and lead to practical answers and effective guidance.

Ladies and Gentlemen,

At this stage, I would like to reiterate an important distinction. The mere fact of being deployed in a situation of armed conflict does not necessarily mean that peace forces automatically become party to that conflict. Indeed, peace forces may be sent into a context in which they operate as non-belligerent forces insofar as they do not participate in the ongoing hostilities. The deployment of European Union forces in Chad from 2007 to 2009 is a case in point. In such a situation, it is clear that the activities of the peace forces are not governed by IHL rules. The question, therefore, is what would be the relevant legal framework applicable to non-belligerent peace forces?

It is now well established that peace operations and their intrinsic extraterritorial dimension do not create circumstances beyond the reach of international obligations. It is also widely recognised that the legal framework applicable to peace operations has several layers including the UN Charter, UN Security Council resolutions, Status of Forces Agreements with the host country and other relevant rules of international law. However, the extent to which the relevant norms of international law apply to peace forces is still imbued with controversy and needs to be clarified.

This is particularly the case when it comes to Human Rights Law (HRL) whose applicability to peace forces operating extraterritorially has been repeatedly challenged. Addressing this issue is of great importance. One consequence of the evolution of peace operations has been the increased involvement of international forces in law enforcement and detention activities. This raises complex legal issues related to the applicability of HRL to operations carried out by these forces. In particular, it will be important to determine whether or not the material capacity of peace forces to exert effective control or legal authority over individuals abroad entails their subjective capacity to be bound by international HRL obligations in the framework of their activities. I look forward to hearing – in the forthcoming discussions – the position of various actors involved in peace operations on this important issue.

Ladies and Gentlemen,

The complexity inherent in peace operations has also brought to the fore the following question: 'Where does legal responsibility lie when internationally wrongful acts occur in the course of such operations?' This is the second central theme of the conference. Addressing the issue of international responsibility in the course of peace operations may have a direct impact on compliance with IHL and other relevant international law. Thus, the determination of who bears the responsibility for violations of international law during peace operations is of great importance.

From a strictly legal point of view, it has become increasingly difficult to answer that question in light of the complex features of contemporary peace operations and the variety of actors involved in these operations. The issue remains of practical importance, as demonstrated by the growing body of litigation in domestic and international courts. It also has a direct bearing on the broader question of the relationships between responsibility of States and responsibility of international organisations.

In this respect, I am sure you recall that 2011 was marked by the adoption by the International Law Commission (ILC) of its Draft Articles on the Responsibility of International Organisations, which codify the legal framework that applies when international organisations commit internationally wrongful acts. As such, those Articles will likely have important and concrete implications for international organisations. For instance, the practical application of these ILC Articles would help clarify and resolve legal issues linked to responsibility arising in the context of the ongoing NATO intervention in Libya. Indeed, the Articles' rules of attribution would determine which entity is responsible for internationally wrongful acts: the UN, NATO or the TCCs. The ILC Articles also anticipate that international responsibility can be joint and severable, meaning that NATO could be held responsible in its own right or could be held responsible in conjunction with the TCCs. The ILC Articles could then be further applied in order to determine whether NATO or the TCCs can invoke circumstances precluding the wrongfulness of their actions. Furthermore, as the ILC Articles foresee reparations, NATO and/or the TCCs, if held responsible, might have a financial obligation *vis-à-vis* the victims of the wrongful acts.

Another related challenge will be to determine the fora in which the international responsibility may be affected – be it at the domestic or international level. This is an issue of importance, which, if not addressed, will leave the victims of violations of IHL and HRL bereft of any possibility of seeing international organisations or TCCs effectively held responsible. This issue has not yet been thoroughly explored and certainly deserves much more attention than it has actually received.

Finally, another issue that deserves attention is the responsibility of individuals for breaches of IHL and HRL during peace operations and the ability to hold responsible those who have seriously violated important provisions of these bodies of law. In this respect, it will be interesting to analyse how individual responsibility for violations of IHL and human rights law has been dealt with in recent peace operations. While the TCCs generally retain criminal jurisdiction over their personnel engaged in such operations and many have passed and implemented domestic legislation through which they can prosecute perpetrators of violations, it is still not clear how this criminalisation of IHL and international HRL violations works in practice. In addition, it will be very interesting to see if, besides domestic avenues, some room remains

for the jurisdiction of international tribunals, in particular the International Criminal Court, in relation to international law violations committed by peace forces.

Ladies and Gentlemen

I am confident that the forthcoming discussions on these various topics will be fruitful in bringing more clarity to these controversial but important issues. You are now embarking on two days of debate which I am sure will be substantial and comprehensive. I am looking forward to these exchanges of ideas, listening to your views and comments on the various points raised in this address. I thank you for your attention and wish you a very successful Symposium.

Thank you.

Session 1
Applicability/Application of IHL to International Organisations (IO) involved in Peace Operations

Chair person: **Elizabeth Wilmshurst,** *Chatham House*

IHL APPLICABILITY TO INTERNATIONAL ORGANISATIONS INVOLVED IN PEACE OPERATIONS

Tristan Ferraro
Legal Adviser – ICRC

Résumé

La question de savoir si les organisations internationales (OI) engagées dans des opérations de paix deviennent parties ou non à un conflit armé doit être résolue avant de s'interroger sur le contenu même du droit international humanitaire applicable. Il s'agit alors de déterminer comment et quand le droit international humanitaire gouverne l'activité des forces de paix. Le CICR considère cet enjeu comme étant de première importance dans son dialogue avec les acteurs concernés.

Il a été suggéré, au regard des récentes opérations de paix, que les conditions d'applicabilité du DIH différeraient des critères classiques lorsque des forces armées interviennent au nom de la communauté internationale. Le CICR a toujours rejeté cette position qui ignore la distinction claire et établie entre le jus ad bellum et le jus in bello. La question du mandat et la légitimité des missions confiées aux OI sont de l'ordre de la première catégorie et n'ont aucune incidence sur la deuxième, qui concerne en l'espèce l'applicabilité du DIH aux opérations de paix.

L'article 2 des Conventions de Genève de 1949 dicte que l'on se trouve en présence d'un conflit armé international lorsque qu'il y a un recours à la force entre deux ou plusieurs États. Par interprétation évolutive du droit, il est donc suggéré qu'un CAI existe lorsqu'il y a recours à la force entre au moins deux entités dotées d'une personnalité juridique internationale. Les facteurs d'intensité et de durée ne sont pas pertinents dans le cas d'un CAI et le seul critère qui doit être vérifié est celui de l' animus belligerendi, ou intention belligérante. Cette intention est constituée dès lors que la situation de conflit armé reflète objectivement la volonté de l'OI, ou du pays contributeur de troupes, d'être engagé dans une opération militaire dont l'objectif est de nuire à la partie ennemie.

En ce qui concerne l'existence d'un conflit armé non international (CANI), deux critères doivent être cumulés : les combats doivent opposer deux ou plusieurs groupes armés organisés et doivent avoir atteint un certain degré d'intensité. Si la classification grâce à ses deux critères peut donc paraître assez simple, elle est en fait compliquée par l'existence de nombreuses zones grises, en particulier en ce qui concerne le critère d'intensité. Cette difficulté est accentuée lorsqu'il s'agit de forces multinationales étant donné que leur engagement dans le conflit armé peut prendre différentes formes et varier dans le temps.

Dans de nombreux cas la force multinationale va intervenir en appui à l'une des parties d'un conflit armé préexistant. Ce genre d'intervention ne se caractérise pas forcément par un usage de la force létale mais peut également prendre la forme d'un support logistique, d'activités d'intelligence ou de participation dans la planification et la coordination des opérations militaires menées par la partie soutenue. Dans cette situation particulière, le CICR propose de considérer, en complément des critères classiques pour la détermination de l'existence d'un CANI, une approche fonctionnelle, selon laquelle même si l'engagement des forces multinationales n'atteint pas l'intensité demandée, la nature même de la participation des forces de paix dans le CANI préexistant peut suffire à les faire devenir parties au conflit.

Si le CICR a participé au processus de rédaction de la Circulaire du Secrétaire Général des Nations Unies sur le respect du DIH par les forces des Nations Unies et que celle-ci a été essentielle afin de déterminer si le DIH leur étaient applicable, certains éléments de cette circulaire sont néanmoins problématiques, en particulier sa section 1 sur le champ d'application. L'ambiguïté de la lettre de cette section et son application de la théorie de la porte tournante ("revolving door theory"*) aux forces des Nations Unies reflète une interprétation erronée et étroite de l'applicabilité du DIH aux forces des Nations Unies. La théorie de la porte tournante doit en effet être réservée à la population civile et ne peut en aucun cas s'appliquer à des forces armées organisées, telles que celles des Nations Unies.*

Le CICR travaille actuellement à un document traitant de l'applicabilité et de l'application du DIH aux forces multinationales, afin de se positionner sur des problématiques clés concernant des opérations de soutien à la paix.

Very often, the discussions on the topic of International Humanitarian Law (IHL) and peace operations tend to focus mainly on the application of substantive rules of IHL to peace forces rather than addressing issues raised by the conditions for IHL applicability. This is quite surprising since the question of whether International Organisations (IOs) involved in peace operations have become party to an armed conflict or not needs to be answered before any substantive question of IHL can be addressed at all.

Before tackling the issue of the conditions under which IHL can be applicable to IOs involved in peace operations, it is important to recognise the legal consequences of the fact that the most important IOs have an international legal personality, and thereafter to consider that the material capacity of an IO to be engaged in military operations entails its subjective capacity to be bound by IHL. In other words, if the constitutive document of an IO provides for the possibility of deploying armed forces in a foreign country, IHL may potentially be a legal frame of reference once those forces are involved in military operations that reach the level of an armed conflict.

For a long time, the crux of the debates revolving around this very topic was the question as to whether IHL might be, as such, applicable to IOs – in particular the United Nations (UN). This important question has been settled partly with the publication of the Secretary-General Bulletin of 1999 on the observance of IHL by UN forces. Now the problem is not anymore as to whether IHL applies *per se* to peace forces but how and when this body of law will govern peace forces' activities.

Therefore, it has become essential to determine under which conditions IHL will apply to IOs involved in peace operations. In this regard, the issue of IHL applicability to peace operations ranks very highly within the framework of the legal dialogue the ICRC maintains with the stakeholders.

1. The separation *jus in bello / jus ad bellum*

Recent peace operations have been characterised by the development of sophisticated legal constructions suggesting that the conditions triggering IHL applicability would differ when armed forces intervene on behalf of the international community. Eventually, the objective of such theories is to put across a view according to which IHL would not be applicable to certain peace operations conducted by IOs or, at best, would apply differently.

The ICRC has constantly rejected this position, which ignores the longstanding distinction between *jus in bello* and *jus ad bellum*. It has always stressed that the applicability of IHL to multinational forces, like to any other actors, depends on the factual circumstances prevailing in the field and on the fulfilment of specific legal conditions stemming from the relevant norms of IHL, in particular Common Articles 2 and 3 of the Geneva Convention (GC) of 1949. Thus, the ICRC has always maintained that the applicability of IHL must be determined solely on the basis of the facts on the ground, irrespective of the international mandate assigned to multinational forces by the Security Council and of the designation given to the parties potentially opposed to them. The mandate and the legitimacy of a mission entrusted to IOs are issues which fall within the province of *jus ad bellum*, and have no effect on the applicability of IHL to peace operations.

Moreover, it is of the utmost importance to respect scrupulously the distinction between IHL and *jus ad bellum* if the strict equality between belligerents, which lies at the very heart of IHL, is to be maintained.

This clear distinction between *jus in bello* and *jus ad bellum* is not an exclusive ICRC creation and did not appear out of nowhere. This separation has a strong legal foundation in domestic and international jurisprudence, in treaty law (in particular Common Article 1 of the GC and in the Preamble of Additional Protocol 1(AP1)); it is supported by the vast majority of the academic writers and is recognised expressly in several Military Manuals.

In this respect, it is worth quoting the Military Manual of New Zealand which states:

'To the extent that the law of armed conflict applies to [military operations by or on behalf of the UN], it does so on a basis of complete equality. That is to say, the fact that one side is acting as a law enforcer against another party which is a law breaker does not invalidate the operation of [IHL]'[1].

2. IHL conditions of Applicability

As has already been mentioned in the keynote address, multinational forces are more often than not deployed in conflict zones. Therefore, it becomes essential to determine which situations constitute armed conflict for the purposes of IHL.

This is all the more important since recent positions taken by some academics and certain stakeholders on IHL applicability to peace operations are characterised by the attempt to raise the bar in relation to this body of law's threshold of applicability. It has been notably contended that, when multinational forces are involved, a higher degree of intensity should be observed in order to constitute an armed conflict for the purposes of IHL.

Any legal basis for such a position is obviously lacking. Under *lex lata*, criteria used to determine the existence of an armed conflict involving multinational forces do not differ from those applied to more 'classic' armed conflicts.

The limited scope of this contribution does not allow for a long exposé on the classic conditions for IHL applicability. However, it is important to briefly recall some important points in this respect since IHL remains vague when it comes to the definition of the notion of armed conflict.

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1 Interim Law of Armed Conflict Manual, DM 112, Directorate of Legal Services, New Zealand Defence Forces, 1992, at Paragraph 1902.

2.a. Criteria for the determination of an armed conflict in which IOs would be a party

As it is well recognised, IHL makes a distinction between international armed conflict (IAC) and non-international armed conflict (NIAC).

According to Article 2 common to the 1949 Geneva Conventions, an international armed conflict exists whenever there is recourse to armed force between two or more States. By application of an evolutive interpretation of the law, it is submitted that IAC exists whenever two or more entities endowed with an international legal personality resort to armed force. Such interpretation will allow military actions undertaken by IOs to be included within the IHL scope of application,, provided they reach the IHL threshold of application.

Thus the threshold for IAC is very low, and factors such as duration and intensity do not enter into the IAC equation: the mere capture of a soldier or minor skirmishes between the forces of two or more States or international organisations may spark off an international armed conflict and lead to the applicability of IHL, insofar as such acts demonstrate a genuine *animus belligerendi* (belligerent intent). For the sake of clarity, one should consider that belligerent intent exists when a situation displays objectively the willingness of an IO or a troops contributing country (TCC) to be involved in military operations whose objective is to harm and submit the enemy. Existence of belligerent intent is important since it allows for ruling out the possibility to include situations that are the result of a mistake, or of individual acts not endorsed by the TCCs or the IO involved in the peace operation, into the IHL scope of application..

Even if the on-going NATO operation in Libya exemplifies some of the involvement of IOs in IAC, the reality of contemporary peace operations shows that, in most cases, the question is rather as to whether IOs involved in peace operations have become party to an NIAC.

The issue of classification of NIAC under IHL can be more complex.

For the purposes of IHL, two conditions must be fulfilled in order to determine the existence of an NIAC:

1. the fighting must oppose two or more organised armed groups
2. the fight must reach a certain threshold of intensity

Without dwelling here on the concept of NIAC, it should be mentioned that the decisions handed down by the International Criminal Tribunal for the former Yugoslavia (ICTY) in the *Haradinaj* and *Boskoski* cases in April and July 2008 have together established a framework of reference for the various criteria which make up the equation of an NIAC within the meaning of

Article 3 common to the 1949 Geneva Conventions.[2] The Court, while acknowledging that the intensity of the fighting and the participation of organised armed groups were indispensable conditions, defined what could constitute probative indications that those requirements had been met. To evaluate the 'intensity' factor, the ICTY identified the following elements: the number, duration and intensity of individual confrontations; the types of weapons and other military equipment used; the number and calibre of munitions fired; the number of persons and type of forces partaking in the fighting; the number of casualties; the extent of material destruction; the number of civilians fleeing combat zones; the widespread nature of the fighting, etc...

To assess the level of organisation of the parties to the conflict, the Trial Chamber proposed relying on indicative factors such as the existence of a headquarters; the fact that the group controls a certain territory; the ability of the group to gain access to weapons, other military equipment, recruits and military training; its ability to plan, coordinate and carry out military operations, including troop movements and logistics; its ability to define a unified military strategy and use military tactics, etc. With regard to this criterion of organisation, it is needless to specify that it is inherently fulfilled by peace forces. However, it will be essential then to verify whether the armed groups themselves, opposed to the peace forces, meet the criterion of organisation.

Thus, at first sight, the process of classifying a situation may appear easy; it suffices to apply the pre-established criteria to determine that a state of belligerence exists. Yet the objective assessment of situations which may be classified as non-international armed conflicts is often complicated by the existence of grey areas, especially when it comes to the criterion of intensity. Such an assessment is all the more complex insofar as the involvement of multinational forces in an armed conflict may take different forms.

2.b. Support by peace forces to a party involved in a pre-existing NIAC:

In recent peace operations such as those in Somalia, Democratic Republic of Congo or Afghanistan, multinational forces have grafted their military actions onto the pre-existing NIAC, supporting the governmental forces against the insurgent party. These interventions of the multinational forces are not necessarily made of lethal operations, but may take the form of logistic support (such as the transportation of governmental armed forces to the front line for instance), intelligence activities or participation in the planning and coordination of military operations carried out by the party supported. In such circumstances, legal advisers faced a

2 ICTY Trial Chamber, Judgment of 3 April 2008, *Prosecutor v. Haradinaj and co-accused* (IT-04-84-T), Paragraph. 63 et s.. ICTY Trial Chamber, Judgment of 10 July 2008, *Prosecutor v. L. Boskoski and J. Tarculovski* (IT-04-82), Paragraph 175 et s.

dilemma: what would be the legal status of those multinational forces under IHL while not engaged in the front line but still playing a substantial role in the capacity of the supported party to carry out military operations? That particular situation prompted the ICRC to examine whether the classic criteria for the determination of an NIAC could be complemented by a functional approach. According to the latter, even if multinational forces' engagement does not meet the classic criterion of intensity, the nature of the peace forces' involvement in the pre-existing NIAC may well turn them into a party to that conflict.

This approach of IHL applicability to multinational forces will thus be used when the following conditions are met:

1. There is a pre-existing NIAC,
2. The multinational forces' intervention is carried out in support of one of the parties engaged in the pre-existing armed conflict,
3. The support consists of actions objectively displaying the involvement of multinational forces in the collective conduct of hostilities,
4. The actions in question reflect the decision by the concerned TCCs or the IOs to support a party involved in the pre-existing NIAC.

It is important to underline that this functional approach does not replace but only complements the determination of IHL applicability on the basis of the classic criteria. However, we deem that this functional approach allows us to avoid an absurd situation in which armed forces who effectively contribute to military operations in a pre-existing armed conflict would not be considered belligerent, and could still claim protection against direct attacks. In this respect, we consider this approach to be compliant with the IHL logic and in line with the imperative necessity to avoid blurring the distinction between combatants and civilians not directly participating in hostilities.

3. IHL applicability according to the 1999 SG Bulletin: a too narrow approach

This contribution will be concluded by a few thoughts concerning the scope of application of the 1999 Secretary-General Bulletin on the observance of IHL by UN forces.

Even if the ICRC has been involved in the drafting process of this document and if the latter has been key in settling the issue as to whether IHL applies at all to the UN forces, one can be concerned by some elements of the Bulletin, in particular its section 1 which addresses the scope of IHL application to UN forces.

Indeed, section 1 foresees that IHL will be applicable to UN forces only when, in a situation of armed conflict, they are actively engaged therein as combatants to the extent and for the duration of their engagement. Despite the ambiguity of this wording, it is submitted that it reflects a flawed and very narrow interpretation of IHL applicability to UN forces since it applies the revolving door theory to the UN forces. In others words, it applies an approach based on the notion of direct participation in hostilities. However, this theory and approach can in no way be applied to organised armed forces whose loss of protection against direct attacks is exclusively based on their status under IHL and not on the sporadic acts they could accomplish.

We are also aware that recent decisions taken by the International Criminal Court and the Special Court for Sierra Leone have adopted the Secretary-General 1999 Bulletin's position. However, we consider that it is legally flawed. Extending the concept of direct participation in hostilities beyond individual acts carried out on a sporadic and unorganised basis would blur the distinction made by IHL between temporary and activity-based loss of protection conferred to civilians and the continuous status or function-based loss of protection that characterises armed forces and other organised armed groups.

Finally, it is worth noting that the ICRC is currently working on a comprehensive document addressing the question of IHL applicability and application to multinational forces. This document should be ready by 2012 and will portray the position of the ICRC on important issues relating to peace support operations, some of which are being addressed within the framework of this Symposium.

Thank you for your attention.

INTERNATIONAL ORGANISATIONS VS TROOPS CONTRIBUTING COUNTRIES: WHICH SHOULD BE CONSIDERED AS THE PARTY TO AN ARMED CONFLICT DURING PEACE OPERATIONS?

Marten Zwanenburg
Ministry of Defence, The Netherlands

Résumé

Dans une opération de paix menée par une Organisation Internationale (OI) possédant la personnalité juridique internationale, qui de l'OI ou des États contributeurs de troupes (ECT) doivent être considérés comme la «partie au conflit» au regard du droit international humanitaire (DIH) ?

Les opérations de paix peuvent être définies par deux caractéristiques principales : elle sont menées par des OI et leur objectif est de contribuer à l'établissement, au rétablissement ou au maintien de la paix. Il a longtemps été considéré que du fait de leur nature initialement «impartiale» (qui ne soutient aucune des parties au conflit) et non belliqueuse ces opérations ne pouvaient devenir partie à un conflit armé. Cependant, même les Nations Unies reconnaissent aujourd'hui cette possibilité. Il s'agit en effet de faire une claire distinction entre le jus ad bellum et le jus in bello et de considérer uniquement le comportement des troupes sur le terrain afin de déterminer qui est partie au conflit.

La seconde difficulté est le fait que ces OI ne possèdent pas leurs propres troupes mais disposent de celles de leurs États membres. L'attribution de la responsabilité est alors plus complexe et il n'existe aujourd'hui pas de pratique constante en la matière. Si l'attribution de la responsabilité et la détermination de la partie au conflit sont en principe deux questions différentes, il semble pourtant que l'on puisse y répondre par le même raisonnement. Le test permettant de déterminer qui est partie au conflit serait donc le même que celui permettant de déterminer à quelle entité attribuer un certaine conduite. Ce test du «contrôle effectif» est particulièrement pertinent dans le cas des opérations de paix dans lesquels, si l'OI peut avoir le contrôle officiel des troupes, ces dernières sont en pratique souvent contrôlées par leur État de nationalité.

Se pose enfin la question de savoir si l'OI et les ECT peuvent être parties au conflit en parallèle. A première vue cela peut sembler difficile, du fait que cette situation engendrerait deux régimes de DIH différents qui s'appliqueraient à la même unité militaire. Cependant, si l'on admet qu'il n'est pas possible que les deux entités soient parties au conflit en même temps, cela n'exclut pas certaines obligations indépendantes de la part de l'ECT, dans le cas où l'OI est partie au conflit.

En effet, l'article 1 des Conventions de Genève de 1949, qui fait peser sur les États parties une obligation de «faire respecter» le DIH, est une règle de droit coutumier qui peut être comprise comme une obligation pour les États de «faire respecter» le DIH par une OI. Cela est d'autant plus pertinent lorsqu'un État a mis certaines de ses forces armées à disposition de cette OI.

When airplanes and ships from a number of States started operations against the Gaddafi regime in Libya in March 2011, there was no doubt that this constituted an armed conflict between those States and Libya. As it often does, the International Committee of the Red Cross (ICRC) approached the States involved to remind them of their obligations under International Humanitarian Law (IHL). A few weeks later, NATO assumed responsibility for the military operations in Libya.[1] Did this mean that from that moment on NATO instead of individual States became a party to the conflict with Libya?

This is one example of the question that this contribution will address. That question is if in a peace operation led by an international organisation, the organisation or the troop contributing States should be considered as the "Party to the conflict" as that term is used in IHL.

Key terms that first require definition are "international organisation" and "peace operation". For the purposes of this contribution, an "international organisation" is an organisation with international legal personality. Only in the case of such an organisation does it seem to make sense to speak of being a Party to an armed conflict, because only this kind of organisation is capable of having obligations under international law. A complication that arises here is that although there is consensus that the United Nations (UN) has international legal personality, the same is not necessarily true for other international organisations such as NATO.[2]

Much more than "international organisation", "peace operation" is a difficult term to define. One thing is clear: there is no uniform understanding of this term or related terms among different actors. Nevertheless, it is possible to identify at least two characteristics of "peace operations". The first is that these operations are often led by an international organisation. There is a rich variety of international organisations that have led peace operations. This includes the UN, NATO, the European Union (EU), the African Union (AU), the Organisation

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1 S. Erlanger & E. Schmitt, 'NATO Set to Take Full Command of Libyan Campaign', *The New York Times*, 25 March 2011.

2 This author has argued elsewhere that NATO is an international organisation. Marten Zwanenburg, *Accountability of Peace Support Operations* (Leiden: Martinus Nijhoff, 2005), p.66 .

of American States (OAS) and the Commonwealth of Independent States (CIS).[3] The second characteristic of peace operations is that their objective is to contribute in some way, shape or form to the maintenance or re-establishment of peace. As such, they are not primarily aimed at defeating an enemy.

This latter characteristic raises the question of whether it is useful to talk of which entity involved in a peace operation is a "Party to the conflict" at all. If peace operations are by their nature peace-oriented and impartial, can they become a side in the conflict in the first place? For a long time, there was a body of opinion that argued they could not. This was particularly the case with regard to peace operations led by the United Nations, an organisation that traditionally strongly emphasises that its peace operations are impartial and for which the robust use of force is controversial. It is difficult to reconcile being a "Party to the conflict" with being impartial, at least semantically. This was one of the reasons why for a long time it was difficult for the UN to accept that its peacekeepers could become combatants. Even the UN however has now come to accept that as a matter of law, this combination is possible.[4] This recognition takes into account the separation between the *ius ad bellum* and *ius in bello*. In other words, whether there is an armed conflict and who is a party to that conflict must be judged on the basis of the facts on the ground. The legal basis for the use of force and the motivation of the parties for the fighting do not affect the qualification of those facts under IHL.

This leads to the conclusion that those undertaking a peace operation can become a Party to a conflict. But it leaves the most important question open, namely who is the Party if there are both an international organisation and troop contributing States involved. In this context it is important to underline that international organisations do not have armed forces of their own. They rely on states to place troops at their disposal for them to be able to carry out peace operations. Those troops are then associated with the international organisation, and it is common to hear people talk about "UN forces" or "NATO forces". But this does not adequately reflect the links that remain between the troops and their State of nationality.

The question of how to deal with an organ of a State placed at the disposal of an international organisation has been extensively analysed in the framework of international responsibility. It may be instructive to look at the situation in that context for guidance.

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3 It may be noted however that it is disputed whether all of these organisations have international legal personality and are thus international organisations as that term is used in this contribution.

4 This is reflected in the Secretary-general's Bulletin on the Observance by UN Forces of International Humanitarian Law of 6 August 1999, UN Doc. ST/SGB/1999/13.

The International Law Commission (ILC) has drafted an article specifically for this category in its articles on the responsibility of international organisations.5 National courts have also had to deal with this kind of situation. One example is the courts in the Netherlands. In three cases concerning events in the former Yugoslavia in 1995, relatives of men who were killed by the Bosnian Serb Army brought torts cases against the Netherlands. In one of these cases, the United Nations is a co-defendant. In this case the proceedings have so far only concentrated on the issue of immunity of the UN from jurisdiction in the Netherlands.[6] In the other two cases, however, the courts have made pronouncements on the attribution of conduct of members of a peace operation led by the UN.[7] It is interesting to note that the courts of first instance and the court of appeal came to different conclusions. They did so on the basis of different tests, although it is not entirely clear whether the tests are different in substance or only in formulation.

Determining who is a "Party to the conflict" is however not the same as determining to which entity conduct must be attributed for purposes of responsibility. Or is it? In both cases, what is at issue is linking the conduct of physical persons to a holder of international obligations. In the case of determining who is a "Party to the conflict", the purpose of the exercise is to clarify whose obligations come into play. If the conduct of physical persons leads to the conclusion that they become combatants, which entity has the primary responsibility to ensure that that conduct respects IHL? In contrast to the law of responsibility, in the framework of determining who is a Party to the conflict, the answer to this question is also relevant before any obligation has been breached. But that does not necessarily mean that the substantive standard used in the two fields of law must be different.

If we consider international law as one system, it is logical to answer similar questions in a similar way. Why use different tests for what is essentially the same operation of linking conduct to a legal person, albeit in different fields of law? If this logic is accepted, this would mean that the test to determine who is a Party to the conflict is the same as the test for determining to which entity conduct must be attributed. According to the ILC, this is the test of "effective control". The adjective "effective" in this expression implies that control must be based on an actual factual basis. This is relevant for conduct in peace operations, because

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5 In 2011, the ILC adopted on second reading a full set of articles on the responsibility of international organizations. See the Report of the ILC on its sixty-sixth session. UN Doc. A/66/10. The article referred to is article 7.

6 On 30 March 2010 the Court of Appeals of the Hague determined that the UN enjoyed immunity from jurisdiction. *Association of the Mothers of Srebrenica v. the Netherlands*, Court of Appeal of the Hague, 30 March 2010.

7 *Mustafic v. the Netherlands* and *Nuhanovic v. the Netherlands*, Court of Appeals of the Hague, 5 July 2011.

in practice it sometimes happens that an international organisation has control in name but in reality, a State is in control. The ILC does not provide more clarity on what the criteria for "effective control" actually are. This leaves much room for courts to further refine this test.

An opportunity for the International Court of Justice (ICJ) to do this was provided by the so-called "Use of Force" cases arising from the NATO-led intervention in the Federal Republic of Yugoslavia. In those cases, the FRY claimed *inter alia* that the respondent States had violated a number of obligations under IHL. Some of the respondent States argued that not they, but NATO should have been the respondent. This implied that if there was a party to an armed conflict on the Western side, this was NATO itself. In 1999 with respect to two of the respondents and in 2004 with respect to the rest, the Court however found that it lacked jurisdiction in these cases. As a result, the ICJ did not have an opportunity to express itself on this question.

State practice does not offer much clarity on the issue. Public statements made by States tend to be quite general, and often refer to the peace operation itself as a party to the conflict. A peace operation does not have international legal personality however, and it is therefore difficult to see how it could be a party in its own right. It seems therefore that the wording of the statements is the result of imprecise drafting rather than the expression of a particular legal position. One could argue that the fact that States that investigate and prosecute alleged breaches of IHL by their peacekeepers implies that they see themselves as a Party. This is not determinative, however: on the basis of the *aut dedere aut iudicare* provisions in the Geneva Conventions and Additional Protocol I, an obligation to do so exists irrespective of being a party to the conflict.

An interesting question is whether both the international organisation leading a peace operation as well as the troop contributing States could be a Party to the conflict. At first sight this seems difficult to imagine, because this would mean that potentially two different regimes of IHL would apply to one and the same military unit. One regime being the IHL obligations of the organisation, the other the IHL obligations of the troop contributing State concerned. If it is indeed the case that the organisation and the troop contributing State cannot both be a party to the conflict, does that mean that there is no role for the troop contributing State if the organisation is a party to a conflict? That is not necessarily the case. There are good reasons for arguing that the obligation to "ensure respect" for IHL in common Article 1 of the Geneva Conventions has become customary law. The ICRC customary law study states that as a customary rule, States must exert their influence, to the degree possible, to stop violations of IHL.8 If that is the case, there is no reason in principle why this customary obligation should

8 J. Henckaerts & L. Doswald-Beck, *Customary International Humanitarian Law* (Cambridge: CICR, 2005), Vol I, p. 210.

not extend to ensuring respect for IHL by an international organisation. All the more so if that organisation employs troops provided by the State concerned.

In this contribution, the question if in a peace operation led by an international organisation, the organisation or the troop contributing States should be considered as the "Party to the conflict" has been addressed in a very broad-brush manner. The question certainly deserves more in-depth study. If anything, it is likely that the number of military operations led by international organisations will increase rather than decrease in the future. In further studying the question of who is a Party to the conflict in this context, this contribution suggests that it is worthwhile to consider the parallels with the question of attribution of the conduct of peace operations.

INTERNATIONAL ORGANISATIONS INVOLVED IN ARMED CONFLICT: MATERIAL AND GEOGRAPHICAL SCOPE OF APPLICATION OF INTERNATIONAL HUMANITARIAN LAW

Vaios KOUTROULIS
Free University of Brussels (ULB)

Résumé

L'exposé qui va suivre met en lumière les questions complexes que soulèvent l'application matérielle et territoriale du droit international humanitaire (DIH) aux organisations internationales (OI) impliquées dans des conflits armés.

Le champ d'application matériel du DIH aux forces d'une OI soulève la question fondamentale de qualification du conflit armé dans lequel ces forces sont impliquées.

En ce qui concerne la qualification de l'intervention d'un tiers dans un conflit armé non-international, la tendance est de distinguer selon que l'intervention se fait en faveur de forces armées rebelles (a) ou en faveur d'un gouvernement (b).

(a) Le cas d'un conflit armé non-international entre des forces gouvernementales et un groupe rebelle, dans lequel une OI intervient en support aux rebelles contre le gouvernement de l'Etat, est considéré comme déclenchant un conflit armé international entre l'OI et l'Etat en question.

(b) Le cas d'intervention d'une OI dans un conflit armé non-international en support au gouvernement (sur invitation ou avec le consentement de celui-ci) a, quant à lui, donné lieu à de nombreuses controverses.

D'une part, il a été suggéré que l'intervention de l'OI n'altère pas la nature du conflit. Le conflit demeure un conflit non-international opposant les rebelles aux forces gouvernementales assistées par l'OI. La raison de cette qualification repose sur le fait que l'OI n'agit pas contre l'Etat lui-même mais contre les rebelles. Par conséquent, il n'y a pas de conflit armé inter-étatique au sens de l'Article 2 commun aux quatre Conventions de Genève de 1949. Cette conception attribue un rôle significatif au consentement donné par le gouvernement de l'Etat impliqué dans le conflit armé non-international à l'intervention et la présence de forces étrangères à l'intérieur de son territoire.

D'autre part, il a été avancé que l'intervention d'une OI dans un conflit armé non-international en soutien au gouvernement résulte dans un conflit armé international entre l'OI et les rebelles.

Cette conception, rejetant « l'argument du consentement », estime qu'une OI ou un Etat tiers intervenant en soutien au gouvernement contre les rebelles, combat dans les faits un autre Etat (les rebelles représentant également celui-ci), le conflit résultant d'une telle confrontation devient par ce fait international.

Admettre le caractère international d'un conflit entre une OI intervenant dans un conflit armé non-international et les forces armées adverses nous amène à nous poser une seconde question: cette intervention externe, internationalise-t-elle le conflit armé non-international dans son ensemble ou implique-t-elle deux conflits parallèles mais distincts, à savoir un non-international et un international? La réponse à cette question doit tenir compte des réalités sur le terrain. Si l'intervention de l'OI atteint un niveau d'intensité élevé de manière à influencer substantiellement l'issue du conflit, le conflit armé devrait être considéré comme un seul et unique conflit armé international.

Si un conflit est qualifié comme étant international, le DIH s'applique « dans tout le territoire des Etats belligérants » (Tribunal pénal international pour l'ex-Yougoslavie, Tadic, Arrêt de la Chambre d'Appel du 2 Octobre 1995). Si l'on accepte que le conflit armé impliquant une OI peut être de nature non-internationale, la décision Tadic établit que « les règles figurant à l'article 3 s'appliquent aussi à l'extérieur du contexte géographique étroit du théâtre effectif des combats » et conclut que le DIH dans les conflits armés non-internationaux s'applique « sur l'ensemble du territoire sous le contrôle d'une Partie, que des combats effectifs s'y déroulent ou non ». Le critère décisif pour l'application ratione loci du DIH repose sur l'occurrence d'hostilités et les personnes y étant connectées.

Le champ d'application territorial du DIH aux OI soulève également la question du « débordement » d'un conflit armé non-international impliquant les forces d'une OI dans le territoire d'un Etat voisin. Cette situation se réfère à ce qui est communément appelé « conflit armé transnational ». Prenons comme exemple l'hypothèse d'attaques de drones conduites par les forces de l'Organisation du traité de l'Atlantique Nord (OTAN) contre des groupes talibans à l'intérieur du territoire du Pakistan. Si l'on applique l'argument du consentement, la réaction de l'Etat territorial devient un facteur déterminant dans la qualification du conflit. Il conviendrait alors de déterminer si le Pakistan a consenti ou non à ces attaques. L'absence de consentement dans le chef du Pakistan signifierait que les attaques déclenchent un conflit armé international entre les forces de l'OTAN et le Pakistan. Ce conflit armé international existerait en parallèle au conflit entre les forces de l'OTAN et la milice talibane. Si, cependant, l'Etat territorial – à savoir le Pakistan – consent aux attaques, le seul conflit armé existant est le conflit armé non-international entre le gouvernement Afghan et les forces de l'OTAN d'une part et la milice talibane d'autre part. Ce conflit demeure non-international, malgré sa dimension extraterritoriale.

I. Introduction

The scope of application of International Humanitarian Law (IHL) to international organisations (IOs) involved in armed conflicts has been the object of much legal debate.1 This presentation will deal with two particular aspects of this application, namely, the material (II) and geographical (III) scope of application of IHL.

Before proceeding with the presentation, three preliminary remarks are in order. Firstly, as the title of my topic suggests, I will deal with IO forces that are *involved* in an armed conflict. When such forces become involved in an armed conflict is a question treated by other presentations and will not be examined here. Secondly, I will discuss IO forces as such. Thus, situations where the intervening actors are not IOs but States (acting either with or without UN authorisation) are excluded from this presentation. Thirdly, it should be stressed that, in my view, the mandate of the force (peacekeeping, robust peacekeeping, peace-enforcement operation etc.) has merely a factual impact on the scope of application of IHL to IO forces, in the sense that, given its mandate, a peace-enforcement operation is more likely to become involved in an armed conflict than a peacekeeping operation with a mandate limited to the observance of a cease-fire. However, *in abstracto*, no type of force is excluded from the possibility of being involved in an armed conflict, though this possibility may naturally be higher for some operations than for others.

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1 For recent studies on the subject, see G.L. Beruto (ed.), I*nternational Humanitarian, Law Human Rights and Peace Operations*, International Institute of Humanitarian Law, ICRC, 31st Round Table on Current Problems of International Humanitarian Law, Sanremo, 4-6 September 2008, p. 405.; O. Engdahl , *Protection of Personnel in Peace Operations : The Role of the 'Safety Convention' against the Background of General International Law* (Leiden: Martinus Nijhoff Publishers, 2007), p. 357; R. Kolb, G. Porretto, S. Vite, *L'application du droit international humanitaire et des droits de l'homme aux organisations internationales, Forces de paix et administrations civiles transitoires* (Bruxelles: Bruylant, 2005), p. 500.; F. Naert , *International Law Aspects of the EU's Security and Defence Policy* (Antwerp,Oxford,Portland: Intersentia, 2010), 682 p.; M C Zwanenburg, *Accountability under International Humanitarian Law for United Nations and North Atlantic Treaty Organization Peace Support Operations* (Leiden: E. M. Meijers Institut, 2004), p. 394. For a comprehensive list of legal doctrine concerning the application of IHL to international organisations, see F. Naert , *ibid.*, pp. 463-464, notes 1997, 1998 and T. Ferraro, 'The applicability of the law of occupation to peace forces ', in G. L. Beruto (ed.), *ibid.*, pp. 133-134, note 56.

II. Material scope of application of IHL to international organisations involved in armed conflict

The material scope of application of IHL to IO forces raises the fundamental issue of the qualification of the armed conflict in which these forces are involved. This relates to the question of IO intervention in a non-international armed conflict (NIAC) between governmental and rebel armed forces. In this respect, I will examine: firstly, whether the conflict between the intervening IO and the opposing armed force (governmental or rebel) is internal or international; and secondly, in the event that this conflict is qualified as international, whether the initial NIAC is internationalised a result of the IO's intervention.

1. Armed conflict between an international organisation and an organised armed force (governmental or rebel): internal or international?

In relation to the question of the qualification of a third-party intervention in a NIAC, the basic tendency is to distinguish between intervention in favour of rebel armed forces (a) and intervention in favour of a government (b).

(a) The case of an NIAC between governmental forces and a rebel group, where an IO intervenes in support of the rebels, against the State's government, is accepted as triggering an international armed conflict (IAC) between the IO and the State in question. Recent relevant examples include NATO's intervention in Kosovo in 1999[2] and in Libya in 2011.[3]

(b) The case of an IO's intervention in a NIAC in support of the government – that is with the government's consent or at the government's invitation – has led to considerable controversy.

On the one hand, it has been suggested that the organisation's intervention does not alter the nature of the conflict. According to this view, the conflict remains a non-international one, opposing the rebels to the government's forces assisted by the IO. The reason for this qualification lies with the fact that the IO is not acting against the State itself, but against the rebels. Therefore, there is no inter-State armed conflict in the sense of Common Article 2 to the four 1949 Geneva Conventions. This view attributes a decisive role to the consent given by the government of the State involved in the NIAC to the intervention and presence

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2 See, e.g., statements by the ICRC: *Operational update no. 99/02 on ICRC activities in Kosovo*, 24 March 1999; *Kosovo crisis: ICRC transfers released detainees*, News release, 25 June 1999, available at <www.icrc.org>. See also ICTY, *The Prosecutor v. Dordevic*, Trial Chamber II, 23 February 2011, p. 629, Paragraph 1580.

3 Cf. the concluding remarks to this conference made by the Vice-President of the ICRC, Ms. Christine Beerli. See also R., Van Steenberghe, 'L'emploi de la force en Libye: questions de droit international et de droit belge', *Journal des Tribunaux*, 2011, p. 531.

of foreign forces inside its territory.[4] It is because of this consent that the conflict does not become international (the "consent argument").

State practice offers some support for this view. An example is the foreign presence in Afghanistan since 2001. According to the ICRC, the IAC continuing in Afghanistan since October 2001 became an NIAC after June 2002, as a result of the consent extended to the intervening forces by the transitional government put in place by the Loya Jirga.[5] Along the same lines, in 2010, confronted with a case against German soldiers concerning a NATO air strike near Kunduz in Afghanistan, the German Federal Prosecutor-General qualified the situation in Afghanistan as a NIAC.[6]

On the other hand, it has been advanced that an IO intervention in a NIAC on the side of the government results in an IAC between the IO and the rebels. Different arguments have been put forward in order to substantiate this view.

