

APPLICABLE LAW IN PEACE SUPPORT OPERATIONS

In the last decades, during the course of peace support operations (PSOs) tragic incidents have occurred pushing the international community to a harsh debate on the applicable law in such peace missions. In that respect, the only basic conclusion which is commonly shared and accepted is that in order to achieve justice and, ultimately, peace in any field it is of crucial importance that all civil and military personnel respect, observe and enforce the rule of law. Discussions and disagreements then have been raised as to which law should be applied: **Local or domestic law** (*id est*, national law of the occupied country)? **National law** (of the occupying country)? **International humanitarian law**? **International human rights law**? **Public international law**? **SOFAs**? **RoEs**?

Now, the issue of which is the applicable law in any peace mission acts differently for each kind of PSO: peacekeeping, peace-enforcement and robust peacekeeping. That is why it is so fundamental for field operators to understand the existing differences between those peace missions and to be trained in advance of the nature of the operation they are engaged in. The present paper will then **firstly** and briefly underline the **different nature** of the **peacekeeping, peace-enforcement** and **robust peacekeeping** and **after** it will try to describe the **applicable law** regime in each type of PSO.

1) PEACE KEEPING

After the **II World War**, in **1945** the atrocities which had taken place during that conflict brought the international community to promise "never again" and to establish the **U.N.O.**, which was created with the main purpose of maintaining international peace and security. Unfortunately, soon after the UN was born the **Cold War** started, with the opposition of the East-communist and the West-democratic member States. That led to the Security Council permanent Member States to put a **veto** on all **Chapter VII peace-enforcement** operations (with the notable exception of North Korea in 1950). During the Cold War from 1945 to 1990, the Security Council Permanent Members vetoed 279 resolutions, effectively preventing the UN from taking constructive and determined action in over one hundred major conflicts, resulting in approximately 20 million deaths. In order to avoid the complete failure of the UN duties, the **member States created the peace-keeping operations (PKOs)**. In fact, the term **peacekeeping is not mentioned** at all in the **Chapter VI (Pacific Settlement of Disputes)** of the UN Charter, so that the former UN Secretary General Dag Hammarskjold referred to **Chapter VI and a half**. PKOs find the legal basis on **art. 33** of the UN Charter, which considers the peaceful means to avoid a conflict. The traditional **PKO** is than a **peaceful mean chosen and consented to by the parties to pursue a peaceful settlement of a conflict**. In other words, the PKO is a stop-gap measure that suspends a conflict in order to allow the peace process to occur. As traditional **peacekeepers** are not belligerent engaged in any ongoing conflict, as they merely **monitor previously agreed-upon cease-fires and truces**, they are **not combat forces**.

The elements of a classical PKO are:

- a) **Host nation consent**: absent a chapter VII peace-enforcement resolution and absent the host nation consent, the Security Council cannot deploy armed forces on

otherwise sovereign territory, without violating the national **sovereignty principle**. Consequently, if a nation or party to the conflict withdraws its consent, UN peacekeepers must withdraw. The UN and the host nation usually formalize the host nation consent with a SOFA. The **SOFA, Status of forces agreement** is an **agreement** between the **UN** and the **host nation** regulating the **consent** of the host nation to allow a UN PKO on its soil and giving to UN peacekeepers jurisdictional immunity; the host nation agrees to afford UN military forces full respect and allow the forces freedom of movement throughout the area of operations and grants the UN personnel with an absolute jurisdictional immunity from the host nation regarding criminal matters. For example, the SOFA between the EU and Bosnia and Herzegovina, dated 30 September 2002, grants the members of the police mission a status equal to that of the diplomatic mission, with all the relevant immunities (art. 4).

- b) **Impartiality or neutrality**: peacekeepers mediate a conflict and **do not side** with any of the State in conflict. Not only peacekeepers have to act in an impartial and neutral manner but they also have to be seen and perceived to be impartial and neutral.
- c) **Self defensive rules of engagement (RoEs)**: the peacekeepers **use of force** is restricted to **self defence** and has to be **necessary** and **proportional**. There must be a potential or real threat that justifies the use of force and the soldier may not use any greater force than is necessary to deal with the threat. If attacked with deadly force, a peacekeeper may respond with deadly force. After the threat is neutralized, the soldier must stop using force. When a peacekeeper uses a proportionate force in self-defence, the peacekeeper does **not** then **lose non combatant protection**. However, a peacekeeper, if engaged in sustained conflict and no longer acting strictly in self defence, could lose non-combatant status, become a combatant and then be lawfully engaged as a target. Restricting the use of force to self-defence

attempts to ensure that the UN peacekeepers remain impartial to the conflict and do not take sides. Classical peacekeepers are generally equipped with weapons for use in self defence. Since the parties have consented to the presence of the peacekeepers, the need to resort to force is greatly diminished. RoEs are a tool which allows political control over the military's use of force, since it imposes constraints and reduces the freedom of action of the commanders on the ground. RoEs are the primary legal tool that regulates the use of force during military operations. They are an instrument granting the commanders legality for the action they need to carry out. The problem exists of a possible **conflict between UN RoEs**, in compliance with customary law standards of international humanitarian law, **and national RoEs**, in compliance with higher standards of international humanitarian law set in various ratified conventions. In that case, if the national contingent sticks to the UN RoEs it would breach the national RoEs and it would incur in international responsibility for not respecting the ratified conventions. On the contrary, if the military contingent respects the national RoEs it would go beyond the UN RoEs and it would cause confusion and ambiguities as different contingents would act differently. For example, if a contingent belongs to a State which ratified the First Additional Protocol, it will be bound to treat the members of a national liberation movement as legitimate combatants and to grant them the status of prisoners of war once they have been arrested (art. 44). On the contrary, these obligations are not incumbent on those States which haven't ratified the First Additional Protocol. Inconsistent rules of engagement between different troop contributors severely undermine UN peace operations. RoEs should be explicitly agreed as between different troop contributors.

Law Of Armed Conflict

To traditional PKOs the **law of armed conflict (*ius in bello* or international humanitarian law) does not apply**, because peacekeepers are **not combatants** (they are not in a state of war or armed conflict with anyone) but internationally **protected persons**; they are **not lawful targets**. To PKOs the **1994 Convention on the safety of the UN and associated personnel applies**, so the attacker of a peacekeeper is a war criminal. Notwithstanding the fact that to PKOs the international humanitarian law as such does not apply, the **international community** has put **pressure** on the UN to make sure that peacekeepers would nevertheless be bound to observe at least the fundamental principles of the international humanitarian law. Art. 20 of the 1994 Convention on the safety of the UN and associated personnel states that the Convention does not prejudice "*the applicability of international humanitarian law and universally recognized standards of human rights as contained in international instruments in relation to the protection of United Nations operations and United Nations associated personnel or the responsibility of such personnel to respect such law and standards.*" The **1991 Model SOFA** (Status of forces agreement) now states that peacekeepers shall observe and respect "*the principles and spirit of the general international conventions applicable to the conduct of military personnel*" (1949 Four Geneva Conventions; 1977 Two Additional Protocols and 1954 UNESCO Convention on the Protection of Cultural Property in the event of Armed Conflict). In conclusion, to PKOs **only** the **principles and spirit of the law of armed conflict apply**. That is to say that the **combatant's privilege** (*id est* the right to lawfully kill the belligerent enemy) and the **technical rules regarding the creation and operation of a prisoner of war camp** do **not apply** to peacekeepers. On the contrary, the principles of **proportionality, military necessity, martial honour, chivalry, humanity, prevention of unnecessary suffering** will **apply** to them.