One line of reasoning suggests that the armed conflict between an IO and a rebel group is international because the "territorial sovereignty" element, *raison d'être* of the distinction between IACs and NIACs, cannot be invoked with regard to an IO. Therefore, in the words of Marten Zwanenburg, 'sovereignty is not a reason for [IOs] not to apply the regime that offers the highest level of protection.'[7] This reasoning views conflicts involving IOs as a particular type of armed conflict that is to be distinguished from third State interventions in a NIAC. It

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4 ICRC, *International Humanitarian Law and the challenges of contemporary armed conflicts*, Report for the 31st International Conference of the Red Cross and Red Crescent, Doc. no. 31IC/11/5.1.2., Geneva, October 2011, p. 31:

> 'The ICRC has opted for an approach similar to that adopted by the International Court of Justice in its 1986 judgment in the [*Nicaragua* case]. It involves examining and defining, for the purposes of IHL, each bilateral relationship between belligerents in a given situation. In accordance with this approach, when multinational forces are fighting against state armed forces, the legal framework will be IHL applicable to IAC. When multinational forces with the consent of a host government are opposed to an organised non-state armed group (or groups), the legal frame of reference will be IHL applicable to NIAC.'

5 ICRC, *International humanitarian law and terrorism: questions and answers*, FAQ, 1st January 2011, available at <http://www.icrc.org>. For the impact of consent to the qualification of the conflict in Afghanistan see V. Koutroulis, *Le début et la fin de l'application du droit de l'occupation* (Paris: Pedone, 2010) pp. 213-217.

6 For the decision of the Prosecutor-General see <http://www.generalbundesanwalt.de/de/ showpress.php?themenid=12&newsid=360>.

7 M. C. Zwanenburg, supra note 1, p. 196. See also M. Sassoli, 'International humanitarian law and peace operations, scope of application ratione materiae', in G.L. Beruto (ed.), *supra* note 1, p. 104. For more doctrinal references in favour of qualifying an armed conflict involving IO's as an IAC independently of the nature of the opposing party, see R. Kolb, G. Porretto, S. Vite, *supra* note 1, p. 184, note 500.

should be noted that the position in favour of qualifying a conflict between IO forces and rebel groups as international does find some support both in legal texts[8] and in State practice.[9]

A second line of reasoning rejects the consent argument as such and can be applied to any type of third-party intervention in a NIAC (whether by IOs or by States). This view reacts to the consent argument by noting that, since both the government and the population (that is the rebels) are constitutive elements of the State, in a situation of NIAC, they can both claim to represent the State in question. Thus, an IO or a third State intervening on the side of the government against the rebels is in fact still fighting another State, the conflict resulting from such a confrontation thereby being international.[10]

If one accepts the parallel between a third State and an IO intervention in a NIAC, then the consent given by the government for such an intervention becomes a crucial element for the qualification of the conflict. However, attributing such a central role to consent in the qualification phase is not without its problems. The NATO intervention in Libya is a useful precedent in this respect. Given the NATO bombing campaign in Libya, the existence of an IAC between NATO and Gaddafi forces does not pose any particular difficulty. The question becomes more complicated in light of the evolution of the facts on the ground, the victories of the Libyan opposition against governmental forces and their gradual access to power.[11] On March 10, 2011, France recognised the National Transitional Council (NTC) – a council formed by the Libyan rebels – as the sole legitimate representative of Libya; Italy followed suit on April 4, 2011.[12] In June 2011, Germany and Australia also recognised the NTC as the legitimate government of Libya.[13] The question here is what impact, if any, does this recognition have on the qualification of the conflict between States and the Gaddafi forces? A consistent application of the consent argument would mean that, at least for the countries having recognised the NTC, the conflict may potentially be considered a NIAC since one can validly assume that the NTC has consented to NATO operations against Gaddafi forces. This would lead then to the parallel existence of multiple qualifications of the conflict, depending on the particular States' stance

8 Notably Article 2 Paragraph2 of the 1994 Convention on the safety of United Nations and associated personnel (*UNTS*, vol. 2051, p. 392), although not being an example of clarity, can be read as supporting such a qualification.

9 Several statements made by States during the elaboration of the 1994 Safety Convention indicate that an armed conflict involving UN forces was considered as an IAC, see UN Doc. A/AC.242/2, 13 April 1994, pp. 43-45.

10 E. David, *Principes de droit de conflits armés*, 4th ed., (Bruxelles : Bruylant, 2008), pp. 160-161 et 179-180.

11 *Keesing's Record of World Events*, vol. 57, 2011, pp. 50620, 50679-50680.

12 *Ibid*., pp. 50365, 50427.

13 *Ibid.*, p. 50539.

on the recognition of the NTC. Such a solution is problematic in at least two ways: firstly, it creates uncertainty as far as the applicable law is concerned; secondly, it subordinates IHL application to a political – and as such inherently random and uncertain– decision (the recognition of the government of a State), thereby running counter to the primacy attributed to facts on the ground in the qualification operation. In this regard, it is useful to recall the qualification problems concerning USSR's intervention in Afghanistan in 1979. Afghanistan's invasion by Soviet troops in December 1979 resulted in the accession to power of a new government that, on 28 December 1979, invited USSR forces to stay in Afghan territory.[14] This led the USSR to deny that it was involved in an armed conflict in Afghanistan and to reject all related ICRC appeals.[15]

These precedents show the limits and inconsistencies of the consent argument as far as the material scope of application of IHL is concerned. In this respect, it is important to note that, in the Libyan context, to the best of my knowledge, States have not invoked their recognition of the NTC in order to modify the qualification of the conflict. In view of all the above, I would suggest qualifying conflicts resulting from an IO's intervention in a NIAC as international, independently of the side upon which the organisation intervenes.

2. The "degree" of internationalisation: two parallel armed conflicts or one single international conflict?

Admitting that the conflict between an IO intervening in an NIAC and the opposing armed forces is international leads us to the second hypothesis to be investigated: does this external intervention internationalise the original NIAC or do we have a situation of two parallel but distinct armed conflicts, one internal and one international? Applying the question in the Libyan context: in view of NATO's bombing campaign, do we have one single IAC between, on the one hand, NATO and the opposition forces and, on the other hand, the Libyan governmental forces supporting Gaddafi? Or, does the IAC between NATO and Gaddafi forces exist in parallel with the initial NIAC between the Gaddafi forces and the rebels?

This last option finds support in State practice and has also been adopted by the ICRC.[16] In my view, in some situations, this binary approach may prove somewhat artificial in relation to realities on the ground. I thus agree with professor Eric David's statement that:

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14 *Keesing's Contemporary Archives*, vol. XXVI, 1980, pp. 30229, 30363.

15 ICRC, *Rapport d'activité 1980*, ICRC, Geneva, 1981, p. 49.

16 See the statement reproduced *supra* at note 4.

> 'dans l'hypothèse où ces affrontements [i.e. between UN and the opposite Party] deviendraient récurrents et prendraient une certaine ampleur (…) on pourrait considérer, comme dans le cas de l'intervention massive d'un Etat tiers, que l'ensemble du conflit interne s'internationalise.'[17]

Indeed, I would suggest that in cases where the third-party intervention reaches a high level of intensity and influences the outcome of the conflict substantially, allowing for the party favoured by the intervention to go on with the fighting,[18] the armed conflict should be viewed as one single IAC. The international jurisprudence of the ICTY and the ICC, as well as the UN Office of Legal Affairs, offers some support for this view.[19] Thus, if one considers that these conditions are fulfilled in the case of NATO's intervention in Libya, the conflict could be considered an IAC between, on the one hand, Gaddafi forces and, on the other, Libyan opposition forces and NATO.

III. Geographical scope of application of IHL to international organisations involved in armed conflict

The second part of this presentation deals with the geographical scope of application of IHL to IOs involved in an armed conflict. We will start by examining this scope of application in IACs and in NIACs (1) before turning to the particular case of 'transnational' conflicts (2).

1. *Ratione loci* application of IHL in international and non-international armed conflicts

If a conflict is qualified as an IAC, then IHL applies, according to the *Tadic* Appeals Chamber decision of 1995, 'in the whole territory of the warring States'.[20] If we accept that the armed conflict involving an IO can be of a non-international character, then the 1995 *Tadic* decision states that 'the rules contained in [Common] Article 3 also apply outside the narrow geographical context of the actual theatre of combat operations' and concludes that IHL in NIACs

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17 E. David, *supra* note 10, p. 183.

18 *Ibid*., p. 175.

19 See the ICTY jurisprudence cited by Eric David, *ibid*., p. 175. See also, ICC, *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Decision on the confirmation of charges, Pre-Trial Chamber I, 30 September 2008, p. 78, Paragraph 240. For the position of the UN Office of Legal Affairs see D. Shraga, 'The applicability of international humanitarian law to peace operations: from rejection to acceptance', in G.L. Beruto (s.l.d.), supra note 1, p. 94:

> 'It was the Secretariat's view (…) that, in reality, the involvement of peacekeepers in an internal armed conflict blurs the distinction between an international and internal armed conflict, if not "internationalizes" the conflict as a whole.'

20 ICTY, *The Prosecutor v. Dusko Tadic*, Appeals Chamber, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, Paragraph70, available at <www.icty.org>.

applies to 'the whole territory under the control of a party, whether or not actual combat takes place there.'[21] This view is endorsed by the 1998 ICTR *Akayesu* judgment.[22]

It is submitted that, both in IACs and NIACs, the geographical criterion in IHL application is subordinate to IHL's material and personal scope of application.[23] In other words, the decisive factor for IHL's *ratione loci* application rests with the occurrence of hostilities and the persons connected with them.

There is ample textual support for this proposition. As far as IACs are concerned, the 1949 Geneva Conventions (GC) do not explicitly determine their geographical scope of application. They do state however that prisoners of war remain protected by the GC III even if they are transferred to a third State (Article 12). Articles 4 of the GC I and 5 of the GC II stipulate the application by analogy[24] of the GC to members of the armed forces of the belligerent parties that are wounded, sick, shipwrecked, medical personnel etc. and are received or interned in the territory of a neutral State. The 1977 First Additional Protocol (AP I) is more explicit about the *ratione loci* scope of application of its rules. AP I Article 49 offers a clear indication that the Protocol's geographical scope of application should be construed liberally. The second paragraph of the Article states that 'The provisions of this Protocol with respect to attacks apply to all attacks in whatever territory conducted …'. More significantly, according to AP I Article 9, the rules of the relevant part of the Protocol – a part concerning the protection of wounded, sick and shipwrecked – shall apply 'to all those affected by a situation referred to in Article 1' of the Protocol. The *travaux préparatoires* of the AP I reveal that the reference to the ratione loci criterion was deliberately omitted from the text of Article 9 and that, in the words of the ICRC Commentary, 'it was considered that the application *ratione personae* in itself determined the field of application of the Protocol in a sufficiently clear manner.'[25]

The same reasoning applies in NIACs, if one accepts that IOs can be involved in such conflicts. Common Article 3 does not contain much information on the subject. Article 2 of the 1977

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21 *Ibid*., Paragraphs69, 70.

22 ICTR, *The Prosecutor v. Jean-Paul Akayesu*, Trial Chamber I, Judgment, 2 September 1998, ICTR Reports of Orders, Decisions and Judgments 1998, vol. I, p. 362, Paragraphs 635, 636.

23 R. Kolb &R. Hyde, *An Introduction to the International Law of Armed Conflicts* (Oxford,Portland Oregon: Hart Publishing, 2008), pp. 94-95.

24 'By analogy' because some of the Conventions' provisions are applicable only to the belligerents. The term was inserted in the Articles in order to avoid introducing a full list of applicable Articles. Such a list would be 'somewhat rigid and arbitrary, some of the Articles being partially applicable', J. S. Pictet, *Commentary – II Geneva Convention*, Geneva, ICRC, 1960, pp. 44-45.

25 Y. Sandoz,C. Swinarski,B. Zimmermann (eds.), *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (Geneva, ICRC: Martinus Nijhoff Publ., 1987), p. 138, Paragraph 413 (hereafter: *ICRC AP Commentary*).

Second Additional Protocol (AP II) stipulates that the Protocol shall be applied 'to all persons affected by an armed conflict as defined in Article 1'. Thus, the principle guiding the application of AP II is that persons affected by the NIAC are protected by the Protocol wherever they are in the territory of the State engaged in the conflict. The reason for not stating explicitly that AP II applies to the whole territory of the State in question was that the conflict may be limited to one part of a State's territory.[26] In this case, persons living in other parts of the territory with no nexus to the conflict will not be affected by it and therefore need not be protected by IHL. The 1998 *Akayesu* judgment confirmed that the same reasoning is to guide the applicability of common Article 3 as well.[27] These provisions clearly reflect the importance of the criterion over the *ratione loci* one. As the ICRC commentary to AP II states, 'the applicability of the Protocol follows from a criteria [sic] related to persons, and not to places.'28

2. The case of "transnational" armed conflicts

The final point that will be discussed is the "spill-over" of a NIAC involving IO forces into the territory of a neighbouring State. An illustration of this situation would be a scenario of drone attacks conducted by International Security Assistance Force (ISAF) forces against Taliban groups inside the territory of Pakistan. This situation relates to what has been referred to as 'transnational armed conflicts'.[29] It should be noted that this term is purely descriptive and does not entail the application of a specific body of rules as such. Therefore, one should look to traditional IHL conflict classifications in order to determine the applicable law.

If one applies the consent argument, the reaction of the territorial State becomes the decisive factor in qualifying the conflict. In the example of ISAF drone attacks inside Pakistan, one would need to determine whether Pakistan consented or not to these attacks. In this speaker's opinion, absence of consent by Pakistan would mean that the attacks trigger an IAC between ISAF forces and Pakistan. This IAC would exist in parallel to the conflict between ISAF forces and the Taliban militia.[30] If however the territorial State – in this case Pakistan – consents to the attacks, then the only existing armed conflict is the NIAC between the Afghan govern-

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26 *Ibid*., pp. 1359-1360, Paragraph 4490.

27 ICTR, *The Prosecutor v. Jean-Paul Akayesu*, Judgment, *supra* note 22, p. 362, Paragraph 635.

28 *ICRC AP Commentary*, *supra* note 25, p. 1360, Paragraph 4490.

29 See among many, M. Sassoli, *Transnational Armed Groups and International Humanitarian Law*, HPCR Occasional Paper Series no. 6, Winter 2006, 43 p., available at <http://www.hpcrresearch.org/sites/default/files/ publications/OccasionalPaper6.pdf>; N. Lubell, 'Transnational Armed Conflicts?', in *Armed Conflicts and Parties to Armed Conflicts under IHL: Confronting Legal Categories to Contemporary Realities*, Proceedings of the 10th Bruges Colloquium, 22-23 October 2010, pp. 58-63.

30 As long as there is no link between the two actors opposing ISAF (Pakistan on the one hand and the Taliban on the other) there is no case for an internationalisation of the NIAC between ISAF and the Taliban.

ment, and the invited ISAF forces with the Taliban militia. This conflict remains non-international, despite its extraterritorial dimension.

As far as the applicable law is concerned, it is submitted that this includes at least Common Article 3 and customary rules of IHL. Common Article 3 speaks of a conflict 'occurring in the territory of one of the High Contracting Parties'. Despite the fact that the traditional understanding of a NIAC is that it takes place inside a single country, Common Article 3 has been interpreted widely, so as to include cases of armed conflicts not limited to the territory of a single State. The US Supreme Court *Hamdan v. Rumsfeld* judgment[31] is an example of this. This is not excluded by the text of the Article itself, since the 'territory of one of the High Contracting Parties' can be read as meaning 'the territory of any one of the High Contracting Parties'. It is also consistent with the nature of Common Article 3 as positing minimum humanitarian standards to be observed in all armed conflicts. As for customary IHL rules, it suffices to note that the 2005 ICRC study on customary IHL does not subject the application of these rules to territorial limitations.

The case is somewhat different with the AP II. Article 1 of the Protocol requires the conflict to take place 'in the territory of a High Contracting Party between its armed forces and dissident armed forces'. Provided that the material scope of application of AP II is met in the case of the conflict in Afghanistan, Article 1 would seem to exclude the Protocol's application both to States that have ratified it and are participating in hostilities in Afghanistan as invited forces, and to Afghan forces[32] operating outside Afghan territory, for example in Pakistan. The importance of this question is diminished by the fact that most AP II rules have reached customary status, at least according to the ICRC study. Nonetheless, there still may be some practical use for the conventional application of AP II, for example in case of a State objecting to the customary character of some of the Protocol's rules. In this case, it should be pointed out that a strict application of the territorial criterion in AP II Article 1 could lead to unfortunate results from a humanitarian perspective. Let's take again the conflict in Afghanistan as an example and the hypothesis of a State A (party to AP II and not recognising the customary nature of its rules) intervening in this conflict on the side of the Afghan government. On the one hand, State A could rely on the consent argument and emphasise the fact that its operations against the Taliban are conducted on behalf and with the consent of the Afghan government, thereby excluding the qualification of the conflict as international and the fully-fledged application of IHL. On the other hand, turning to IHL rules applicable in this NIAC, State A could invoke

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31 US Supreme Court, *Hamdan v. Rumsfeld et al.*, 29 June 2006, 548 U.S. 557 (2006).

32 Afghanistan ratified AP II on 10 November 2009, see the ICRC table of State parties to IHL treaties available at: <http://www.icrc.org/IHL.nsf/(SPF)/party_main_treaties/$File/IHL_and_other_related_Treaties.pdf >.

the territorial criterion in AP II Article 1 in order to exclude the application of the Protocol in its operations. In this scenario, we are confronted with two contradictory lines of reasoning. State A is relying on its connection to the Afghan government in order to exclude the qualification of the conflict as international. Conversely, when it comes to applying the rules governing NIACs, State A invokes its independence from the territorial State in whose territory its forces operate in order to reject the application of AP II. The Afghan government could thus circumvent AP II provisions simply by avoiding engaging in operations that entail a risk of violating AP II, and by delegating the conduct of these operations to invited forces, since these forces would not be bound by the Protocol.

IV. Conclusion

The material and geographical scope of application of IHL to IO operations gives rise to many interesting and complex questions that are still heavily debated in legal doctrine. The objective of this presentation was to guide you through these questions without betraying their complexity. Thank you very much for your attention.

SESSION 1 – APPLICABILITY / APPLICATION OF INTERNATIONAL HUMANITARIAN LAW (IHL) TO INTERNATIONAL ORGANISATIONS INVOLVED IN PEACE OPERATIONS

During the debate following the presentations of the first session, the audience raised five main issues:

1. The belligerent nexus

One participant questioned the relevance of using the belligerent nexus as a condition for the applicability of IHL, in particular in a peacekeeping context, where the international force is not acting on behalf of a party to the conflict.

One of the panellists highlighted that the belligerent nexus, used as a complementary approach, is very important. He deems that without the belligerent nexus, it is necessary to wait for the classic criteria to be met and in the case of non international armed conflict (NIAC), for the criterion of intensity to be fulfilled, in order to apply IHL. Therefore, it is important to know whether to interpret the belligerent nexus broadly or narrowly. The belligerent nexus can be used only if the action of the third party in the pre-existing conflict can reasonably and objectively be perceived as designed to support one of the other parties. If this is not the case, it recommends applying a cautious approach and waiting for the intensity criterion to be fulfilled.

2. Identification of the parties to the conflict and its consequences

One of the speakers asked about the case where only the international organisation (IO) is party to a conflict. What would be the scope of application of IHL? Does it apply to only the forces that, at that moment, are at the disposal of the IO, or does it extend to all the armed forces of the troops contributing countries (TCCs)?

One panellist replied that from a State's perspective it was, of course, much more interesting to consider that the effects of being a party are limited to your area of operations and do not reflect on your situation back home. It is, for example, what the United Kingdom argued during the Falklands War with Argentina.

Another speaker highlighted that for the ICRC, this issue was an important dilemma in the case of Libya. Indeed, did the fact that only NATO was party to the conflict, and that IHL was therefore applicable only in the theatre of NATO's operations, mean that Libyan civilians arrested in France, for example, were not protected by the 4th Geneva Convention? Beyond the

issue of legal qualification, it raises real practical problems in terms of protection. However, the law is still not very settled about this issue and it seems necessary to work on it in order to be able to delimit the legal scope of application of IHL in such a situation.

3. Co-responsibility

Someone in the audience asked about the possibility of having co-responsibility shared by the IO and the TCC: in that case, would there be two different legal regimes applicable, one for the IO and another for the TCC, or would they be bound by the same regime?

One of the panellists replied by saying that establishing the responsibility of the IO can be quite complicated. However, if that responsibility were to be established, as well as the responsibility of the TCC, there is a great chance that two different regimes would be applicable. Indeed, in practice, the IO and the TCC do not have the same IHL obligations, as the IO is more likely to be bound only by customary law and the TCC by its treaties' obligations as well as customary law. However, in that situation, it can be very complicated for a Commander of Unit to know which regime the unit has to respect. The solution might be, considering the aim of IHL, that it should obey the regime granting the most protection.

Another speaker highlighted that an either/or approach of responsibility is not in accordance with realities on the ground. Indeed, taking the example of detention in Afghanistan, even if NATO were considered a party to the conflict at some point and therefore bore responsibility for the actions of its TCCs, the reality was that for detention operations TCCs took over and were therefore directly responsible.

One of the panellists furthermore added that, in that case, co-responsibility offers the victims a broader opportunity to bring their case to justice, as it is much easier to take a TCC to court than an IO.

4. Internationalisation of the conflict

The question of the internationalisation of the conflict through the intervention of an IO was raised on several occasions, especially in reference to Libya. Speakers had different points of view on the question.

One participant argued that two conflicts existing in parallel, a NIAC between the governmental forces and the rebels, and an IAC between the IO and the rebels or the governmental forces, is not the only possible scenario. Indeed, in certain situations, the degree of intervention by the IO is such that it leads to a general internationalisation of the conflict (see ICTY *Naletilic* 2003). In his view, in the Libyan conflict, there was a moment where the link between NATO

and the rebels became such a strong link that it generated a complete international conflict, with NATO and the rebels on one hand and the Gaddafi regime on the other. The consequence of such a global internationalisation of the conflict is, for example, to grant the prisoner of war status to any pro-Gaddafi fighter detained by the rebels and vice versa.

On the contrary, another panellist replied that, in the view of the ICRC, even if the concept of global internationalisation is very attractive because of its effect of granting the whole protection provided by the Geneva Conventions, it however does not always match the reality. Firstly, States are reluctant to adopt such an approach, as they do not want to give up their right to prosecuting the insurgents. Secondly, applying the law of IAC to all parties to the conflict means imposing very heavy obligations on the non-State actors involved (NSAs).The ICRC dialogues with some NSAs on a regular basis and it appears that concerning conditions of detention under the 3rd Geneva Convention, most NSAs have no capacity to fulfil those obligations. In that case, internationalising the conflict generates an inadequacy of the law to apply to a specific situation. Therefore, the ICRC thinks that when it comes to confrontation between a State or an IO against an NSA, it is only the law governing NIAC that applies.

5. Articulation of law enforcement and IHL

A more general discussion about the articulation between IHL and law enforcement was raised during the debate.

A speaker in the audience highlighted that the application of IHL should not be effected on a geographical basis but by the definition of a military objective, whether in IAC or in NIAC. In IAC, the best example would be Northern Iraq, in 1990, where as the Hussein regime was not making use of their military infrastructures in Iraqi Kurdistan in relation to the conflict in Kuwait, those infrastructures were not military targets. In NIAC, this approach can be used to limit what or who can be targeted. Indeed, generalising the application of IHL to an entire territory, while the conflict is in fact limited to a certain part of this territory, can weaken the effect of human rights application.

One of the panellists further added that indeed, looking at the *travaux préparatoires* of the 2nd Additional Protocol of the Geneva Conventions, it was first suggested that it would state that 'the 2nd additional protocol is applicable to the entire territory'. However, for the reasons mentioned above, this was given up and the 2nd Additional Protocol does not contain any precise rationae loci element but instead its Article 2 states that if a person affected by the hostilities 'finds himself in some distance of the theatre of hostilities', he still remains covered by IHL.

A speaker then clarified that to determine which rules apply (IHL or law enforcement), it does not depend on either the place or the person. For example, in the case of an NIAC taking place in the south of a given territory, if a person affected by the hostilities finds himself in the north of that territory, far away from the theatre of hostilities, different rules will apply depending on the type of operations concerned (i.e.: use of force or detention). If the person is not in the battlefield then the rules for opening fire will be law enforcement rules. However, concerning detention, if the person is arrested on grounds of activities related to the conflict, then the rules of NIAC apply and especially the possibility of internment.

Session 2
Panel Discussion : Applicability/Application of Human Rights Law to IOs involved in Peace Operations

Chair person: **Jan Wouters,** *Catholic University of Leuven*

Dr. Frederik Naert[1]
Legal Service, Council of the EU

Résumé

La place accordée aux droits de l'homme dans les opérations de paix régies par le cadre normatif et institutionnel de l'Union européenne (UE) est caractérisée par de multiples spécificités. Tout d'abord, les normes de la Convention européenne des Droits de l'Homme (ConvEDH) sont souvent plus détaillées et spécifiques que celles des autres instruments internationaux ou régionaux de droits de l'homme. La Cour Européenne des Droits de l'Homme (CEDH), qui rend des jugements contraignants, peut être saisie, non seulement par les États, mais également par les individus. La nature même de l'UE est également à prendre en compte dans cet état des lieux. En effet, l'UE possède maintenant la personnalité juridique internationale et peut donc être partie à des conventions. Elle est ainsi soumise à des obligations conventionnelles concernant les droits de l'homme. Ces règles de droits de l'homme de l'UE, reconnues par la Cour de justice de l'UE (CJUE) comme les plus hautes normes de droit primaire de l'UE, s'appliquent non seulement à l'UE elle-même, mais également à ses États membres lorsque ceux-ci mettent en œuvre «le droit de l'Union».

La CEDH estime que la ConvEDH s'applique extra-territorialement dans certaines conditions. Cette jurisprudence est aujourd'hui établie même si elle reste encore sujette à interprétation et est encore en évolution. La question de l'application extraterritoriale des dérogations à certains droits de l'homme reste cependant plus floue. Selon la jurisprudence récente de la CEDH, de telles dérogations requerraient soit une autorisation de dérogation explicite de la part du Conseil de Sécurité des Nations Unies soit une autorisation formelle de la part des États membres.

La CEDH n'a fait référence au droit international humanitaire (DIH) qu'assez récemment, appelant à sa prise en compte, de manière cependant limitée. La Cour aura sûrement à préciser son interprétation de la relation entre le DIH et les droit de l'homme dans l'avenir, ainsi que sur de

1 Member of the Legal Service of the Council of the EU and affiliated senior researcher at the KU Leuven. The views expressed are solely the author's and do not bind the Council or its Legal Service.

nombreuses autres problématiques liées au DIH. Les lignes directrices de l'UE sur la promotion du respect du DIH, revues en 2009, impliquent la reconnaissance d'une potentielle application concurrente du DIH et des droits de l'homme.

Dans le cadre de la Politique de sécurité et de défense commune (PSDC) de l'UE, les opérations de maintien de la paix peuvent comporter des tâches de force de combat. Si l'UE a reconnu que dans le cas, jamais concrétisé pour l'instant, où l'UE serait partie à un conflit le DIH s'appliquerait entièrement en tant que lex specialis, elle considère la plupart du temps que le cadre normatif applicable reste celui des droits de l'homme. Cependant les obligations des États membres en la matière ne sont pas toute identiques et sont souvent interprétées différemment d'un État à l'autre. Dans tous les cas, au moins en terme de politique générale, les normes de droits de l'homme sont une référence centrale dans la conduite des opérations de PSDC. En pratique, la planification opérationnelle de l'UE et les règles d'engagement prennent en compte les standards reconnus des droits de l'homme.

Enfin, certaines spécificités européennes doivent également être soulignées quant à la question de la responsabilité. Tout d'abord, l'UE possèdent un système propre de recours avec un rôle central des États membres puisque la CJUE n'a pas juridiction en ce qui concerne les questions de PSDC. Contrairement à d'autres OI, l'UE ne possèdent pas d'immunité de juridiction devant les Cours de ses États membres, à l'exception des domaines où la CJUE est compétente. Si, comme de nombreuses autres OI, l'UE met en place des mécanisme de recours spécifiques dans ses opérations de PSDC, à travers des accords sur le statut des forces, il existe également un accord entre les États membres de l'UE afin de réglementer le statut de leurs forces et personnels respectifs sur les territoires des différents États membres. Cet accord n'est cependant pas encore rentré en vigueur. Il faut enfin ajouter que toute la question de l'attribution de responsabilité entre les États membres et l'UE perdra fortement de son importance une fois que l'UE sera partie à la ConvEDH. En effet, la CEDH aura alors compétence, que ce soit l'UE ou les États membres qui soient responsables pour la conduite d'une opération de PSDC.

Introduction

In this contribution, I will identify the main issues relevant for the application of Human Rights Law to international organisations involved in peace operations from a European perspective.

While the focus will be on the European Union (EU), I will also cover to some extent a wider European perspective (I). I will examine the question of the extraterritorial scope of application of the European Convention on Human Rights (ECHR), including extraterritorial deroga-

tions (II) and subsequently the relationship between International Humanitarian Law (IHL) and Human Rights Law (III). This is followed by an overview of how these issues have been addressed in the framework of EU crisis management operations (IV). In the final section, I will briefly point out some EU specificities in relation to responsibility (V).

I. A 'Double' European Perspective

1. A'Wider' European Perspective: the European Convention on Human Rights

The ECHR was concluded in the framework of the Council of Europe, binds 47 European States and is undoubtedly the primary European human rights instrument.

In this contribution, it may suffice to highlight two features of the ECHR. First, its provisions are often more detailed and specific than those of other human rights treaties (such as the International Covenant on Civil and Political Rights), e.g. in relation to the right to life and deprivation of liberty. Second, States Parties to the ECHR have to accept the jurisdiction of the European Court of Human Rights (ECtHR), including in relation to complaints by individuals, as the ECtHR issues binding judgments.

It might be added that there has been an increase in ECtHR judgments in relation to armed conflicts and military/peace operations during the last 15 years.

This wider European perspective may be relevant for European States participating in operations led or mandated by international organisations (not only the EU).

2. A More 'Narrow' European Perspective: the European Union

In addition to all EU Member States being bound by the ECHR, there are specific human rights obligations in the framework of the EU, some of which are relevant for our purposes.[2]

First, the EU has now explicitly been granted legal personality (by the Treaty of Lisbon), including international legal personality.[3]

Second, as opposed to most international organisations, the EU has extensive human rights obligations, including treaty-based ones. These obligations are especially laid down in Article

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2 See extensively F. Naert, *International Law Aspects of the EU's Security and Defence Policy, with a Particular Focus on the Law of Armed Conflict and Human Rights* (Brussels: Intersentia, 2010), pp. 397-408, 418-419 and 646-653.

3 See Article 47 TEU and the notification to third parties regarding the Treaty of Lisbon (EU Council Doc. 16654/1/09, available at http://www.consilium.europa.eu/documents/access-to-council-documents-public-register?lang=en).

6 of the Treaty on European Union (TEU) and in the EU's Charter of Fundamental Rights,[4] which has the same value as the EU Treaties. Article 6 TEU *inter alia* binds the EU to the ECHR and provides that fundamental rights, as guaranteed by the ECHR and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union's law. Article 21 TEU reinforces this in relation to the EU's external relations. In addition, Article 6(2) TEU provides for the EU's accession to the ECHR. That accession is currently under negotiation. It will constitute an important precedent for an international organisation to become a party to a key human rights treaty.[5] As the EU is already bound to the ECHR in substance (via Article 6 TEU) this accession will mainly have an impact on remedies (see briefly section V below).

Third, the European Court of Justice (ECJ) has essentially elevated EU human rights rules to the highest norms of primary EU law.[6]

Fourth, these EU human rights rules bind not only the EU itself but also its Member States when they are implementing Union law (see Article 51(5) of the Charter of Fundamental Rights).

Therefore the EU has ample human rights obligations. The challenges that arise for the EU in relation to human rights in its peace operations essentially concern the same issues that also vex States. In addition, there is the question of attribution (see very briefly section V below).

II. The Extraterritorial Application of Human Rights

1. Extraterritorial Scope of Application of the ECHR: 'Jurisdiction'

Pursuant to Article 1 ECHR 'The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in … this Convention'. Since peace operations generally take place outside the territory of the States participating in them, the question has

4 [2010] OJ C 83/389.

5 See also Protocol No 5 to the Treaty of Lisbon as well as Article 17 of Protocol No 14 ECHR (Strasbourg, 13 May 2004), which inserted a new paragraph in Article 59 ECHR stating that '[t]he European Union may accede to this Convention'. The negotiations on this accession are ongoing. See generally http://www.coe.int/lportal/web/coe-portal/what-we-do/human-rights/eu-accession-to-the-convention. The EU is already a party to the Convention on the Rights of Persons with Disabilities (New York, 13 December 2006) but this does not have the same significance.

6 See especially Joined Case C-402/05 P and C-415/05 P, *Kadi and Al Barakaat v. Council and Commission*, 3 September 2008, Paragraphs 301-309.

arisen as to what extent participating States' human rights obligations apply extraterritorially to the conduct of their forces abroad in peace operations.[7]

This question arises before that of the relationship between IHL and human rights comes into play, since the latter requires that IHL and Human Rights Law (HRL) are applicable in the same case.

Given the brevity of this contribution, I have to be extremely short on this point. The ECtHR has accepted that the ECHR applies extraterritorially in some circumstances.[8] However, the case-law is not necessarily fully consistent and is still evolving. I would submit that the most recent *Al-Skeini* judgment[9] confirms a tendency to restrict the scope of the *Bankovic* judgment[10] and to accept extraterritorial application of the ECHR in wider circumstances, including to a limited extent where only limited powers are exercised extraterritorially.[11] It is probably fair to say that States Parties to the ECHR have often opposed extraterritorial application but that their positions have evolved towards what one might describe as a reluctant acceptance.

2. Extraterritorial Derogations

Article 15 ECHR permits derogation from most human rights in case of war or serious emergency. When the ECHR applies extraterritorially, the question arises of whether it is possible to derogate extraterritorially in relation to a peace operation.

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7 See generally F. Naert, *supra* note 2, pp. 544-567; F. Coomans & T. Kamminga (eds.), *Extraterritorial Application of Human Rights Treaties* (Intersentia, 2004); M. Gondek, *The Reach of Human Rights in a Globalising World: Extraterritorial Application of Human Rights Treaties* (Intersentia, 2009); C. Meredith & T. Christou, *Not in My Front Yard: Security and Resistance to Responsibility for Extraterritorial State Conduct* (Wolf Legal Publishers, 2009) and J. Cerone, 'Human Dignity in the Line of Fire: The Application of International Human Rights Law during Armed Conflict, Occupation, and Peace Operations', 39 Vanderbilt J.T.L. 2006, pp. 1447-1510.

8 See ECtHR, *Soering v. UK*, 7 July 1989; *Drozd and Janousek v. France and Spain*, 26 June 1992; *Loizidou v. Turkey*, 23 February 1995 (preliminary objections) and 18 December 1996 (merits); Cyprus v. Turkey, 10 May 2001; *Halima Musa Issa and Others v. Turkey*, 30 May 2000 (admissibility) and 16 November 2004 (merits); *Ilie Ilaşcu and Others v. Moldova and Russia*, 4 July 2001 (admissibility) and 8 July 2004 (merits); *Vlastimir and Borka Bankovic and Others v. Belgium and Others*, 12 December 2001 (admissibility); *Öcalan v. Turkey*, 12 May 2005 (Grand Chamber); *Isaak v. Turkey*, 28 September 2006 (admissibility); *Mansur Pad and Others v. Turkey*, 28 June 2007 (admissibility); *Solomou v. Turkey*, 24 June 2008; *Al-Saadoon and Mufdhi v. UK*, 30 June 2009 (admissibility) and, most recently, *Al-Jedda v. UK* and *Al-Skeini v. UK*, both 7 July 2011 (the domestic judgments are [2007] UKHL 26 and [2007] UKHL 58). See also *Behrami and Behrami v. France* and *Saramati v. France, Germany and Norway*, Grand Chamber, 31 May 2007 (admissibility).

9 *Supra* previous note.

10 *Supra* note 8.

11 See already my analysis prior to this judgment, in F. Naert, *supra* note 2, pp. 544-557.

The issue has not been analysed extensively in doctrine or jurisprudence. Several commentators have opposed this possibility, arguing mainly that the life of 'the nation' which needs to be threatened in order for Article 15 ECHR to apply could only be that of the participating State, and that this will rarely be threatened. However, there is support in the case law for the opposite view, namely that where the ECHR does apply extraterritorially, it is also possible to make extraterritorial derogations. I consider the latter to be the better view – and also a more realistic one.[12]

This matter is likely to become more topical in the wake of the ECtHR's recent *Al-Jedda* judgment.[13] Following the rejection of derogation from the ECHR based on a Security Council mandate which did not explicitly include a derogation,[14] it would appear that under the ECHR any derogation will require either an explicit UN Security Council derogation or a formal derogation by participating States under the ECHR.[15]

III. The IHL – Human Rights Relationship

1. ECHR Case-Law on IHL

The space available here only allows for mentioning a few key features of the ECHR jurisprudence on IHL.[16]

First, there was an interesting but arguably inconsistent finding of the European Commission of Human Rights regarding civilian internees on the one hand (breach of the ECHR without examining IHL) and prisoners of war on the other hand (governed by IHL and not examined on substance under the ECHR) in one of the early Cyprus cases.[17]

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12 See F. Naert, supra note 2, pp. 577-580 with further references. Compare especially UK, House of Lords, *R (on the application of Al-Jedda,) v Secretary of State for Defence)*, 12 December 2007, [2007] UKHL 58, Paragraphs 38 and 150, with European Commission of Human Rights, *Cyprus v. Turkey*, 4 *E.H.R.R.* 1982, pp. 482-582 Paragraph 525. See also ECtHR, *Bankovic* (*supra* note 8), Paragraph 62. In *Al-Jedda v. UK* (*supra* note 8), the ECtHR merely stated that *'No deprivation of liberty will be compatible with Article 5 Paragraph 1 unless it falls within one of those grounds or unless it is provided for by a lawful derogation under Article 15'* (Paragraph 99) and that *'The Government do not … purport to derogate under Article 15'* (Paragraph 100). Compare also Human Rights Committee, *Concluding Observations/ Comments on Israel*, UN Doc. CCPR/CO/78/ISR, 21 Augustus 2003, Paragraph 11. See also some of the annotations on *Al-Jedda* forthcoming in *50 Mil L L War Rev* 2011.

13 *Supra* note 8.

14 The Court ruled that *'…it is to be expected that clear and explicit language would be used were the Security Council to intend States to take particular measures which would conflict with their obligations under international human rights law'* (Paragraph 102) and did not accept that that was the case in the case at hand.

15 Similarly the annotation of *Al-Jedda* by H. Krieger forthcoming in 50 *Mil L L War Rev* 2011.

16 See more extensively F. Naert, *supra* note 2, pp 607-615.

17 *Cyprus v. Turkey*, Report of 10 July 1976, 4 *E.H.R.R.* 1982, pp. 482–582, especially pp. 529–533 and 555–559, including points II.2–3 of the conclusions in Part IV. Note the criticism in the dissenting opinion, *id*., pp. 561–565, especially Paragraphs 6–7.

This was followed by a period of silence on IHL with the exception of a few isolated cases in which there may have been an implicit application of IHL in cases where the result would most likely have been the same under both IHL and Human Rights Law (and marked by ignoring IHL altogether in relation to Northern Cyprus). This includes the rulings in several Chechnya cases on the basis of strict human rights standards.[18]

It is only in recent years that the ECtHR has started to explicitly refer to IHL.

In *Varnava and Others v. Turkey* (18 September 2009, Paragraph 185), the Court ruled that

> *'Article 2 must be interpreted in so far as possible in light of the general principles of international law, including the rules of [IHL] which play an indispensable and universally-accepted role in mitigating the savagery and inhumanity of armed conflict […]. The Court therefore concurs … that in a zone of international conflict Contracting States are under obligation to protect the lives of those not, or no longer, engaged in hostilities ….' (emphasis added)*.

In *Al-Jedda v. UK* (7 July 2011, Paragraph 107),

> 'the Court does not find it established that [IHL] places an obligation on an Occupying Power to use indefinite internment without trial. Article 43 of the Hague Regulations requires an Occupying Power to take "all the measures in his power to restore, and ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country" (…). While the International Court of Justice in its judgment Armed Activities on the Territory of the Congo interpreted this obligation to include the duty to protect the inhabitants of the occupied territory from violence, including violence by third parties, it did not rule that this placed an obligation on the Occupying Power to use internment; indeed, it also found that Uganda, as an Occupying Power, was under a duty to secure respect for the applicable rules of international human rights law … (…). In the Court's view it would appear from the provisions of the Fourth Geneva Convention that under [IHL] internment is to be viewed not as an obligation on the Occupying Power but as a measure of last resort (see paragraph 43 above)'.

18 E.g. the judgments of 24 February 2005 in *Isayeva, Yusupova and Bazayeva v. Russia, and Isayeva v. Russia*.

This suggests that the ECtHR is willing to take IHL into account, but only to a certain extent. The Court will probably have to elaborate its views on the relationship between IHL and human rights in more detail in some of the Georgia cases.[19]

In any event, a number of questions currently remain open. For instance, can the applicability of IHL, at least in the case of international armed conflicts, entail an automatic derogation under the ECHR? And can the exception to the right to life due to death resulting from the use of force strictly necessary 'in action lawfully taken for the purpose of quelling a riot *or insurrection*' (emphasis added) in Article 2(2)c ECHR be a basis for consulting conduct of hostilities rules under IHL that are applicable in non-international armed conflicts, even in the absence of a derogation?