What about violations of the law of armed conflict? There are two possibilities:

- 1 If a **violation** of the **law of armed conflict** is committed **against** a **UN peacekeeper**, the **1994 Convention** on the safety of the UN and associated personnel provides that the Member States that have ratified the Convention have to establish inside their national penal system a specific **crime** with severe punishment for the attacks against the peacekeepers. The host country will also be responsible for the violation of the general rule of international law that provides for the State to adopt all the measures to **protect** the strangers (UN peacekeepers) and will have to **restore** the **damages**.
- 2 If a **violation** of **law of armed conflict** (*rectius*, of the principles and spirit of the law of armed conflict) is committed **by** a **UN peacekeeper** against a military or civilian of the host country, the **SOFA** provides **jurisdiction immunity** for the peacekeeper. Only the national judicial authority of the peacekeeper can eventually prosecute the case. This might lead to unfair solutions. The law will apply to each State individually; each State, therefore, bears individual responsibility for adherence to the law. Certain States might be more willing than others to punish their military or civil personnel. In the ONUC Operation in Congo in 1960, the UN accepted liability for the violation of international law by peacekeeping forces and stipulated agreements for damage compensation.

International human rights law

a) The problem concerning “when” is the international human rights law applicable. The relation between international human rights law and international humanitarian law.

It is submitted that **international humanitarian law** applies in time of **war (armed conflict)** (common art 2 GCs and art 1 API [international armed conflicts] and common

art. 3 GCs and art. 1 APII [non international armed conflicts]) and that **international human rights law** is applicable at any time, in time of **peace** and in time of **war (armed conflict)**. Given the concomitant existence of two different branches of law in the case of war (armed conflict), which is the relation between the two?

The relationship between international humanitarian law and international human rights law is ruled by the *lex specialis* principle, meaning that the international human rights law will impinge whenever the international humanitarian law is silent on a point. The fact that there is a specific body of law regulating the occupation situation will mean that this will override the human rights regime with respect to the occupations to which it applies.

In recent times the **ICJ**, in the 8 July **1996** advisory opinion on the *Legality of the Threat or Use of Nuclear Weapons* case, has stated that: “*the protection of the International Covenant of Civil and Political Rights does not cease in times of war, except by operation of Article 4 of the Covenant whereby certain provisions may be derogated from in a time of national emergency. Respect for the right to life is not, however, such a provision. In principle, the right not arbitrarily to be deprived of one’s life applies also in hostilities. The test of what is an arbitrary deprivation of life, however, then falls to be determined by the applicable lex specialis, namely, the law applicable in armed conflict which is designed to regulate the conduct of hostilities.*”.

In the 9 July **2004** advisory opinion on the *Wall* case, the ICJ considered that: “*the protection offered by human rights conventions does not cease in case of armed conflict, save through the effect of provisions for derogation of the kind to be found in Article 4 of the International Covenant on Civil and Political Rights. As regards the relationship between international humanitarian law and human rights law, there are thus three possible situations: some rights may be exclusively matters of international humanitarian law; others may be exclusively matters of human rights law; yet others may be matters of both these branches of international law. In order to answer the question put to it, the Court will have to take into consideration both these branches of international law, namely human rights law and, as lex specialis, international humanitarian law.*”

Also the Inter-American Commission for human rights, in the *Coard v. United States*, 1999, has stated that: “*...while international humanitarian law pertains primarily in times of war and the international law of human rights applies most fully in times of peace, the potential application of one does not*

necessarily exclude or displace the other. There is an integral linkage between the law of human rights and humanitarian law because they share a common nucleus of non-derogable rights and a common purpose of protecting human life and dignity, and there may be a substantial overlap in the application of these bodies of law."

The Special Rapporteur in the Iraqi's invasion of Kuwait, in a chapter entitled "*interactions between human rights and humanitarian law*" reaffirmed that "*there is consensus with the international community that the fundamental human rights of all persons are to be respected and protected both in time of peace and during periods of armed conflict*".

From the international jurisprudence we understand that:

a) **Some of the rights provided in the international human rights law are also considered in the international humanitarian law.**

Of these rights, some have a different regulation:

- 1 in the international human rights law the right to **life** is extended to **any person** (Art. 6, 1966 ICCPR) whereas in the international humanitarian law the right to life is guaranteed to the **protected persons** (civilians and prisoners of war) but **not** to the **combatants**, who can be lawfully killed (combatant's privilege). International humanitarian law also admits "incidental loss of civilian life" subject to the principle of proportionality (art. 52, 1949 IVG Convention);
- 2 the human rights law recognizes that everyone has the right to the enjoyment of an "*adequate standard of living, including adequate food, clothing and housing and the highest attainable standard of physical and mental health.*" (artt. 11 and 12, 1966 ICESCR). On the other hand, in the international humanitarian law the occupying power is required to ensure that the people as a whole have the "*necessary means of survival*" and to accept outside relief shipments if necessary to achieve this purpose (art. 43, 1907 Hague Regulation, artt. 55, 1949 IVG Convention and 69, 1977 I Additional Protocol);
- 3 the international human rights law guarantees the right to **freedom of movement** and right to choose a residence (art. 12, 1966 ICCPR), whereas in

the international humanitarian law there is no prohibition of **curfews**, provided that are not being employed as a form of collective punishment and that are aimed at maintaining order following such situations as riots or looting, or to assist in the apprehension of terrorists or assailants against the force (art. 64, 1949 IVG Convention);

Other rights have the same regulations:

- 4 the prohibition of **torture** or to cruel, inhuman or degrading treatment or punishment is provided both in human rights law (Art. 7, 1966 ICCPR) and in international humanitarian law (art. 3 common G Convention);
- 5 the prohibition of **slavery** is considered both in the human rights law (art. 8, 1966 ICCPR) and in the international humanitarian law (art. 4 II Additional Protocol);
- 6 the protection of **children** and family is also considered in the human rights law (Art. 24, 1966 ICCPR) and in the international humanitarian law;
- 7 the prohibition of **discrimination** and protection of religious faith is also considered in the human rights law (Art. 18, 1966 ICCPR) and in the international humanitarian law (art. 27 IVG Convention).

b) However, it should be noted that there are a number of human rights, such as the **rights of association and the political rights**, that are **not** included in the **international humanitarian law** because they are not perceived as being of relevance to the protection of persons from the particular dangers of armed conflicts. For example the right of every citizen to take part in the government of his country (art. 25, 1966 ICCPR).

c) On the other hand, there are **provisions** which are **only** considered by the **international humanitarian law**, and **not** also by the **human rights law**, as, for example, the rules on the establishment of **prisoners of war camps** or on prohibition of certain means of war.

On the other hand, although in some cases international human rights law and

international humanitarian law tend to overlap, there are still situations where a **gap** between those two branches of law is created. That is when there is **no** recognition by the State of an **armed conflict**, so that international humanitarian law is not applicable and the State decides to derogate the human rights law because there is a **public emergency** situation. In this case it is possible to apply only the very basic principles of non derogable human rights law. **Art. 4 ICCPR** states that in time of public emergency which threatens the life of a nation, a State party may derogate to the Covenant, informing the Secretary General of the UN, with the **exception of art. 6, right to life, 7, prohibition of torture, 8, prohibition of slavery, 11, prohibition of imprisonment for contractual obligations, 15, *nullum crimen sine lege*, 16, principle of legality, 18, freedom of thought, conscience and religion, and art. 1 APII, abolition of death penalty**. Similar derogations are present in ECHR (art. 15) and ACHR (art. 29). However, the other rights do not thereby cease to be applicable, but must be respected in so far as this is possible in the circumstances. See also 1955 "Standards minimum rules for the treatment of prisoners", 1988 "Body of principles for the protection of all persons under any form of detention or imprisonment" and 1990, "Turku/Abo Declaration" providing a series of "*standards which must be respected whether or not a state of emergency has been proclaimed.....in all situations, including internal violence, disturbances, tensions, and public emergency*" (art. 1).