2. An EU perspective

The EU Guidelines on promoting compliance with IHL, updated in 2009, provide in Paragraph 12 that 'while distinct, the two sets of rules may both be applicable to a particular situation and it is therefore sometimes necessary to consider the relationship between them'.[20]

This implies recognition of the potential concurrent application of IHL and human rights. The European view appears to recognise the *lex specialis* principle but as a principle to be applied on a case-by-case basis, e.g. leaving room for a possible distinction between international and non-international armed conflicts as regards issues such as detention.

IV. The Handling of These Issues in the Framework of EU Crisis Management Operations

1. The Nature of EU Crisis Management Operations and Implications for Applicable Law

Under Article 42(1) TEU, the EU's Common Security and Defence Policy (CSDP) includes military and civilian 'missions outside the Union for peacekeeping, conflict prevention and strengthening international security'. These missions are further defined in Article 43 TEU as follows: they shall include a broad range of tasks, including 'peacekeeping tasks, tasks of combat forces in crisis management, including peace-making and post-conflict stabilisation'. The 'tasks of combat forces in crisis management, including peace-making' cover peace enforcement and hence potentially high intensity operations involving combat.

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19 On 13 December 2011, the ECtHR declared admissible the case of *Georgia v. Russia* (II) (Appl. No. 38263/08), relating to the armed conflict between Georgia and Russia in August 2008.

20 [2009] OJ C 303/12.

The EU and its Member States accept that if EU-led forces become party to an armed conflict, IHL will fully apply to these forces. This was *inter alia* reflected in the Salamanca Presidency Declaration, which provided that '[r]espect for International Humanitarian Law is relevant in EU-led operations when the situation they are operating in constitutes an armed conflict to which the forces are party'.[21] It is consistent with the scope of application of IHL itself (see the contributions in session One).[22]

However, given the wide range of CSDP operations, only some of these operations might involve combat and IHL is therefore likely to be applicable only in very few CSDP operations. EU policy is therefore that IHL does not necessarily apply in all CSDP operations as a matter of law nor is it necessarily the most appropriate standard as a matter of policy in all CSDP operations. In fact, so far EU-led forces have not become engaged in combat as party to an armed conflict in any of the EU's CSDP operations. While IHL could have become applicable if the situation had escalated in some of these operations, especially Artemis and EUFOR Chad/RCA, this did not happen.[23]

2. EU Policy and Practice

When IHL does not apply, the EU primarily looks towards HRL as the appropriate standard for the conduct for CSDP operations (that is not to say that HRL is not relevant when IHL does apply; see section III above).

However, the controversies regarding the applicability of HRL *de iure* referred to above are 'imported' into the EU framework and potentially affect the application of human rights in CSDP operations.[24] While divergences are limited as Member States broadly have the same European and international human rights obligations, Member States' obligations are not fully identical and they may interpret some of their shared obligations differently.

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21 The outcome of the international humanitarian law European seminar of 22-24 April 2002 in Salamanca, Doc. DIH/Rev.01.Corr1 (on file with the author).

22 Compare generally F. Naert, supra note 2, pp. 463-540; A.-S. Millet-Devalle (ed.), *L'Union européenne et le droit international humanitaire* (Paris: Pedone, 2010) and M. Zwanenburg, 'Toward a More Mature ESDP: Responsibility for Violations of International Humanitarian Law by EU Crisis Management Operations', in Blockmans (ed.), *The European Union and International Crisis Management: Legal and Policy Aspects* (The Hague: TMC Asser Press, 2008), pp. 395-416.

23 See F. Naert, 'Challenges in Applying International Humanitarian Law in Crisis Management Operations Conducted by the EU', in A.-S. Millet-Devalle (ed.), *supra* previous note, pp. 142-143.

24 See more generally F. Naert, *supra* note 2, pp. 541-658 and F. Naert, 'Accountability for Violations of Human Rights Law by EU Forces', in S. Blockmans (ed.), *supra* note 22, pp. 375-393.

In any event, at least as a matter of policy human rights provide significant guidance in CSDP operations and in practice, EU operational planning and rules of engagement take into account internationally recognised human rights standards.

This is explicitly reflected in legal instruments relating to some CSDP operations. For example, the European Union Rule of Law Mission (EULEX) Kosovo is to 'ensure that all its activities respect international standards concerning human rights and gender mainstreaming'.[25] Also, suspected pirates or armed robbers at sea captured by the EU's counter-piracy operation Atalanta may not be transferred to a third State 'unless the conditions for the transfer have been agreed with that third State in a manner consistent with relevant international law, notably international law on human rights, in order to guarantee in particular that no one shall be subjected to the death penalty, to torture or to any cruel, inhuman or degrading treatment'.[26] The latter provision has led to the conclusion of the transfer agreements between the EU and third States in the region (Kenya,[27] the Seychelles[28] and Mauritius[29]) and arrangements with third States participating in Atalanta (e.g. Croatia[30]), which contain substantial provisions aiming to ensure respect for human rights.[31]

V. Responsibility

For issues regarding responsibility, including attribution,[32] I refer to the contributions in the framework of sessions Three and Four, including that by Gert-Jan Van Hegelsom on the overall

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25 Article 3(i) of Council Joint Action 2008/124/CFSP of 4 February 2008, [2008] OJ L 42/92.

26 Article 12 Council Joint Action 2008/851/CFSP of 10 November 2008, [2008] OJ L 301/ 33 (corrig. [2009] OJ L 253/18).

27 [2009] OJ L 79/49 (agreement no longer in force)

28 [2009] OJ L 315/37.

29 [2011] OJ L 254/3.

30 See Article 3 Agreement on the participation of Croatia in Operation Atalanta, [2009] OJ L 202/84, and the Annex.

31 On this operation, see F. Naert, supra note 2, pp. 179-191 and F. Naert & G.-J. Van Hegelsom, 'Of Green Grass and Blue Waters: A Few Words on the Legal Instruments in the EU's Counter-Piracy Operation Atalanta', Issue 25 *NATO Legal Gazette*, 5 May 2011, pp. 2-10 (available as KU Leuven Institute for International Law Working Paper No 149 at http://www.law.kuleuven.be/iir/eng/research/wp.html).

32 See the ILC's 2011 Draft Articles on the Responsibility of International Organisations (ILC, Report of the Sixty-third session, UN Doc. A/66/10, pp. 52-172), Articles 6 and 7 and associated commentaries. Compare ECtHR *Behrami and Behrami v. France and Saramati v. France, Germany and Norway and Al-Jedda v. UK* (all supra note 8). See also the recent Dutch cases *M. M.-M., D.M and A.M. (Mustafić) and H.N. (Hasan Nuhanović) versus the State of the Netherlands*, Court of Appeals The Hague, case nos 200.020.173/01 and 200.020.174/01, judgments of 5 July 2011 (English translations available at http://jure.nl/br5386 and http://jure.nl/br5388). See also several annotations forthcoming in 50 Mil L L War Rev 2011 and K.M. Larsen, *Human Rights Treaty Obligations of Peacekeepers* (Cambridge: Cambridge University Press, 2012).

legal framework, planning, conduct and command and control in CSDP operations[33]. Beyond that, the scope of this contribution only permits a very summary identification of some EU specificities.[34]

First, the EU has a specific system of remedies with a role for Member State courts given the lack of jurisdiction on the part of the European Court of Justice in relation to the CSDP.[35]

Second, the EU has no immunity from *jurisdiction* (as opposed to execution) before the courts of its Member States, except where the European Court of Justice has jurisdiction.[36]

Third, like many other organisations, the EU usually sets up specific claims mechanisms in its operations as part of status of forces/mission agreements.[37]

Fourth, there is an Agreement *between the Member States* of the EU to regulate the status of their forces and personnel within each other's territory (EU SOFA),[38] which has not yet entered into force. This is complemented by an Agreement between the Member States of the EU concerning claims introduced between them in the context of an EU crisis management operation,[39] which has not yet entered into force either. A declaration in relation to this Agreement states that:

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33 See also F. Naert, 'Legal Aspects of EU Military Operations', 15 *Journal Int. Peacekeeping* 2011, pp. 218-242 and F Naert, 'The Application of Human Rights and International Humanitarian Law in Drafting EU Missions' Mandates and Rules of Engagement', in M. Aznar & M. Costas (eds.), *The Integration of the Human Rights Component and International Humanitarian Law in Peacekeeping Missions Led by the European Union* (CEDRI/ATLAS, 2011), pp. 61-71 (also available as KU Leuven Institute for International Law Working Paper No 151 at http://www.law.kuleuven.be/iir/eng/research/wp.html).

34 See F. Naert, 'The International Responsibility of the Union in the Context of Its CSDP Operations', in P. Koutrakos & M. Evans (eds.), *The International Responsibility of the European Union* (Oxford: Hart, 2012).

35 See Articles 275 *juncto* 340 and 19(1) Treaty on the Functioning of the European Union (TFEU).

36 Pursuant to Article 343 TFEU the Union shall enjoy in the territories of the Member States such privileges and immunities as are necessary for the performance of its tasks, under the conditions laid down in the Protocol (No. 7) on the privileges and immunities of the EU. This Protocol does not grant the EU immunity from jurisdiction before the courts of its Member States (as opposed to its property and assets being exempt from any measure of constraint without the authorisation of the ECJ). Article 274 TFEU adds that 'Save where jurisdiction is conferred on the [ECJ] by the Treaties, disputes to which the Union is a party shall not on that ground be excluded from the jurisdiction of the courts or tribunals of the Member States'.

37 See F. Naert, *supra* note 34 and A. Sari, 'Status of Forces and Status of Mission Agreements under the ESDP: the EU's Evolving Practice', 19 *EJIL* 2008, pp. 67-100.

38 16 November 2003, [2003] OJ C 321/6. See extensively A Sari, 'The EU Status of Forces Agreement: Continuity and Change in the Law of Visiting Forces', 46(1-2) *Mil L L War Rev* 2007, pp. 9-253.

39 28 April 2004, [2004] OJ C 116/1.

> 'In signing this Agreement, all Member States will endeavour, insofar as their internal legal system enables them, to limit as far as possible their claims against any other Member State for injury, death of military or civilian personnel, or damage to any assets owned, used or operated by themselves, except in cases of gross negligence or wilful misconduct'.

Fifth, once the EU has acceded to the ECHR (see above), the question of attribution will become much less important[40] since the ECtHR will then be competent irrespective of whether the EU or the participating Member States are responsible for the conduct of a CSDP operation.[41]

40 Assuming the CSDP will not be excluded from the EU's accession to the ECHR.

41 The question of Member State responsibility is wider than that of attribution, see F. Naert, 'Binding International Organisations to Member State Treaties or Responsibility of Member States for Their Own Actions in the Framework of International Organisations', in J. Wouters, E. Brems, S. Smis & P. Schmitt (eds.), *Accountability for Human Rights Violations by International Organisations* (Brussels: Intersentia, 2010), pp 129-168.

Katarina Grenfell[1]
Office of Legal Affairs, UN

Résumé

L'expansion de la nature et des activités des missions de maintien de la paix de l'Organisation des Nations unies (ONU) a été accompagnée par une reconnaissance accrue de l'application des droits de l'homme à l'ONU dans la conduite de ses opérations.

Il est établi que l'ONU possède la personnalité juridique et la capacité d'être sujet à des droits et des obligations en droit international. La Charte de l'ONU définit l'un des buts de l'Organisation comme étant celui de «promouvoir et encourage le respect des droits de l'homme». S'il est aujourd'hui clair que l'ONU est soumise aux normes internationales des droits de l'homme, la question est maintenant de définir le champ d'application de ces normes.

L'ONU est sujette aux normes de droit de l'homme coutumier telles qu'elles sont reflétées par les traités internationaux, et qui s'appliquent mutatis mutandis à l'ONU lorsqu'elle s'engage dans des activités similaires à celle d'un État.

Un certain nombre d'obligations de droit de l'homme pesant sur les forces de l'ONU est également exprimée à travers les instruments juridiques qui encadrent ses opérations de paix, tels que dans le « Statut des forces », le « Memorandum of Understanding » *avec les États contributeurs de troupes, les règles d'engagement ou encore les codes de conduites de la police des Nations unies. Ce cadre juridique sur l'application des droits de l'homme à l'ONU en situation d'opérations de paix reste cependant encore limité et souvent peu explicite.*

La pratique de l'ONU en la matière est, au contraire, beaucoup plus riche et concerne des situations dans lesquelles l'organisation exerce un contrôle soit sur le territoire soit sur la personne elle-même. Cela inclut l'exercice de pouvoir de police ou de détention; l'administration du territoire; les situations où des individus viennent trouver refuge dans les locaux de l'ONU; le transfert de personne aux autorités locales; et les situations où l'ONU soutient des groupes armés. L'organisation a su montrer qu'elle était soucieuse de prévenir les violations de droits de l'homme commises par ses propres agents et de ne pas permettre que de telles violations soient commises par des acteurs extérieurs en conséquence de ses actes ou omissions.

1 Katarina Grenfell is a Legal Officer in the United Nations Office of Legal Affairs. The views expressed are those of the author in her personal capacity, and may not necessarily reflect the official position of the UN.

The expansion in the nature and activities of United Nations peacekeeping operations has been accompanied by increasing recognition of the relevance of human rights law to the UN in the conduct of its operations. Because the UN is doing so many more things these days, and is having a lot more direct contact with the local population, there is now much more scope for human rights obligations to arise.

The UN has explicitly acknowledged the applicability of international humanitarian law to UN forces in the form of a Secretary-General's Bulletin[2]. However, there has been no similar official statement recognizing the applicability of human rights law to the UN in respect of its peace operations. Instead, statements by political organs or by judicial bodies have usually been limited to the human rights obligations of States participating in UN operations[3]. That said, as a matter of policy, the UN certainly uses human rights law as a way of setting standards for the conduct of its personnel[4].

Today, I will look at whether, as a matter of law, the UN is bound by human rights law. I will then examine the practical legal and policy frameworks that apply, followed by a number of practical examples. While the legal framework is a bit thin, the practical examples will show that the UN applies human rights law principles in respect of its conduct in situations when it exercises similar kinds of powers as States.

It is well established since the ICJ's Advisory Opinion in the Reparations Case that the UN has independent international legal personality and has the capacity to bear rights and obligations under international law. In respect of the nature of its obligations, the ICJ emphasized that the duties of the UN in respect to international law depend on the 'purposes and functions as specified, or implied, in its constituent document and developed in practice'[5].

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2 Secretary-General's Bulletin "Observance by United Nations forces of international humanitarian law", dated 6 August 1999 (UN document: ST/SGB/1999/13)

3 See for example, Committee against Torture, General Comment 2, Implementation of Article 2 by States Parties of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment of Punishment (CAT/C/GC/2/CRP.1/Rev.4); and Human Rights Committee General Comment No 31 (80) on Article 2 of the International Covenant on Civil and Political Rights (CCPR/C/21/Rev.1/Add.13)

4 "United Nations Peacekeeping Operations – Principles and Guidelines", otherwise known as the "Capstone Doctrine" issued by the Department of Peacekeeping Operations (DPKO) as a policy document in 2008, states 'International human rights law is an integral part of the normative framework for UN peacekeeping operations' and that 'UN peacekeeping operations should be conducted in full respect for human rights and should seek to advance human rights through the implementation of their mandates'. (<http://pbpu.unlb.org/pbps/Library/Capstone_Doctrine_ENG.pdf>)

5 *Reparation for Injuries Suffered in the Service of the United Nations* (The Hague: I.C.J. Reports, 1949), p. 180

The constituent document of the UN is its Charter. Under the Charter, one of the purposes of the United Nations 'promoting and encouraging respect for human rights'. Further, Article 55 provides that the UN shall promote 'universal respect for, and observance of human rights'. And under Article 56, Member States pledge to cooperate with the UN to achieve these purposes. It is sometimes argued that the Charter does not require the UN to observe human rights law, but simply requires it to encourage respect for human rights by its Member States. Here it is pointed out that the international human rights framework is generally designed for States, and that such rights exist between States and persons within their jurisdiction, and not between international organizations and individuals. But this point of view does not take into account that the Charter goes beyond this, – it requires that the Organization itself promote human rights, together with States. In my view, it is clear that the UN is bound by international human rights norms, but that the question is rather the scope of application. While the UN is not bound under the human rights treaties, as it is not party to them, it is bound by customary human rights norms as reflected by those treaties, which apply *mutatis mutandis* in respect of the UN when it is engaged in the same fields of activity, and it is also bound under general international law.

I will now briefly look at how human rights obligations are given expression in the UN's legal instruments concerning peacekeeping operations. These include (i) the status or forces (SOFA) or status of mission agreement (SOMA) – which is the agreement between the UN and the host State; (ii) the memorandum of understanding between the UN and troop contributing countries (MOU with TCCs); (iii) the rules of engagement (ROE); (iv) directives for formed police units (FPUs) on use of force; (v) codes of conduct and standard operating procedures (SOP) for UN police and civilian members of peacekeeping operations.

The "Model SOFA"[6] is used as a basis for the conclusion of agreements with individual host states. While there is no explicit reference to the application of human rights law, paragraph 6 provides that the UN peacekeeping operation and its members "shall respect all local laws and regulations". This is a source of human rights law binding on the UN operation in the host state, if the law of the host state is consistent with human rights law.

The MOU with TCCs[7] specifies the required standards of conduct for personnel provided by Governments, and arrangements to enforce those. The MOU requires that the Government will ensure that all members of the national contingent are required to comply with UN standards of conduct. This includes an undertaking to comply with 'Guidelines on international humanitarian law' and 'the applicable portions of the Universal Declaration of Human Rights as the

6 Model status of forces agreement for peacekeeping operations (UN document A/45/594, Annex, 9 October 1990)

7 See the model "Memorandum of Understanding" (UN document A/C.5/63/18)

fundamental basis of our standards'. There are also specific undertakings not to 'use unnecessary violence or threaten anyone in custody', or to 'commit any act that could result in physical, sexual or psychological harm or suffering to members of the local population, especially women and children'. A Blue Card which sets out 'Ten Rules Code of Personal Conduct for Blue Helmets' is issued to individual members of peacekeeping operations. Rule number 5 states the obligation to 'respect and regard the human rights of all'.

The ROE reflect a number of principles of human rights law in that they impose a duty to report every confrontation resulting in detention, or involving the use of force, and any contravention of the ROE must be subject to a formal investigation. The ROE also address conditions of detention which are required to be carried out in compliance with international law.

UN civilian police (including members of FPUs), corrections officers, military observers, and military liaison officers are required to comply with mission directives and standard operating procedures and policies which reflect human rights obligations. These include obligations as contained in directives on use of force as issued in each mission, the Secretary-General's Bulletin on Special Measures for Protection from Sexual Exploitation and Sexual Abuse[8], the UN Code of Conduct for Law Enforcement Officials of 1979[9], UN Civilian Police Principles and Guidelines, UN Standard Minimum Rules for the Treatment of Prisoners 1977[10], UN Declaration of Basic Principles of Justice for Victims of Crimes and Abuse of Power of 1985[11], UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment of 1988[12], Basic Principles for the Treatment of Prisoners of 1990[13], and the UN Basic Principles on the Use of Force and Firearms by Law Enforcement Officers of 1990[14].

Overall, the legal framework on the application of human rights to the UN in the context of peace operations is rather thin. The obligations under the SOFA could be made more elaborate and explicit; more emphasis could be placed on them in the MOU with TCCs; and they could be explicitly referred to in the ROE. In my view they are given the most expression in the guidelines that govern the conduct of police. Here it would appear that there was recognition that police carry out the kinds of powers that States usually exercise, and that the obligation to observe human rights goes hand in hand with such powers.

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8 UN document ST/SGB/2003/13 of 9 October 2003

9 Adopted by the General Assembly in its resolution 34/169 of 17 December 1979

10 E/5988 (1977)

11 A/RES/40/34

12 A/RES/43/173

13 A/RES/45/111

14 Adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, 1990

At the same time, however, the UN's practice is rich. I will now discuss a number of examples from UN practice where human rights law has been of particular relevance. In each case, the defining characteristic has been the UN's control either over the territory, or over individual persons. These include when the UN detains persons, or exercises executive police powers; when it administers territory such as in East Timor and in Kosovo; when persons seek "safe haven" in its premises; when the UN transfers persons back to local authorities; and when the UN acts in support of armed groups.

Exercise of executive police powers, including detention

Human rights violations can arise when peacekeepers detain, search, arrest and disarm, and when they transfer detainees to local authorities. This may be in the context of a peacekeeping operation with an executive policing mandate, as in the case of UNMIT in Timor-Leste, or when the military apprehend and detain persons in the course of carrying out their mandate – using non-lethal force.

When peacekeepers have apprehended and confined individuals, advice has been given that their treatment should be in accordance with internationally recognized standards. The guidance was based on customary international law as reflected in the instruments such as the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment of Punishment; the Standard Minimum Rules for the Treatment of Prisoners; the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment of 1988 etc.

Some internal advice, which is now in the public domain, as it was published by the New York Times in 2009, expressed the view that where a peacekeeping operation has no mandate to hold onto detainees, persons detained must be transferred to the appropriate local authorities as soon as possible, and that arrangements should be put in place to ensure that such transfers are tracked, and that the treatment of the detainees is monitored. Regarding the issue of transfer, advice has been given, *inter alia*, that:

> 'the United Nations cannot lawfully hand a person over to local authorities if there are substantial grounds for believing there to be a real risk that that person will be tortured or subjected to cruel, inhumane or degrading treatment, or otherwise have their human rights grossly violated. It is therefore crucial that the necessary arrangements are made with the local authorities to ensure that detainees transferred by [the peacekeeping operation] are treated in accordance with international norms.'[15]

15 See the U. N. Correspondence on Peacekeeping in the Democratic Republic of the Congo ("Note to Mr. Le Roy. MONUC – Operation Kimia II"), as published by the New York Times, http://documents.nytimes.com/united-nations-correspondence-on-peacekeeping-in-the-democratic-republic-of-the-congo#p=1

Currently the Secretariat is working on preparing an SOP on Detention in UN Peacekeeping Operations. A draft was prepared following an extensive consultation process in 2009, but is currently in the process of being reviewed. The purpose of the SOP is stated as

> 'to ensure that persons detained by UN personnel in UN peace operations are handled humanely and in a manner that is consistent with applicable international human rights, humanitarian and refugee law, norms and standards'.

Administration of territory

The UN's transitional administrations in Kosovo (UNMIK), and in East Timor (UNTAET) are prime examples of the Organization undertaking a much greater role than a traditional peacekeeping operation. In both cases, the UN established transitional administrations which were vested with 'all legislative and executive authority with respect to [the territory], including the administration of the judiciary'[16]. This led to them being described as

> 'carrying out tasks which are more similar to those of a State administration, than those of an international organization proper'[17].

In both cases, the UN was concerned to specify the legal framework that applied in respect of the transitional administrations. Both UNTAET and UNMIK promulgated regulations which provided that everybody undertaking public duties, or holding public office, shall observe internationally recognized human rights standards, as reflected in the main international human rights instruments: UDHR, ICCPR, ICESCR, CERD, CEDAW, CAT and the CRC[18]. In the case of UNMIK, the ECHR and its protocols were also applicable. Questions have arisen about the scope of application of these regulations, and how they applied to the activities of the UN itself – whether they simply set "guidelines and standards", or whether they are actually legally binding on the UN.

When people seek refuge or safe haven with the UN

Over the years, the UN has had to deal with a number of cases, in the context of peacekeeping operations, when persons have sought refuge or safe haven on UN premises. While these situations give rise to a host of issues for the UN – including its obligations under the SOFA, and the safety and security of its staff – one has been the human rights of the refuge seekers.

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16 See UNMIK Regulation 1999/1 of 25 July 1999 and UNTAET Regulation 1999/1 of 27 November 1999

17 Opinion of the European Commission for Democracy through Law (Venice Commission) on Human Rights in Kosovo: Possible Establishment of Review Mechanisms, Opinion no 280/2004, Doc CDL-AD (2004) 033, at para 91.

18 See UNMIK Regulation 1999/24 of 12 December 1999 and UNTAET Regulation 1999/1 of 27 November 1999.

A practice has developed in which the UN provides temporary refuge to persons under an imminent threat of death, or serious physical injury, for the duration of that threat, and takes measures to ensure that when persons are transferred back to the Government authorities, their human rights will be respected. This usually involves obtaining written assurances from the Government that it will ensure the persons' protection and safety, and abide by the provisions of the ICCPR, – that they will be guaranteed due process, not subjected to torture or inhumane treatment, and if prosecuted and convicted of a crime, that the death penalty will not be carried out. It also requires that if detained, the person can be visited by the UN human rights officers or the ICRC without prior notice.

The "human rights due diligence policy"

I will now speak briefly to what has become known as the "human rights due diligence policy", that was developed in response to concerns that the UN's peacekeeping operation in the DRC, MONUC (as it was then called), might support members of the Congolese army (the FARDC) who were committing human rights violations.

MONUC was mandated by the Security Council in resolution 1856 (2008) to support operations led by the FARDC in order to disarm local and foreign armed groups who presented a serious risk to the safety of the civilian population, and to ensure their participation in a disarmament and resettlement process. In 2009 there were concerns that members of the FARDC, who were provided with logistical supplies by the UN, were committing human rights violations against the very population they were supposed to be protecting. This led to a specific policy being devised by the Secretariat which specified that MONUC would not participate in, or support operations with FARDC units if there were substantial grounds to believe that there was a real risk that such units would commit grave violations of international humanitarian, human rights or refugee law, in the course of the operation. The policy was subsequently endorsed by the Security Council, which in resolution 1906 (2009), called upon MONUC 'to intercede with the FARDC command if elements of a FARDC unit receiving MONUC's support are suspected of having committed grave violations of such laws', and 'if the situation persists… to withdraw support from these FARDC units'. The policy now applies across the board where the UN is considering providing support to non-UN security forces.

Concluding observations

- The UN uses human rights law to set standards for conduct in respect of its peacekeeping operations, in particular the conduct of its individual military and civilian peacekeepers.
- In its practice, the UN has been concerned to prevent human rights violations by its agents when they exercise control over a territory, or individuals.
- The UN has also been concerned not to allow human rights violations to take place by other actors, as a consequence of its acts or omissions.

Col. Michael C. Jordan[1]
ISAF

What is going on now in Afghanistan with respect to detention operations?

The United Nations Assistance Mission in Afghanistan (UNAMA) released a report entitled 'Treatment of conflict-related detainees in Afghan Custody' on the 10th of October 2011.

There are two paths for detention operations in Afghanistan. There is one that the US follows pursuing its operation 'Enduring Freedom', and the other that the International Security Force in Afghanistan (ISAF) follows. On the NATO side, the rule is that any detainee captured must be released or handed over to the Afghan government within 96 hours of their capture.

The UNAMA report is the combination of 12 months of study by the UNAMA personnel and local nationals hired in order to conduct the surveys. Over that period of 12 months, UNAMA went to 47 detention facilities throughout Afghanistan and during that time, they interviewed 379 detainees. Out of these 379 detainees, 324 were detained because of suspicion or conviction of offences related to the conflict. In other words, they were security detainees related to the insurgency. Out of these 324, approximately half expressed allegations of torture, and 89 were related to ISAF operations, whether captured independently or as a result of combined operations between ISAF and Afghan forces. Out of the 89, 19 claimed that they were tortured while in Afghan custody and were in fact detained that had been handed over by the United States (US). Indeed, until that moment, the US did not monitor its detainees once they were handed over to Afghan authorities. Afghan sovereignty was a real obstacle to doing so.

Out of the 37 facilities, UNAMA concluded that torture was systematic, however not as governmental plan, in 16 facilities. There were allegations of the following acts: suspension, being hung by the wrists, by chains or shackles, from the ceiling or higher up on the wall; beating with rubber hoses, electric cables, wires or sticks; electric shocks; manipulation of male genitalia; forced stress positions; removal of teeth, toenails and fingernails, and threats of sexual abuse.

ISAF heard of the UNAMA report around late August and within four days had suspended all transfer of detainees to Afghan facilities, and come up with a six-phase plan involving systematic inspections of all the concerned facilities. ISAF will probably never be able to confirm

1 In agreement with the speaker, we publish a summary of his intervention which has not been reviewed by the speaker.

or refute the allegations contained in the UNAMA report, as the report refers to numbers only, in order to protect the targeted individuals. Moreover, those facilities are supposed to be temporary facilities. When conducting inspections, ISAF encountered the situation where in an announced visit, it was clear that the authorities of the detention facilities had foreseen their arrival and arranged the facilities accordingly. However, in unannounced visits, ISAF was able to procure some torture allegations. Part of the process of the six-phase plan is certification, where the ISAF Commander must certify that he is certain that torture will not take place in the future. All findings discovered during the inspections were transmitted to the higher level of Afghan authorities.

The positive effect of the UNAMA report is that the US put monitoring in place regarding detention, continuing unannounced inspections and tracking handed-over detainees in the Afghan detention system.

Ola Engdahl
Swedish National Defence College

Résumé

En 2011, le gouvernement suédois a mené une enquête qui a permis de suggérer une loi régissant le droit du personnel militaire suédois d'utiliser la force dans le cadre d'un mandat d'opération de paix, une telle loi n'existant pas précédemment en Suède. L'une des difficultés majeures de cette enquête fût de clarifier la situation quant au respect des obligations relatives aux droits de l'homme qui s'imposent tant à la Suède qu'aux organisations internationales (OI) concernées, dans de telles opérations.

Il est tout d'abord apparu que la plupart des traités concernés ne s'appliquaient pas directement à la Suède dans de telles opérations. Au-delà de la question de l'extraterritorialité, le fait que l'OI exerce un commandement sur les troupes nationales mises à sa disposition semblait exclure l'attribution des actes de ces troupes à la Suède. La démarche de la commission d'enquête a alors été de déterminer si les règles de la Convention européenne des droits de l'homme devaient être prises en compte par la Suède dans la décision même de faire participer ses troupes à une mission de maintien de la paix sous contrôle d'une OI. La commission a conclu qu'un État contributeur de troupes (ECT) pouvait refuser de placer des troupes à la disposition d'une OI s'il était conscient que ses troupes pourraient être utilisées pour des actes qui violeraient des ses obligations relatives aux droits de l'homme, comme par exemple trouver un individu sur le territoire d'une autre État qui une fois captif encourrait le risque d'être soumis à la torture par les autorités locales. Un ECT aurait ainsi l'obligation d'évaluer les conséquences de l'usage des ses troupes sur les personnes situées dans la zone d'opération de la mission de l'OI.

Une fois le transfert de commandement de l'ECT à l'OI effectué, c'est l'OI qui a en pratique la capacité d'affecter les droits de l'homme des personnes situées dans ses zones d'opérations. L'applicabilité des obligations de respect et de garantie des droits de l'homme à l'OI peut alors se faire à travers plusieurs vecteurs. Tout d'abord il est généralement admis que les OI possédant la personnalité internationale sont sujettes aux normes du droit international coutumier. Par ailleurs, la Cour européenne des droits de l'homme a admis qu'un État avaient des obligations relatives aux droits de l'homme envers des individus se trouvant hors de leur territoire s'il exerçait un contrôle effectif sur un territoire et/ou sur des personnes. On peut alors présumer que cette règle pourrait s'appliquer à une OI à partir du moment ou celle-ci agit, de facto, comme un État et influence directement la vie des personnes qui sont sous son contrôle.

Introduction

In most peace operations international humanitarian law does not apply and the military personnel on the ground often function as a robust police force with the capacity for interfering with the human rights of the local population. The question of applicability of human rights law in peace operations is therefore of utmost importance. While human rights obligations are primarily the duties of states, the applicability of human rights law to international organizations is also of paramount importance, since it is often these organizations that command peace operations. But even so, the proper application of human rights (or its denial) will in the end depend on the tangible or actual acts of the troops placed at the disposal of the particular international organization. In this way, the human rights obligations of states and organizations are inextricably linked. It could concern the very same soldiers, the same mandate and the same potential victims. The only matter that differs is the command and control structure. I therefore propose to begin this presentation by briefly referring to the work of a Swedish Governmental Inquiry on the use of force in peace operations. This Inquiry has now completed its substantive work and will present its finding to the government on the 1st of December.

The Governmental Inquiry[1]

The main purpose of the Inquiry was to suggest a law establishing the right of Swedish military personnel to use force in order to fulfill the mandate of a peace operation. Currently there is no such law in Sweden. And according to the work of the Inquiry, it seems that many other states also lack an explicit law with regard to the use of force in peace operations. This was viewed in Sweden as a potential problem because the Swedish criminal code applies to its military personnel. This could lead to a situation where a soldier correctly performing a military task according to both the mandate and the operational plan could be charged with violations of the Swedish criminal code simply because there is no explicit basis in Swedish law in relation to the use of force for military personnel in peace operations.

So the easy part in drafting such a law would be to state plainly that military personnel participating in peace operations are authorized to use proportionate and necessary force in accordance with the mandate from the Security Council and the perceived threat on the ground. The more difficult part involves the relationship to human rights law and international humanitarian law in such operations. Almost all decisions of the Swedish parliament explicitly state that military forces must conduct operations in accordance with applicable human rights law and international humanitarian law. The question of formal applicability of human rights

1 *Våld och tvång under internationella militära insatser* (Stockholm: Statens Offentliga Utredningar – SOU, 2011:76), <http://www.regeringen.se/content/1/c6/18/14/92/0bb1478b.pdf>

law in an extraterritorial context, where the effective control of the troops in question has been transferred to an international organization, is (as we all know) somewhat difficult and subject to different interpretations.

The Inquiry struggled with the question of the formal applicability of human rights law and realized – in many instances – that the human rights treaties under consideration may not in fact apply. One of the main obstacles as we saw it, apart from the extraterritorial context, was that the command authority over the troops is inevitably transferred to an international organization in all of the peace operations in which Sweden participates. As you know, the acts of a state organ placed at the disposal of an international organization are attributable to that organization if that organization exercises effective control over those acts. In a peace operation it would at least be a presumption in law that the acts of the military are attributable to the organization that exercises operational control over its troops. We were, of course, also aware of the fact that the European Court has employed the condition of ultimate authority and control, but that would not affect the position of troops placed at the disposal of an international organization from the sending state perspective.

One of the issues confronting the Inquiry was whether the provisions of the European Convention on Human Rights should be observed in the decision-making process leading to a decision to contribute troops to a mission, as well as the possible consequences of transfer of command authority – that is, did the Convention confer certain obligations on Sweden in relation to its national decisions to contribute troops? Furthermore, when the command authority over troops is transferred and the acts of the military personnel concerned are attributed to the particular organization (at least that is the presumption), what are the human rights obligations of the organization? I shall now discuss this latter question and then return to the former at the end of the presentation

Why human rights could be binding on international organizations

After the transfer of command authority it is in fact the international organization that acts and thus has the real capacity to interfere with the human rights of persons within the areas of operation. It is only natural to argue that any intergovernmental organization entrusted with the power and authority to get in the way of human rights should also assume responsibility for respecting and protecting such rights.

Several grounds may be referred to regarding the binding effect of human rights law on international organizations. I will take the perspective of customary law primarily on the ground that there seems to be a common understanding that organizations considered subjects of international law are generally bound by customary international law. This appears to be true

of all organizations having international personality and competence to intervene directly in the rights of individuals. Customary international law would in that respect reflect a level of human rights law by which such organizations are at least bound.

Obligations on the part of intergovernmental organizations to respect and protect individual human rights will consequently differ between various organizations dependent on the level of competence with which they are entrusted. If such an organization possesses a competence to enter into international agreements it may also be possible that such organization has additional human rights obligations derived from treaties or other commitments.

Under treaty law the human rights obligations of states towards an individual require a certain nexus. A state generally has obligations under human rights law towards any person present on its territory and such individuals fall within the jurisdiction of that state within the meaning of the term in human rights treaties.

What we must ask is whether or not there is a similar requirement in customary international law – in as much as do individuals need to come within the jurisdiction of a state or international organization? Another question concerns the customary law status of human rights and the need and ability to apply them in the context of a peace operation.

Do individuals need to fall within an organization's jurisdiction?

In a number of cases, primarily from the European Court of Human Rights, it has become clear that the state may also have obligations towards individuals outside the territory of the particular state if the state exercises effective control over territory or individuals within the territory of another state. The exact content of the criterion of effective control is not easy to interpret and one could assume that at least the ECHR will continue to refine its interpretation of effective control as an instrument for establishing jurisdiction.

Even though the territorial-extraterritorial divide may not be precisely transferrable to international organizations I nevertheless believe it to be useful, since it concerns a situation where states do not exercise the same powers that relate to their own territories – a situation similar to that of international organizations leading peace operations.

It is of course possible to argue that human rights under the Universal Declaration of Human Rights have attained customary law status and that the rights set out in the Declaration are not explicitly dependent on a requirement of jurisdiction. Therefore the customary rights reflected in the Declaration would always apply. However, this would also mean that states would retain more extensive rights under customary law than those held under treaty law – in

an extraterritorial context. This would not seem to be an acceptable assessment of the law as it stands today, especially when one takes into consideration the hesitant approach expressed so far by states to the extraterritorial application of human rights law.

The research in this area appears to be mostly directed to the situation of territorial administration where an international organization retains the competence to exercise almost all state functions. In these circumstances it is more or less taken for granted that the required link between the organization and individuals exists as the organization de facto acts as a state. The position is indeed very similar to that of a state acting in its own territory.

Less interest has been directed towards the more traditional, but yet robust, peace operations that are less ambitious with regard to state functions, but nevertheless execute traditional state functions that interfere with the fundamental human rights of local people. Here one could at least argue that when troops acting within the competence of an intergovernmental organization physically impede the lives of a local population these individuals would fall under the effective control of that organization, and consequently trigger the customary obligation to respect and protect the human rights of such people.

It is, also possible to interfere physically from a distance by the shooting of a bullet. This would not, according to the practice of the European Court, necessarily mean that such troops exercised jurisdiction over the individual unless there was effective control in the territorial sense, or as the Court held in the *Al-Skeini* case, exercised some of the public powers normally exercised by the government.

The applicability of human rights for international organizations would most certainly require some form of nexus towards individuals, and possibly also a requirement established with regard to some sort of effective control in customary law. The practice of the European Court perhaps reflects (at least) regional customary law. Whether or not the requirement of effective control also applies to the African Union is arguably less clear.

Customary law status of human rights

When it comes to the norms themselves it is certainly a fact that several human rights norms have acquired the status of customary international law and are thus binding upon international organizations. Many of these rights, of specific interest in peace operations, are the non-derogable rights but also such entitlements as the right to assembly, freedom of movement, and the right to private and family life, all of which may be of a customary law nature. States have shown reluctance however to apply the human rights law as a whole in an extraterritorial context. It is clear that some states would find it almost impossible to participate in

peace operations if the whole set of human rights law were to be applied. This all-or-nothing approach to human rights law may in fact have worked against its intended purpose in peace operations, and possibly in the extraterritorial context as a whole. However, in the *Al-Skeini* case the European Court held that a state is under an obligation to secure the human rights law that is relevant to the particular individual. This appears to accord with the views of states and the fact that the impossible cannot be required of states that do not have the practical means, or in the case of peace operations, the mandate to secure all human rights. Owing to the approach of states in this matter it is not impossible that the position of the Court is indeed reflective of customary law. Translated to the responsibility of international organizations this could mean that the obligation to observe a specific rule is based upon the specific competence of the organization in question, and the actual and legal authority exercised by that organization in relation to individuals under some form of effective control.

Conclusions

Finally, I return to the work of the Governmental Inquiry and the question regarding the possible responsibility for a Troops Contributing Country (TCC) when taking the decision to participate in a peace operation. If one takes as a point of departure that not only executive but also judicial and prescribing powers may have an extraterritorial effect, the issue arises as to whether a state party to a human rights convention has any responsibility with regard to those effects. The European Court, for instance, has found that the extradition of a person to a non-member state where there was concrete evidence that the individual concerned ran an undoubted risk of being subject to human rights violations involves the responsibility of the extraditing state under the Convention.

From that perspective the Inquiry was of the opinion that it could also be in contravention of the object and purpose of the Convention to transfer information regarding a particular person to authorities in another state if it was known that such information would lead to the arrest and torture of that person. Based upon these considerations the Inquiry concluded that a TCC could be excluded from placing troops at the disposal of an international organization if the state concerned was aware that its troops were to be employed in finding individuals in the territory of another state, and where such persons on capture would face the certain risk of torture at the hands of local authorities.

The Inquiry therefore found that the human rights obligations of TCCs need to be considered when the decision to participate is taken and that there is an obligation to assess the effects the use of their troops can have in relation to individuals in the area of operations. It accordingly follows that TCCs are under an obligation to prevent predictable violations and to ensure that the national decision to participate in a peace operation does not create effects which could be in contravention of that states human rights obligations.

This would have the effect of limiting the use of troops by the particular international organization to those acts that accord with the sending state's human rights obligations. In that way, one could argue that an international organization commanding a peace operation is indirectly bound by human rights law by the limits placed upon the troop contributions under its command.

SESSION 2: PANEL DISCUSSION ON THE APPLICABILITY/APPLICATION OF HUMAN RIGHTS LAW TO INTERNATIONAL ORGANISATIONS (IOS) IN PEACE OPERATIONS

During the debate following the presentations of the second session, the audience raised four main issues:

1. Human Rights application to the United Nations

A panellist wondered if, while the EU is on its way to acceding to the European Convention on Human Rights (ECHR) and has already become a party to the Convention on the rights of people with disabilities, there was any thinking within the United Nations (UN) about the possibility for the UN to accede to human rights instruments. Another panellist replied by stating that since at the moment the UN does not have the capacity to carry out the obligations under human rights treaties, this issue does not seem to be being discussed.

A panellist asked the audience if, similarly to the United Nations Secretary-General's (UNSG) bulletin on the applicability of International Humanitarian Law (IHL) to UN forces, it would be relevant to have a bulletin on Human Rights Law applicable to UN forces? It was underlined that it could however rattle the hornet's nest that is the very nature of the rights themselves – whether the bulletin makes reference to the lowest common denominator or to the highest standards that the UN would like to promote. A speaker in the audience answered that if a bulletin is an opportunity for an organisation to show how it understands a matter of international law, and, in the case of the human rights application to UN forces, would therefore be a good initiative, the process by which it is done should not be the same as the one by which the bulletin on IHL was adopted in 1999. It is unfortunate that the input of the Member States did not have any influence on the letter of the 1999 bulletin which now needs to be revised according to a correct understanding of the law of armed conflict. The panellist acknowledged that the circumstances surrounding the adoption of the 1999 bulletin are controversial. Moreover, the document contains rules of IHL that were not considered customary at the time, and could therefore benefit from a revision round with the Member States. Maybe the statements of national and regional courts will put sufficient pressure on the UNSG to address these issues comprehensively.

A speaker from the audience asked what would be needed for the UN to get authority to detain. One of the panellists replied that if the UN does not have all the necessary means to detain, it is established that the UN does not have the authority to detain. Nevertheless, a person might be apprehended temporarily and then the human rights principles would still apply with respect to the apprehension of that person.

2. The extent of the International Organisation (IO)'s obligations in the framework of NATO and EU detention operations

One of the speakers wondered who actually hands over the detainees to local authorities. Is it the troops contributing country (TCC) or is it NATO, since it is NATO that commands and controls the operation?

A panellist replied that, as stated in the first session discussion, detention is in practice a national issue, even if as a matter of law it would be possible to demonstrate that NATO is responsible.

Someone from the audience highlighted that in the framework of NATO counter-piracy operation Ocean Shield, off the coast of Somalia, NATO decided, two years ago, not to have a detention policy. It indeed appeared impossible to come to a common understanding of what will happen to detainees, which authorities they can be returned to, the regional countries' capacity to deal with these people, and NATO difficulties in making legal arrangements with the regional countries. If some pirates are caught and should be detained, they are in practice detained through national capacities and their case is dealt with at the national level.

Another panellist stated that, on the contrary, a common legal framework concerning detention in the Atalanta operations had been established by the EU, mostly because its Members States' human rights obligations are essentially identical, leaving less room for diverging views. The joint action setting up operation Atalanta specifically provides, in relation to the transfer of suspected pirates, that it should take place in accordance with Human Rights Law (HRL). The EU has concluded transfer agreements with regional States containing extensive obligations in terms of human rights and monitoring provisions. In parallel, there are other EU instruments used to support capacity building within the prison and judicial systems in those States, in order to make sure that they have the resources to treat the pirates in accordance with the transfer agreement.

3. Monitoring obligations of States in case of transfer

A speaker in the audience recalled that it was mentioned that the obligations of the TCC before transferring a detainee imply that you evaluate the situation and if there are indications that there could be human rights violations in the course of the operations, you should not transfer. What is the position of the Swedish Commission of Inquiry (SCI) on the on-going monitoring of the situation? Is there a continuous obligation to monitor the situation once the transfer has been made? A panellist replied that there is no clear case-law supporting the SCI's position but that it was interpreting other court decisions saying that the TCC would have the obligation to ensure that there is no indication of future violations. Concerning a continuous obliga-

tion, the SCI does not consider that there is a legal obligation to do that. However, if a TCC gets a report that some violations are being made, it would have the obligations to act. Nonetheless, it is not an obligation of constant monitoring over the whole detention operation.

Another speaker in the audience asked, regarding Afghanistan, if the US was monitoring as a matter of policy or because they recognise they have legal obligations. One of the panellists replied that this detention programme is now monitored by the International Security Assistance Force (ISAF). However, at the same time, the US was already working on a long-term monitoring programme that has not been implemented and it will now dovetail off the ISAF monitoring programme. The US view is that human rights treaties have no extraterritorial application. Nevertheless, they believe that as a matter of customary international law, certain fundamental human rights, as expressed in common Article. 3, are obligatory to States.

Another speaker wondered why the six-step transfer process including certification by an ISAF commander could not have included certification from another entity, e.g. the United Nations Assistance Mission in Afghanistan (UNAMA) itself, which might be seen as more independent. A panellist answered that the ISAF has considered having certification done by an external actor but choose not to do so in order to avoid it being counter-productive. However, since the allegations, the ISAF has been entirely transparent in its process, working with the ICRC and UNAMA, as well as with the Afghan authorities in order for them to eradicate all malpractice.

4. The scope of TCCs' human rights obligations

A speaker in the audience stated that some States have difficulties with the either/or approach of the application of human rights extraterritoriality. It was argued, In one of the presentations, that the problem was whether only some rights apply or whether all rights apply. However, the real question might be whether certain rights apply in their full scope or whether certain practical realities must be taken into account. Reading ECHR case-law, it seems that in some cases the court is open to considering some practical impossibility (e.g. *Medvedev* case) but it may not really alleviate the States' concerns, as they want to know in advance how far the court will be willing to go. This could potentially explain the use of derogation.

A panellist further added that the reluctance of States to apply the whole of the ECHR concerns the full extent of each and every right, including the rights that are not directly linked with the operations as such. The question of whether a State with a specific mandate might be obliged to go beyond this mandate, once it has effective control over the territory, is still a debated issue.

Session 3
The Determination of International Responsibility for Wrongful Acts committed in the Course of Peace Operations

Chair person: **Jann Kleffner,** *Swedish National Defence College*

COMMAND AND CONTROL STRUCTURE IN PEACE OPERATIONS: THE CONCRETE RELATIONSHIP BETWEEN THE INTERNATIONAL ORGANIZATION AND ITS TROOPS CONTRIBUTING COUNTRIES

Gert-Jan van Hegelsom[1]
External Action Service, EU

Résumé

Le commandement et le contrôle dans des opérations internationales est une question très sensible pour toutes les organisations internationales impliquées. Cet exposé se concentre sur la manière dont l'Union Européenne a structuré ses relations avec les pays fournisseurs de contingents.

La planification des opérations de l'Union Européenne passe par un processus dénommé « concept de gestion de crise ». Ce concept développe toutes les options à la disposition de l'Union Européenne afin de contribuer à une solution de la crise et constitue la base permettant au personnel militaire et son homologue civil de développer des « options stratégiques » détaillant comment l'Union Européenne peut contribuer à une situation de crise spécifique. Des organes préparatoires tels que le Comité Militaire et le Comité politique et de sécurité sont associés étroitement au développement des différentes phases de la planification.

Le cadre juridique de l'opération est établi par une décision du Conseil. Cette décision détaille le mandat, identifie les quartiers généraux et la chaîne de commandement pour une opération spécifique, détaille le degré de surveillance exercé par le Comité politique et de sécurité et le Comité militaire, prévoit les relations avec des pays tiers susceptibles de contribuer à l'opération et contient un nombre de dispositions diverses.

1 This contribution has been written on the basis of audio record and has not been reviewed by the speaker.

Le contrôle de la conduite des opérations est exercé par le Comité politique et de sécurité. Ce comité peut également modifier les documents de planification, désigner de nouveaux commandants et accepter la contribution de pays tiers.

Les Commandants de l'UE exercent les fonctions de commandement et contrôle leur permettant d'attribuer des missions et tâches dans le cadre juridique définit par le plan d'opération approuvé par le Conseil. Partant, la relation entre le Commandant d'opération de l'UE et l'Etat membre fournisseur de contingents est très claire et peu controversée.

La décision du Conseil régissant une opération prévoit normalement la possibilité d'inviter des pays tiers à participer à celle-ci. Il existe, cependant, une exception à cette règle dans le cas d'opérations ayant recours aux moyens et capacités communs de l'OTAN. Les pays européens non membres de l'UE et alliés de l'OTAN sont en droit de participer à une opération s'ils le souhaitent. L'enjeu politique est évidemment l'engagement de l'UE, conformément à l'article 21 du TUE, à coopérer avec des pays tiers et d'autres organisations dans la plus large mesure possible.

L'articulation de la relation avec un pays tiers concerné peut se faire de deux manières : à travers la conclusion d'accords-cadres de participation et à travers la conclusion d'accords ad hoc de participation. Ces accords sont négociés et conclus par l'UE avec l'Etat tiers concerné.

L'association d'Etats tiers à la gestion journalière d'une opération se fait par le biais du Comité de contributeurs. Ce comité est consulté sur tous les aspects relatifs à la conduite de l'opération.

La relation entre l'UE et les Etats fournisseurs de contingents – que ceux-ci soient des Etats Membres de l'UE ou des Etats tiers – est conciliée par un cadre juridique approprié.

Command and control in international operations is a very sensitive issue for all international organisations involved. In light of the presence of colleagues of NATO and the UN, I will concentrate on the way in which the EU has structured its relations with troops contributing countries (TCCs) and would invite those colleagues in international organisations or colleagues in national Ministries who are responsible for the issue as TCCs, to join the debate.

Those of you who I have had the pleasure to present EU issues to before will be aware of the complex and legalistic approach that the EU has vis-à-vis its operations. I therefore apologise in advance if some of the elements will already be familiar to them.

I. Preparation of operations by the European Union

1. Planning of military operations

The planning of our operations goes through a process of what we call a "crisis management concept" (CMC), which develops all the options that would be available to the EU for contributing to a solution of the crisis. That is the basis for the military staff and for its civilian counterparts to develop "strategic options" which then can detail how the EU could contribute to a specific crisis situation. There is a choice of the option, a concept of operations and, finally, an operation plan with the rules of engagement attached to it.

The structure of the EU is such that these different documents ultimately are approved by the Council, i.e. at ministerial level within the European Union. Preparatory bodies like the Military Committee and the Political and Security Committee are closely associated with the development of all various stages of planning.

2. Legal framework

In terms of the legal framework applicable to our operations, I would like to recall Article 2.1 of the Treaty on European Union (TEU) which states that the objectives of the Union are to be pursued in full respect of democracy, rule of law, human rights, fundamental freedoms, the principles of the UN Charter and international law. Therefore, EU Institutions are obliged to conform to international law in the conduct of the Common Foreign and Security Policy (CFSP) including the Common Security and Defence Policy (CSDP).

I referred earlier on when I mentioned the CMC and strategic options to the choice of an option. This is done by a Council decision setting out the legal framework for the operation. It details the mandate, identifies the headquarters and chain of command for a particular operation, details the degree of oversight by the Political and Security Committee (PSC) and the Military Committee, provides for the relations with potential third States contributing to the operation and contains a number of miscellaneous provisions (classified information, Status of Forces). These decisions are published in the Official Journal of the European Union.

Article 42(1) TEU stipulates that Member States shall make civilian and military capabilities available to the Union for the implementation of the CFSP to contribute to the objectives defined by the Council.

As Member States are closely associated with the planning of the operations and because decisions are taken unanimously, there would be no reason not to provide the required capabilities. In practice, however, we may not get all the assets required for the operation from

the Member States, hence the importance of the association of third States with the conduct of our operations.

II. Conduct of the EU operations

As indicated in the first chapter, the Council decision details the mandate and the chain of command for each operation. It also deals with the oversight by the Council and the High Representative of the Union for Foreign Affairs and Security Policy over the conduct of the operation. In practice, this oversight is delegated to the Political and Security Committee which, pursuant to Article 38 TEU, exercises the political control and strategic direction of the operation under the responsibility of the Council and the High Representative.

Through the Council decision, the right to take the required (legally binding) decision necessary for the proper conduct of the operation is usually delegated to the PSC. This Committee can also amend the planning documents, appoint new commanders and, most importantly, accept contributions from third States. Operation Commanders report on a weekly basis on the actual conduct of the operations through the Chairman of the EU Military Committee. Moreover, Commanders contribute to the annual reviews that the High Representative conducts of ongoing operations.

III. Relations with troops contributors

1. Relation with EU Member States

In light of the provisions of the Treaty on European Union, the relationship between the EU Operation Commander and the troops contributing Member States is quite clear. The operational planning clearly identifies the command and control relationship between the Commander and the contingents. Because of the involvement of the Member States in the approval process, there should be no problem in those relationships on a day-to-day basis, although it is quite clear that Member States retain full command over their armed forces (the possibility to withdraw from the operation) and administrative responsibility, including disciplinary and judicial competence. In practice, therefore, EU Commanders will exercise command and control functions allowing them to assign missions and tasks within the legal framework detailed in the operation plan approved by the Council. Hence, the question of the relationship between the Member States and the EU military chain of command is not controversial. It might be much more interesting for potentially contributing third States.

2. Relations with contributing third States

As mentioned earlier, the Council decision governing an operation normally contains a provision on the relations with third States. The decision normally provides for the possibility to

invite third States to participate. There is, however, one exception to that rule in the case of operations with recourse to NATO common assets and capabilities. Non-EU European NATO Allies are entitled to participate in such an operation if they so wish. The political issue at stake is obviously the commitment of the EU pursuant to the TEU to co-operate with third States and other organisations to the maximum extent possible. That aspiration is laid down specifically in Article 21 of the TEU.

The articulation of the relationship with a third country concerned can be done in two ways: through the possibility to conclude framework participation agreements and through *ad hoc* participation agreements.

These agreements are negotiated and concluded by the European Union with the third State concerned. Although they might be tailored to the specifics of each operation, they generally carry the same characteristics. Examples of Framework Participation Agreements include those with Iceland and Norway. Such agreements –published in the official journal- may be supplemented by arrangements with the third State concerned to cater for the specifics of that operation.

Through the Participation Agreement, the third State concerned commits itself to:

- pursue the objectives laid down in the Council decision, the operation plan and the rules of engagement:
- instruct its personnel to abide by the legal framework of the EU operation;
- transfer command and control to the EU operational Commander who may in turn delegate this to subordinate EU commanders.

A very special Participation Agreement has been concluded with the Russian Federation with regard to its participation to the EU operation in Chad and the Central African Republic. Obviously, given the particular sensitivities of the Russian Federation, this agreement deviates substantially from our standard agreement albeit in that delegation of command and control is provided for in the agreement. Needless to say that with these agreements, the contributing third State –as with EU Member States for that matter- is responsible for the settlement of claims caused by its personnel as well as for the conduct of disciplinary and/or judicial proceedings against the personnel of that State.

Finally, association of the third State to the day-to-day management of an operation, is done through the Committee of Contributors. This Committee is consulted on all aspects relating to the conduct of the operation and is invited to issue recommendations on proposed amendments to operational planning documents.

Conclusion

In light of the above, the relationship between the EU and the troops contributing countries – regardless of whether these are EU Member States or third States – is conciliated through an appropriate legal framework.

LE CADRE JURIDIQUE GÉNÉRAL DE LA DÉTERMINATION DE LA RESPONSABILITÉ POUR FAITS ILLICITES COMMIS AU COURS D'OPÉRATIONS DE MAINTIEN DE LA PAIX : LES PRINCIPES D'ATTRIBUTION ET LEURS IMPLICATIONS

Pierre Bodeau-Livinec
Université Paris 8

Summary

There has been an important amplification phenomenon regarding peacekeeping operations (PKO) in recent years, whether concerning their number, their nature or the variety of actors involved. In parallel, the issue of the responsibility for acts conducted within a PKO has been more and more a subject of interest for national and regional jurisdictions. The issue at stake here is the attribution of the international responsibility for wrongful acts and not accountability or liability. The emerging awareness around this question has also changed the classic perception of peacekeeping operations.

The legal sources governing the question of attribution are usually not really highlighted. Some international conventions simply do not deal with that question, where others only state general principles of attribution or are specific to a certain normative regime. There can however be some bilateral agreements between the international organisation (IO) and the troops contributing country (TCC) in order to set more precisely the rules of attribution in a specific PKO.

The European Court of Human Rights and some national bodies such as the UK's House of Lords have consequently generously referred to the codification work (the Draft Articles on State responsibility for international wrongful acts and the Draft Articles on the Responsibility of International Organisations) of the International Law Commission (ILC) on this issue. However, this application of the ILC work is ambiguous, as no discussion on the status of those texts has ever taken place. In addition, practice regarding IOs is much less widespread and coherent than that regarding the responsibility of the State, and it is therefore not clear whether the rules set for States can apply, mutatis mutandis, *to IOs.*

The criteria for attribution themselves are also ambiguous. Indeed, if the United Nations (UN) and the ILC agree on the exclusion of attribution through delegation such as contained in Behrami, *the debate is still open on whether Article 6 or Article 7 of the ILC Draft Articles on the Responsibility of International Organisations should apply. For the UN, the first solution should prevail and the attribution of responsibility should be determined by the principle of 'command*

and control' of the conduct in question. This logic obeys a functional and non-factual allocation of attribution. The effective control criterion is only secondary. On the other hand, the ILC supports the application of Article7 to determine the attribution of responsibility, which gives the effective control criterion a determining role.

Attribution and responsibility are however not always linked and can apply independently of each other. The responsibility of an IO without attribution could exist in the case where an IO decides to extend its responsibility beyond what could legally be attributable to it. In that case, the IO could act as the responsible of the wrongful act before turning to the responsible TCC in order to get reparation. Attribution without responsibility would be possible in the situation where a conduct is attributable both to the TCC and the IO but only one actually bears responsibility. Moreover, the case where an act has been attributed to an IO can also lead to that situation, as it can be very difficult to find a basis for determining the correlative responsibility, or even once the responsibility is established, to obtain reparation.

In general, however, IOs are very concerned by all wrongful acts committed during the course of their operations as their very legitimacy and credibility are at stake.

Nul ne peut contester la pertinence et l'intérêt qui s'attachent au choix du thème retenu cette année pour le colloque conjoint du Collège d'Europe et du CICR. On assiste en effet à un phénomène d'amplification manifeste des opérations de maintien de la paix (OMP), à un triple point de vue: – la multiplication des missions avec 16 OMP en cours sous les auspices des Nations Unies, impliquant 120 000 personnes (100 000 militaires / 20 000 civils) ; – la diversification des acteurs des missions, parfois au sein d'une même opération (organisation internationale/État en Côte d'Ivoire, plusieurs organisations internationales au Kosovo ; opération hybride au Darfour avec la MINUAD et Union africaine; la diversification de l'objet des missions avec des missions de maintien de la paix *stricto sensu* (Force des Nations Unies chargée du maintien de la paix à Chypre, UNFICYP), missions d'assistance (Afghanistan), missions de consolidation de la paix (MINUT au Timor-Leste).

Corrélativement à cette amplification, on observe une apparition récente mais significative dans la pratique internationale de la problématique de la responsabilité pour les actes des OMP . Des juridictions, tant régionales que nationales, ont eu à connaître de plusieurs affaires relatives aux actions ou aux omissions d'organes des organisations internationales ou de contingents nationaux agissant dans le cadre d'OMP (*Behrami et Saramati*, CEDH, mai 2007, à propos d'actes de la MINUK et de la KFOR; *Al-Jedda*, Chambre des Lords et CEDH, à propos des actes des forces britanniques dans le cadre de la force multinationale en Irak ; *Nuhanovic* et

Mustavic, Trib. de district et Cour d'appel de la Haye, à propos du comportement du contingent néerlandais participant à la FORPRONU à Sebrenića en juillet 1995). La responsabilité en cause dans ces affaires est la responsabilité/*responsibility* internationale pour fait illicite, et non pas une responsabilité/*accountability*, qui se développe par ailleurs en droit international pour désigner le devoir, politique et moral, qu'ont les acteurs de la société internationale de rendre compte de leurs actes, ou encore une responsabilité/*liability*, qui s'attache plus classiquement à l'indemnisation des dommages dans le champ des rapports contractuels.

Dans le même temps, il importe de ne pas mésestimer la perturbation importante que l'émergence de la question de la responsabilité provoque quant à la perception habituelle des missions que remplissent les organisations internationales. Dans la logique de l'avis fondateur rendu par la Cour sur la *Réparation des dommages subis au service des Nations Unies* (Comte Bernadotte), l'affirmation de la personnalité internationale a d'abord permis d'affermir la protection de l'Organisation, en lui permettant de porter réclamation contre des tiers pour des actes dont ses agents seraient victimes : « la pratique [...] a confirmé ce caractère d'une Organisation placée, à certains égards, en face de ses membres, et qui, le cas échéant, a le devoir de rappeler à ceux-ci certaines obligations »[1] . Bien évidemment, la possibilité d'engager la responsabilité de l'Organisation est consubstantielle à l'affirmation de la personnalité juridique internationale : la responsabilité étant le « corollaire nécessaire du droit »[2], il n'y a rien de surprenant à ce que l'Organisation puisse être « amenée à supporter les conséquences dommageables » d'actes accomplis par elle-même « ou par ses agents dans l'exercice de leurs fonctions officielles »[3] . La question s'est d'ailleurs posée à quelques reprises dans l'histoire de l'Organisation (génocide au Rwanda en 1994, par ex.). La question est cependant restée longtemps latente et plutôt théorique. Elle va surgir sous le double effet d'un effort de conceptualisation au sein du système des Nations Unies (travaux de la CDI à partir de 2003) et de la matérialisation du « risque » de l'engagement de la responsabilité des Nations Unies devant des juridictions internationales ou internes.

La communication qui précède et celle qui suit présentent, de manière très savante et détaillée, les questions complexes que soulèvent l'articulation entre organisations internationales et États contributeurs et les conséquences de celle-ci en termes d'attribution. Je ne vais donc pas répéter les éléments présentés par M. van Hegelsom et le Professeur Palchetti et m'en tiendrai, comme l'intitulé de mon intervention m'y invite d'ailleurs, au « cadre juridique général » et aux « principes d'attribution », en m'attachant aux modalités d'attribution des actes

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1 Avis consultatif du 11 avril 1949, Rec. 1949, p. 179.

2 CIJ, *Barcelona Traction*, arrêt du 5 février 1970, par. 36.

3 CIJ, *Différend relatif à l'immunité de juridiction d'un rapporteur spécial de la Commission des droits de l'homme*, avis consultatif du 29 avril 1999, par. 66.

concernés aux organisations internationales . De même, le colloque couvre scrupuleusement le spectre très large des questions soulevées par le thème de la responsabilité dans le cadre des OMP (obligations primaires, modalités de réparation, forum, responsabilité individuelle). Dans le temps qui m'est imparti, je ne vais donc pas m'attacher à déterminer l'ensemble des « implications » de l'attribution d'un acte accompli dans le cadre d'une OMP mais me bornerai à exposer quelques pistes de réflexion que m'inspire, précisément, l'absence d'automaticité entre attribution et engagement de la responsabilité.

Mais, avant d'en venir à ces deux points – ambivalence des principes d'attribution et complexité de la relation entre attribution et responsabilité – vous me permettrez d'aborder brièvement une question préliminaire d'importance : celle des sources du droit applicable aux questions qui nous préoccupent.

I. Les sources des principes d'attribution

Il est curieux de constater que cette question, pourtant logiquement essentielle à la détermination des principes applicables en matière d'attribution des comportements accomplis dans le cadre des OMP, est souvent maintenue dans une relative obscurité ou abordée très allusivement. Or, la question des sources du droit applicable est sans doute plus complexe qu'il y paraît de prime abord.

1. L'indétermination des règles primaires

Certains conventions sont silencieuses sur la question de la responsabilité pour violation des obligations qu'elles comportent : c'est notamment le cas des deux Pactes des Nations Unies sur les droits de l'homme. Ce silence est conforme à la distinction entre règles primaires et secondaires, qui renvoie donc à l'application du droit coutumier commun de la responsabilité pour fait illicite.

D'autres traités évoquent plus directement la question de la responsabilité des parties : Art. 29 de la IVe Convention de Genève (protection des personnes civiles en temps de guerre) : « La Partie au conflit au pouvoir de laquelle se trouvent des personnes protégées est responsable du traitement qui leur est appliqué *par ses agents*, sans préjudice des responsabilités individuelles qui peuvent être encourues »; Art. 91 du Protocole I aux Conventions de Genève (est à la fois plus inclusif (couvre l'ensemble. des Conventions) et plus précis, en ce qu'il porte une règle générale d'attribution : « La Partie au conflit qui violerait les dispositions des Conventions ou du présent Protocole sera tenue à indemnité, s'il y a lieu. Elle sera responsable de *tous actes commis par les personnes faisant partie de ses forces armées* ». Ces textes sont tout à fait importants mais sectoriels (droit international humanitaire) et énonçant simplement des principes généraux d'attribution.

D'autres traités peuvent aborder plus précisément la question de la responsabilité, notamment des conventions bilatérales entre l'organisation qui autorise et met en œuvre une OMP et l'État qui contribue à l'opération par la mise à disposition de contingents : Art. 9 Memorandum d'accord relatif aux contributions entre l'ONU et l'État participant : « [i]l incombe à l'Organisation des Nations Unies de régler toute demande d'indemnisation émanant de tiers lorsque la perte ou la détérioration des biens des intéressés, le décès ou le préjudice corporel a été causé par le personnel ou le matériel fourni par le Gouvernement dans l'exercice des fonctions ou toute autre activité ou opération au titre du présent mémorandum. Toutefois, si la perte, la détérioration, le décès ou le préjudice corporel est dû à une faute grave ou à une faute intentionnelle du personnel fourni par le Gouvernement, il appartiendra à celui-ci de régler cette demande d'indemnisation »[4]. Toutefois, comme l'a souligné la CDI, la portée d'un tel texte est doublement limitée : « Ce texte ne traite apparemment que de la répartition des responsabilités, non de l'attribution du comportement. En tout état de cause, ce type d'accord n'est pas probant parce qu'il ne régit que les relations entre l'État ou l'organisation qui fournit des ressources et l'organisation d'accueil, et il ne saurait donc avoir pour effet de priver un tiers d'aucun droit que celui-ci pourrait détenir à l'égard de l'État ou de l'organisation qui est responsable d'après les règles générales »[5].

Dès lors, il importe d'examiner le fondement normatif sur lequel les juridictions internationales et internes se sont appuyées pour déterminer ces « règles générales » de responsabilité et d'attribution applicables dans les cas qui leur ont été récemment soumis.

2. L'influence exacerbée de l'œuvre de codification et de développement progressif

Un aspect important et pourtant quelque peu négligé de la décision rendue par la CEDH dans les affaires *Behrami et Saramati* tient précisément aux sources utilisées par la Cour pour conduire son raisonnement sur l'attribution « en principe » des comportements considérés aux Nations Unies. Sous le titre « Le droit et la pratique pertinents », la Cour évoque successivement la Charte des Nations Unies puis, après avoir rappelé la création de la CDI sur le fondement de l'art. 13 de la Charte, « le projet d'articles sur la responsabilité des organisations internationales » et le projet d'articles sur la responsabilité des États »[6]. Les décisions ultérieures de la CEDH suivant immédiatement la décision *Behrami et Saramati* en reproduisent le raisonnement sans davantage de précisions quant aux projets de la CDI. De même, la Chambre des Lords, dans l'affaire *Al-Jedda*, fait amplement référence aux travaux de la CDI, sans davantage

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4 A/C.5/60/26, chap. 9, art. 9.

5 Projet d'articles de la CDI sur la responsabilité des organisations internationales, commentaire de l'art. 7, par. 3, *in Rapport CDI…* 2011, pp. 88-89.

6 CEDH (Grande chambre), *Behrami et Behrami c. France et Saramati c. France, Allemagne et Norvège*, décision sur la recevabilité, 2 mai 2007, pars.29-34.

déterminer leur portée et leur opposabilité[7]. Le Tribunal de district puis la Cour d'appel de La Haye font également référence à ces travaux sans plus d'analyse[8]. Enfin, dans l'aff. *Al-Jedda c. Royaume-Uni*, la CEDH range les travaux de la CDI parmi les « éléments pertinents de droit international »[9]. Il y a donc comme une forme d'évidence à s'appuyer sur les travaux de la CDI pour déterminer les principes d'attribution applicables, alors que ce fondement peut prêter à discussion, au moins sur le plan de la méthode.

Cet appui sur les travaux de la CDI est très ambivalent. Les mentions incluses dans ces décisions juridictionnelles appellent plusieurs remarques. Il n'existe aucune discussion sur le statut des textes considérés alors qu'il s'agit de textes de portée juridique très contrastée en droit international (Charte / articles adoptés par la CDI). Parmi ces derniers, existent aussi des différences notables. Les articles sur la responsabilité de l'État ont été définitivement adoptés par la CDI puis annexés à la résolution de l'Assemblée générale en 2001 . Les articles sur la responsabilité des organisations internationales n'étaient, à l'époque où ils ont été utilisés, qu'à l'état d'un projet en débat en première lecture au sein de la CDI (adoption définitive en seconde lecture en juillet 2011).

Sans évidemment mettre en cause la valeur intrinsèque qui s'attache aux travaux de la Commission, ce procédé soulève des questions. Il est couramment admis que les dispositions principales relatives à l'attribution dans les articles sur la responsabilité de l'État ont valeur coutumière[10] . Le projet d'articles sur la responsabilité des organisations internationales procède largement, notamment dans les dispositions relatives à l'attribution, par transposition des articles sur la responsabilité de l'État. *Prima facie*, il paraît donc possible de dire que les dispositions sur l'attribution dans le second projet reflètent également le droit coutumier. Mais cette affirmation doit être immédiatement nuancée sur deux points. La pratique en ce qui concerne les organisations internationales est beaucoup moins développée et sans doute plus diverse qu'en ce qui concerne les États. Surtout, au-delà de la pertinence générique des principes en cause – l'attribution du comportement des organes et agents ou l'attribution sur le fondement du contrôle effectif –, il n'est pas assuré que les notions à l'œuvre – organe, agent, contrôle effectif – aient une signification immédiatement similaire dans le cas des États et dans celui des organisations internationales.

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7 Décision du 12 décembre 2007, *R (sur la requête d'Al-Jedda) (FC) c. Secretary of State for Defence*. Lord Bingham of Cornhill, pars. 5-6.

8 *Mustafic*, 5 juillet 2011 (LJN: BR0132), par. 5.8.

9 CEDH, *Al-Jedda c. Royaume-Uni*, arrêt du 7 juillet 2011 (Grande Chambre), pars. 55-56.

10 V. not. C.I.J., *Application de la Convention sur la prévention et la répression du crime de génocide (Bosnie-Herzégovine/ Serbie et Monténégro)*, arrêt du 26 février 2007, pars. 385 (actes des organes) et 398 (contrôle effectif).

Il convient d'aborder les principes d'attribution applicables dans le cas des OMP en ayant ces remarques de prudence méthodologique à l'esprit, afin d'apprécier ces principes pour ce qu'ils disent, et non pas sur la foi d'un postulat de transposition à l'identique des règles d'attribution dégagées dans le cadre de la responsabilité de l'État.

II. L'ambivalence des principes d'attribution

Dans la décision *Behrami*, la CEDH a tenté de mettre en œuvre un critère d'attribution par délégation : « l'action litigieuse [était], en principe, « attribuable » à l'ONU »[11], parce que, quels que soient les acteurs effectivement impliqués, les pouvoirs qu'ils exerçaient leur avaient été « légalement délégués en vertu du chapitre VII » par le Conseil de sécurité. A suivre une telle logique, et en supposant simplement que les opérations de paix ici considérées aient reçu l'autorisation ou l'aval du Conseil de sécurité, il n'existerait plus de principes d'attribution à identifier et appliquer, puisque toute action devrait, *in fine*, être attribuée aux Nations Unies. Cette conception a fait l'objet de vives contestations, tant par les Nations Unies que par certains États, la CDI et la doctrine ; la CEDH semble elle-même l'avoir considérablement nuancée récemment (cf. intervention du Professeur Palchetti). Si, donc, cette hypothèse d'attribution par délégation est écartée, quels sont les principes d'attribution applicables ?

Le projet d'articles de la CDI sur la responsabilité des organisations internationales comporte 4 dispositions sur l'attribution. Deux d'entre elles ne sont pas directement pertinentes ici : l'art. 8 (« excès de pouvoir ou comportement contraire aux instructions » d'un organe ou agent d'une organisation ») qui vient compléter l'art. 6 ; et l'art. 9 (« Comportement reconnu et adopté comme étant sien par une organisation »), qui traite d'une hypothèse exceptionnelle et *a priori* assez différente des situations ici envisagées.
Il restent donc deux hypothèses : celle de l'attribution, en quelque sorte naturelle ou normale, à l'organisation des actes de ses organes ou agents (art. 6) et celle, plus empirique sans doute mais a priori plus proche du cas des OMP, de l'attribution à une organisation du comportement des organes et agents qu'un État ou une autre organisation mettent à sa disposition. Ce sont deux principes distincts, qui ne reposent pas sur les mêmes critères d'attribution, et qui, pourtant, ont été diversement compris par les Nations Unies et la CDI pour déterminer le ou les sujets responsables du fait des actes accomplis dans le cadre des OMP.

1. L'attribution de principe : le cas des organes et des agents

> Art. 6 (1) : « Le comportement d'un organe ou agent d'une organisation internationale dans l'exercice des fonctions de cet organe ou agent est considéré comme un fait de

11 CEDH (Grande chambre), *Behrami et Behrami c. France et Saramati c. France, Allemagne et Norvège*, décision sur la recevabilité, 31 mai 2007, pars. 140-141.

cette organisation d'après le droit international, quelle que soit la position de l'organe ou agent dans l'organisation ».

C'est l'hypothèse première d'attribution, la plus directe, qui transpose au cas des organisations internationales la règle d'attribution à l'État du comportement de ses organes, qui constitue « l'une des pierres angulaires du droit de la responsabilité internationale »[12] (art. 4 des arts. sur la responsabilité de l'État) . Il est possible de parler ici d'attribution de principe, même si l'attribution est toujours un processus empirique : c'est le propre de la personnalité juridique que d'attribuer au sujet les actes accomplis par ses organes ou ses agents sur le fondement du lien fonctionnel qui les unit. Toutefois, appliqué aux OMP, et notamment à celles qui se déploient sous l'égide des Nations Unies, ce principe d'attribution est d'un maniement moins aisé qu'il y paraît de prime abord. En effet, soit il faudrait considérer qu'en l'absence de mise à disposition de l'Organisation des contingents nationaux prévus par l'art. 45 de la Charte, les opérations concernées ne sont pas conduites, militairement, par des organes ou agents des Nations Unies et alors il faut trouver un autre fondement d'attribution, sous peine de dégager l'Organisation de toute forme de responsabilité ; Soit il faudrait considérer que le lien fonctionnel s'étend à l'ensemble des organes et agents qui agissent au nom et pour le compte de l'Organisation, et le principe de l'art. 6 impliquerait alors les Nations Unies de manière si inclusive que la question de la répartition de l'attribution entre l'Organisation et les États contributeurs deviendrait secondaire.

La CDI et les Nations Unies s'accordent à rejeter les termes d'une alternative aussi caricaturale. En revanche, elles ne semblent pas partager le même point de vue quant à la possibilité d'attribuer les actions accomplies dans le cadre des OMP sur le fondement de l'art. 6. Sur ce point, leurs positions paraissent assez paradoxales.

Pour la CDI, le critère de l'art. 6 s'avère particulièrement inclusif mais ce n'est pas sur ce fondement que la question de l'attribution des actes des OMP doit être principalement abordée. Le critère est inclusif parce qu'il ne se limite pas aux organes de l'organisation (c'est-à-dire, selon l'art. 2 c), « toute personne ou entité qui a ce statut d'après les règles de l'organisation »), mais couvre également le comportement des agents, (c'est-à-dire, selon l'art. 2 d), une personne ou entité, autre qu'un organe « chargée par l'organisation d'exercer, ou d'aider à exercer, l'une des fonctions de celle-ci, et par l'intermédiaire de laquelle, en conséquence, l'organisation agit »). Est donc attribuable à l'organisation l'ensemble des actes accomplis par ses agents, y compris lorsque les personnes considérées, sans avoir un statut officiel dans l'organisation, exercent

12 C.I.J., *Application de la Convention sur la prévention et la répression du crime de génocide (Bosnie-Herzégovine/ Serbie et Monténégro)*, arrêt du 26 février 2007, par. 385.

pour le compte de celle-ci des fonctions qu'elle leur a conférées[13] . Pourtant, la CDI précise que, dans l'hypothèse où l'organe ou l'agent de l'organisation a été détaché auprès d'elle par un État ou une autre organisation internationale, « la question de savoir dans quelle mesure le comportement de l'organe ou agent détaché est attribuable à l'organisation d'accueil »[14] relève de l'art. 7 et non de l'art. 6. En clair, il semble que, pour la Commission, dans un tel cas de figure, auquel peut être rapportée la situation des OMP, le critère du contrôle effectif prime sur celui du lien fonctionnel.

Pour les Nations Unies en revanche, c'est bien sous l'empire de l'art. 6, et non de l'art. 7, que doit être appréciée la question de l'attribution des actes accomplis dans le cadre des OMP. Dans ses observations sur le projet de la CDI, le Secrétariat de l'Organisation explique que « dans la pratique, l'ONU distingue nettement deux types d'opérations militaires, à savoir : a) les opérations des Nations Unies menées sous commandement et contrôle des Nations Unies, et b) les opérations autorisées par l'ONU et menées sous commandement et contrôle national ou régional »[15]. Dès lors, pour l'Organisation, la question de l'attribution doit être déterminée par application du « principe dit du « commandement et contrôle » de l'opération ou de l'action en question »[16]. Ce principe opère une répartition fonctionnelle- et non pas empirique – de l'attribution entre l'Organisation et les États concernés : le Secrétariat rappelle sa position habituelle : « La responsabilité internationale de l'Organisation des Nations Unies en cas d'activités menées par les forces des Nations Unies lors de combats est fondée sur l'hypothèse que l'opération considérée est placée sous le commandement et le contrôle exclusifs de l'Organisation. Lorsqu'une opération autorisée en vertu du Chapitre VII de la Charte est conduite sous commandement et contrôle national, la responsabilité au plan international des activités de la force incombe à l'État ou aux États qui conduisent l'opération »[17]. Le critère du contrôle effectif ne joue plus dans ce cadre qu'un rôle résiduel, pour déterminer la responsabilité de chacun dans l'hypothèse d'une opération conjointe ONU/ États contributeurs de troupes, comme dans le cas des opérations conduites en Somalie entre 1992 et 1994[18].

Il y a donc une divergence apparente d'appréciation entre la CDI et le Secrétariat des Nations Unies quant à l'importance du critère du contrôle effectif en matière d'attribution. Pas certain, cependant, que cette divergence soit, par ses conséquences, si sensible en pratique.

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13 V. le commentaire de l'article 6 du Projet d'articles de la CDI sur la responsabilité des organisations internationales, , in *Rapport CDI*… 2011, pp. 85-86, pars. 2-3.

14 *Ibid*., pp. 86-87, par. 6.

15 A/CN.4/637/Add.1, p. 10, par. 2.

16 *Ibid*., par. 3.

17 *Ibid*., pp. 11, par. 3 (citant le rapport sur la Force de protection des Nations Unies (A/51/389, par. 17).

18 *Ibid*., pp. 11-12, pars. 6-7.

2. L'attribution établie : l'exercice d'un contrôle effectif

> Art. 7 : « Le comportement d'un organe d'un État ou d'un organe ou agent d'une organisation internationale mis à la disposition d'une autre organisation internationale est considéré comme un fait de cette dernière d'après le droit international pour autant qu'elle exerce un contrôle effectif sur ce comportement ».

Pour la CDI, c'est bien sur le fondement de ce critère que doit être réglée la question de l'attribution des actes accomplis dans le cadre des OMP : prime donc une détermination empirique, *in casu*, de l'emprise que l'organisation possède sur le comportement considéré. Pour la CDI en effet, l'article 7 vise la situation « où l'organe ou l'agent détaché agit encore dans une certaine mesure en qualité d'organe de l'État de détachement ou en qualité d'organe ou d'agent de l'organisation de détachement. C'est ce qui se produit, par exemple, dans le cas des contingents militaires qu'un État met à la disposition de l'Organisation des Nations Unies pour une opération de maintien de la paix, puisque l'État conserve ses pouvoirs disciplinaires et sa compétence pénale à l'endroit des membres du contingent national »[19] . Dans ce cas, le critère d'attribution repose « sur le contrôle qui est exercé dans les faits sur le comportement particulier adopté par l'organe ou l'agent mis à la disposition de l'organisation d'accueil »[20] ; il s'agit là de la « question décisive »[21] à trancher. La CDI se démarque clairement des Nations Unies, en soulignant qu'au-delà du seul cas des opérations conjointes, ce critère vaut pour les autres OMP : « S'il est compréhensible que pour l'efficacité des opérations militaires, l'Organisation des Nations Unies revendique l'exclusivité du commandement et du contrôle des forces de maintien de la paix, l'attribution du comportement devrait aussi à cet égard être fondée sur un critère factuel »[22].

Pour le Secrétariat des Nations Unies à l'inverse, le critère du contrôle effectif n'est pas dénué de pertinence, mais il tient en quelque sorte un rôle secondaire, en ce qu'il reste subordonné à la détermination préalable de l'autorité détenant le commandement et le contrôle de l'opération. L'Organisation explique qu'elle privilégie une application « horizontale » du critère d'attribution, « distinguant selon que l'opération des Nations Unies est menée sous commandement et contrôle de l'ONU ou que l'opération est autorisée par l'ONU et menée sous commandement et contrôle national ou régional »[23] . Dès lors, « les forces mises à [la] disposition [de l'ONU] sont « transformées » en organe subsidiaire de l'ONU et, par suite, sont susceptibles

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19 *Projet d'articles de la CDI sur la responsabilité des organisations internationales, commentaire de l'art. 7*, par. 1, in Rapport CDI… 2011, p. 88.

20 *Ibid*., par. 4, in Rapport CDI… 2011, p. 89.

21 *Ibid*., par. 8, in Rapport CDI… 2011, p. 90.

22 *Ibid*., par. 9, in Rapport CDI… 2011, p. 91.

23 A/CN.4/637/Add.1, p. 14, par. 2.

d'engager la responsabilité de l'Organisation, comme tout autre organe subsidiaire – que le contrôle exercé sur tous les aspects de l'opération soit, en fait, « effectif » ou non »[24].

Pour autant, la divergence n'est peut-être pas si importante que cela en pratique. Il existe un point d'accord fondamental entre la CDI et les Nations Unies pour considérer, contre la jurisprudence *Behrami*, que « le comportement des forces militaires d'États ou d'organisations internationales n'est pas attribuable à l'Organisation des Nations Unies lorsque le Conseil de sécurité autorise des États ou des organisations internationales à prendre les mesures nécessaires en dehors d'une chaîne de commandement reliant ces forces aux Nations Unies »[25] (commentaire général, par. 5). L'essentiel est ainsi sauf. La position de la CDI paraît plus conforme aux prescrits classiques du droit international en la matière, qui se fondent sur l'emprise exercée sur un comportement plutôt que sur l'autorité exercée sur une personne ou une entité : la responsabilité est déterminée à raison de faits, et non de liens entre sujets. Dans le même temps, comme elles le reconnaissent elles-mêmes[26], il y a un impératif politique évident à ce que les Nations Unies étendent le principe de leur responsabilité à l'égard des tiers pour les OMP : apporter une garantie aux États contributeurs et affirmer la personnalité de l'Organisation. Surtout, le critère du lien fonctionnel et le critère du contrôle effectif ne sont sans doute pas si éloignés que cela dans la pratique : pour déterminer dans quelle mesure un agent agit pour le compte de l'Organisation, il faut bien, dans le silence des règles de celle-ci, se fonder sur le lien qui le rattache effectivement à l'Organisation. De même, le principe du commandement et du contrôle doit reposer sur un rapport de subordination effectif pour ne pas être réduit à une simple relation de délégation : l'Organisation l'admet elle-même lorsqu'elle évoque « le critère du « commandement et du contrôle effectifs » que l'ONU et ses États Membres appliquent, depuis plus de six décennies, en matière d'attribution de responsabilité »[27].