The gap which still exists today between human rights law and international humanitarian law is diminishing as **influences** from both sides are gradually tending to bring the two spheres together. It is possible to **interpret** the international humanitarian law using the human rights law: the ICTY, *Prosecutor v. Furundzija* case, 10 December 1998, has stated that :"*international humanitarian law, while outlawing **torture** in armed conflict, does not provide a definition of the prohibition. Such a definition can instead be found in article 1 (1) of the 1984 Torture Convention*". The humanitarian law sometimes has made reference from the human rights law. After the **1966 ICCPR**, which established essential

legal guarantees, in **1977** similar guarantees were considered in the **two Additional Protocols (art. 75)**. On the opposite, the human rights law sometimes has made reference to the international humanitarian law; the **1989 Convention on the Rights of Child** makes a general reference to the humanitarian law provisions applicable to children and lays down rules itself that are applicable in the event of armed conflict (art. 38).

In conclusion, although the gap between the two branches of international law is being filled up, there is still a major legal difference to be considered. The **international humanitarian law** is **not** formulated as a **series of rights**, but rather as a **series of duties** that combatants have to obey. This does have one very definite advantage from the legal theory point of view, in that humanitarian law is not subject to the kind of arguments that continue to plague the implementation of economic and social rights. For example, in the international humanitarian law the occupying power is required to ensure that the people as a whole have the *“necessary means of survival”* and to accept outside relief shipments if necessary to achieve this purpose (art. 43, 1907 Hague Regulation, artt. 55 FG Convention and 69 of I Additional Protocol), whereas the human rights law recognizes that *“everyone has the right to the enjoyment of an adequate standard of living, including adequate food, clothing and housing and the highest attainable standard of physical and mental health.”* (artt. 11 and 12, ICESCR)). Moreover, the universal system of guarantees against **violations of international humanitarian law** (national courts; proportionate reprisals and retaliations; *aut dedere aut iudicare*; ICC) is much **more effective and less politicized** than the universal system of guarantees for the violations of human rights law (national courts; recommendations of the Commissions). One concern could be that the growing **politicization of human rights law** by governmental bodies could affect humanitarian law; it is to be hoped that **human rights law instances are incorporated in the international humanitarian law as much as possible, without blurring the distinction between the two branches of law.**

b) The problem concerning “to whom” is the international human rights law applicable.

International human rights law applies **between States and their own nationals (all individuals within its territory and subject to its jurisdiction)**. With regard to the enforcement of the treaties on human rights by the peace forces in the area of operations, there is one main problem concerning the territorial scope of these treaties. It is assumed that these forces shall operate outside their national territories. Art. 2 of the 1966 ICCPR reads: *"Each State party to the present Covenant undertakes to respect and ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant.."*. The Human Rights Committee, in the general comment to art. 2 (1), stated that the Covenant applies to the individuals present within the national territory of the State party and to those present within foreign territory under the effective control of the State Party (*Delia Saldias del Lopez v. Uruguay*, 1981). Art. 2 of the International Covenant on Civil and Political Rights (there is not such an article in the International Covenant on Economic, Social and Cultural Rights as these rights are essentially territorial), which binds the State Parties to respect and ensure the rights recognized in the Covenant *"to all individuals within its territory and subject to its jurisdiction"* does not cover only the individuals who are both present within a State's territory and subject to that State's jurisdiction, but **it covers both individuals present within a State's territory and those outside that territory but subject to that State's jurisdiction**. The drafters of the Covenant did not intend to allow States to escape from their obligations when they exercise jurisdiction outside their national territory. The International Covenant on Civil and Political Rights is applicable in respect of acts done by a State in the exercise of its jurisdiction outside its own territory. The ICJ declared that Israel, as the occupying State, was obliged to apply the two Covenants of 1966 and the Convention on the rights of children of 1989, to which Israel is a party; the actions taken by Israel outside

its national territory, but in areas under its control, fall under its jurisdiction and imply that they must be consistent with the treaties mentioned (ICJ in the 9 July 2004 advisory opinion on the *Wall* case).