III. La relation entre attribution et engagement de la responsabilité

Comme indiqué auparavant, il est impossible de traiter de l'ensemble des « implications » des principes d'attribution en matière de responsabilité pour les faits illicites commis au cours d'opérations de paix. Je me bornerai ici à de très brèves observations quant à l'absence de rapport d'automaticité entre attribution et responsabilité dans ce contexte.

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24 *Ibid.*, p. 14, par. 3.

25 *Projet d'articles de la CDI sur la responsabilité des organisations internationales, commentaire général sur l'attribution, par. 5, in Rapport CDI…* 2011, p. 84.

26 A/CN.4/637/Add.1, p. 15, par. 6.

27 A/CN.4/637/Add.1, p. 13.

1. La responsabilité sans attribution

Il s'agit là d'une garantie offerte par l'Organisation. Dans la logique de l'intérêt politique qu'a l'Organisation d'affirmer sa responsabilité, il n'est pas possible d'exclure que celle-ci étende sa responsabilité au-delà des cas où les comportements lui seraient effectivement attribuables. Cette hypothèse prévue dans l'art. 9 du projet de la CDI, qui prévoit qu'« [u]n comportement qui n'est pas attribuable à une organisation internationale selon les articles 6 à 8 est néanmoins considéré comme un fait de cette organisation d'après le droit international si et dans la mesure où cette organisation reconnaît et adopte ledit comportement comme étant sien ». Cette hypothèse est conceptuellement différente, mais assez proche en pratique, de l'action en recouvrement que prévoit l'art. 9 du Memorandum d'accord relatif aux contributions entre l'ONU et l'État participant, évoqué précédemment. Dans ce cas de figure en effet, l'Organisation n'assumerait qu'une responsabilité « de façade » vis-à-vis des tiers, avant de se retourner vers le responsable réel qu'est l'État contributeur. Mais il n'est pas certain, loin s'en faut, que l'Organisation exerce cette faculté et se retourne vers l'État responsable : elle préfèrera souvent prendre le risque politique de la responsabilité pour sauvegarder la qualité de sa relation avec les États contributeurs.

2. L'attribution sans responsabilité

Il peut exister une pluralité d'attribution. Cette éventualité est soulignée par la CDI elle-même : « Bien qu'elle ne soit sans doute pas fréquente dans la pratique, la double – voire la multiple – attribution d'un comportement ne saurait être exclue. Ainsi, l'attribution d'un certain comportement à une organisation internationale n'implique pas que le même comportement ne puisse pas être attribué à un État, pas plus que l'attribution d'un comportement à un État n'exclut l'attribution du même comportement à une organisation. » Dans une telle hypothèse, il est possible qu'un seul des sujets auxquels le comportement est attribué assume sa responsabilité. Cela particulièrement sensible dans le cas d'opérations conjointes, où il pourrait s'avérer très délicat de distinguer la « part » d'attribution respective, et donc de responsabilité, de l'Organisation et des États participants.

Quand bien même l'acte accompli dans le cadre de l'opération serait bel et bien attribuable à l'Organisation, encore faudrait-il trouver le forum approprié pour l'établir et déterminer la responsabilité corrélative. Traditionnellement, les organisations comme les Nations Unies sont triplement protégées à cet égard. Elles ne sont pas parties aux instruments qui prévoient un forum juridictionnel éventuel : c'est le sens de la décision d'irrecevabilité rendue dans l'affaire *Behrami*. La mission qu'elles remplissent pour le maintien de la paix et de la sécurité internationales joue toujours le rôle d'un « garde-fou » qu'il faut préserver contre les mises en cause intempestives de la responsabilité : comme l'a reconnu la CEDH, un contrôle trop intrusif du juge pourrait s'analyser « en une ingérence dans l'accomplissement d'une mission essentielle

de l'ONU dans ce domaine »[28]. Les organisations restent protégées par leurs immunités juridictionnelles encore que certaines évolutions de la jurisprudence conduisent à douter de la résistance de ce bouclier en cas d'absence de protection équivalente (*Beer et Regan, Waite et Kennedy c. Allemagne*, 1999).

Se pose enfin le problème de l'effectivité de la réparation. Quand bien même la responsabilité de l'Organisation serait engagée, encore faudrait-il qu'elle puisse fournir effectivement réparation et indemniser le préjudice subi. C'est le problème que soulève la CDI lorsqu'elle indique que « L'organisation internationale responsable prend toutes les mesures voulues conformément à ses règles pour que ses membres lui donnent les moyens d'exécuter efficacement les obligations que [la réparation] met à sa charge » (art. 40(1)). Cette hypothèse est peu plausible en pratique mais pas complètement inenvisageable, notamment si certains États membres de l'Organisation mettent en cause l'opération conduite par celle-ci par le biais d'autres États membres.

Plus généralement, et cela sera ma remarque conclusive, il existe une autre implication des principes d'attribution, dépassant le seul cadre de la détermination juridique : l'Organisation ne peut, en effet, qu'être particulièrement attentive aux faits répréhensibles commis dans le cadre des opérations de paix. C'est en réalité sa crédibilité et sa légitimité comme acteur fondamental de la paix qui se trouvent, en l'occurrence, mises en jeu. Quel que soit alors le principe d'attribution applicable, elle ne saurait y rester insensible.

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28 CEDH (Grande chambre), *Behrami et Behrami c. France et Saramati c. France, Allemagne et Norvège*, décision sur la recevabilité, 31 mai 2007, par. 149.

HOW CAN MEMBER STATES BE HELD RESPONSIBLE FOR WRONGFUL ACTIONS COMMITTED DURING PEACE OPERATIONS CONDUCTED BY INTERNATIONAL ORGANISATIONS?

Paolo Palchetti
University of Macerata

Résumé

Déterminer dans quelles conditions les actions conduites au cours d'une opération de paix peuvent être attribuées à un État contributeur de troupes (ECT) et/ou à l'Organisation internationale (OI) qui a initié et conduit l'opération exige une examen approfondi de la question de l'attribution. Il faut tout d'abord préciser que les articles de la Commission de droit international (CDI) sur la responsabilité des OI envisagent un certain nombre de situations dans lesquelles un ECT peut être considéré comme responsable pour une action en lien avec la conduite de l'OI. Ce scénario reste toutefois exceptionnel. En particulier, le fait de prendre part dans le processus de décision de l'OI et de soutenir activement l'envoi d'une mission militaire ne suffit pas à déclencher la responsabilité de l'ECT. Il faut, en fait, que l'ECT ait « aidé et assisté » ou « dirigé et contrôlé » l'OI dans la commission de l'acte en question. Dans cette évaluation le contexte factuel reste en général décisif.

Lorsque placé à la disposition d'une OI, un contingent national fait partie d'une entité qui possède en général le statut d'organe de l'OI concernée. Il serait alors logique de considérer qu'en principe la conduite de la force de maintien de la paix est attribuable à l'OI. Cependant le statut officiel des forces de maintien de la paix ne peut être considéré comme décisif lorsqu'il s'agit d'attribution de responsabilité. L'important est de savoir quelle entité exerce un « contrôle effectif » sur la conduite en question. Au sens de l'article 7 de la CDI, le contrôle effectif semble devoir être interprété de manière plus souple que dans le contexte du droit de la responsabilité des États et n'exigerait pas la preuve que la conduite soit le résultat d'instruction spécifique. La répartition formelle de l'autorité entre l'OI et l'ECT est alors également à prendre en compte. Le fait que l'autorité officielle sur les troupes appartiennent à l'OI établi une présomption de « contrôle effectif » de l'OI sur la conduite de ces troupes. Cette présomption peut bien sûr être renversée s'il est démontré que l'État exerçait dans les faits un « contrôle effectif » sur la conduite concernée. La Cour d'Appel de la Haye, dans son récent jugement dans l'affaire Nuhanovic, soutient que lors du test du « contrôle effectif », si aucune instruction spécifique n'avait été donnée, il s'agissait alors de savoir si l'ECT ou l'OI avaient le pouvoir de prévenir la conduite concernée.

Un acte d'un contingent national dans le cadre d'une opération de paix d'une OI peut aussi être simultanément attribuée à l'OI et à l'ECT. Si les commentaires de la CDI reconnaissent cette possibilité, la pratique à cet égard est cependant presque inexistante. La double attribution pourrait être admises lorsque les deux entités sont formellement investies d'une autorité sur le contingent national et que la conduite en question résulte d'instructions prises par accord mutuel entre l'OI et l'ECT.

Dans les situations où le Conseil de sécurité de l'Organisation des Nations unies (ONU) autorise des États à conduire une opération militaire, les contingents nationaux n'opèrent alors pas sous le commandement des Nations Unies. Cependant, la Cour européenne des droits de l'homme (CEDH), dans sa décision Behrami et Saramati, *a estimé qu'en l'espèce l'ONU exerçait le « contrôle et l'autorité finale » sur les activités des forces de maintien de la paix et qu'alors les actes de ces forces devait être attribuée à l'ONU. Ce raisonnement ne peut qu'être déploré, puisqu'il est assez peu raisonnable qu'un État qui exerce un contrôle effectif sur un contingent autorisé par l'ONU ne puisse pas porter la responsabilité pour la conduite de ce dernier. Le récent jugement de la CEDH dans l'affaire* Al-Jedda, *dans lequel la Cour recourt à la notion de « contrôle effectif », est alors à cet égard une évolution positive. Il est en effet souhaitable que la CEDH abandonne la notion de «contrôle final» au profit de celle du « contrôle effectif » comme seul critère applicable en ce qui concerne l'attribution de responsabilité dans ce type de situation.*

I. Introduction

In principle, holding a State to account for a wrongful act presupposes that the act in question is attributable to that State. In this respect, the problem of determining when a Member State of an international organisation can be held responsible for wrongful actions committed during peace operations conducted by that organisation may be regarded as equivalent to the problem of determining when actions taken in the course of such a peace operation can be attributed to the Member State rather than (or in addition) to the organisation which had promoted and conducted the operation. It is therefore not surprising that the great bulk of my intervention will be devoted to the problem of attribution. I will address this issue by distinguishing two situations. I will first examine the case in which national contingents are placed under the operational command of the organisation – such as in the case of United Nations (UN) peacekeeping operations. With regard to this situation, I will mainly focus on the criterion of attribution, which is based on the existence of effective control over the conduct at issue; I will also examine the possibility that the same conduct may simultaneously be attributed both to the organisation and to the troops contributing country (TCC). The other situation which I intend to address is where a State's military forces act under the authorisation of the UN Security Council.

II. A preliminary remark on the possibility of holding a Member State responsible for acts attributable to the international organisation

While in principle a State is only responsible for acts which are attributable to it, under certain circumstances the responsibility of a Member State may also arise from acts which are attributable exclusively to the organisation. Part Five of the Draft Articles on the Responsibility of International Organisations envisages a number of situations where a Member State may be held responsible in connection with the conduct of the international organisation.[1] However, while responsibility without attribution cannot be excluded, it must be admitted that the possibility of a State being held responsible for acts of the international organisation of which it is a member is restricted to rather exceptional situations. The separate legal personality of the international organisation generally prevents a member from being held responsible for acts of the organisation.

In particular – to mention just one example – the fact that a Member State, by taking part in the decision-making process of the international organisation, sponsored and actively supported the sending of a military mission does not, as such, entail the international responsibility of that Member State for the wrongful acts committed in the course of such a military operation. A higher threshold of involvement in the wrongful activities is required. It must be demonstrated that, when acting within the framework of the organisation, the Member State was in fact 'aiding or assisting' or 'directing and controlling' the organisation in the commission of the wrongful activities within the meaning of Articles 58 and 59 of the International Law Commission (ILC) Draft Articles. In other words, the possibility of holding the Member State responsible for its role in the decision-making process of the organisation should be assessed in light of the factual circumstances of each case. As the ILC Commentary makes clear, '[t]he factual context such as the size of membership and the nature of the involvement will probably be decisive'.[2]

III. National contingents put at the disposal of the organisation: the "effective control' test

When placed at the disposal of an international organisation, national contingents form part of an entity which is generally given the status of organ of the relevant organisation. This is precisely what occurs in the case of military contingents that States place at the disposal of the UN for a peacekeeping operation. UN peacekeeping forces are generally given the status of subsidiary organs of the UN. Given that these forces are considered organs of the organisation,

1 Report of the International Law Commission on the work of its sixty-third session, UN doc. A/66/10, p. 157 ff.

2 *Ibid*., p. 159.

it might be argued that in principle the conduct of a peacekeeping force is to be attributed to the organisation. In the words of a UN legal counsel, 'as a subsidiary organ of the United Nations, an act of peacekeeping forces is, in principle, attributable to the Organisation'.[3] This view was recently also adopted by the European Court of Human Rights (ECtHR). In its *Behrami and Saramati* decision, the ECtHR mainly relied on the status of United Nations Interim Administration Mission in Kosovo (UNMIK) as a subsidiary organ of the UN in order to justify its conclusion that the conduct of UNMIK had to be attributed to the UN.[4] However, the formal status of peacekeeping forces within the UN system can hardly be regarded as decisive for purposes of attribution. As the ILC Commentary makes clear,[5] for purposes of attribution what matters is to establish which subject – the UN or the TCC – has authority over the contingent in relation to a specific act. This is because generally national contingents are not placed under the exclusive authority of the UN and do not cease to act as organs of their respective States. The retention of certain powers by the sending States implies that these forces, while put at the disposal of the UN, continue to act simultaneously as organs of their respective States. It is this dual status as organs of both the UN and the sending State which justifies the application of a criterion of attribution which is based not on the formal status of peacekeeping forces within the UN system but on the factual control over the conduct of such forces.

Article 7 of the ILC's Draft Articles provides that the conduct of an organ of a State that is placed at the disposal of an international organisation is to be attributed to that international organisation 'if the organisation exercises effective control over that conduct'. Thus, under Article 7, attribution of conduct to the IO or to the sending State depends on the assessment of who has effective control over such conduct. The same test has been applied by a number of judgments of domestic courts dealing with the problem of attribution with respect to acts of UN peacekeeping forces. The main problem in this regard is how to determine what 'effective control' means within the context of this rule.

A first question that may be raised is whether the notion of effective control referred to in Article 7 has the same meaning as the notion used in the context of the law of State responsibility. As is well known, an 'effective control' test was employed by the International Court of Justice (ICJ) in the *Nicaragua* and in the *Genocide Convention* cases in order to determine whether the conduct of groups of individuals – who are not organs of a State and who are con-

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3 Letter of 3 February 2004 by the United Nations Legal Counsel to the Director of the Codification Division, A/CN.4/545, sect. II.G (see Report of the International Law Commission, cit., p. 88).

4 See the decision of the European Court of Human Rights of 2 May 2007 in the cases *Behrami and Behrami v. France and Saramati v. France, Germany and Norway*, Paragraph. 141.

5 Report of the International Law Commission, cit., pp. 87-88.

nected to the State only on the basis of a *de facto* link – is to be attributed to that State.[6] It might be argued that the test of effective control used in Article 7 has the same meaning as the test applied by the International Court of Justice and subsequently adopted by the ILC in Article 8 of the Articles on State Responsibility. This would mean that, for an act of a member of a peacekeeping force to be attributed to the UN (or to the sending State), it would have to be demonstrated that that specific act was taken under the instruction or the effective control of the UN (or the sending State). However, it does not seem that Article 7 requires such a high threshold of control for the purposes of attribution. As the ILC Commentary makes clear, the notion of 'effective control' within the context of Article 7 does not play the same role as in the context of the law on State responsibility. The ILC is careful to specify that control within the context of Article 7 does not concern 'the issue whether a certain conduct is attributable at all to a State or an international organisation, but rather to which entity – the contributing State or organisation or the receiving organisation – conduct is attributable'.[7] Thus, it seems that, in the ILC's view, the test of effective control under Article 7 is to be applied in a more flexible way than for the attribution to a State of an act performed by *de facto* organs. In particular, attribution – to the organisation or to the sending State – does not necessarily depend on whether it is demonstrated that the conduct was taken as a result of a specific instruction.

A second question is whether the manner in which the transfer of powers was formally arranged between the organisation and the troops contributing country is relevant for the purposes of attribution. As is well known, in the case of UN peacekeeping forces the general authority of the UN over the forces is confined to operational command, while important command functions, such as the exercise of disciplinary powers and criminal jurisdiction over the forces, 'remain the purview of their national authority'.[8] Moreover, a troops contributing country maintains the power to withdraw the troops and to discontinue their participation in the mission. It may be asked whether the manner in which formal authority over the troops is distributed between the organisation and the sending State has an impact on the problem of determining who has effective control. I would submit that, while factual control is decisive for the purpose of attribution, formal authority may also be relevant. In particular, it can be held that, depending on the manner in which the transfer of authority over the forces is arranged, a *presumption* may arise that a certain conduct is attributable to the organisation

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6 See *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Judgment, I.C.J. Reports 1986*, p. 65; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (Bosnia and Herzegovina v. Serbia and Montenegro), Judgment, I.C.J. Reports 2007, p. 208.

7 Report of the International Law Commission, cit., p. 88.

8 Comprehensive Review of the Whole Question of Peace-Keeping Operations in All Their Aspects, Command and Control of United Nations Peace-Keeping Operations, Report of the Secretary-General, UN doc. A/49/681, 21 November 1994, p. 3.

rather than to the contributing State. If the force was acting "under the formal authority" of the organisation, and not of the contributing States, it can be presumed that its conduct is attributable to the organisation. In other words, the "formal authority" vested in the organisation generates a presumption that the conduct is to be attributed to the organisation, without the need to demonstrate that that conduct was the result of instructions or of effective control over the specific acts. Obviously, this presumption may be rebutted if it is demonstrated that the contributing State was in fact exercising its control over the specific conduct of the national contingent. It may happen that a force, while acting under the general authority of the organisation, has undertaken a certain conduct because of the instructions given to it by the contributing State. In such circumstances, the act must evidently be attributed to the State and not to the organisation.

The recent judgment of the Court of Appeal of The Hague in the *Nuhanovic* case appears to support the view that, for purposes of attribution, account must be taken of a combination of legal and factual elements. The Court of Appeal found that the criterion for determining whether the conduct of Dutch troops in Srebrenica had to be attributed to the UN or to the Dutch State was the "effective control" test now set forth in Article 7 of the ILC Draft Articles. According to the Court of Appeal, when applying this criterion, 'significance should be given [not only] to the question whether that conduct constituted the execution of a specific instruction, issued by the UN or the State, but also to the question whether, if there was no such specific instruction, the UN or the State had the power to prevent the conduct concerned'.[9] When mentioning the power of the State 'to prevent the conduct concerned', the Court of Appeal appears to refer to those powers which each contributing State formally retains over its troops. The point the Court appears to make is that, for purposes of attribution, relevance must be given not only to factual control but also to the formal authority of the organisation or of the contributing State to exercise control over the acts concerned. This is confirmed in the reasoning followed by the Court of Appeal in order to justify its findings that the conduct concerned was to be attributed to the Dutch State. The Court heavily relied on the fact that, during the evacuation from Srebrenica, the Dutch Government had control over Dutchbat 'because this concerned the preparations for a total withdrawal of Dutchbat from Bosnia and Herzegovina'[10] – the power to withdraw the troops being a power belonging to the sending State. The Court also referred to that fact that the Dutch Government had failed to exercise its power to take disciplinary action in order to prevent the conduct concerned.[11] The formal authority retained by the State over its troops during the evacuation period and the control it had

9 Court of Appeal of The Hague, *Nuhanović v. Netherlands*, judgment of 5 July 2011, Paragraph. 5.9 (text in Oxford Reports on International Law in Domestic Courts, ILDC 1742 (NL 2011)).

10 *Ibid*., Paragraph. 5-18.

11 *Ibid*.

actually exercised at that time were the two elements the Court of Appeal relied on in order to justify its conclusion that the conduct concerned had to be attributed to the Netherlands.

IV. Dual attribution of the same conduct to the State and to the organisation?

The judgment of the Court of Appeal of The Hague I have just mentioned is also relevant in that it admits the possibility that the conduct of a national contingent in the course of a UN peacekeeping operation may be simultaneously attributed to the sending State and the UN. According to the Court of Appeal, it cannot be ruled out that the application of the criterion of "effective control" 'results in the possibility of attribution to more than one party'.[12] However, the judgment does not clarify what the specific conditions are which may justify dual or multiple attribution.

The ILC Commentary acknowledges the possibility that the same conduct is simultaneously attributed to a State and to an international organisation. According to the Commentary, 'although it may not frequently occur in practice, dual or even multiple attribution of conduct cannot be excluded'.[13] While the ILC does not expressly refer to the case of peacekeeping operations, it cannot be ruled out that even in this context situations may arise in which the conduct of a contingent must be jointly attributed to the UN and to the contributing State. This will depend on the specific circumstances of the conduct. It must be admitted, however, that apart from the abovementioned judgment, practice in this regard appears to be lacking.

With recourse to the command and control structure of UN peacekeeping operations, the possibility of dual attribution has been advocated in connection with the role played by the National Contingent Commander. Since a contributing State, through the National Contingent Commander, can exercise a form of control over its contingent and, in fact, can decide whether to agree with (or to decline) instructions from the Force Commander to its contingent, it has been held that the conduct of a peacekeeping force must be jointly attributed to the UN and to the contributing State – the UN for being the originator of the instructions, and the contributing State for having concurred with the instructions. As I have just said, there is little practice supporting this view. Moreover, the work of the ILC does not seem to support this solution. The ILC's approach appears to be premised on the idea that, when an organ of a State is placed at the disposal of an international organisation, in most cases it will have to be determined whether the conduct of such an organ must be attributed to the organisation or, alternatively, to the contributing State. The view of the ILC appears to be that, in the case

12 *Ibid*., Paragraph. 5.9.

13 Report of the International Law Commission, cit., p. 81.

of UN peacekeeping operations, the conduct of a national contingent is to be attributed to the UN if the contingent was operating under a chain of command leading to the UN. The fact that the National Contingent Commander agreed with the instructions from the UN Force Commander does not appear to be sufficient in order to justify the conclusion that the contingent was also acting under the effective control of the State.

Dual attribution might be admitted in those cases where it is not clear whether the national contingent was acting under the authority of the sending State or of the receiving organisation because, with regard to the conduct concerned, both were formally entitled to exercise their authority over the contingent and the conduct was in fact the result of instructions which were taken by mutual agreement between the organisation and the State. One may refer, for instance, to the situation described by the Court of Appeal of The Hague with regard to the evacuation of the Dutchbat from Srebrenica. As the Court put it, during the transition period following the fall of Srebrenica, it was hard to draw a clear distinction between the power of the Netherlands to withdraw the Dutchbat from Bosnia and the power of the UN to decide about the evacuation of the United Nations Protection Force (UNPROFOR) unit from Srebrenica.[14] Since during that period both the Netherlands and the UN appeared to be formally entitled to exercise their respective powers over the Dutchbat, and since in fact they both exercised their actual control by issuing specific instructions, dual attribution might be regarded as justified.

V. Attribution of action taken by a contingent within the context of an authorised mission

When the Security Council authorises States to conduct a military operation, national contingents operate outside a chain of command leading to the UN. In principle, States retain full control over their contingents. They must therefore bear responsibility for the conduct of their contingents. As is well known, the ECtHR took a different position on this issue in its *Behrami and Saramati* decision. According to the European Court, since the Security Council retained 'ultimate authority and control' over the activities of Kosovo Force (KFOR), the conduct of KFOR was to be attributed to the UN.[15]

As observed by the ILC in its Commentary, the "ultimate control" test referred to by the ECtHR differs considerably from the "effective control" test under Article 7.[16] While the ECtHR did not explain in detail the meaning of the notion of "ultimate control", this concept appears to refer to the special powers assigned to the Security Council under Chapter VII of the UN

14 Court of Appeal of The Hague, *Nuhanović v. Netherlands*, judgment of 5 July 2011, Paragraph. 5.18.

15 *Behrami and Behrami v. France and Saramati v. France, Germany and Norway*, Paragraph. 133.

16 Report of the International Law Commission, cit., p. 91.

Charter. In order to demonstrate that the Security Council retained ultimate authority and control, the ECtHR attached relevance to elements such as the fact that Chapter VII of the UN Charter allows the Security Council to delegate tasks to Member States or the fact that Resolution 1244(1999) 'put sufficiently defined limits on the delegation by fixing the mandate with adequate precision'.[17] The idea behind this notion of ultimate control seems to be that, since the Security Council has a sort of "normative control" over the conduct of States participating in a UN-authorised mission, this normative control would justify the attribution to the UN of the conduct of participating States. However, "normative control", as such, is not an element which can justify the attribution to an organisation of the conduct taken by Member States. This can be seen from the ILC's Draft Articles on the Responsibility of International Organisations. According to these Draft Articles, "normative control" may only justify the possibility that the organisation has to bear responsibility for the conduct of a State. Article 17 of the ILC's Draft Articles provides that, under specific conditions, an organisation has to bear responsibility for having authorised a State to commit an act that would be wrongful for that organisation. As regards this provision, it must be observed, first, that unlike the "ultimate control" test applied by the ECtHR under Article 17, the possibility of holding an organisation responsible because of its authorisation is subject to a number of strict conditions. Moreover, Article 17 concerns the attribution of responsibility and not the attribution of conduct: the fact that the organisation has to bear responsibility is without prejudice to the responsibility of the State to which the conduct concerned has to be attributed.[18]

By attaching importance to the normative control exercised by the UN, the "ultimate authority and control" test allows States to escape responsibility for actions taken by their troops in the context of an authorised mission. This is a rather unfortunate result, as it is quite unreasonable that a State which has effective control over a UN-authorised contingent does not bear responsibility for their actions. In this respect, the approach taken by the ECtHR in its recent judgment in the *Al-Jedda* case represents, in many respects, a welcome departure from the solution applied in *Behrami*. The case concerned actions taken by UK troops operating in Iraq within the Multi-National Force – a force whose presence in Iraq had been authorised by the Security Council. The European Court found that the applicant's detention by British troops was to be attributed to the United Kingdom. While the Court referred to the 'ultimate control' test and although, with regard to that test, it justified its conclusion by distinguishing the facts of the case from those underlying the *Behrami* case, it is noteworthy that the Court also referred to the "effective control" test.[19] The fact that the United Kingdom had full command

17 *Behrami and Behrami v. France and Saramati v. France, Germany and Norway*, Paragraph. 141.

18 See Article 19 of the ILC's Draft Articles on the responsibility of international organisations.

19 Judgment of the European Court of Human Rights of 7 July 2011 in the case *Al Jedda v. United Kingdom*, Paragraph. 84.

and control over its forces and that this state of affairs had not changed as a result of the authorisation of the Security Council, is an element that weighs heavily in the Court's analysis of the question of attribution. As I have just said, this is a welcome change in the Court's attitude. It is to be hoped that in the future the Court will progressively abandon the notion of "ultimate control" and will rely on the determining of who has "effective control" as the only criterion for attribution that will be applicable in this kind of situation.

SESSION 3: THE DETERMINATION OF INTERNATIONAL RESPONSIBILITY FOR WRONGFUL ACTS COMMITTED DURING THE COURSE OF PEACE OPERATIONS

During the debate following the presentations of the third session, three main issues were raised:

1. The criterion of effective control and the power to prevent

A speaker in the audience highlighted that in one of the presentations reference was made to the fact that, in the judgment of the Hague Court of Appeal in the *Nuhanović* case, the court took into account 'the power to prevent a certain conduct'. In doing so, the Court admitted the relevance of "command and control" as an element of presumption that there is effective control. However, should that "power to prevent" rather be seen as real effective control? In that case, could it be used as a criterion to determine if there is effective control?

A speaker recalled that it has been argued that there should be a more flexible test for what effective control is when it comes to international organisations' (IOs) responsibilities than for States' responsibilities in the context of Article 8 of the Draft Articles on States' Responsibilities. However, it would be unreasonable to say that a "power to prevent" will lead to the attribution of responsibility to a State, because it always has this "power to prevent" certain behaviour if it is made aware of it by a national contingent in a peacekeeping operation; and therefore all wrongful acts committed during a peace operation would be attributable to a troops contributing country (TCC) and never to the IO.

One of the panellists replied that the effective control test implies that account must be taken not only of factual control, even if it is the decisive element, but also the legal element, the way in which the IO and the TCCs formally arranged the transfer of powers. If you interpret the *Nuhanović* judgment in this way, you are able to limit the potential implication of the notion of "power to prevent" which is a dangerous notion, as States in theory always have the "power to prevent" certain conduct of its national contingent. Linking that notion with legal authorities makes the situation in which a State may be held responsible much more limited. This has also to be considered with the States' power to withdraw their troops, which formally belongs to the States. In a Belgian judgment concerning Belgian troops participating in the UN mission in Rwanda, the Court decided that the misconduct of troops was attributable to Belgium and not to the UN. Moreover, the decision was taken during the evacuation phase, giving relevance to the formal authority more than to the factual control.

Another speaker in the audience noted that the "responsibility to prevent" concerning an act of an IO will remain with the IO anyway. However, there can be a distinct *obligation* to prevent for the TCCs, e.g. the obligation to prevent genocide, for the failure of which it can be held responsible.

A panellist explained that the main problem remains determining where the attribution lies when a force is put at the disposal of an IO by a State. If it is established that the State has an obligation to prevent, then it means that the State will intervene in the chain of command of the IO in order to fulfil this obligation. Therefore, if it is established that the national force is acting within the authority of the UN, then the act is exclusively attributable to the IO. A State is not responsible for not preventing unless it has the formal authority to intervene.

Based on European Union (EU) practice, another panellist further added that the IO's obligation is to ensure that its legal framework and its operational planning documents clearly reflect its obligation under the law. The rules of engagement, approved at the ministerial level within the EU, are the constraint within which the soldiers are obliged to operate. A person committing genocide in the framework of an EU operation would be in clear violation of the EU operational documents. If the EU has ordered that specific conduct, which is highly unlikely, the responsibility of the IO will be clearly established. Otherwise, it is necessary to establish if there has been a failure to prevent violations by the IO forces.

2. The possibility of dual or multiple attribution and its practical conditions

A speaker in the audience stated that in the context of the *Nuhanović* case, the Court said that there was a possibility of dual or multiple attribution but it did not examine what conditions would be required for dual or multiple attribution. In the context of a UN Peacekeeping operation, the UN assumes the responsibility for the acts of the Peacekeeping operations unless there is gross negligence or wilful misconduct by the troops of a TCC. There is a clause to that effect in Memoranda of Understanding of the UN with TCCs. Consequently, what circumstances could lead to dual or multiple attribution of responsibility, in situations such as sexual exploitation and abuse in a peacekeeping operation with respect to potential claims against the UN and national contingents, with respect to all the deaths which have arisen as a result of cholera in Haiti? If the UN exercises due diligence in terms of screening peace-keepers before they go to a host State for any communicable diseases and if it instates policies which demand zero tolerance on sexual exploitation and abuse, will it be enough to prevent the UN from being held responsible for those types of incidents?

Someone in the audience further added that, in case of behaviour amounting to grave breach of International Humanitarian Law (IHL) or to an act of genocide, dual or multiple attribution

should be the rule. If the IO does not give the order, but the unlawful order is made by the national State, it is logical that the responsibility goes to the State and not the IO. If the IO ordered criminal behaviour, should the local commander not refuse to obey that order? And should the State not order to refuse that instruction?

A panellist answered that as the International Law Commission said, the hypothesis of a dual or multiple attribution being enforced is theoretically possible, but in practice, it would be very difficult to prove that there has been two parties responsible for the same wrongful act, for the same breach of the same obligation. Even if there is a single event at the origin of the breach, the responsibilities of the IO and the TCC may be different and not evaluated on the same criteria. For example, in a case of sexual harassment, it will depend on the chain of command and control of the IO, but also on the direct disciplinary matters that fall on the State. Consequently, there might be two attributions but it will not be one dual attribution. On this matter, attribution is only relevant in order to determine responsibility. If you have dual attribution, does that mean that you have a dual responsibility? However, if it is the same wrongful act, and there is only one dual responsibility, who makes the reparation in practice?

Another panellist replied that even if a soldier acts *ultra vires*, his act must be imputable to the IO. This raises the problem of the relationship between Article 7 and Article 8 of the Draft Articles on States' Responsibility. Who is responsible for the *ultra vires* activities of a peacekeeper? It depends on who has the formal authority with regard to that conduct. In this context, Article 8 regarding ultra vires activities has an important role to play. There must be due diligence control over the activities of the troops. Therefore, if the troops are acting under a UN chain of command and act *ultra vires*, unless it is demonstrated that they were acting under the instructions of a State, the UN has to bear responsibility for the troops' *ultra vires* activities under Article 8 of the Draft Articles on the Responsibility of International Organisations.

Someone in the audience emphasised the fact that the State has disciplinary power and must be held responsible for not having exercised that power. In the *Nuhanović* case, the Hague Court of Appeal gave relevance to those powers in order to justify the conclusion that the conduct was attributable to the Netherlands rather than to the UN. In the context of human rights and from the perspective of victims of a wrongful act committed under an IO operation, would it not be wise to base the decision on what is most helpful to the victim in terms of who assumes the responsibility? For example, a German regulation states that it is a constitutional right for citizens that the German State is responsible for the wrongful acts of its civil servants or agents.

One of the panellists explained that, at the practical level, beyond the legal issue of attribution, IOs usually bear the moral and practical consequences of the act in order to protect the victims and to retain a good public image. When *Behrami* was issued, States supported its decision that the IO was virtually responsible. Progress has been made since then. The fact that IOs are increasingly fighting not to be the only agent responsible, and the awareness that in the end there are States behind IOs convinced the States to change their position. However, important progress is still to be made, as in practice IOs do not often exercise their right to go against States. The best solution would be to define what exactly are the conditions for the attribution of responsibility between the IO and the State prior to the existence of a grave violation.

3. The allocation of responsibility within the EU framework of operation

A participant highlighted that according to one of the presentations of the session, in the case of crisis management operations conducted by the EU, TCCs hand over their operational and command control to the EU Force Commander, while the Force Commander is under the close supervision of the Political and Security Committee and of the Military Committee. In the event of a crisis management operation, if the EU forces get involved in an armed conflict, is it the EU only, or both the EU and the TCCs that are parties to the conflict?

One of the panellists replied that for EU Member States it is difficult to accept that the EU determines for them whether Human Rights Law (HRL) is *de jure* applicable to their contribution in an operation, or whether IHL would be applicable to their contingent in an armed conflict. The EU hopes that its Member States would be able to come to a sound assessment of the exact legal qualification with which their armed forces are confronted. The corollary is the protection of the military personnel at the disposal of the EU on operations. The protection granted to these personnel will depend on the legal qualification of the situation. It includes both the EU and its Members States because it is the best way to ensure maximal protection to all the personnel involved in an operation and show the unanimity that is required to engage in an EU military operation.

A participant stated that it has been argued that in the event of a military operation resulting in the involvement of the EU in a situation of armed conflict as a belligerent, the EU and the Member States will both be parties to the conflict. Does it concern the EU and the TCCs or the EU and the Member States? What about countries that have opted out of the EU Security and Defence Policy, such as Denmark?

A panellist replied that all Member States carry obligations and responsibility for the decisions that are taken by the EU in its institutional framework. There should not be any distinction

between TCCs and Members States in that context because decisions are taken unanimously, which means that Member States all carry the same burden of responsibility regarding the decision. Concerning Denmark, as it does not participate in decision-making, it cannot be held responsible for the consequences of the decision. However, if Denmark does not legally become a party to the armed conflict, the practical implications of that situation are only hypothetical.

Session 4
Effectuating International Responsibility during Peace Operations?

Chair person: **Gert-Jan van Hegelsom,** *External Action Service, EU*

FORA FOR EFFECTUATING INTERNATIONAL RESPONSIBILITY IN RELATION TO WRONGFUL ACTS COMMITTED IN THE COURSE OF PEACE OPERATIONS, OR, WHERE CAN YOU SUE?

Françoise J. Hampson[1]
School of Law and Human Rights Centre
University of Essex, UK

Résumé

L'exposé qui va suivre traite des voies de recours disponibles en cas de violation du droit international humanitaire (DIH) ou des droits de l'homme commises au cours d'opérations de paix.

Des violations du DIH et des droits de l'homme peuvent être commises, dans le cours d'opérations de paix, par les membres de contingents nationaux, des civils accompagnants les contingents, des employés de départements gouvernementaux non-militaires, des membres de la police civile ainsi que par la composante civile de ces missions.

1. Voies de recours contre des individus

Dans l'Etat territorial, les procédures civiles et pénales peuvent être bloquées par des problèmes d'immunité ainsi que par la probabilité d'un système judiciaire inexistant ou dysfonctionnel.

Dans l'Etat de nationalité de l'auteur de la violation, les procédures pénales peuvent se heurter à d'éventuels problèmes de compétence devant les juridictions de « common law ». Des problèmes pratiques peuvent également surgir dès lors que les autorités nationales ne disposent pas toujours de toute l'information constituant la base des poursuites ou encore de la volonté politique de poursuivre. Des problèmes d'immunité peuvent également se poser.

1 This contribution has been written on the basis of audio record and has not been reviewed by the speaker.

En ce qui concerne les procédures civiles, des problèmes de juridiction peuvent surgir pour les membres de contingents nationaux ou personnes bénéficiant d'une immunité absolue ou fonctionnelle. En outre, des problèmes pratiques liés à l'introduction d'une procédure dans un pays étranger peuvent se poser.

En ce qui concerne les procédures civiles et pénales intentées dans l'Etat de nationalité de la victime (lorsque celui-ci est différent de l'Etat territorial), des problèmes de juridiction et d'immunité peuvent se poser.

Enfin, des procédures civiles ou pénales dans tout autre Etat que ceux susmentionnés, sur base du principe de compétence universelle, sont peu probables en pratique.

2. Voies de recours contre des Etats

Au niveau national, l'introduction d'une procédure contre un Etat dans l'Etat territorial a peu de chance d'aboutir en raison de l'immunité garantie par des accords conclus entre l'Etat territorial et les pays ayant envoyé des troupes. Les procédures introduites dans l'Etat de nationalité de l'auteur dépendent, quant à elles, du contenu du droit national, y compris des règles de compétence. De nombreux Etats ont des règles de compétence qui empêchent les étrangers d'introduire des procédures à l'encontre de l'Etat sur base d'actes extraterritoriaux commis par les forces armées de ce dernier.

Au niveau international, bien qu'en théorie l'introduction d'une demande auprès de la Cour Internationale de Justice (CIJ) soit possible, en pratique, des problèmes de compétence viennent s'ajouter à un manque de volonté politique. Les Cours régionales des droits de l'Homme et les organismes de droit de l'Homme, bien que ne délivrant pas de jugements contraignants, sont également des forums possibles.

3. Voies de recours contre une organisation internationale (OI)

Un problème se pose en ce qui concerne l'introduction de procédures contre les OI, dès lors que, sur le plan national, celles-ci bénéficient d'une immunité de juridiction et, sur le plan international, la CIJ ne dispose pas de compétence dans des contentieux impliquant des OI.

Conclusions

Un Protocole additionnel au Pacte International relatif aux Droits Civils et Politiques traitant de la responsabilité des Nations Unies, exigeant des rapports périodiques relatifs aux missions sur le terrain et prévoyant un droit de recours individuel, pourrait contribuer à une amélioration du système actuel.

I would like to start by thanking the International Committee of the Red Cross and the College of Europe for inviting me to participate in this Colloquium.

The subject 'Fora for effectuating international responsibility in relation to wrongful acts committed in the course of peace operations' sounds straightforward but I think, in fact, it is far more complicated and unfortunately technical than is often recognised. I also get frustrated at the lack of sense of what is at stake. This is an issue of mission effectiveness. Generally speaking, when you have a peace support operation, the context is one in which you are hoping that people will experience what could be a brave new dawn. Once you have serious violations of the law and those violations are not redressed, that is actually precisely what people are used to. In that case, the lack of urgency about securing both effective accountability and the appearance of accountability is, I believe, an real problem.

First, I would like to highlight some clarifications or caveats.

This presentation addresses the issue of redress concerning violations of International Humanitarian Law (IHL) and Human Rights Law (HRL). I believe, however, there is another category of conduct that constitutes a problem but with which I won't be dealing : acts that don't constitute violations of IHL or HRL but which constitute crimes in every national jurisdiction. An example of such crime is burglary. If burglary is occurring at the hands of members of the international presence in a peace support operation, it is not going to suffice as an answer to the victims to say it is not a violation of IHL or HRL.

A second issue concerns fora. I have chosen to interpret fora as including judicial and quasi-judicial bodies but there are a range of other mechanisms that one shouldn't neglect even if they don't necessarily entail a binding finding. Examples include boards of inquiry, the monitoring of the United Nations special procedures, the Universal Periodic Review, an increasing number of investigations ordered by the United Nations (usually the Human Rights Council) and national mechanisms of a similar type.

I. Who can violate IHL and HRL?

There is a tendency to over-simplify the answer to this question regarding the people who are present. Yesterday, at a conservative estimate, 98% of what was talked about was national contingents. If you look at the situation on the ground, certainly there are far more national contingents than there are other people so it is likely that they are the biggest part of the problem, but they certainly are not 98% of the problem.

A novel problem posed notably by the CIA has been that of employees of non-military government departments working alongside the military contingents. They give rise to different problems with regard to enforcement and one needs to remember they may be present.

Additionally, violations can also be the act of deploying members of the civilian police (CIVPOL). There are newly formed units deployed as units but the majority of CIVPOL personnel are still individuals deployed as individuals, and not acting as State agents.

Finally, civilian components can also be at the origin of such violations and for example very senior officials, such as UN officials, non-UN official mission staff, foreign personnel working for the UN mission (e.g. security guards), or local personnel.

II. Theoretical Pattern of Accountability Mechanisms and jurisdictions potentially available

Criminal procedures can be brought against individuals to domestic jurisdictions of the territorial State, the State of nationality of the perpetrator, the State of nationality of the victim, the State of nationality of the employer and exceptionally in any State, on the grounds of universal jurisdiction. Criminal procedures can also be sorted before the International Criminal Court (ICC). Concerning civil claims, they can only be taken to domestic jurisdiction of the territorial State, the State of nationality of the defendant, the State of nationality of the plaintiff, or the State of nationality of the employer.

States can only be subject to civil claims. Claims against States can be brought before domestic jurisdictions of the territorial State, courts of the claimant's State, courts of the State of nationality of the victim or before courts of other States. Civil claims against States can also be taken to international jurisdictions such as the International Court of Justice (ICJ), regional human rights courts, individual or inter-State petition to human rights bodies not delivering binding legal judgments, or International Humanitarian Fact-Finding Commission (IHFFC).

For international organisations (IOs), it is not very clear under which conditions they can be subject to claims in front of a jurisdiction either domestic or international, immunity being

the main obstacle. Exceptionally, where the IO is the de facto government in a territory, it may be subject to the jurisdiction of a human rights body not delivering binding legal judgments, as for example the UN Mission in Kosovo (UNMIK) and NATO Kosovo Force (KFOR) in Kosovo and the Human Rights Committee. The IO may conclude ad hoc agreements with monitoring mechanisms such as the UNMIK and KFOR and the European Convention for the Prevention of Torture (ECPT) and the Committee under the Framework Convention on National Minorities.

III. Problems with finding a forum in practice

1. Claims against individuals

The territorial State is obviously the best forum for bringing proceedings since the witnesses and the evidence are there. Proceedings may, however, be blocked by problems of immunity and by the likelihood of a non-existent or dysfunctional legal system.

In the State of nationality of the perpetrator, criminal proceedings can encounter possible problems of jurisdiction in common law jurisdictions (apart from members of national contingents). Practical problems are also likely to arise as, for example, national authorities may not have all the information available on the basis of which to prosecute, or the political will to prosecute. There may also be problems of immunity.

Concerning civil proceedings in the State of nationality of the defendant, problems of jurisdiction may occur in the case of members of national contingents or UN absolute or functional immunity. There can also be practical problems in bringing a claim in a foreign State and the defendant may just not be worth suing.

In the case of proceedings in the State of nationality of the victim (where different from the territorial State) criminal proceedings can encounter problems of jurisdiction and immunity – either absolute or qualified by reference to the exercise of professional functions. On the practical side, all the evidence is likely to be in the territorial State. For civil proceedings, there can also be problems of jurisdiction in the case of members of national contingents or UN absolute or functional immunity. Moreover, it can be difficult to bring a claim in a foreign State and, once again, the defendant may not be worth suing.

Finally, proceedings, whether criminal or civil, in other States than those aforementioned are most unlikely to arise in practice.

2. Claims against States

At a domestic level, bringing a claim against a State in the territorial Sate (the host State) is very unlikely to be possible because of the immunity arranged by agreements between the host State and the troops contributing countries. Proceedings within the perpetrator State (State of nationality of the perpetrator) depend on the content of domestic law, including rules on jurisdiction. Many States have either defences or rules on jurisdiction that preclude foreign nationals from bringing claims against the State on account of the extra-territorial acts of its armed forces. Furthermore, there is also a practical problem: Is legal aid available to foreign victims who cannot afford to bring proceedings in the national jurisdiction?
As far as other States are concerned, the principle of sovereign immunity will make any proceeding impossible.

At the international level, a claim through the ICJ is possible in theory but there are often problems of jurisdiction and a lack of political will. Regional human rights courts are also possible fora in theory but there may be problems of attribution (*Behrami and Behrami v. France*; *Saramati v. Norway and France*) and of jurisdiction involving the scope of the extra- territorial applicability of HRL. The same issues arise for human rights bodies not delivering binding judgments. Finally, the International Humanitarian Fact Finding Commission (IHFFC)'s jurisdiction (Article 90 Additional Protocol I) can only be invoked against a party to an armed conflict that has accepted the competence of the IHFFC. It is therefore *de jure* limited to international armed conflicts and has never in fact been used.

3. Claims against an IO

Theoretically, we have a problem when it comes to international organisations because in domestic fora they enjoy immunity of jurisdiction and internationally there is no body that has jurisdiction over IOs in contentious cases. The case of Kosovo is an interesting precedent whose significance is, however, uncertain since it was not a typical peace support operation. Unusually, the UN was the government so there might be an argument as to why they should co-operate that wouldn't exist in other missions. Furthermore, in that same situation, UNMIK chose to conclude ad hoc agreements with two regional treaty bodies for the exercise of monitoring functions with regard to torture and minority rights protection.

IV. Conclusions

Accountability with regard to a national contingent is not a problem in theory on the condition that the sending State accepts claims from foreigners arising out of the extra-territorial conduct of its armed forces. There have been significant problems in practice, owing to barriers to jurisdiction/defences and serious practical obstacles.

Accountability with regard to the conduct of CIVPOL and the members of the civilian component are subject to difficulties in both theory and practice, owing to the effect of immunity, even if only qualified. There are serious practical difficulties and an apparent complete indifference to tackling the issue.

A way forward could be a protocol to the International Covenant on Civil and Political Rights (ICCPR) dealing with the accountability of the UN itself, requiring periodic reporting with regard to field missions and providing for the exercise of the right of individual petition.

A second more controversial proposal to ensure that immunity is not a cloak for impunity would be to grant jurisdiction over defined crimes committed by CIVPOL or members of the civilian component to the New York State Courts. Since the United Nations headquarters are geographically located in New York State I think that would be an appropriate choice. The jurisdiction should be a default jurisdiction: only if the territorial State or the State of nationality of the perpetrator cannot or will not bring proceedings.

EFFECTS OF NATIONAL AND INTERNATIONAL JURISPRUDENCE ON THE IMPLEMENTATION OF INTERNATIONAL RESPONSIBILITY FOR WRONGFUL ACTS COMMITTED IN PEACE OPERATIONS

Jann K. Kleffner
Swedish National Defence College

Résumé

Cette contribution analyse la pratique des juridictions internationales et nationales en ce qui concerne la problématique de la responsabilité collective des organisations internationales (OI) et des États lors de la conduite de leurs opérations de maintien de la paix. Cette question n'a été que très peu soulevée par les juridictions tant internationales que nationales et cela pour diverses raisons.

Les juridictions nationales se heurtent tout d'abord bien souvent à l'immunité des États étrangers et des OI, et ont donc souvent uniquement compétence pour juger leur propre État. Cependant, même à cet égard, elle rencontrent de nombreux obstacles, que ce soient des doctrines de non juridiction comme celle des questions politiques, leur méconnaissance du droit international applicable ou encore leur incapacité à l'appliquer si celui-ci n'est pas incorporé dans les normes nationales.

En ce qui concerne les juridictions internationales, les possibilités sont également assez limitées même si on trouve ici un peu plus de pratique. La responsabilité des OI ne peut qu'être invoquée devant la Cour international de Justice (CIJ) à travers sa compétence consultative. Les États peuvent, quant à eux, voir leur responsabilité mise en cause à travers la compétence de la CIJ mais également devant les cours régionales de droits de l'homme telles que la Cour européenne des droits de l'homme (CEDH), la Cour interaméricaine des droits de l'homme ou encore la Cour africaine des droits de l'homme. Les jurisprudences de ces différentes juridictions, internationales ou nationales, sont marquées par certaines spécificités.

La CIJ n'a eu à traiter qu'une seule fois d'une affaire pouvant se rapprocher de la question de la responsabilité dans une opération de paix, à travers la procédure sur « la légalité de l'usage de la force » initiée par la Serbie et le Monténégro contre plusieurs pays membres de l'OTAN ayant participé à l'opération « Forces alliées » (qui n'était pas une opération de paix) en 1999. Dans cette affaire deux approches contraires étaient présentées : la première selon laquelle les États membres devaient être tenus conjointement responsables de la structure de commandement mili-

taire de l'OTAN; la seconde qui proposait que les actes en cause devaient être attribués à l'OTAN en tant qu'OI, et que c'est donc cette dernière qui était alors responsable. La Cour ne s'est pas prononcée sur le fond, s'étant déclaré incompétente.

La CEDH, dans son jugement Behrami et Saramati, *s'est basée sur le critère du « contrôle et de l'autorité ultime » de l'Organisation des Nations unies (ONU), dégageant ainsi les États de toute responsabilité. Cette jurisprudence, que la Cour a entérinée par plusieurs jugements par la suite, a été vivement critiquée. La Commission de droit international et le Secrétariat de l'ONU se sont accordés sur le fait que la critère central pour l'attribution de la responsabilité devait rester le «contrôle effectif opérationnel» sur l'acte en cause. La CEDH semble être récemment revenue vers cette interprétation à travers son jugement* Al Jedda *de juillet 2011.*

La pratique des juridictions nationales a été marquée par le jugement de la Cour d'appel de La Haye dans l'Affaire Nuhanovic *en juillet 2011. La Cour a ici repris le critère du contrôle effectif mais a également initié deux nouveautés majeures. Elle a d'abord considéré qu'il y avait contrôle effectif si la conduite concernée résultait d'une instruction spécifique ou d'une absence d'instruction si l'État avait le pouvoir de prévenir la conduite en cause. Ce pouvoir de prévenir ne semble pas faire référence à un pouvoir formel mais plutôt à une simple capacité. Dans ce jugement, la Cour a également été la première juridiction à expressément reconnaître la possibilité de double ou multiple attribution de la responsabilité, même si elle n'a pas précisé les conditions d'une telle attribution.*

I. Introduction

The present contribution addresses the effects of national and international jurisprudence on the implementation of international responsibility for wrongful acts committed in such operations. It provides an analysis of whether and how domestic and international courts and tribunals have addressed issues of responsibility that arise in the context of peace operations and provides an overview of domestic and international case-law.

In order to properly define the boundaries of the contribution, it needs to be clarified at the outset that the contribution will deal solely with case-law on collective responsibility, i.e. the responsibility of troops contributing countries (TCCs) and of international organisations (IOs). It will not address individual responsibility under international law, since that is being addressed separately in the present volume. Nor will it discuss what bearing the international criminal responsibility of an individual for acts committed during a peace operation may be for the responsibility of a State or IO. Last but not least, the contribution is limited to case-law that addresses collective responsibility in peace operations specifically. Obviously, many

more cases exist that stem from other factual circumstances but pertain to peace operations as far as the underlying legal principles are concerned. These principles are addressed in other contributions and it is certainly necessary to consider the specific topic of the present contribution against the background of the general legal framework for responsibility of States and IOs. However, a review of that general legal framework is beyond the purview of the present contribution.

Rather, I will be approaching the overall question of whether and how domestic and international courts and tribunals have addressed issues of responsibility that arise in the context of peace operations from two angles. First, I will briefly sketch some of the factors that have prevented courts from addressing such issues. Secondly, I will delve into the actual case-law and seek to identify some of its key features pertaining to issues of responsibility.

II. Factors that have prevented courts from addressing issues of responsibility

As to the question of *whether* domestic and international courts and tribunals have addressed issues of responsibility that arise in the context of peace operations, the short answer is: only very occasionally. There are several reasons for this. Let me briefly summarise these reasons, in order to remind ourselves of the potential – or lack thereof – of domestic and international courts and tribunals to both clarify the law, and provide redress for violations of international law.

As far as *domestic courts* are concerned, the immunity of States and IOs has often prevented national jurisdictions from addressing matters of responsibility head on. The fate of the claims brought against the United Nations (UN) in the courts of the Netherlands by relatives of victims of the Srebrenica genocide illustrates that point. Indeed, as long as States or IOs do not waive their immunity, domestic courts will, as a general rule, only be capable of providing a basis in cases that concern their parent State. The exception that confirms the general rule stems from the European Union (EU) in as much as the latter is *not* immune from Member States' jurisdiction in matters concerning the Common Foreign and Security Policy (CFSP). However, to date no domestic case exists that addresses issues of international responsibility in peace operations in the context of CFSP.

Even if domestic courts act, and are faced with determining the responsibility of their own State for alleged violations of international law that may have arisen in the course of a peace operation, several challenges remain. These challenges include a number of avoidance doctrines or doctrines of non-justiciability, such as the political questions doctrine and judicial deference towards the executive branch. What is more, the fact that domestic courts will not

necessarily be familiar with the applicable international legal framework for responsibility, or the fact that they are unable to apply it because of the domestic jurisdiction's approach to the implementation of international law, will mean that they seek to determine the responsibility of their own State on the basis of domestic law.

All in all, the contribution of domestic jurisdictions to the effectuation of international responsibility is therefore modest.

As far as *international courts and tribunals* are concerned, the situation is not very different, albeit for different reasons, in the realm of the responsibility of international organisations for wrongful acts that occurred in a peace operation. Here, it is only the International Court of Justice (ICJ) through its advisory jurisdiction that can potentially delve into the matter (subject to the caveat that there is the theoretical possibility of an international organisation submitting a matter to arbitration, but that so far remains what it is: a *theoretical* possibility!).

As for *state responsibility*, several international jurisdictions exist, first and foremost the ICJ, through its competence in contentious inter-state proceedings, and the regional human rights courts, i.e. the European, Inter-American and African human rights courts.

However, when I now turn to the second part of my contribution and address the case-law itself with the aim of identifying some key features as to how courts have addressed issues of responsibility that arose in the context of peace operations, it will soon become apparent that the contribution of these international courts and tribunals to the effectuation of international responsibility of States is also modest.

III. Key Features of actual case law

As far as the *International Court of Justice* is concerned, the closest that one gets to a case that has a more or less direct bearing on responsibility in peace operations are the *'Legality of Use of Force'* proceedings that Serbia and Montenegro initiated against several NATO Member States that participated in Operation Allied Force in 1999[1]. Let me immediately clarify that this 'more or less direct bearing' is certainly not meant to suggest that Operation Allied Force is to be characterised as a peace operation. However, the proceedings in the case for the first time provided an opportunity for States to pronounce themselves before an international court

1 ICJ *Legality of Use of Force* (Serbia and Montenegro v. Belgium) (Serbia and Montenegro v. Canada) (Serbia and Montenegro v. France) (Serbia and Montenegro v. Germany) (Serbia and Montenegro v. Italy) (Serbia and Montenegro v. Netherlands) (Yugoslavia v. Spain) (Serbia and Montenegro v. United Kingdom) (Yugoslavia v. United States of America), Applications filed on 29 April 1999, General List Nos. 105-114.

on the question of where responsibility lies when an IO – *in casu* NATO – conducts military operations. More precisely, the pleadings before the ICJ revealed some of the different approaches that one can contemplate and that could equally be contemplated in military operations in the form of a peace operation that takes place under the auspices of an international organisation, such as the UN. Indeed, some States, such as Portugal, very expressly draw the parallel between Operation Allied Force and UN peace operations as far as the question of attribution is concerned.[2]

One such approach is to hold Member States jointly and severally responsible for the actions of NATO's military command structure, as argued by Serbia and Montenegro.[3] The other, diametrically opposed view, presented by France, Italy and Portugal, was that acts should be attributed to, and any possible responsibility lie with, NATO as an IO (and also the UN as far as actions of Kosovo Force (KFOR) and the United Nations Interim Administration Mission in Kosovo (UNMIK) are concerned).[4]

As is well known, the Court never had an opportunity to consider the merits of these arguments as it declined jurisdiction in 2004. The stand of the ICJ on the matter hence remains unclear.

The European Court of Human Rights, on the other hand, took the opportunity to express its view on attribution in peace operations in *Behrami and Saramati*.[5] Much has already been written and said about these decisions. I will not repeat here in any detail what the Court held. Suffice it to recall that its view in relation to KFOR in Kosovo was that the decisive factor for attributing responsibility for acts within a peace operation was whether 'the United Nations Security Council retained ultimate authority and control so that operational command only was delegated'[6]. While acknowledging 'the effectiveness or unity of NATO command in

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2 *Legality of Use of Force* case (Serbia and Montenegro v. Portugal), Preliminary Objections of the Portuguese Republic, 5 July 2000, Paragraphs. 130-141, especially Paragraph. 134.

3 *Legality of Use of Force* case (Serbia and Montenegro v. UK) (Oral Proceedings), [Public Sitting 10 May 1999] CR 1999/14, Paragraph VII; Legality of Use of Force (Serbia and Montenegro v. UK) (Oral Proceedings) [Public Sitting 12 May 1999] CR 1999/25, 16.

4 *Legality of Use of Force* case (Serbia and Montenegro v. France), Preliminary Objections of the French Republic, 5 July 2000, Paragraphs. 23-28, 40-47; (Serbia and Montenegro v. Italy), Preliminary Objections of the Italian Republic, 5 July 2000, p. 19; (Serbia and Montenegro v. Portugal), Preliminary Objections of the Portuguese Republic, supra note 2.

5 European Court of Human Rights, *Behrami and Behrami v. France and Saramati v. France, Germany and Norway*, Applications No. 71412/01 ; 78166/01, Grand Chamber, Decision on Admissibility, 2 May 2007.

6 *Ibid*, Paragraph. 133.

operational matters'[7] concerning KFOR, the Court noted that the presence of KFOR in Kosovo was based on a resolution adopted by the Security Council (UNSC) and concluded that 'KFOR was exercising lawfully delegated Chapter VII powers of the UNSC so that the impugned action was, in principle, "attributable" to the UN'[8].

Reactions to this opinion of the European Court of Human Rights were overwhelmingly critical. Not the least, the International Law Commission (ILC) and its Special Rapporteur on the Responsibility of International Organisations retains the criterion of effective control, and helpfully specifies in the most recent commentary on Draft Article 7 of the Draft Articles on the Responsibility of International Organisations that it shares the view of the Secretary General of the United Nations in as much as 'effective control' means 'effective *operational* control'.[9] In contrast, the European Court of Human Rights has affirmed its jurisprudence in the admissibility decisions in *Kasumaj v. Greece*, *Gajić v. Germany* and *Berić and others v. Bosnia and Herzegovina* (all rendered in 2007), all of which suggest that it emphasises the criterion of 'ultimate authority and control'.

To then sum up how international courts have addressed issues of responsibility that arose in the context of peace operations leaves us with a string of cases decided by the European Court of Human Rights that are heavily criticised, and have suggested a consolidation of its jurisprudence in a direction away from the general law on international responsibility. The interesting question for the foreseeable future seems to be whether the recent judgment of the European Court of Human Rights in *Al Jedda*[10] constitutes the first step towards a lasting departure away from the ultimate authority and control test and a move towards effective control. In the judgment, the European Court of Human Rights has chosen rather ambiguous language and avoided answering the question inasmuch as it held that, as far as the detention of the applicant in Iraq by British forces was concerned, 'the United Nations Security Council had *neither effective control nor ultimate authority and control* over the acts and omissions of troops within the Multi-National Force and that the applicant's detention was not, therefore, attributable to the United Nations.'[11]

Let us then turn to the case law of *domestic* courts. It is here where, to my mind, the most interesting recent developments have taken place, notably in the form of the judgment of the

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7 *Ibid*, Paragraph. 139.

8 *Ibid*, paragraph. 141.

9 International Law Commission, Report on the work of its sixty-third session (26 April to 3 June and 4 July to 12 August 2011), UN Doc A/66/10, p. 89, emphasis added.

10 *Al Jedda v. United Kingdom*, Application no. 27021/08, Grand Chamber Judgment of 7 July 2011.

11 *Ibid*, Paragraph 84, emphasis added.

Dutch Court of Appeal of The Hague in the Srebrenica proceedings, rendered in July of 2011.[12] The Appeal Court held that the State of the Netherlands is legally responsible for removing four Bosnian nationals from the compound of Dutchbat (a Dutch battalion under the command of the United Nations peacekeeping force UNPROFOR) in Srebrenica in July 1995.

For our purposes, the most significant feature of the judgment relates to the Court's analysis of the question of to whom the conduct in question should be attributed – the UN or the Netherlands, or indeed, both. In answering that question, the Court of Appeal departs from the earlier findings of the District Court of The Hague, which had used the criterion of "operational overall control", and also from the European Court of Human Rights' criterion of "ultimate authority and control". In contrast, the Court of Appeal affirms the ILC's criterion of effective control.[13] In doing so, the Court of Appeal takes the same approach as the Court of First Instance of Brussels in *Mukeshimana-Ngulinzira and others v. Belgium and others*[14], which found that the decision by the Commander of the Belgian contingent of the United Nations Assistance Mission for Rwanda (UNAMIR) to abandon a refugee camp in Kigali in April 1994 was 'taken under the aegis of Belgium and not of UNAMIR' and hence was attributable to Belgium, rather than the UN.

The Court further determined that effective control exists if the conduct in question takes place upon the specific instruction of the entity in question (ie either a State or an IO) or, in the absence of such specific instruction, if the entity in question *had the power to prevent the conduct concerned*. The language used in the judgment appears to suggest that this "power to prevent" need not necessarily be understood in the sense of a formal power, but could just as well be understood to mean the factual *ability* to prevent, an understanding that would be more in tune with the generally factual question of effective control.

Be that as it may, perhaps the most significant aspect of the judgment is that the Court of Appeal is the first court that has expressly recognised the possibility that more than one entity may possess effective control and that the conduct in question can hence be attributed to more than one entity.[15] While that possibility has been contemplated in academic writings and also in the work of the ILC[16], the Dutch Court's judgment is the first judicial determina-

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12 *Nuhanovic v. The Netherlands*, case number 200.020.174/01, Court of Appeal in The Hague, Judgment of 5 July 2011, LJN BR5388.

13 *Ibid*, at 5.8 and 5.9.

14 *Mukeshimana-Ngulinzira and others v. Belgium and others*, First instance judgment, R.G. n° 04/4807/A et 07/15547/A; ILDC 1604 (BE 2010), 8 December 2010.

15 *Nuhanovic v. The Netherlands*, *supra* note 12, at 5.9.

16 Most recently, see ILC Report, *supra* note 9, p 81, at 4.

tion that such dual or multiple attribution can indeed exist, although the Court stops short of elucidating the conditions under which that is the case.

At the same time, it is justified to add a word of caution as far as an extrapolation of generally applicable principles on dual or multiple attribution from this one judgment of a domestic court is concerned. Assuming that it will stand on appeal – if there is an appeal, which at the point of writing remains uncertain – the case is a very fact-driven singularity, relating to a situation that is in many ways exceptional. It remains to be seen whether and to what extent other courts follow suit as far as dual or multiple attribution is concerned.

IV. Concluding Remarks

The preceding observations suggest the following concluding remarks on the question of whether and how domestic and international courts and tribunals have addressed issues of responsibility that arise in the context of peace operations. On the "whether" I can only repeat what I have said previously: only very occasionally. On the "how", it would seem to be justified to reply, in relation to the European Court of Human Rights: 'by and large wrongly'. In relation to domestic jurisdictions, the "how" would seem to have to be answered with: 'generally in line with general international law on responsibility as identified by the ILC, though somewhat innovatively in relation to the question of dual or multiple attribution'.

EFFECTIVE REPARATION FOR THE VICTIMS OF WRONGFUL ACTS COMMITTED DURING UN PEACE OPERATIONS: HOW DOES IT WORK CONCRETELY?

Katarina Grenfell[1]
OLA, UN

Résumé

La pratique des l'Organisation des Nations unies (ONU) en terme de réparation des actes dommageables commis lors d'une opération de paix de l'ONU remonte aux années 1950 et prend la plupart du temps la forme d'une compensation financière. L'ONU reconnaît ainsi ses obligations internationales et sa responsabilité corrélative pour les actes qui violeraient ces obligations. Cependant, l'organisation ne tient compte que des plaintes dans lesquelles la conduite des opérations est attribuable à l'ONU, considérant que les actes des opérations « autorisées par l'ONU » ne lui sont pas attribuables. De plus, elles possèdent l'immunité juridictionnelle devant les juridictions nationales mais est cependant obligée de fournir des modes de règlement des différents appropriés.

La plupart de la pratique des Nations unies quant à la réparation des victimes concerne des plaintes de droit privé déposées par des parties tierces, c'est-à-dire par des individus ou entités externes à l'ONU et n'ayant pas de rapport contractuel avec elle. Dans le contexte des opérations de maintiens de la paix (OMP), ce sont généralement les accords sur le statut des forces (SOFA) entre l'ONU et le gouvernement du pays hôte qui réglementent ces plaintes. Si le SOFA de référence de 1994 prévoit l'établissement d'une « standing claims commission », en pratique une telle Commission n'a jamais été mise en place, et l'ONU a toujours réglé ces différents en interne.

L'ONU a fixé des limites quant à sa responsabilité vis-à-vis des parties tierces. En effet, il a été avancé, au-delà de la limite des fonds disponibles, que l'État hôte, au bénéfice duquel était engagé l'OMP, devait également assumer une part de responsabilité. Ainsi aucune responsabilité ne sera prise par l'Organisation si l'acte en cause résulte d'une «nécessité opérationnelle» de l'ONU, telle que détaillée dans le rapport du Secrétaire général de l'ONU sur le financement des OMP de l'ONU de 1996. De plus, il existe certaine limite temporelle et financière aux réparations effectuées par l'Organisation.

1 Katarina Grenfell is a Legal Officer in the United Nations Office of Legal Affairs. The views expressed are those of the author in her personal capacity, and may not necessarily reflect the official position of the United Nations.

La problématique de la réparation effective des actes dommageables commis dans le cadre d'une OMP de l'ONU est aujourd'hui toujours en développement. L'une des préoccupations principales de l'ONU à cet égard, est de s'assurer que la procédure de réparation garantisse non seulement les droits de l'homme des victimes mais soit également efficace et pratiquement applicable, notamment en terme financier.

The United Nations (UN) has accepted responsibility to pay compensation regarding wrongful acts committed during UN peace operations since the First United Nations Emergency Force in the Middle East (UNEF-1) in 1956[2] and the UN Operation in the Congo (ONUC) in 1960. In 1965 the UN settled a number of claims brought against the UN by the Belgian Government with respect to damage caused to the persons and property of Belgian nationals which arose out of the operations of the UN Force in the Congo[3]. While individuals have sought compensation from the UN for alleged breaches of International Humanitarian Law (IHL) and International Human Rights Law (HRL)[4], most claims brought against the UN concern actions arising under municipal law in tort or contract, rather than from a breach of an obligation of the Organisation under international law.

As the topic of this presentation concerns how the reparations process 'works concretely' I will focus my comments today on how the UN deals, in a practical sense, with claims in the context of its peacekeeping operations. As you know, the law concerning the responsibility of international organisations (IOs) is still very much developing, not only in terms of what the primary obligations of international organisations are under international law, but also with respect to the obligation to make effective reparations. While other forms of reparation might be appropriate depending on the circumstances of any particular case, in the practice of the UN, the payment of financial compensation would appear to be the main form of reparation for wrongful acts5. Before I give you an overview of how the United Nations addresses cases when its responsibility may be claimed, I wish to mention a few preliminary principles.

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2 Report of the Secretary-General – Summary study of the experience derived from the establishment and operation of the force, 9 October 1958, UN document A/3943.

3 See Exchange of Letters constituting an Agreement between the United Nations and Belgium relating to the Settlement of Claims filed against the United Nations in the Congo by Belgian Nations, 20 February 1965, United Nations Juridical Yearbook, 1965,pp. 39-42.

4 Somalia – Human Rights Abuses by United Nations Forces – African Rights and Mines Advisory Group, July 1993

5 See comments and observations of the United Nations on the ILC Draft Articles on the Responsibility of International Organisations of 17 February 2011, UN document A/CN.4/637/Add.1 at p. 29.

Firstly, the UN accepts that it has international obligations and that it incurs responsibility for acts that violate those obligations. As stated by the Secretary-General in 1996:

> 'The international responsibility of the United Nations for the activities of United Nations forces is an attribute of its international legal personality and its capacity to bear international rights and obligations. It is also a reflection of the principle of State responsibility – widely accepted to be applicable to international organisations – that damage caused in breach of an international obligation and which is attributable to the State (or to the Organisation), entails the international responsibility of the State (or of the Organisation) and its liability in compensation'[6].

Secondly, the UN only deals with claims where the conduct of the peacekeeping operation is attributable to the UN. Conduct is attributable to the UN where the operation is under UN command and control. Acts by "UN-authorised" operations are not attributable to the UN, but to the State or States conducting the operations[7].

Thirdly, as the UN has immunity from legal processes under the 1946 Convention on the Privileges and Immunities of the UN ("the Convention"), the UN cannot be sued in national courts. It is obliged, however, under Article 8, Section 29 (a) of the Convention, to provide for 'appropriate modes of settlement' of 'disputes arising out of contracts or other disputes of a private law character to which the United Nations is a party'[8]. This obligation thus appears limited to protecting the rights of private persons to seek legal redress of claims arising out of tort and contract. The Convention does not address the possibility of private persons bringing claims against the Organisation under public international law, a trend which is a more recent development.

While, as mentioned above, the UN has addressed claims brought against it by a government on behalf of its nationals, most of the UN's practice in providing reparation for the victims of wrongful acts committed during UN peace operations has been in the context of "third-party claims" brought by individuals against the Organisation. When speaking of third-party claims, I mean claims brought by non-UN personnel or entities, which do not arise out of

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6 Report of the Secretary-General, Financing of the United Nations Peacekeeping Operations, 20 September 1996 – UN document A/51/389.

7 See comments and observations of the United Nations on the ILC Draft Articles on the Responsibility of International Organisations of 17 February 2011, UN document A/CN.4/637/Add.1, pp 9-12.

8 Article VIII, Section 29 (b) of the Convention requires the United Nations to make 'provisions for appropriate modes of settlement of disputes involving any official of the United Nations who by reason of his official position enjoys immunity, if immunity has not been waived by the Secretary-General'.

contracts[9]. Some of the more common examples of third-party claims include instances when members of a UN peacekeeping operation: (i) cause death or injury to non-UN personnel (e.g. kill or injure a local person in a traffic accident), or (ii) cause loss or damage to a non-UN person's property (e.g. damage to buildings/destruction of crops); or (iii) when there is non-consensual use of property.

In the peacekeeping context, the issue of the settlement of disputes is governed by the status of forces or status of mission agreement (SOFA/SOMA) concluded with the host government, which, *inter alia*, applies the provisions of the Convention in the host country. The model SOFA of 1994[10] provides for the establishment of a standing claims commission to settle disputes of a "private law character" The standard provision provides as follows:

> '… any dispute or claim of a private law character to which the United Nations peacekeeping operation is a party and over which the courts of [host country/territory] do not have jurisdiction because of the application of the present agreement, shall be settled by a standing claims commission to be established for that purpose. One member shall be appointed by the Secretary-General of the United Nations, one member by the Government and a chairman jointly by the Secretary-General and the Government …'[11]

However, the standing claims commission as envisaged under the model SOFA has never been established in a UN peacekeeping operation.

To date, the UN handles the claim through internal procedures – either through the claims review board process, or through commercial insurance. All claims related to UN vehicle and aircraft accidents are dealt with via commercial third-party insurance which is taken out by the UN with respect to potential liability arising out of the use of its vehicles and aircraft[12]. For claims related to other kinds of injury, local claims review boards are established in every

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9 Contracts entered into by the UN usually contain clauses which specifically provide for arbitration to settle any disputes arising out of the contract – see Legal Opinion of the Secretariat published in United Nations Juridical Yearbook 2001 at p382 and Report of the Secretary-General on Procedures in place for implementation of Article VIII, section 29 of the Convention on the Privileges and Immunities of the United Nations , 24 April 1995, UN Document A/C.5/49/65.

10 UN, *Model status-of-forces agreement for peacekeeping operations* at para. 51 UN document A/45/594, Annex, 9 October 1990.

11 Model SOFA, Paragraph 51.

12 Report of the Secretary-General on Procedures in place for implementation of Article VIII, section 29 of the Convention on the Privileges and Immunities of the United Nations, 24 April 1995, UN document A/C.5/49/65 ,p. 6

peacekeeping operation, on the basis of authority delegated by the Controller, which settle claims by a process of informal negotiation[13].

How does the third-party claims process work? The third-party individual who has suffered the loss or damage either submits a claim to the peacekeeping operation in the form of a letter, or visits the Mission about the claim. The claims unit reviews it, and will then inform the person concerned about what information is required for the Mission to consider the claim. The claims review board is usually composed of about three members, one of whom is a legal officer. If necessary, the circumstances of the incident leading to the claim are investigated. The claims review board considers the case, and recommends the amount of compensation payable up to certain financial thresholds. The amount of compensation that is offered will depend on the facts of the matter and take account of local conditions and local scales. The Mission might get these from the courts, or local insurance companies, or with the assistance of national legal officers. If the amount that is recommended by the claims review board exceeds a certain threshold, it must be referred to United Nations headquarters for approval by the Controller. The Controller will refer a matter to the Office of Legal Affairs when there are legal issues present that haven't been resolved. Almost always, such claims are settled by negotiation. Third-party claims that have not been settled amicably have been submitted to arbitration[14].

As noted by the Secretary-General in a report in 1997, while claims review boards provide an efficient mechanism to deal with claims in the peacekeeping context, 'they are United Nations bodies, in which the Organisation, rightly or wrongly, may be perceived as acting as a judge in its own case'[15].

Limitations on the UN's Third-Party Liability

The UN's liability to pay compensation to third parties in the context of peacekeeping operations is subject to certain limitations and exceptions. In the 1990s when UN peacekeeping expanded, both in terms of the number of operations and the nature of their functions, the scope of interaction between peacekeeping operations and the local population also increased. This gave rise to a significant increase in the number, amount and complexity of third-party claims[16]. The General Assembly called on the Secretary-General to devise means for

13 See Report of the Secretary-General, Financing of the United Nations Peacekeeping Operations, 20 September 1996 UN document A/51/389.

14 *Ibid*. See also Legal Opinion of the Secretariat published in United Nations Juridical Yearbook 2001, p. 382.

15 Report of the Secretary-General, Financing of the United Nations Peacekeeping Operations, UN document A/51/903 of 21 May 1997

16 See Daphna Shraga, 'UN Peacekeeping Operations: Applicability of International Humanitarian Law and Responsibility for Operations-Related Damage', 94 AJIL406 (2000) pp. 409-410

limiting the third-party liability of the Organisation, in the context of peacekeeping operations[17]. The Secretary-General made some recommendations as to how limitations on liability could be implemented[18], which were adopted by the General Assembly in its resolution 52/247 of 1998. These included that no liability would be engaged by the Organisation in relation to claims connected to activities arising from "operational necessity", as well as certain temporal and financial limitations for injury or damage. The financial limitations do not apply to damage caused by "gross negligence" or "wilful misconduct". In those cases the UN assumes responsibility *vis à vis* the third party, and retains the right to seek reimbursement from the members of the force, or from the troops contributing country. In making the recommendations, the Secretary-General explained that the limitation on the liability of the Organisation was premised on the assumption that host States would assume some of the liability, as peacekeeping operations are deployed for the benefit of the host State, and with its express or implied consent. He also noted that it was justified on the basis of the limited availability of funds to finance peacekeeping operations[19].

Operational necessity

According to the principle of "operational necessity", the UN is exempt from liability to compensate third parties in relation to damage resulting from '… necessary actions taken by a peacekeeping force in the course of carrying out its operations in pursuance of its mandate.' In his report to the General Assembly, the Secretary-General noted that what constitutes "operational necessity" must be considered on a "case-by-case" basis, and that four conditions have to be satisfied:

'(a) There must be a good-faith conviction on the part of the force commander that an "operational necessity" exists;

(b) The operational need that prompted the action must be strictly necessary and not a matter of mere convenience or expediency. It must also leave little or no time for the commander to pursue another, less destructive option;

(c) The act must be executed in pursuance of an operational plan and not the result of a rash individual action;

(d) The damage caused should be proportional to what is strictly necessary in order to achieve the operational goal'.[20]

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17 General Assembly resolution 51/13 of 4 November 1996.

18 Report of the Secretary-General of 21 May 1997 UN document A/51/903.

19 Report of the Secretary-General, UN document A/51/903 of 21 May 1997, Paragraph 12

20 Report of the Secretary-General, Financing of the United Nations Peacekeeping Operations, UN document A/51/389 of 20 September 1996, Paragraph 14.

Temporal and financial limitations for injury or damage

The financial and temporal limitations on third-party liability resulting from peacekeeping operations apply with respect to claims arising from: (a) personal injury, illness or death; (b) damage to property; and (c) non-consensual use of privately-owned premises, unless such claims are precluded as a result of "operational necessity".

The temporal limitation was established as 6 months from the time of the damage, or from when it was known about – and in any case, not longer than 12 months after the mandate of the operation has terminated. Compensation for personal injury, illness or death was limited to economic loss – i.e. medical expenses, loss of earnings and financial support measured by local standards of compensation, not to exceed $50,000 – though exceptions can be made. Non economic loss such as pain and suffering are excluded from compensation. Compensation for property loss or damage was limited by reference to certain criteria. For non-consensual use of, or damage to, premises, compensation is determined on the basis of fair rental value of the premises, or repair costs, and for personal property, at reasonable costs of repair or replacement.

Concluding observations

The topic of effective reparation for victims of wrongful acts committed during UN peace operations raises many issues, and is an area of the law that is still very much developing, as is borne out by the recent comments of international organisations with respect to the ILC's Draft Articles on the Responsibility of International Organisations[21]. One of the main challenges for the UN is to ensure that its procedures for making reparations not only respect the human rights of persons injured by the Organisation, but also that they are efficient and workable. Its procedure must take due consideration of the budgetary limitations of the Organisation.

21 Responsibility of International Organisations – Comments and observations received from International Organisations, 14 February 2011, UN documents A/CN.4/637 and Add 1.

SESSION 4: EFFECTUATING INTERNATIONAL RESPONSIBILITY DURING PEACE OPERATIONS

The debate following the fourth session explored five issues in greater detail:

1. The role of the International Humanitarian Fact-Finding Commission

The International Humanitarian Fact-Finding Commission (IHFFC), referred to in the first presentation of the session, is indeed not a good forum for suing but is a very good one for undertaking inquiries in the event of allegations of grave breaches of the Geneva Conventions and of the Additional Protocol I. According to Article 90 of Additional Protocol I, the IHFFC only has jurisdiction when parties to an armed conflict have accepted its expertise. Seventy-two States have accepted it a priori, including all the European States, except for France. However, there is also the possibility of activating the competence of the IHFFC on the basis of an ad hoc agreement. The competence of the IHFFC is, de jure, limited to international armed conflict but it can have a mandate in case of non international armed conflict, with the consent of all the parties concerned. Concerning peace operations, the IHFFC also engages in extensive consultation with the Department of Peacekeeping Operations of the UN (DPKO) for the possibility of being used in the event of allegations against peacekeepers. However, this solution never became concrete.

2. The issue of immunities

Section 29 of the Convention on the Privileges and Immunities of the United Nations (1946), which states that the UN has to provide alternative remedies, has sometimes been used as leverage to argue that, in some particular cases, UN immunity should not be upheld if it has not provided any alternative remedies. Is this a fair argument?

One of the speakers explained that the UN Privileges and Immunities Convention only addresses settlement of claims of a private law nature between the UN and another party. When the Convention was drafted, it was designed to create legal security for private persons dealing with the UN under tort law contract. Therefore, if somebody wants to bring a public law claim against the UN they should get their government to bring it on their behalf. However, usually, peacekeeping operations are stationed in dysfunctional States that do not have this capacity. In 1995, the UN Secretary-General reported on procedures that were in place for implementing section 29 of the Convention, and said that the UN does not agree to engage in litigation or arbitration with a third party that submits claims based on political or policy-related grievances against the UN. It considered that it would be inappropriate to use public funds to submit any form of litigation with a claim that addresses such issues. However, the

question remains open regarding a claim based on the UN's failure to carry out a mandate effectively. There is no provision for that situation in the Convention. Therefore, it seems that such a claim should be brought by a Member State against the UN or that it would need to be taken to the General Assembly, to decide how to address such an issue.

Another speaker insisted that the UN claim system, which is adequate for private law claims, is not suited for making public law claims, in particular concerning violations of International Humanitarian Law (IHL) and grave human rights violations. Compensation is not enough in those cases. A strict distinction should be made between claim processes and legal responsibility.

3. The practical challenges to reparation

In practice, from a legal point of view, paying reparations without legal bases is extremely difficult. In Afghanistan, troops contributing countries (TCCs) found that they could not pay the victim directly but that they had to give the money to the administration, which could be considered as corruption in their own State. How could it be organised in a different way?

One of the speakers explained that there is some UN practice along those lines as it depends on the agreement with the host States. However, even if it can save resources, the current UN process is to deal with individuals on a case-by-case basis, with the money going directly to the victims. Another speaker further added that this question shows how important it is to have clear rules. There should be a general agreement with the States for such a system. It could be an option for the affected individuals but in principle, the payment should always be made directly to the individuals. This issue is also an important one within the European Court of Human Rights system.

The issue of judicial co-operation was deemed as an important consideration when Member States' courts – be it TCCs' or the Court of nationality of a staff member – prosecute, because they are often dealing with dysfunctional States.

4. The NATO claim policy

Within the NATO Status of Forces Agreement (SOFA), which is binding for the 28 members States of the Alliance, there is a particular article dealing with the attribution of jurisdiction and another article dealing with the settlement of claims, which mainly focuses however on claims between parties of the Alliance, and not so much on peace support operation. For that reason, NATO concluded the Partnership for Peace SOFA (PFP SOFA) which, mutadis mutandis, applies the provisions of the NATO SOFA. NATO faced the issue in 'out of area' operations, where in principle, territorial restrictions, the NATO and the PFP SOFA are not applicable. However,

it was recommended that those SOFAs would serve as guidelines for solving these problems. There is an 'out of area' claims policy in all the SOFAs that NATO concluded with host Nations. From the moment that the NATO Council, by consensus, approves an operation, the Council automatically has to approve a specific claim policy.

5. The EU claim policy

The EU has an EU SOFA with its Member Sates, which has not yet entered into force, because this requires ratification by all Member States. To complement it, there are SOFAs for specific operations and a claims agreement for 'out of area' operations, which is also still pending its final ratification. The EU does not have immunities in its Member States' courts except in cases where the European Court of Justice (ECJ) has jurisdiction. The Common Foreign and Security Policy, including crisis management, is an exception to that principle because in all other policy areas the rule is that anyone who has suffered damage from the actions of the EU Institutions, or officials of the EU, can go to the ECJ and sue the EU for damages.

Session 5
Individual Responsibility for IHL/HRL Violations committed during Peace Operations

Chair person: **Elzbieta Mikos-Skuza,** *Warsaw University*

THE CRIMINALISATION OF INTERNATIONAL HUMANITARIAN LAW AND HUMAN RIGHTS LAW VIOLATIONS COMMITTED BY PEACE FORCES: WHAT HAPPENS IN PRACTICE.

Ray Murphy
Irish Centre for Human Rights, School of Law, National University of Ireland Galway.

Résumé

L'obstacle majeur à la mise en œuvre de la responsabilité des membres des forces de paix reste les États contributeurs de troupes et leur réticence à abandonner leur droit de compétence exclusive. Bien que des recommandations aient été faites par le Secrétaire général des Nations unies à cet égard, la situation demeure problématique. Au-delà du manque de volonté des États, il existe également une grande disparité en terme de droit et de procédure.

Le Protocole d'accord cadre entre les Nations unies et les pays contributeurs de troupes tente d'établir régime commun en ce qui concerne la mise en oeuvre de la responsabilité des individus membres d'une opération de maintien de la paix des Nations Unies, notamment en terme de procédures d'enquête. Il institue le recours au Bureau des services de contrôle interne afin de conduire une enquête administrative dans le cas où l'État de nationalité de la personne visée par des allégations resterait inactif. Cependant, en pratique, ces règles de référence restent souvent inappliquées et la poursuite d'individus auteurs de violations reste aujourd'hui encore largement à la discrétion des États.

A titre d'exemples de bonnes pratiques, l'Irlande prévoit que si un membre des forces de défense irlandaises commet un acte contraire au droit militaire irlandais, ce dernier sera poursuivi devant une cour martiale. Cette réglementation a été appliquée à plusieurs reprises dans le cadre d'opérations de maintien de la paix à l'étranger. De manière plus expansive, plusieurs règles du code criminel allemand étendent son application à différentes situations qui couvrent les actes commis à l'étranger, garantissant l'application de la responsabilité pénale au personnel allemand des missions des Nations unies. De même, la loi régissant la responsabilité du personnel des forces de défense australienne s'applique extra-territorialement.

Comme expliqué dans d'autres présentations, les accords sur le statut de mission fournissent généralement un cadre disciplinaire aux forces de la mission. Ainsi l'accord sur le statut de la Mission de l'Union africaine en Somalie (AMISOM) prévoit que, si les membres de l'AMISOM bénéficient de l'immunité de juridiction et sont les sujets exclusifs des juridictions de leur États de nationalité, le chef de l'AMISOM est encouragé à prendre des actions disciplinaires à leur égard et à notifier celles-ci au gouvernement Somalien. Cette option a déjà été utilisée afin de condamner des soldats de l'AMISOM à des peines de prison.

Le manque de transparence et les problèmes identifiés dans le passé persistent cependant. Il est aujourd'hui nécessaire d'institutionnaliser et d'harmoniser les procédures existantes et de mettre en place un mécanisme de contrôle et de notification efficace. Un système de « name and shame », comme il en existe aujourd'hui concernant les mécanisme de droits de l'homme des Nations unies, pourrait peut-être se révéler pertinent.

The issue of accountability and the criminalisation of International Humanitarian Law (IHL) and Human Rights Law (HRL) violations committed by peace forces has become a matter of serious concern in recent years. The major impediment to accountability of members of peace forces remains contributing States and their reluctance to surrender the right to exclusive jurisdiction. However, problems relating to immunity are not new and from the outset, it was realised that such arrangements could, without more, lead to what the UN Secretary-General referred to as a 'jurisdictional vacuum' unless the Contributing States ensured that personnel would be prosecuted under the relevant national laws. Although Contributing State were asked to assure the Secretary-General that they were prepared to exercise such jurisdiction, this did not solve all the problems. The treatment of offenders would not be uniform and would vary as between the Forces of different nationalities. Municipal laws differ in the jurisdiction they confer on courts and courts-martial, especially with regard to offences committed by nationals abroad. Furthermore, criminal codes differ, and an act deemed criminal in a host State might not be criminal in a Contributing State, and the laws of Contributing States may differ between themselves in a similar manner.

Model Memorandum of Agreement between the UN and Contributing States

The Special Committee on Peacekeeping Operations and its Working Group made some significant changes to the draft Model Memorandum of Agreement (MOU) between the UN and Contributing States. Under the Model MOU, Contributing States acknowledge that the Commander of its national contingent is responsible for the discipline and good order of members of the contingent while assigned to UN peace operations. Contributing States also commit to ensure, subject to any applicable national laws, that the Commander of its national contingent

regularly informs the Force Commander of any serious matters involving discipline and good order among members of its national contingent. In practice, this does not always occur and there appears to be little sanction against recalcitrant States.

Investigations

Contributing States have primary responsibility for investigating any acts of misconduct committed by a member of their national contingent. There is a requirement to inform the UN "without delay" and forward the case to its appropriate national authorities for the purposes of investigation.

When it is necessary to preserve evidence and where the Contributing State does not conduct fact-finding proceedings, the UN may initiate a preliminary fact-finding inquiry into the matter, having informed the relevant Contributing State and until such time as the relevant State initiates its own investigation. This has happened in a number of cases in recent years. The investigation team may include a representative from the Contributing State. However, the primary role of the Contributing State is maintained, and the UN has little investigative powers and even fewer accountability mechanisms at its disposal should the Contributing State fail to take appropriate action.

In the event that the Contributing State does not notify the UN as soon as possible, but no later than 10 working days from the time of notification by the UN, that it will start its own investigation of the alleged serious misconduct, the Contributing State is considered to be unwilling or unable to conduct such an investigation. In such cases, the UN may initiate an administrative investigation of alleged serious misconduct without delay. Any such administrative investigation may include, as part of the investigation team, a representative of the Contributing State. National contingent Commanders are obliged to co-operate with UN investigations. The Office of Internal Oversight Services (OIOS) has conducted administrative investigations and reported the investigation results to the relevant Permanent Missions of the Contributing States for appropriate action. In some cases the Contributing States advised the Organisation of sanctions taken against the implicated peacekeepers. In others, where Contributing States have failed to revert, the Organisation, through its Department of Field Support, follows up with relevant Permanent Missions on any action they have taken.

In cases where the Contributing State decides to start its own investigation, the UN will co-operate and provide all available materials of the case to the Contributing State without delay. Where National Investigation Officers are dispatched to the mission area, the role of the UN investigators will be to assist, if necessary, in the conduct of the investigation. This demonstrates the secondary role of the UN in such investigative processes.

Accountability

If either a UN investigation or an investigation conducted by the competent authorities of the Contributing State concludes that suspicions of misconduct are well founded, the Contributing State must forward the case to its appropriate authorities for due action. The Contributing State agrees to notify the Secretary-General of progress on a regular basis, including the outcome of the case. Not all the Contributing States respond on a regular basis, but the situation is reported to have improved. The Department of Field Support follows up with relevant Permanent Missions where no response is received. The nature and outcome of these follow-up efforts is confidential.

Investigation Division – Office of Internal Oversight Services (OIOS)

The aim of OIOS investigations is to establish facts and make recommendations in light of its findings. The OIOS is not a law enforcement agency and does not have subpoena or other coercive statutory powers. Personnel subject to investigation include staff members, UN volunteers, consultants, contractors, UN military observers, UN police officers, formed police units, contingent personnel and additional personnel. The Manual and procedures are evidence of the UN's efforts to improve the process despite the reluctance of States to accept more robust investigative powers for the OIOS. In the end, what is now in place is a largely emasculated UN process that relies on Contributing States to do the right thing. Establishing what States actually do in practice remains a challenge.

The case of Ireland

Ireland is a common law jurisdiction and the issues are governed by the Constitution of 1937 and the Defence Act 1954 as amended. If a member of the Defence Forces commits an offence under Irish military law, he or she can be prosecuted by court-martial.

Allegations of sexual abuse of minors and local women were made against Irish soldiers serving with the UN mission in Eritrea (UNMEE). The misconduct of the soldiers involved a potential violation of human rights and the actions alleged amounted to a serious contravention of the Soldiers Blue Helmet Card. The case arose from a situation where a number of soldiers had relationships with local women. A military police team with a legal officer from the Legal Service were deployed from Ireland. The personnel involved in the misconduct were subject to administrative repatriation and sent home. They were charged under Section 168 of the Defence Act with conduct to the prejudice of good order and discipline and tried within a month. They were found guilty and given a Severe Reprimand.

The disciplinary hearings took place in Ireland, as the soldiers involved had completed their tour of duty by the time action was taken. This is a common problem with most troops con-

tributing countries. If soldiers are rotated every six or twelve months, requiring disciplinary hearings to be held in the mission area is not always practical. However, it is an example of good practice.

Uganda and the Disciplinary Framework of Ugandan Forces in Somalia with AMISOM

The Status of Mission Agreement provides that military personnel part of the African Union Mission in Somalia (AMISOM) have immunity from prosecution under Somali law and they are subject to the exclusive jurisdiction of their respective participating States. The Head of Mission is enjoined to take disciplinary action against errant personnel and notify the Somali government of the action taken.

In the course of implementing the mission, Ugandan forces engaged in serious confrontations with the Al Shaabab. Between October 2010 and February 2011, AMISOM forces mounted an offensive against Al Shaabab which led to civilian causalities. Allegations were made against the Ugandan contingent. The Head of Mission established a Board of Inquiry which established that three Ugandan soldiers were culpable. The soldiers were charged before a Unit Disciplinary Committee for careless shooting in an operation. They were sentenced to 24 months in prison and repatriated to Uganda to serve their sentence.

Germany and the "Kunduz air strike" in Afghanistan

There are various provisions in the German Criminal Code, expanding the application of German criminal law to different situations with a bearing upon foreign countries, so that criminal responsibility for German UN staff on mission is ensured. The situation with regard to Germany is interesting owing to its historical origins. Reflecting this, the legal framework governing military personnel and criminal behaviour is part of the ordinary criminal code. Article 3 of the military penal code refers to the ordinary criminal code for criminal misconduct. In this way, military personnel and others deployed on peace operations are tried before an ordinary criminal court (not courts-martial) for criminal misconduct.

The so called "Kunduz air strike" against two fuel tankers was controversial owing to the number of civilians killed, to the allegation that the officer at the centre of the decision making process, Col. Klein, was reported not to have followed NATO Rules of Engagement (ROE), and to general unease in Germany about the role of German forces in Afghanistan. An interesting aspect of this case is that it arose from action taken due to the mandate of the International Security Assistance Force (ISAF). Matters for consideration include the ISAF ROE, national (German) rules of engagement, target verification and related procedures, the chain of command, and accountability for tactical decisions. Such incidents raise complex

legal, tactical and command issues. The multi-national nature of the mission adds a further complication.

The German Federal Prosecutor investigated the incident and made a determination that if a military attack was justified in accordance with international law, it cannot be a violation of the German national penal code. The decision to bomb the tankers did not constitute a war crime under Article 11 (3) of the international criminal code. Other offences under the international criminal code were not applicable because the civilians were not deliberately attacked and the alleged insurgents constituted a legitimate target.

In 2010, Col. Klein was summoned to appear before a closed hearing of the Bundestag investigative committee created to examine the circumstances and decision behind the air strike. No formal report has been published. The investigation was confidential, however, senior politicians, including the Chancellor, have been questioned about the chain of command.

Australia

Australian Defence Force personnel serving as UN officials or experts on mission are subject to a system of military discipline established by the Defence Force Discipline Act 1982, which has extraterritorial effect. This ensures accountability of Australian Defence Force personnel deployed outside Australia, including those engaged in UN activities. The legal framework governing participation is the Defence Force Discipline Act 1982 which provides for the extraterritorial application of Australian criminal law. A number of incidents during 2010 involved casualties as a consequence of Australian Defence Forces operations in Afghanistan. Hand grenades were used in one particular incident and there were a number of civilian casualties, including children. Three members of the Australian Defence Forces were charged with various offences. The incident was initially reported in a routine manner and the unit legal officer was of the view that no violation of IHL had occurred. Later an Inquiry Office was dispatched from Australia. He questioned whether the use of lethal force was necessary. The matter was referred to the Director of Military Prosecutions for investigation. Charges were proffered against three personnel and these were dismissed at a preliminary stage (Pre-Trial) on the basis of the Chief Advocate's view that negligence was not an appropriate basis for criminal liability in the context of military operations. In fact, the Director of Military Prosecutions conceded that the soldiers had acted in accordance with ROE and they had not violated IHL.

Conclusions

There is a lack of transparency under the current system and problems identified in the 1950s remain. National practice is inconsistent and it is not possible to obtain reliable information in relation to a number of major Contributing States. The biggest jurisdictional gap exists with

respect to civilians, including UN police. There seems little alternative to the present system whereby the only possibility for the prosecution of UN forces lies in their respective state. The UN has attempted to remedy the jurisdictional gap identified by the Secretary-General but these efforts have been largely unsuccessful. Constitutional, legal and other practical obstacles persist in dealing with serious violations by peacekeepers. No UN mechanism for prosecuting UN forces exists and Contributing States are unlikely to agree to any proposal for such an arrangement. The real problem is to ensure that national prosecutions do take place. There is a need to institutionalise procedures and have an effective monitoring and reporting mechanism for follow-up. Establishing a central monitoring system adopted to track the process and outcome is one means of addressing this problem. This could incorporate a system whereby States that failed to co-operate or follow through with prosecutions could be 'named and shamed' similar to what happens under UN human rights monitoring mechanisms.

Selected bibliography

D.W. Bowett, *UN Forces* (London: Stevens, 1964).

F.J. Hampson and A. Kihara-Hunt, 'The accountability of persons associated with peacekeeping operations' in C Aoi, D de Coning, R Thakur (eds.), *Unintended Consequences of Peacekeeping Operations* (Tokyo: United Nations University, 2007), 195-220.

M. Zwanenburg, *Accountability of Peace Operations* (Leiden and Boston: Martinus Nijhoff, 2005)

United Nations, Report of the Special Committee on Peacekeeping Operations and its Working Group on the 2007 resumed session, General Assembly A/61/19 (Part III), 12 June 2007 and endorsed by A/RES/61/267/B.

United Nations, *Investigations Manual*, Investigation Division – Office of Internal Oversight Services (OIOS), March 2009.

United Nations, Report of the Secretary-General, *Criminal accountability of United Nations officials and experts on mission*, General Assembly A/63/260, 11 August 2008.

IHL VIOLATIONS COMMITTED BY PEACE FORCES: IS THERE ANY ROLE FOR THE ICC?

Mrs. Olivia Swaak-Goldman
International Cooperation Adviser
Office of the Prosecutor

Résumé

En théorie, il est tout à fait envisageable que le Bureau du Procureur de la Cour pénale internationale (CPI) puisse avoir juridiction sur des crimes commis par des membres de forces de maintien de la paix commis sur le territoire d'un État partie ou si les auteurs sont ressortissant d'un État partie. Néanmoins, on peut également penser que les conditions constitutives des crimes de génocide, crimes contre l'humanité et crimes de guerre sont difficilement remplies dans le cas de violations commises par des membres des forces de maintien de la paix.

La CPI n'intervient qu'en complémentarité aux autres modes de juridiction. Ainsi la Cour a l'obligation de ne pas poursuivre lorsqu'il existe d'ors et déjà une véritable procédure nationale. La question de l'application du principe de complémentarité par rapport aux procédures prévues par les accords sur le statut des forces ou le statut des missions se pose également.

Quelque soit le mode de déclenchement de la compétence de la Cour, le Procureur ne peut poursuivre une enquête que si cela est dans « l'intérêt de la justice », et en particulier dans l'intérêt des victimes. Il faut ici préciser que cet intérêt de doit pas être confondu avec celui pour la paix et la sécurité qui relève d'autres institutions et en particulier des Nations Unies. Les enquêtes ouvertes sur cette base ne doivent alors se faire que sur demande expresse du Conseil de Sécurité des Nations Unies et doivent également être « dans l'intérêt de la justice » au sens de la CPI.

En ce qui concerne la coopération, si les États parties ont une obligation de coopérer avec la CPI, les organisations internationales (OI) telles que les Nations unies n'ont pas une telle obligation. Cependant, dans de nombreuses affaires de la CPI, les missions de terrain et les missions de maintien de la paix des OI sont parfois les seules à avoir accès à certains territoires. Afin d'établir une coopération efficace avec ces organisations, la CPI doit donc conclure des accords particuliers avec elles. Cette relation permet au bureau du Procureur de requérir la coopération d'une mission concernant la transmission de divers documents ainsi que leur assistance dans le transport et la sécurité des suspects, et l'usage de leurs commodités par le personnel du bureau. La coopération peut également aller plus loin comme dans le cas de la Mission des Nations unies

au Congo (maintenant MONUSCO), qui a été mandaté par le Conseil de sécurité pour faire assurer l'exécution des mandats d'arrêt de la CPI. Un tel mécanisme a également été mis en place concernant la coopération de la Mission des Nations unies en Côte d'Ivoire avec la CPI.

La CPI peut également agir afin de protéger les membres des missions de maintien de la paix dans l'exercice de leur mandat. Une des affaires de la Cour au Soudan implique en effet des attaques directes contre du personnel d'une mission de maintien de la paix des Nations unies au Darfour. Cette affaire peut potentiellement envoyer un signal fort à la communauté internationale quant au respect et à la protection des missions de maintien de la paix.

Ladies and Gentlemen,
Thank you for being here, and thank you to the ICRC and the College of Europe for this kind invitation.

I would like to share with you some reflections on the work of the Office of the Prosecutor of the International Criminal Court (ICC), and on the relations between the ICC and peacekeeping. The Office of the Prosecutor and the ICC itself are part of a new system of international justice created by the Rome Statute. Accountability and the rule of law provide the framework to protect individuals and nations from massive atrocities. There are now 119 States Parties, all committed to prevent and punish massive crimes. As UN Secretary-General Ban Ki-Moon stated in 2007:

> 'The rule of law is a fundamental principle on which the United Nations was established. […] International criminal justice, a concept based on the premise that the achievement of justice provides a firmer foundation for lasting peace, has become a defining aspect of the work of the Organization.'

Let me briefly explain how the Office of the Prosecutor conducts its activities as well as the implications for peace forces.

The Court's jurisdiction can be triggered in three manners:

1. a State Party may refer a situation where massive crimes appear to have been committed to the Prosecutor;
2. the UN Security Council acting under Chapter VII of the UN Charter may also refer a situation to the Prosecutor; or
3. the Prosecutor can initiate an investigation of his own accord.

Neither a State Party referral nor a UN Security Council referral binds the Prosecutor into opening an investigation into a situation: under the Rome Statute, it is for the first time the Prosecutor of an international court is given the mandate to independently open investigations in certain circumstances.
During the preliminary examination phase, the Prosecutor determines whether there is a "reasonable basis" to initiate an investigation, on the basis of criteria relating to jurisdiction, admissibility and the interests of justice. These criteria apply irrespective of the manner in which the Court's jurisdiction is triggered.

With regard to jurisdiction, the Office of the Prosecutor assesses

1. whether the alleged crimes are committed on the territory of States Parties or by nationals or State Parties (not for Security Council Referrals);
2. whether these crimes have been committed after the entry into force of the Rome Statute on 1 July 2002 (or later if the relevant State ratified later); and
3. whether the alleged crimes fall within the Court's subject matter jurisdiction which currently covers genocide, crimes against humanity and war crimes.

In theory, one could argue that the Office could thus have jurisdiction over crimes committed by members of peacekeeping forces committed on the territory of a State Party or if he/she is a national of a State Party. However, with regard to genocide, it would be necessary to establish that the individual had the required special intent to destroy, in whole or in part, a national, ethnical, racial or religious group. Crimes against humanity must be committed as 'part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack. War crimes must be committed, in particular, as 'part of a plan or policy or as part of a large-scale commission.' One could imagine that these are conditions are not easily fulfilled in the case of members of peacekeeping forces. (There may also be issues of Status of Forces Agreements (SOFAs) and Status of Mission Agreements (SOMAs) but those concern the Court's request for surrender and not jurisdiction *per se*).

With regard to admissibility, the Office has a duty *not* to investigate when there are genuine national proceedings, pursuant to the principle of complementarity. The ICC is a court of last resort.

The Statute also requires that the crimes reach a threshold of gravity, which includes an assessment of the scale, nature, manner and impact of the alleged crimes. In accordance with the Statute, particular consideration will be given to conduct involving rapes and other crimes involving sexual or gender violence and crimes committed against children.

Let me give you an example: the Office conducted a preliminary examination of alleged crimes committed in Iraq by nationals of 25 States Parties involved in the military operation there. We found isolated cases of wilful killings and torture but they were not committed 'as part of a plan or policy or as part of a large-scale commission'. So the Office could not open an investigation because the cases did not reach the gravity threshold established by the Statute. In addition, the States concerned were conducting domestic investigations and prosecutions.

The third and final criterion in accordance with the Statute is that the Prosecutor should not proceed with an investigation or prosecution if it is not in the "interests of justice", notably the interest of victims. It would however be exceptional to decide that an investigation would not be in the interest of justice, and the victims. I should stress here that the 'interests of justice' must not be confused with the interests of peace and security, which falls within the mandate of other institutions, notably the UN Security Council. In fact, the Statute provides in Article 16 that no investigation or prosecution may be commenced or proceeded with, if the Security Council, in a resolution adopted under Chapter VII of the UN Charter – thus in the interest of peace and security – has requested the Court to that effect. The Court and the Office of the Prosecutor itself are not involved in political considerations. We have to respect scrupulously our legal limits. The prospect of peace negotiations is therefore not a factor that forms part of the assessment of the Court.

Ladies and Gentlemen,

The Office is conducting preliminary examinations in all regions of the world; it is analysing alleged crimes in Honduras, Republic of Korea, Afghanistan and Nigeria; it is checking if genuine national proceedings are being carried out in Guinea, Colombia and Georgia; and it is assessing the *ad hoc* declaration accepting the jurisdiction of the Court by the Palestinian National Authority.

Following the legal framework, the Office of the Prosecutor has opened investigations in the Democratic Republic of Congo, Uganda, Central African Republic, Darfur, Kenya, Libya, and – most recently – Côte d'Ivoire.

In order to carry out expeditious investigations and prosecutions of massive crimes in these contexts, we have come to rely on the co-operation and the support of international actors, including in the field, of peacekeeping missions.

Arrests in particular are a big test for the international community. The outstanding arrest warrants against Omar Al Bashir, President of the Sudan, and against Joseph Kony, leader of

the Ugandan Lord's Resistance Army, amongst others, show the difficulties. It requires collaborative efforts and a consistent approach of States and international organisations. We have guidelines on how States and others should interact with those subject to Arrest Warrants.

The regime for co-operation established under Part 9 of the Rome Statute touches upon some of the most critical sets of interactions between the Court and national authorities. Besides arrest and surrender, co-operation is also necessary to assist the Court with the protection of victims & witnesses, preservation of evidence; providing forensic expertise & examination of sites; service of documents & notification; and identification, tracing & freezing of assets.

For all forms of co-operation it is important to highlight that even though States Parties have a general obligation to cooperate with the Court (Article 86), intergovernmental organisations, such as the UN, are not obliged to do so (Article 87(6)). However, in many of the situations before the ICC, field missions of international organisations or peacekeeping operations may have unique access to a particular territory.

In order for the Prosecutor to seek co-operation from these organisations and missions he or the Court need to enter into a separate agreement. By signing the ICC-UN Relationship Agreement on 4 October 2004, the UN recognised a general "obligation of cooperation and coordination" with the Court (Article 3), and Part III of the Agreement clearly established the general rules and obligations on co-operation and judicial assistance between the Court and the UN.

On 8 November 2005, these general provisions helped to give shape to the Memorandum of Understanding between the ICC and the UN on co-operation from MONUC, now MONUSCO, the UN Mission in the DRC.

This robust co-operation agreement enabled the Office to request the Mission's co-operation regarding the transmission of various documents, as well as their assistance with the transportation and the security of suspects (Lubanga), and the use of their facilities in the field by Office staff.

Importantly, MONUC (now MONUSCO) has been given a legal basis by the Security Council to enforce the ICC warrants. There is a MONUC mandate authorising assistance to the DRC in executing arrests, a formal request from the DRC for such assistance, and a positive response from the then Special Representative of the Secretary-General and Head of MONUC (now MONUSCO), subject to the limits of its mandate and operational capabilities.

In the situation of Côte d'Ivoire, the Office is similarly formalising an agreement with the UN concerning cooperation with the UN Organization Mission in Côte d'Ivoire (UNOCI).

UN Security Council Resolution 2000 (2011), taking note of the activities of the Prosecutor in relation to the investigation into war crimes and crimes against humanity in Côte d'Ivoire, calls upon UNOCI, where consistent with its existing authorities and responsibilities, to support national and international efforts to bring to justice perpetrators of grave violations of human rights and International Humanitarian Law in Côte d'Ivoire.

I would suggest that this is the way forward.

Whereas the co-operation between the ICC and peacekeeping operations is done on a case-by-case basis, it is important that States and multilateral institutions harmonise their efforts in respect of the legal requirements of the Rome Statute, in particular in support of the arrest and surrender of indicted individuals.

Ladies and Gentlemen,

Through a final example I would like to explain what the Court itself does to protect peacekeepers.

In addition to more generally providing a framework for accountability for crimes of international concern, including crimes against peacekeepers, our third Darfur case involves three charges of war crimes for crimes committed against peacekeepers (namely violence to life, intentionally directing attacks against personnel, installations, material, units or vehicles involved in a peacekeeping mission; and pillaging). These were brought against Abdallah Banda, the Commander-in-Chief of the Justice and Equality Movement, and Mohammed Jerbo, the former Chief-of-Staff of the Sudanese Liberation Army-Unity, in relation to an attack on peacekeepers in an AU Mission at Haskanita in North Darfur, Sudan, on 29 September 2007.

On 7 March 2011, the Pre-Trial Chamber confirmed the charges; we are now waiting for the commencement of trial.

Interestingly, on 16 May 2011, Prosecution and Defence filed a joint submission informing the Judges that the Accused will contest only specific issues:

a) Whether the attack on the Haskanita base was unlawful;

b) If the attack is deemed unlawful, whether the Accused persons were aware of the factual circumstances that established the unlawful nature of the attack; and;

c) Whether the African Union Mission in Sudan (AMIS) was a peacekeeping mission in accordance with the UN Charter.

If the Chamber determines that AMIS was a peacekeeping mission established in accordance with the UN Charter, that the attack itself was unlawful and that the accused persons were aware of the factual circumstances that established the unlawful nature of the attack, the accused persons will plead guilty to the charges brought against them.

The case can send an important signal to the world that violations against peacekeeping missions will not be tolerated.

It is exactly this exponential impact of the Court – its reach beyond the confines of the courtroom – what is truly important. As described by Prosecutor Moreno-Ocampo and by UN Secretary-General Ban Ki-Moon, there is now a large "shadow of the Court", referring to the impact of the Court or a single Court ruling, extending to 119 States Parties, and even beyond, to reach non States Parties. It is affecting the behaviour of Governments and political leaders; armies are apparently adjusting their operational standards; conflict managers and peace negotiators are refining their strategy taking into account the work of the Court, respecting the legal limits. The world increasingly understands the role of the Court.

Thank you for your attention.

COMMAND/SUPERIOR RESPONSIBILITY DURING PEACE OPERATIONS

Darren Stewart[1]
International Institute of Humanitarian Law (IIHL)

Résumé

I. Responsabilité pénale individuelle des commandants et supérieurs dans des opérations de paix

La concrétisation de la responsabilité pénale individuelle des commandants et supérieurs dans des opérations de paix, dépend dans une large mesure de l'existence de mécanismes nationaux de responsabilisation adéquats. Ceci est particulièrement vrai en ce qui concerne le personnel militaire. La question est, en revanche, beaucoup plus compliquée en ce qui concerne les civils ou la composante « police civile » dans les opérations de paix. Lorsque l'on considère le droit applicable aux opérations de paix et aux forces de maintien de la paix, on part du principe qu'elles jouiront d'une immunité vis-à-vis du régime juridique de l'Etat de réception. En tant que tel, elles emporteraient avec elles leurs propres codes disciplinaires nationaux et leur droit pénal et, bien entendu, seraient soumises au cadre juridique international. A cet égard, certains pays en développement ne disposent malheureusement pas de mécanismes légaux internes sophistiqués et robustes leur permettant de poursuivre efficacement, devant leurs juridictions nationales, leurs propres agents de maintien de la paix attachés à des opérations de maintien de la paix.

En ce qui concerne le régime pénal international applicable, le Statut de Rome de la Cour pénale internationale est un véhicule essentiel pour la mise en cause de la responsabilité des commandants et des supérieurs en ce qui concerne les trois crimes principaux relevant de la compétence de la Cour, à savoir les crimes contre l'humanité, le crime de génocide et les crimes de guerre. Dans un contexte international, le crime le plus susceptible d'être commis par des forces de maintien de la paix, et par extension, par des commandants et supérieurs, est le crime de guerre. Pour qu'un crime de guerre puisse être commis, il faut qu'existe un conflit armé. Par conséquent, la détermination de l'existence ou non d'un conflit armé est particulièrement importante.

Les critères d'attribution de responsabilité des commandants et autres supérieurs sont énumérés à l'article 28 du Statut de Rome et se concentrent sur le commandement et contrôle effectifs, ou l'autorité et contrôle effectifs. Ces critères donnent lieu à des débats sur le niveau d'intensité

1 This contribution has been written on the basis of audio record and has not been reviewed by the speaker.

de commandement. Dans la réalité, cependant, aucune nation ne fournira ses forces aux Nations Unies ou à d'autres opérations multinationales sous un commandement total ou même opérationnel. L'allocation de forces par des Etats fournisseurs de contingents à des missions multinationales se fait généralement sous un contrôle tactique ou opérationnel. Par conséquent, il est nécessaire d'évaluer si le commandant d'une opération de maintien de la paix est dans une position lui permettant d'exercer un commandement et un contrôle effectifs ou une autorité et un contrôle effectifs afin de satisfaire à son obligation d'empêcher, réprimer et poursuivre des violations de DIH. La responsabilité des chefs militaires et autres supérieurs étant par nature un crime d'omission plutôt qu'une attaque directe émanant d'un commandant, l'exigence de base, en termes de rapport et de renvoi, devrait être de faire tout ce qui est raisonnable afin de poursuivre ou agir en anticipation en signalant et transmettant un cas sur le point de se produire.

II. Responsabilité d'un commandant ou supérieur en raison d'un acte commis par des contractuels ou des compagnies de sécurité militaires privées.

Une question en évolution à l'heure actuelle est celle de savoir si l'acte d'une personne pouvant être perçue comme un agent ou une personne sous le commandement et contrôle effectifs ou autorité et contrôle effectifs d'un commandant, peut engager la responsabilité de ce commandant ou autre supérieur en question. La question se pose plus particulièrement en ce qui concerne les compagnies de sécurité militaires privées ou les contractuels dès lors que ceux-ci sont de plus en plus souvent présents sur le champ de bataille et remplissent des fonctions ayant un rôle quasi-militaire. Il est, selon moi, concevable qu'en fonction de la nature des activités entreprises et pouvant donner lieu à une violation du DIH, ces derniers puissent engager la responsabilité du commandant ou autre supérieur pour qui ils travaillent. Les termes du contrat seraient, bien entendu, pertinents ainsi que la nature de leur proximité par rapport au commandant en question.

III. Conclusion

Le risque le plus en grand en ce qui concerne la responsabilité de chefs militaires ou supérieurs a trait, selon moi, aux civils – aussi bien les membres de la police civile et aux civils déployés dans des missions sur le terrain – dès lors qu'aucune structure ne s'applique à la composante civile dans les opérations de maintien de la paix. Ceci constitue un défi auquel les Etats devraient apporter une réponse.

I. Introduction

I will focus my presentation on where the greater challenges in terms of affording responsibility lie, which is in the case of command responsibility. I will make reference to the civilian context as well, primarily because I regard this as a particularly problematic area.

If one considers the general topic of this conference as a fairly aspirational one in the sense of accountability and responsibility in general, then I must say the topic I have been asked to address to you is perhaps the most aspirational and that is that of holding commanders and senior civilian management responsible in peace operations for allegations relating to breaches of International Humanitarian Law (IHL) and Human Rights Law. Before I talk about that in brief detail, let me make a couple of comments.

Firstly, when I speak about peace operations, I am referring to both UN mandated and UN authorised missions – blue hatted and non-blue hatted – and I do so on the basis of the question of whether peacekeeping forces can be involved in an armed conflict or not. For the purpose of establishing command and superior responsibility, it is not particularly relevant however. Not because the debate in terms of establishing whether an armed conflict exists or not is pivotal to establishing jurisdiction for a war crime, but because the relevant tribunal will make an objective analysis, based on the facts, to determine whether an armed conflict existed and therefore accesses a trigger to create defence of war crimes. In that sense, I am in agreement with the ICRC's position according to which, when it comes to the *in bello*, approaching differently a situation based upon facts as to whether an armed conflict exists or not, will simply produce unworkable outcomes. Therefore, my comments will apply to the United Nations Organisation Stabilisation Mission in the Democratic Republic of the Congo (MONUSCO), and the United Nations Operation in Somalia (UNOSOM) as equally as they would to the International Security Assistance Force (ISAF) in Afghanistan or coalition forces deployed in Iraq; regional arrangements such as, in the EU context, Operation Atalanta and others. This is because the question of command responsibility and superior responsibility being engaged is a question of the factual situation which establishes jurisdiction, either by domestic or international tribunals. By definition, peace operations are multinational operations and carry with them all of the problematic challenges that have already been referred to in terms of command and control.

II. Individual criminal accountability for commanders and superiors in peace operations

In terms of individual criminal accountability for commanders and superiors in peace operations, or military operations more generally, the effectiveness of it is largely a matter of national jurisdictions. Therefore, the key to ensuring effective command responsibility or superior responsibility in peace operations will be the existence of adequate national account-

ability mechanisms. This is particularly the case in relation to military personnel, but for all the reasons already identified and mentioned today, it is much more difficult when it comes to civilians or civilian police components of peace operations. The reason why I say that is because when one considers the law applicable to peace operations and peacekeeping forces, generally the premise is that they will be immune to the host nation or receiving State's legal regime or criminal regime. As such, they would carry with them their own national domestic disciplinary codes and criminal law and obviously they will also be subject to the broader international legal framework. In this regard, some developing countries, unfortunately, do not have sophisticated or robust internal legal mechanisms allowing them to effectively prosecute their own peacekeepers that are attached to peacekeeping operations in their domestic courts. That is an area organisations such as the Commonwealth Secretariat and other intra-regional organisations are focusing on so as to ensure that the troops contributing countries are actually able to deliver accountability within their own national mechanisms.

In terms of the international criminal regime that is applicable, clearly the Rome Statute of the International Criminal Court is the primary vehicle with which to afford accountability for command responsibility and superior responsibility and that relates to the three primary crimes the Court has jurisdiction over : crimes against humanity, the crime of genocide and war crimes. In an international context, the most likely offence that peacekeepers, and therefore by extension commanders and civilian superiors, might potentially be guilty of is that of war crimes. Given that in order for a war crime to be committed there needs to be an armed conflict, the determination of whether an armed conflict exists or not is particularly important.

The criteria under the Rome Statute to attribute responsibility to commanders and civilian superiors are found under Article 28 and focus on effective command and control, or effective authority and control for military or civilians. That gives rise to the consideration about what the levels of command are. The reality is that no nation will ever provide its forces to UN or other multinational operations under a full command or even operational command. That form of command brings with it disciplinary functions. Allocations of forces by troops contributing countries to multinational missions are generally under a tactical control or operational control. Indeed, the UN in its Department of Peacekeeping Operations (DPKO) principles and guidelines acknowledges this since it is operational control and not operational command under which forces are allocated to UN missions. Therefore, one has to consider whether or not a peace operation commander is in a position to exercise effective command and control or effective authority and control such that he is able to satisfy the requirements to prevent, repress and punish breaches of IHL. Command responsibility by its very nature being a crime of failure to act rather than an overt attack on behalf of a commander, I would suggest that the basic requirements, in terms of reporting and referral, are really the benchmark that most

multinational commanders can strive for in terms of doing everything reasonable to exercise their function of punishing, or acting in anticipation by referring and reporting an event if they know it is about to occur.

If one looks at Article 7 of the UN Model Memorandum of Understanding which requires troops contributing countries to co-operate with UN investigations and places responsibility on troops contributing countries to hold accountable members of their contingents who are accused and found guilty of committing breaches of IHL or Human Rights Law, and at a number of other policy directions given by the UN such as the establishment of the conduct and discipline unit, the office of investigation and oversight, one can see a trend of creating a structure within which UN commanders and senior civilian authorities are able to provide direction and guidance to troops contributing countries but which ultimately have few sanctions they can impose other than largely administrative ones, such as requiring the removal of an individual from the theatre of operations or making reports. That is not unique to the UN, in fact if one looks at other international organisations such as NATO and the EU, one can see even less architecture in terms of accountability and even greater State practice of avoiding, and particularly inhibiting, a broader collective responsibility or accountability within those structures.
In Afghanistan, incidents that occurred which raised allegations or concern of possible breaches of human rights or IHL were generally rigorously investigated on a dual investigatory approach with both the troops contributing country and ISAF conducting an inquiry. However, it is commonplace that the troops contributing country will not necessarily share or co-operate with the ISAF investigation. A number of explanations are given in relation to security concerns, issues outside of the competence of the multinational organisation which effectively mean that the international organisation's investigation is completely hampered and undermined. From a position of command and control, that significantly exposes the multinational force commander to embarrassment and being perceived as quite ineffectual. However, this is in fact a blessing in disguise because is it highly unlikely you will therefore be able to satisfy the criteria under international criminal law for command responsibility if, when you ask for an investigation to be conducted, the troops contributing country does not co-operate with you and you have no ability to actually enforce an investigation. Therefore, in some sense, in a peace operation context, the concept of command responsibility is one which becomes quite problematic and particularly difficult to effect.

III. Command responsibility triggered by the act of private military security companies or contractors

A question which is currently evolving is whether or not conduct by someone who can be perceived as an agent or someone under the effective command and control or authority and control of a commander might trigger the issue of command responsibility. This question is

raised more particularly with regard to private military security companies or contractors as they are an increasing phenomenon on the battlefield and perform functions which have a quasi-military role. It is, I would argue, conceivable that depending upon the nature of the activities they conducted and which may give rise to a breach under Humanitarian Law, they could in fact trigger the accountability of a commander for whom they were working. The terms of the contract would obviously be relevant as would the nature of their proximity to that particular commander and his unit in a theatre of operations.
It is an interesting area and I obviously distinguish it from civilians working within headquarters as part of either UN civil servants or NATO civil servants who, of course, have a disciplinary regime and who are much more integrated in the force.

IV. Conclusion

Although I don't mean to paint a negative picture of the likelihood of command responsibility and superior responsibility coming into play in peace operations, what I would say is that you must look at a much broader picture of accountability. If your measure of effectiveness is a benchmark of the number of indictments issued or success of prosecutions conducted, then I think you will be deeply disappointed. As a result, the concept of accountability needs to be considered in a context where criminal prosecution is about one element and you have other aspects such as political pressure, publication of alleged abuses in a public domain, and the much broader concept of accountability in order to force nations to act and to use their own domestic criminal processes to deal with crimes which are not war crimes because they do not occur within an armed conflict.

Of all of the areas in relation to command superior responsibility, I am most concerned that the greatest risk lies in relation to civilians, both police contingents and civilians within deployed missions on the ground, because even if you accept that there is a structure that applies to military components in peace operations, there is none in relation to civilians and that is the challenge I think nations must address. The U.S media legislation is a good attempt to start down that road, although not comprehensive by any means in order to address the concern that impunity within peace operations exists.

Ultimately the key question is that those who should be exemplars of the law should clearly not have the perception that they are above it, and I think when it comes to the whole question of individual responsibility and, by extension, command and superior responsibility in peace operations, there is some serious ground to be made up to reverse that perception that exists for the moment.

Thank you.

SESSION 5: INDIVIDUAL RESPONSABILITY FOR IHL/HRL VIOLATIONS COMMITED DURING PEACE OPERATIONS

A wide range of questions and remarks followed this last session:

1. The attribution of competence by the United Nations Security Council (UNSC) to the International Criminal Court (ICC)

One of the speakers highlighted that the UNSC does not only give jurisdiction prospectively, it can also give it retroactively. In the first Libya resolution 1970, adopted on the 26th February 2011, the UNSC referred the situation in Libya from the 15th February to the ICC.

2. The concern of humanitarian organisations on co-operating with the ICC

Due to its very specific nature, the ICRC has the right not to testify during procedures at the ICC and other international jurisdictions. But this is not the case for all humanitarian actors.

One of the speakers explained that the Office of the Prosecutor of the ICC is very aware of the concern of humanitarian organisations about any appearance of working or co-operating with the ICC. It has very strict guidelines about not having any contact with humanitarian actors in the field. However, if for some reason a member of a humanitarian organisation was called to testify, the only authorities that could give them the privilege not to do so are the judges. Therefore, it can be useful to fill an *amicus brief* prospectively in order to argue for the benefit of that protection.

3. The role of the UN Office of Internal Oversight Services (OIOS)

A participant highlighted that when the OIOS was established in July 1994, the goal was to ensure criminal prosecution when States themselves do not prosecute crimes committed against local populations by national contingents. However, numerous States objected on the basis that the legal evidential requirements of different States are very specific and that it would be impossible for the OIOS to be familiar with all the appropriate judicial and forensic procedures. The concept was very interesting but practically impossible.

A speaker specified that the OIOS can only step in and conduct investigations when the national State fails to do so. It clearly only plays a secondary role. The issue of evidence is however still a concern. That is reflected in practice, in the OIOS Memorandum of Understanding, and in the manual governing its investigations.

4. The co-operation between the EU and the ICC

Did the ICC attempt to have a specific agreement for co-operation with the EU regarding its Common Security and Defence Policy (CSDP) operations?

The ICC has very good contact with the EU CSDP missions, in particular in terms of exchange of information and certain kinds of assistance. There is an ICC relationship agreement with the EU, which provides an overall framework, but it could go further. In principle, the ICC already benefits from very strong assistance from the EU. The ICC has been participating in the new training programme of the European External Action Service to raise awareness among the desk officers and the Heads of Mission about the role of accountability.

5. Article 16 of the Rome Statute and the complementary paradigm

In an Article 16 situation, in which the UNSC can suspend an ICC investigation, is there a role left for the ICC to stimulate national jurisdiction to assume their primary responsibility?

Article 16 has only been used once, concerning the extension of the United Nations Mission in the Democratic Republic of Congo (MONUC) mandate. It excluded non State Party nationals from the competence of the ICC. For the time being, in terms of preliminary examination processes, the ICC feels that is has a very strong role to play in terms of encouraging national accountability mechanisms before it opens any investigation.

Concluding Remarks and Closure

CONCLUSIONS DU COLLOQUE DE BRUGES 2011

Christine Beerli
Vice-Présidente du CICR

Mesdames et Messieurs,

Nous voici arrivés à la fin de ce 12ème Colloque de Bruges qui fut très riche en échange et en débat. Il me revient maintenant de conclure et d'essayer d'en résumer l'essentiel, ce qui n'est pas chose aisée au vu de la densité et la qualité des discussions.

The first session was dedicated to the applicability and application of International Humanitarian Law (IHL) to international organisations (IOs) involved in peace operations. Presentation and subsequent discussions confirmed the relevance and absolute necessity to maintain the strict distinction between *jus ad bellum* and *jus in bello*. This distinction appeared all the more important in situations involving peace forces in light of the recurrent attempts to use the special legal status of the latter under the UN Charter in order apply IHL differently, and the conditions for its applicability. Maintenance of that fundamental distinction implies that the determining of IHL applicability to peace forces would not differ from the determining of this *corpus juris* applicability to more classic belligerents: facts on the ground and conditions stemming from Common Articles 2 and 3 of the Geneva Conventions will be the land marks of that determination. These conditions will of course differ depending on the classification of the armed conflict as international or non-international. The issue of peace forces supporting one of the parties to an existing non-international armed conflict was also developed and a so-called functional approach was suggested as a complement to the classic conditions for IHL applicability.
We then moved on to the difficult question of the determination of who, out of the IO – that generally has no forces of its own – or the troops contributing countries, should be considered as party to an armed conflict once peace forces are drawn into hostilities. Some preliminary issues were raised, such as the fact that only IOs that have a legal personality could be, in some cases, held responsible. To determine who from the IO or the troops contributing countries (TCCs), or both, will be that party to the armed conflict, we have to look at where the effective control over the military operations lies. The speaker was of the opinion that it would be confusing to have both the IO and the TCCs being party to the conflict, as the same military unit could have to follow two different sets of obligations. In this respect, he favoured an 'either-or' approach that would rule out the possibility to consider simultaneously the IO and the TCCs as parties to the armed conflict.

The last speaker of this session presented the material and geographical scope of application. The issue of the classification of the situation involving peace operations as either an international armed conflict or a non-international armed conflict, or even both at the same time led to a lively debate. For the speaker, the situation in Libya, at the time when Colonel Gaddafi was still in power, was entirely internationalised by NATO's involvement due to the scale of the intervention and the impact it had on the conflict. I have to say that this reading is not shared by the ICRC as we consider it as not being a realistic point of view that could also have negative effect on IHL compliance. In addressing this issue, the ICRC has opted for an approach similar to that adopted by the International Court of Justice in the famous 1986 Nicaragua case. It involves examining and defining for the purposes of IHL, each bilateral relationship between belligerents in a given situation. In accordance with this approach, when multinational forces are fighting against State armed forces, the legal framework of reference will be IHL applicable to international armed conflicts. When multinational forces with the consent of the host government are opposed to non-State armed groups, the legal framework of reference will be IHL applicable to non-international armed conflict. Therefore and in reference to the on-going military operations in Libya, the ICRC is of the view that this situation is characterised by the existence of two armed conflicts in parallel.

The second panel raised a number of fundamental issues around the applicability and application of human rights to IOs. We were lucky to have speakers coming from three different organisations: the UN, the EU and NATO, as well as an academic expert in the matter. It was very interesting to see how important it is for the EU to conduct its crisis management operations in accordance with its obligations under HRL. In this respect, the EU presents a unique character insofar as it has its own charter of fundamental rights and wishes to accede to the European Convention of Human Rights. The EU speaker depicted very interestingly the current state of the case-law, especially as far as extraterritoriality of human rights and the issue of derogation are concerned. He then explained the relationship between HRL and IHL. In this respect, he affirmed that, under certain circumstances and on a case-by-case basis, IHL should be considered the *lex specialis*. Eventually, he gave an insight into how the European Court of Human Rights is increasingly referring to IHL norms and principles and raised the challenges those decisions posed in relation to the issue of derogation.
The UN representative referred to the UN Charter that specifically states that one of the main aims of the UN is to promote and respect human rights. Acknowledging that the legal base for the applicability of human rights to the UN is rather thin, she underlined, however, that in practice, a large number of UN regulations are integrating human rights norms and uphold that human rights would be a legal framework binding upon the UN.
To illustrate how NATO, in its International Security Assistance Force (ISAF) operations, is handling its legal obligations under international law vis à vis individuals, the speaker used

the example of detention in Afghanistan and underlined the effect that the United Nations Assistance Mission in Afghanistan (UNAMA) report had on ISAF policy regarding transfer of detainees. Following that report which provided strong allegations of torture, ISAF stopped the transfer of detainees and strengthened its post-transfer mechanism with a view to ensuring that the transferred detainees' fundamental rights will be respected by the Afghan detention authorities. It is certainly a very positive effect of the UNAMA report that the residual responsibilities of the transferring authorities is now taken much more seriously.
We also benefited from an academic perspective based on the Swedish experience. The speaker stressed the difficulties that a lack of national legislation on the use of force by peace operations can raise. He also underlined the importance of customary human rights that, of course, are applicable to IOs.

The third session focused on the determination of international responsibility for wrongful acts committed in the course of peace operations. It has been extremely interesting to better understand the relationship between an organisation like the EU and the Member States contributing troops as well as third States contributing troops. Knowledge of the peace operations' framework is definitively indispensable in order to subsequently address the question of attribution and responsibility. Then, the general legal framework for determining international responsibility was clearly described and explained, in particular the relationship between attribution and responsibility. I would like to recall the speaker's saying: 'if there is multiple attribution, there might not be multiple responsibility'. We have seen what the notion of 'effective control' means, and how to evaluate this notion on the basis of both factual and legal elements. The issue of dual, or multiple, attribution has been exposed, but it seems to me that the conditions for such a multiple attribution are not entirely clear so far. Further exploration of this very issue should be considered in light of its importance and practical effects.

I will not recall the discussions of the last panel discussion as the debates are still fresh in your mind. But I briefly come back to **the first morning session** that was devoted to the ways to effectuate international responsibility during peace operations. The first speaker brilliantly depicted to different possibilities of effectuating responsibility for wrongful acts committed during peace operations. A number of problems and obstacles were highlighted such as the immunities or the lack of jurisdiction of some courts, and possible solutions to these problems were suggested. The second speaker explained whether and how domestic and international courts and tribunals have addressed issues of responsibility that have arisen in the context of peace operations. He provided us with a number of very interesting examples of national and international case-law illustrating some shortcomings and how difficult it was for those courts to identify a common approach for the notion of attribution, which ultimately impacts on the effectuation of international responsibility during peace operations. We then benefited from

examples of UN practice in terms of effective reparation for the victims of wrongful acts committed during UN peace operations. The UN has foreseen procedures to deal with claims that exist both at the headquarters level as well as within each UN peace operation, although the information on how to proceed is not very well publicised and therefore not easily accessible for victims of wrongful acts.

Mesdames et Messieurs,

Je suis très heureuse de la qualité des débats que nous avons eus, qui démontre l'importance du sujet traité. Nous avons vu qu'un certain nombre de questions restent, à l'heure actuelle, sans réponse claire, et le CICR va très certainement, en consultations avec les experts dans ce domaine, continuer ses recherches et réflexions. Comme il a été mentionné en ouverture de ce Colloque, il ne s'agit pas uniquement d'une question d'ordre juridique, mais également opérationnel.

Je vous remercie de votre attention et vous invite d'ores et déjà au 13ème Colloque de Bruges qui aura lieu la troisième semaine d'octobre 2012.

PARTICIPANTS LIST
LISTE DES PARTICIPANTS

- **APRAXINE Pierre**
  International Committee of the Red Cross
- **ATTAHERI Mimoun**
  Faculté pluridisciplinaire /NADOR/ MAROC
- **AYGÜN Hasan**
  NATO HQ's – Joint Force Command Lisbon
- **BALDOVIN Anne-Marie**
  Ministère de la Défense belge
- **BARTELS Rogier**
  Netherlands Defence Academy
- **BEERLI Christine**
  International Committee of the Red Cross
- **BELLON François**
  International Committee of the Red Cross
- **BERGEOT Anna**
  ECHO
- **BJORK Christine**
  Ministry for Foreign Affairs, Dept for International Law, Human Rights and Treaty Law
- **BODEAU-LIVINEC Pierre**
  Université Paris 8 – Nanterre – La Défense
- **BOOM Rembert**
  Netherlands – Ministry of Foreign Affairs
- **BUTTICKER François**
  Comité international de la Croix-Rouge
- **CALA GONZÁLEZ Diego**
  Mexican Embassy in Belgium, Luxembourg and European Mission
- **CASALIN Deborah**
  CIDSE
- **CASIER Frédéric**
  Croix-Rouge de Belgique – Communauté francophone
- **CAULFIELD Eamon**
  Irish Defence Forces
- **CEBRON Chloé**
  International Committee of the Red Cross

- **CHOCANO BEDOYA Vanessa del Socorro**
  University of Vienna
- **CHRETIEN Gino**
  NATO Joint Forces Command Naples
- **CLOUVEL Matthieu**
  Ministère français des affaires étrangères
- **COLLIENNE Fleur**
  Université de Liège
- **COMITO Matteo**
  Ambassade d'Italie à Bruxelles
- **CUYCKENS Hanne**
  Institute for International Law, K.U. Leuven
- **DE BLEEKER Delphine**
  Croix-Rouge de Belgique – Communauté francophone
- **DE CERJAT Bénédict**
  Swiss Mission to NATO
- **DE VIDTS Baldwin**
  International Institute of Humanitarian Law
- **DECKMYN Annelies**
  College of Europe
- **DECOCK Christian**
  Ministry of Defense, BE
- **DEMARET Paul**
  College of Europe
- **DENTI Davide**
  College of Europe
- **DOUCET Ghislaine**
  Délégation du CICR en France
- **DUCHEINE Paul**
  Netherlands Defence Academy
- **ENGDAHL Ola**
  Swedish National Defence College
- **ERMENKOVA Elka**
  European External Action Service, Civilian Planning and Conduct Capability
- **FERRARO Tristan**
  International Committee of the Red Cross
- **GARRIDO María Teresa**
  Indépendante

- **GERMOND Thierry**
  International Committee of the Red Cross
- **GHELARDUCCI Martina**
  Médecins Sans Frontières – Belgique
- **GIDRON Avner**
  Amnesty International
- **GINGRAS Marie-Josée**
  Mission du Canada
- **GOES Benjamin**
  SPF Chancellerie du Premier Ministre
- **GOLUB Kirill**
  CSTO Secretariat
- **GOSSELIN Caroline**
  International Committee of the Red Cross
- **GRADITZKY Thomas**
  International Committee of the Red Cross
- **GRENFELL Katarina**
  Office of Legal Affairs, United Nations
- **HAMPSON Françoise**
  Human Rights Centre of the University of Essex
- **HANF Dominik**
  College of Europe
- **HAUMER Stefanie**
  German Red Cross
- **HELINCK Pauline**
  Université de Liège
- **HENNEAUX Benoit**
  Ministère de la Défence – BE
- **HERNANDEZ Jose**
  Embassy of Chile
- **HORVAT Dubravka**
  Croatian Red Cross
- **JONCHERAY Nicolas**
  College of Europe
- **JORDAN Col. Michael**
  International Security Assistance Forces (ISAF), Afghanistan
- **JULLIEN Gaëlle**
  Université de Liège

- **KIEFER Nik**
  Free University of Brussels
- **KIRSS Kalle**
  Ministry of Defence of the Republic of Estonia
- **KLEFFNER Jann**
  Swedish National Defence College
- **KOLANOWSKI Stéphane**
  International Committee of the Red Cross
- **KOUTROULIS Vaios**
  Université Libre de Bruxelles (ULB)
- **KRYUKOV Archil**
  ICRC Moscow
- **L. HARTMANN Ylva**
  Faculty of Law, Uppsala University
- **LINGAAS Carola**
  Norwegian Red Cross
- **MAGLIA-DEAVIN Laura**
  NATO Headquarters
- **MARAVAL Benoît**
  Permanent Representation of France to NATO
- **MARTINO Nicola**
  Ambassade d'Italie à Bruxelles
- **MASSCHELEIN Liesbet**
  Chancellery of the Prime Minister
- **MIKOS-SKUZA Elzbieta**
  University of Warsaw
- **MOSKALENKO Denis**
  Permanent Mission of Russia to NATO
- **MURPHY Ray**
  National University of Irland Galway
- **NAERT Frederik**
  Council of the EU
- **NASKILA Annika**
  Ministry for Foreign Affairs of Finland
- **NEYRINCK Roeland**
  Rode Kruis-Vlaanderen, BE
- **NICHOLS James H.**
  US Army War College, Peacekeeping & Stab Ops Inst

- **NOTT William**
  NUIG, Ireland
- **ÖSTERDAHL Inger**
  Faculty of Law, Uppsala University
- **PALCHETTI Paolo**
  University of Macerata
- **PONTIROLI Andrea**
  Médecins Sans Frontières
- **POUW Eric**
  Netherlands Defense Academy
- **RAUSCHER Katharina**
  Permanent Representation of Austria to the EU
- **REY SÁNCHEZ Clara**
  Universitat Jaume I Castellón
- **ROS Tim**
  Netherlands Defence Academy
- **SAENEN Jan**
  Royal Miltary Academy – Chair of Law
- **SANNIER Nazli**
  Croix-Rouge française
- **SCHMIDT Martin**
  German Delegation to NATO
- **SCHNEEVOIGT Thomas**
  Führungsakademie der Bundeswehr
- **SHAHIDI CHUBIN Nanaz**
  Comité international de la Croix-Rouge
- **SNYERS Anne-Marie**
  Représentation permanente de la Belgique auprès de l'UE
- **SONCZYK Barbara**
  University of Westminster
- **SOUSA BRAVO Alejandro**
  Embassy of Mexico in Belgium, Luxembourg and European Mission
- **STEWART Darren**
  International Institute of Humanitarian Law
- **STÖHR Gerhard**
  Führungsakademie der Bundeswehr
- **SWAAK-GOLDMAN Olivia**
  International Criminal Court

- **SZKLANNA Agnieszka**
  Council of Europe, Secretariat of the Parliamentary Assembly
- **THIBAULT Annabelle**
  Ecole de Formation du Barreau, Paris
- **TOSATO Mattia**
  Diplomatic Mission of the Holy See to the EU
- **TOTHOVA Klara**
  NATO-ACT SEE
- **TROSZCZYNSKA-VAN GENDEREN Wanda**
  European Parliament
- **VAN DEN BERG Marieke**
  Netherlands Red Cross
- **VAN DEN BOOGAARD Jeroen**
  Netherlands, Ministry of Defence
- **VAN DER BRUGGEN Guy**
  Ordre de Malte
- **VAN HEGELSOM Gert-Jan**
  European External Action Service
- **VANDECASTEELE Jean-Pierre**
  Belgian Defence
- **VANDEN DRIESSCHE Thomas**
  International Committee of the Red Cross
- **VANHEUSDEN Alfons**
  Office of the Minister of Defence – BE
- **VANHULLEBUSCH Matthias**
  PhD University of London
- **WALLEYN Luc**
  Blanmailland & Partners
- **WARNOTTE Pauline**
  SPF Justice – BE
- **WILMSHURST Elizabeth**
  Chatham House
- **WISE James**
  NATO
- **WOUTERS Jan**
  University of Leuven (KULeuven)
- **ZASOVA Svetlana**
  Ministry of Defence, France
- **ZWANENBURG Marten**
  Ministry of Defence of the Netherlands

PROGRAMME: INTERNATIONAL ORGANISATIONS' INVOLVEMENT IN PEACE OPERATIONS: APPLICABLE LEGAL FRAMEWORK AND THE ISSUE OF RESPONSIBILITY

12th Bruges Colloquium – 20th- 21st October 2011
12ème Colloque de Bruges, 20-21 octobre 2011

Simultaneous translation into French and English will be provided
Traduction simultanée anglais/français

DAY 1: Thursday, 20st October

9:00 – 9:30 Registration and Coffee

9:30 – 9:40 Welcome address by Prof. **Paul Demaret**, Rector of the College of Europe

9:40 – 9:50 Welcome address by Mr. **Francois Bellon**, Head of Delegation, ICRC Brussels

9:50 – 10:10 Keynote address by Ms. **Christine Beerli**, Vice-President of the ICRC

10:10 – 10:30 Coffee break

Session One: Applicability/Application of IHL to International Organizations (IO) involved in Peace Operations

Chair person: **Elizabeth Wilmshurst**, Chatham House

10:30 – 10:50 IHL APPLICABILITY TO INTERNATIONAL ORGANISATIONS INVOLVED IN PEACE OPERATIONS
Speaker: **Tristan Ferraro**, Legal division, ICRC Geneva

10:50 – 11:10 INTERNATIONAL ORGANISATIONS VS. TROOPS CONTRIBUTING COUNTRIES: WHICH SHOULD BE CONSIDERED AS THE PARTY TO AN ARMED CONFLICT DURING PEACE OPERATIONS?
Speaker: **Marten Zwanenburg**, Ministry of Defence, The Netherlands

11:10 – 11:30 INTERNATIONAL ORGANISATIONS INVOLVED IN ARMED CONFLICT: THE MATERIAL AND GEOGRAPHICAL SCOPE OF APPLICATION OF IHL
Speaker: **Vaios Koutroulis**, Université Libre de Bruxelles

11-30-12.30 Discussion

12:30 – 14:00 Sandwich lunch

Session Two: Panel discussion: Applicability/Application of IHL to International Organizations (IO) involved in Peace Operations

14:00 – 16:00 Moderator: **Jan Wouters**, Catholic University of Leuven

Panelists:
Frederik Naert, Legal Service, Council of the EU
Katarina Grenfell, Office of Legal Affairs, UN
Col. Michael C. Jordan, ISAF
Ola Engdahl, Swedish National Defence College

16:00 – 16:30 Coffee break

Session Three: The Determination of International Responsibility for Wrongful Acts committed in the course of Peace Operations

Chair person: **Jann Kleffner**, Swedish National Defence College

16:30 – 16:50 COMMAND AND CONTROL STRUCTURE IN PEACE OPERATIONS: THE CONCRETE RELATIONSHIPS BETWEEN THE INTERNATIONAL ORGANIZATION AND ITS TROOPS CONTRIBUTING COUNTRIES
Speaker: **Gert-Jan van Hegelsom**, External Action Service, EU

16:50 – 17:10 LE CADRE JURIDIQUE GÉNÉRAL DE LA DÉTERMINATION DE LA RESPONSABILITÉ POUR FAITS ILLICITES COMMIS AU COURS D'OPÉRATIONS DE MAINTIEN DE LA PAIX : LES PRINCIPES D'ATTRIBUTION ET LEURS IMPLICATIONS
Speaker: **Pierre Bodeau-Livinec**, Université Paris 8

17:10 – 17:30 HOW CAN MEMBER STATES BE HELD RESPONSIBLE FOR WRONGFUL ACTIONS COMMITTED DURING PEACE OPERATIONS CONDUCTED BY IOS?
Speaker: **Paolo Palchetti**, University of Macerata

17:50 – 18:30 Discussion

19:30 – 22:30 Dinner

DAY 2: Friday, 21st October

Session Four: Effectuating International Responsibility during Peace Operations

Chair person: **Frederik Naert**, Legal Service, Council of the EU

9:00 – 9:20 FORA FOR EFFECTUATING INTERNATIONAL RESPONSIBILITY IN RELATION TO WRONGFUL ACTS COMMITTED IN THE COURSE OF PEACE OPERATIONS
Speaker: **Françoise Hampson**, University of Essex, UK

9:20 – 9:40 NATIONAL VS. INTERNATIONAL JURISPRUDENCE: WHAT EFFECTS DO THEY HAVE ON THE IMPLEMENTATION OF INTERNATIONAL RESPONSIBILITY FOR WRONGFUL ACTS COMMITTED IN PEACE OPERATIONS?
Speaker: **Jann Kleffner**, Swedish National Defence College

9:40 – 10:00 EFFECTIVE REPARATION FOR THE VICTIMS OF WRONGFUL ACTS COMMITTED DURING UN PEACE OPERATIONS: HOW DOES IT WORK CONCRETELY?
Speaker: **Katarina Grenfell**, OLA, UN

10:10 – 10:40 Discussion

10:40 – 11:00 Coffee break

Session Five Individual Responsibility for IHL/HRL Violations committed during Peace Operations

Chair person: **Elzbieta Mikos-Skuza**, Warsaw University

11:00 – 11:20 THE CRIMINALIZATION OF IHL AND HRL VIOLATIONS COMMITTED BY PEACE FORCES: HOW DOES IT WORK IN PRACTICE?
Speaker: **Ray Murphy**, National University of Ireland

11:20 – 11:40 IHL VIOLATIONS COMMITTED BY PEACE FORCES: IS THERE ANY ROLE FOR THE ICC?
Speaker: **Olivia Swaak-Goldman**, Office of the Prosecutor, ICC

11:40 – 12:00 COMMAND/SUPERIOR RESPONSIBILITY DURING PEACE OPERATIONS
Speaker: **Darren Stewart**, IIHL

12:00 – 12:30 Discussion

Concluding Remarks and Closure

12.30-13.00 **Concluding remarks**
Ms. Christine Beerli, Vice-President of the ICRC

SPEAKERS' BIOS
CURRICULUM VITAE DES ORATEURS

Opening Session/Session d'introduction

Le **Professeur Paul Demaret** est Docteur en droit de l'Université de Liège et Licencié en sciences économiques, où il a également obtenu un diplôme d'études spécialisées en droit économique. Il a ensuite poursuivi ses études aux États-Unis, et est titulaire d'un Master of Law de l'Université de Columbia et d'un Doctor of Juridical Science de l'Université de Californie à Berkeley. Le Professeur Demaret a enseigné des matières juridiques ou économiques dans de nombreuses universités, notamment celles de Genève, Paris II, Pékin et Coimbra, ainsi qu'à l'Académie de droit européen de Florence et au Colegio de México. Il est actuellement Recteur du Collège d'Europe. De 1981 à 2003, il a été Directeur du programme d'études juridiques au Collège d'Europe et Directeur de l'Institut d'études juridiques européennes à l'Université de Liège. Il a enseigné le droit à l'Université de Liège de 1982 à 2006. Spécialiste des aspects juridiques et économiques de l'intégration européenne, Paul Demaret est l'auteur de nombreux ouvrages et articles sur ces questions. Son expertise en matière de commerce international a été sollicitée par diverses institutions, dont l'Organisation mondiale du commerce, où il a servi dans deux panels.

François Bellon is the Head of the ICRC Delegation to the European Union, NATO and the Kingdom of Belgium, in Brussels since August 2010. Mr Bellon joined the ICRC in 1984, and has occupied numerous positions within the ICRC. Prior to Brussels, he has been the Head of ICRC Regional Delegation for the Russian Federation (2006-2010), the Head of Delegation in Israël (2002-2005), in Georgia (1999-2002), in Budapest (1997-99), and in the Federal Republic of Yougoslavia (1994-97). Before that, Mr Bellon did several ICRC field missions in Azerbaijan (Nagorni Karabakh), Moldova, Bosnia-Herzegovina, Sri Lanka, Pakistan, Iraq and Lebanon. He also served at the ICRC Headquarters at the Middle East and North Africa Desk as well as in the Legal Division. He holds a Master in Law from the Lausanne University in Switzerland and completed a Postgraduate course in conflict management and emergency response at the Complutense University in Madrid.

Christine Beerli is the Vice-President of the International Committee of the Red Cross. A member of a law firm in Biel, Ms Beerli began her political career on that city's municipal council, where she served from 1980 to 1983. From 1986 to 1991 she was a member of the legislative assembly of the Canton of Bern. In 1991 she was elected to the upper house of the Swiss parliament, where she remained until 2003, chairing the foreign affairs committee (1998-99) and the committee for social security and health (2000-01). Ms Beerli chaired the

caucus of the Free Democratic Party in Switzerland's federal assembly from 1996 to 2003. She also served on committees dealing with security policy and economic and legal affairs. She retired from politics in 2003. Since 1 January 2006, she has headed Swissmedic, the Swiss supervisory authority for therapeutic products. She is former director of the School of Engineering and Information Technology at Bern University of Applied Sciences.

Session One/1ère session

Elizabeth Wilmshurst is Associate Fellow in International Law, at Chatham House (the Royal Institute of International Affairs – UK) and a visiting professor at University College, London University. She was a legal adviser in the United Kingdom diplomatic service between 1974 and 2003. Between 1994 and 1997 she was the Legal Adviser to the UK mission to the United Nations in New York. She is a co-author of An Introduction to International Criminal Law and Procedure (2nd ed. Cambridge, 2010) and a co-editor of Perspectives on the ICRC Study on Customary International Humanitarian Law (Cambridge, 2007).

Tristan Ferraro is thematic legal adviser at the International Committee of the Red Cross (HQ Geneva). He is the in-house expert on legal issues relating to multinational forces. He is also the head of the ICRC project on occupation and other forms of administration of foreign territory. Before coming back to the ICRC HQ in 2007, he has served with the ICRC some years in the field – in particular as legal coordinator – in Afghanistan, Pakistan and Israël/Palestinian occupied territories. Prior to joining the ICRC, Tristan Ferraro worked as senior lecturer at the University of Nice-Sophia Antipolis (France), teaching Public International Law, including International Humanitarian Law. He holds a Doctor of Laws (Dr. jur. summa cum laude) from the University of Nice-Sophia Antipolis.

Marten Zwanenburg is a senior legal advisor with the Directorate of Legal Affairs, International and Legal Policy Affairs Section of the Ministry of Defense of the Netherlands, where he advises primarily on international law and military operational law issues. He also teaches a course on UN peacekeeping in the Master of Advanced Studies in Public International Law program at Leiden University. Marten has published widely on International Humanitarian Law and collective security law. His PhD dissertation 'Accountability of Peace Support Operations' was published by Brill publishers in 2005, and received several prizes including the 2006 Paul Reuter prize of the International Committee of the Red Cross. Marten is an editor of the Military Law and the Law of War Review.

Vaios Koutroulis est licencié en droit (Université d'Athènes, 2002), titulaire d'un diplôme d'études spécialisées en droit international (Université Libre de Bruxelles, 2005), d'un diplôme d'études approfondies (ULB, 2006) et docteur en Sciences juridiques (ULB, 2011). Sa thèse de

doctorat est intitulée : « Les relations entre le jus contra bellum et le jus in bello : étanchéité absolue ou vases communicants ». Affilié au Centre de droit international de l'ULB, il est actuellement maître d'enseignement auprès de cette même université, où il dispense le cours de « Responsabilité internationale » dans le cadre du Master complémentaire en droit international public, et chargé de cours à la Faculté libre de droit de Lille, où il enseigne le droit international humanitaire. Avocat au Barreau d'Athènes, il est, en outre, en Belgique, membre en tant qu'expert du Groupe de travail « Législation » de la Commission interministérielle de droit humanitaire et membre du Comité scientifique du Centre d'étude de droit militaire et de droit de la guerre. Il a à son actif plusieurs publications portant sur le droit international humanitaire, dont une monographie intitulée « Le début et la fin de l'application du droit de l'occupation », publiée en 2010 aux éditions Pedone (Paris). En outre, il est intervenu, tant en Belgique qu'à l'étranger, dans de nombreux colloques et cours en droit international humanitaire et en droit pénal international, notamment dans le cadre des formations adressées aux forces armées.

Session Two/2ème session

Jan Wouters is Professor of International Law and International Organizations, Jean Monnet Chair Ad Personam EU and Global Governance and Director of the Leuven Centre for Global Governance Studies and Institute for International Law at the University of Leuven (KULeuven). He is Visiting Professor at the College of Europe, President of the Flemish Foreign Affairs Council and Of Counsel at Linklaters. He is Member of the Royal Flemish Academy of Belgium for Sciences and Arts. He studied law and philosophy in Antwerp and Yale University (LLM 1990), was a Visiting Researcher at Harvard Law School and obtained his PhD at KULeuven (1996). He taught at the Universities of Antwerp and Maastricht, was Visiting Professor at Liège and Kyushu University and Référendaire at the European Court of Justice (1991-1994). He has published widely and is Editor of several books and reviews. Apart from his participation in many national and international research projects and networks, he often trains international and national officials, advises a number of international organizations and frequently comments international events in the media.

Frederik Naert is a member of the Legal Service of the Council of the European Union, where he deals with EU external relations, including EU military crisis management operations. He is also an affiliated senior researcher at the Institute for International Law of Leuven University and is Director of the Military Law & Law of War Review. Frederik was previously a legal advisor at the Belgian Ministry of Defence/Defence Staff and a research and teaching assistant at Leuven University. He is the author of International Law Aspects of the EU's Security and Defence Policy, with a Particular Focus on the Law of Armed Conflict and Human Rights (Intersentia, 2010), which is a revised version of his Ph.D. thesis. He has published and given lectures on

European security organisations, peace operations, international humanitarian and human rights law, terrorism, European and international criminal law and international immunities. He studied law at Leuven University and at the University of Melbourne.

Katarina Grenfell is a Legal Officer in the Office of the Legal Counsel at United Nations Headquarters in New York. She specializes in public international law, and currently advises on peacekeeping operations. In 2009, she served as a Legal Officer with the United Nations Integrated Mission in Timor-Leste.
Prior to joining the United Nations in 2000, Katarina worked in Australia as a lawyer with the Attorney-General's Department advising Government departments on environmental and administrative law matters (1999); as a Prosecutor with the South Australian Director of Public Prosecutions (1995-1997) and as a Judge's Associate in the Supreme Court of South Australia (1994).
She holds a law degree and an arts degree from the University of Adelaide, Australia, and a masters degree in law from the London School of Economics and Political Science.
She is admitted to practice as a Barrister and Solicitor in the Bar of South Australia and the High Court of Australia.

Colonel Michael Jordan serves as the Legal Advisor to the Commander, International Security Assistance Forces (ISAF), Afghanistan, and as the Staff Judge Advocate, U.S. Forces Afghanistan. He was awarded a Juris Doctorate from the University of Alabama School of Law as well as a Master of Laws degree from the US Army Judge Advocate General's School in Charlotteville, Virginia as well as a Master of Laws in International Law with distinction from the Georgetown University Law Center and was awarded Georgetown's Chetwood Prize for the most distinguished performance in International Law.
Col. Jordan is a member of the bars of the State of Alabama, the Court of Appeals of the US Armed Forces and the US Supreme Court. From June 1997 to June 1999, he was the Head of the Law of Armed Conflict Branch with the International and Operational Law Division at the Office of the Judge Advocate General of the Navy and Legal Counsel to the Director of the Special Programs Division at the Pentagone. Between June 1999 and June 2001 he was assigned as a Professor at the US Army Judge Advocate General's School in Charlotteville, Virginia.
Besides several assignments in the US, Col. Jordan served with the UN Military Observer's Team in Western Sahara as well as in the Operation Restore Democracy in Haiti, and Operations Provide Promise and Deny Flight in the area of the Former Republic of Yugoslavia. He was also part of the US EUCOM in Stuttgart, Germany and deployed in Iraq and Afghanistan.
Colonel Jordan was awarded a Black Belt in the Marine Corps Martial Arts Program. His personal awards include the Defense Superior Service Medal, Legion of Merit, Bronze Star Medal, Defense Meritorious Service and Meritorious Service Medals, Navy and Marine Corps and Army

Commendation Medals, Joint Service Achievement and the Navy and Marine Corps Achievement Medals.

Ola Engdahl is Associate Professor of international law at the National Defence College in Sweden. He wrote his thesis on the protection of personnel in peace operations. Dr Engdahl is an appointed expert in the Governmental Inquiry on the regulation on the use of force in peace operations. He has previously served as a legal adviser in the SFOR operation in Bosnia-Herzegovina, and as a legal adviser at the Ministry of Foreign Affairs. Dr. Engdahl is currently working on a research project aiming to identify applicable law in multinational peace operations regarding the use of force and to explore the question of responsibility of the actors involved.

Session Three/3ème session

Jann Kleffner is the Head of the International Law Center and an Associate Professor of International Law at the Swedish National Defence College. He holds a LLM degree in International law and a PhD from the University of Amsterdam. In the past, Mr Kleffner has been working with the International Tribunal for Former Yugoslavia and the International Criminal Court. He has also been an Assistant Professor and a Visiting Professor in numerous academic institutions and universities, and a general rapporteur to the International Society of Military Law and the Law of War (2000-2003). More recently, Jann has been an Advisor with the UN Interregional Crime and Justice Research Institute (UNICRI) on the ICC Judicial Summaries Project, and an Expert on a project to develop Manual on the International Law Applicable in Cyber Warfare with Durham University Law School and the Cooperative Cyber Defence Center of Excellence. Mr. Kleffner is a member of several Law societies and has published widely.

Gert-Jan van Hegelsom is the head of the European External Action Service legal divison. Before that he was the dedicated Legal Adviser to the Director-General of the European Union Military Staff and the Representative of the Council Legal Service to the European Union Military Committee. Born in the Netherlands, he followed primary and secondary schooling education in Belgium and Luxembourg. He read law at Leiden University (specialised in Public International Law) and graduated in 1980 (LLM equivalent). He performed his military service as a reserve officer in the Royal Netherlands Navy, lecturing on public international law issues at the Naval War College in Den Helder and developing operational training modules. He joined the Directorate of Legal Affairs of the Ministry of Defence of the Kingdom of the Netherlands as a junior legal adviser in 1981. His latest assignment was Head of the Department of International and Legal Policy Affairs of that Directorate, a position that he held from 1994 till February 2001. He joined the external relations Team of the Legal Service of the Council of the European Union in March 2001. Mr van Hegelsom is a graduate of the NATO Defence College (Course 68) and holds the Diploma (Public International Law) of the Hague Academy of Inter-

national Law. He lectured at the University of Nice-Sophia Antipolis as a visiting Professor in 1995-1996. He has published on legal aspects of military operations.

Pierre Bodeau-Livinec est Agrégé des Universités et professeur de droit public à l'Université Paris 8 – Vincennes-Saint-Denis, où il enseigne le droit international public, le droit des organisations ainsi que le droit constitutionnel. Il co-dirige la spécialité « Grands systèmes de droit contemporains et diversité culturelle » du Master de droit comparé de l'Université et préside la Commission pédagogique de l'Université. Il est docteur en droit public de l'Université Paris Ouest – Nanterre-La Défense. Après avoir travaillé à la Direction des affaires juridiques du ministère français des affaires étrangères, Pierre Bodeau-Livinec a exercé, de 2006 à août 2010, les fonctions de juriste au sein de la Division de la codification du Bureau des affaires-juridiques des Nations Unies à New York. Ses domaines de recherche principaux concernent la théorie des sujets du droit international, le droit des organisations internationales ainsi que le droit international administratif.

Paolo Palchetti is professor of international law at the Faculty of Law of the University of Macerata. His additional functions include: director of the Ph.D. program in international law and European Union law of the University of Macerata, member of the editorial committee of the Rivista di diritto internazionale, member of the Advisory Committee of the Office of the Legal Advisor of the Italian Ministry for Foreign Affairs. He has been counsel in cases before the International Court of Justice. He is the author of L'organo di fatto dello Stato nell'illecito internazionale (Milan, Giuffré 2007) and editor of Customary International Law on the Use of Force: A Methodological Approach (The Hague, Martinus Njihoff, 2005; together with Enzo Cannizzaro) and of International Law as Law of the European Union (Brill, forthcoming; together with Enzo Cannizzaro and Ramses Wessel). His general research interests lie in the field of international law and the external relations of the European Union, with a focus on the law of international responsibility, the settlement of international dispute and United Nations law.

Session Four/4ème session

Frederik Naert (see session 2)

Françoise Hampson is a Professor of Law at the Human Rights Centre of the University of Essex. She was a member of the steering group and the group of experts for the ICRC study on customary international humanitarian law. She has taught on courses and participated in conferences for members of the armed forces in Australia, Canada, Ghana, the UK and the USA, as well as at the International Institute of Humanitarian Law in San Remo, Italy. She is a member of the IIHL Military Department Training Advisory Committee. She was a member of the UN Sub-Commission on the Promotion and Protection of Human Rights from 1998-2007.

She is an expert on the European Convention on Human Rights and has been the legal representative of applicants before the European Court of Human Rights in many cases arising out of military operations. In recognition of their litigation on behalf of Turks of Kurdish origin, she and her colleague Professor Kevin Boyle were given the award Human Rights Lawyer of the Year in 1998. She produced an expert report for the Steering Committee on Human Rights of the Council of Europe on Human Rights Protection during Situations of Armed Conflict, Internal Disturbances and Tensions. Her publications are in the fields of the law of armed conflicts and human rights law. In 2005, she was awarded an OBE for services to international law and human rights.

Jann Kleffner (see session 3)

Katarina Grenfell (see session 2)

Session Five/5ème session

Elzbieta Mikos-Skuza is a lecturer in Public International Law at the Faculty of Law and Administration of the University of Warsaw. She established also specific courses on International Humanitarian Law, on state responsibility and on case law of the International Court of Justice. For more than twenty years, she has been dedicated to the work of the Polish Red Cross as a volunteer legal adviser, president of the Polish Red Cross Commission for Dissemination of International Humanitarian Law. Since 2004, she is Vice-President of the Polish Red Cross. Dr Mikos-Skuza is also Vice-President of the International humanitarian Fact Finding Commission. She is the author of numerous publications on Public International Law and International Humanitarian Law and co-author of the collection of 73 documents on IHL, published in Polish language.

Ray Murphy is the Interim Director of the Irish Centre for Human Rights, National University of Ireland Galway. He completed his B.A. in Political Science and Legal Science in 1979, and then took a Bachelor in Law (LL.B.) degree in 1981. He studied at Kings Inns in Dublin where he completed a B.L. degree and was called to the Irish bar in 1984. He completed a Masters degree in International Law (M.Litt.) at Dublin University (Trinity College) in 1991. In 2001 he completed his Ph.D. in International Law at the University of Nottingham, England. In addition to his position at the Irish Centre for Human Rights, Prof. Murphy is on the faculty of the International Institute for Criminal Investigations, Justice Rapid Response/No Peace Without Justice. He is a member and Vice Chair of the Executive Committee of Amnesty International (Ireland). Prof. Murphy was awarded a Fulbright Fellowship in 2006 and worked with Human Rights Watch in New York as a resident scholar. In 2008 he received the National Award for Excellence in Teaching by the National Academy for the Integration of Research & Teaching & Learning (NAIRTL).

Prof. Murphy is a former Captain in the Irish Defence Forces and he served as an infantry officer with the Irish contingent of UNIFIL in Lebanon in 1981/82 and again in 1989. He practiced as a barrister for a short period before taking up his current appointment. He was Chairperson of the Broadcasting Complaints Commission from 1997 to 2000. He has field experience with the OSCE in Bosnia in 1996 and 1997. He has also worked on short assignments in west and southern Africa and the Middle East for Amnesty International, the European Union and the Irish Government.

Olivia Swaak-Goldman is responsible for External Relations in the Office of the Prosecutor of the International Criminal Court. Before joining the Court in 2006 she held the position of Senior Legal Counsel in the International Law Department of the Netherlands Ministry of Foreign Affairs where she was responsible for international humanitarian law and international criminal law issues. She has previously worked at the Iran-United States Claims Tribunal, the International Criminal Tribunal for the former Yugoslavia and Leiden University, and has published extensively on areas of international criminal law and humanitarian law.

Colonel Darren Stewart is Director of the Military Department of the International Institute of Humanitarian Law. He was commissioned into the Royal Regiment of Australian Artillery in 1988 before transferring to the Australian Army Legal Corps in 1991. As a Legal Officer in the Australian Army he fulfilled a number of staff appointments at Captain and Major level. He was the first legal adviser at the Australian HQ Special Operations when established in 1997. Transferring to the British Army in 1998, he served initially as the Army Legal Services training officer. He deployed to Kosovo in June 1999 for seven months as the legal adviser to the Commander of British Forces, for which he was awarded a UK Joint Commanders Commendation. A tour at the UK Permanent Joint HQ followed where Colonel Stewart saw further operational duty in Sierra Leone, the Balkans, the Middle East and Afghanistan acting as the legal adviser to Commanders of British Forces in each of these theatres. In March 2003 he was posted to SHAPE as the Assistant Legal Adviser (UK). A tour as the Commander Legal, HQ Northern Ireland then followed. In August 2006 he was posted to HQ Allied Rapid Reaction Corps and deployed to Afghanistan as the Chief Legal Adviser, HQ International Security Assistance Force for Afghanistan (ISAF), returning with HQ ARRC to Rheindahlen, Germany in February 2007. Colonel Stewart holds a Postgraduate Diploma in Legal Practice and Bachelors Degrees in Economics and Laws. He is a Barrister of the Supreme Courts of Queensland and New South Wales and the High Court of Australia. He is a Solicitor of the Supreme Court of England and Wales. He was made an OBE in the 2003 Queens Birthday Honours List.

Christine Beerli (see Opening Session)