On the contrary, art. 1 of the European Convention on Human Rights reads as follows: “*The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section 1 of this Convention.*” The Convention, therefore, unlike the Covenant, sets the territory aside and its scope should then be wider. Any individual could be within the territory which does not belong to a Member State, but be under its jurisdiction, as it happens in the case of an individual within the territory occupied by a Member State. The European Court gave a broad interpretation of art. 1, declaring that the Convention was applicable in case of governmental tasks carried out abroad. As regards the deployment of armed forces abroad, that of the Turkish military contingents in the Turkish State of northern Cyprus, a State which has not been acknowledged by international community, is a typical example. In the *Loizidou* case (1995), the Court ruled that the territory of northern Cyprus was under overall control of Turkey. This is the situation of a foreign territory when it is under the control of a State Party, the troops of which are quartered on it or which controls it through a local administration subjected to that State. This case law was partially amended by the *Bankovic* case (2002) concerning the application made by those having cause of action for the victims of the bombing of the radio-television headquarters in Belgrade in the course of the NATO air strike campaign against the Federal Republic of Yugoslavia in 2001. The applicant claimed that when the bombing took place Belgrade was under the control of the States participating in the air strike and that therefore the Convention was to be applied, since at the time the individuals were within Serbian territory under the jurisdiction of the State Parties to the Convention responsible for the air strike. The Court rejected the application and declared the claim inadmissible, ruling that the precise meaning of the word jurisdiction demonstrates that jurisdiction is essentially territorial. Cases of extra-territorial jurisdiction are exceptional, such as the consent of the government of that territory or the occupation of a foreign territory. The *Bankovic* judgment was criticised for its quite restrictive reading of the European Convention on Human Rights. The following conclusions can be drawn: the European Convention can be applied when the armed forces of a Member State actually control permanently (but not only temporarily and not for air operations only) the territory of another Member State of a non-Member State.

Local law

As for the local law (national law of the country where the peacekeepers operate), the SOFA (or Memorandum of Understanding) provides a **jurisdiction immunity** for peacekeepers but they still have to respect local law. If they commit a crime (any crime) they are not prosecuted in the host country (jurisdiction immunity) but if the crime is provided also in the national law (ex. murder) they will be prosecuted in their own country. As a consequence, if two militaries working in the same PKO and coming from different national contingents commit the same crime (ex. personal use of drugs), it might happen that one of the countries decides to prosecute him or her and the other country not.

National law

With reference to the national law (of the national contingent country) it is the duty of the peacekeepers to respect their own national law. Again, even in this case the sending State is responsible for the prosecution of the peacekeepers, which might lead to unfair situations. Sometimes, for political reasons, States prefer to apply to their troops the ordinary criminal code instead of the military criminal code, granting a *status* of substantial impunity for their peacekeepers. In fact, in the ordinary criminal code there are procedural mechanisms (for example, the crime of bodily harm might need for its prosecution the victim suit, which is very unlikely to be obtained in the framework of a PKO) which do not exist in the military criminal code (in the same example, the crime of mistreatment of civilians or prisoners of war does not need any victim action to be prosecuted).

2) PEACE ENFORCEMENT

Also the term **peace-enforcement** is **not mentioned** in **Chapter VII** (Actions with Respect to Threats to the Peace, Breaches of the Peace, and Acts of Aggression). Art. 43 providing a standing UN military force has never been applied so that now the UN authorizes national contingents to use force on its behalf (art. 42).

The elements of a peace enforcement operation (PEO) are:

- a) **No nation consent:** the UN forces enter the soil of the aggressor State without its consent. When a State puts in place a threat to the peace or a breach of the peace or an act of aggression the Security Council can react authorizing national military forces to attack the aggressor State and put an end to the illegal conduct of that State.
- b) **No impartiality or neutrality:** the UN forces side with the State unlawfully attacked by the aggressor State, so that peace enforcers are not impartial or neutral in any way;
- c) **Use of force:** the UN forces use force against a nation State in order to stop the aggression and not just in self defence. Rules of engagement for peace enforcers allow them to use the necessary and proportionate force in order to put an end to the illegal conduct of the aggressor State.

With regard to the respect of the **international human rights law** and the **national law** the situation for the peace enforcement operators is the same as to the peacekeepers. Some peculiar considerations have to be expressed instead with reference to the remaining applicable law.

Law Of Armed Conflict

To PEOs the **law of armed conflict (*ius in bello* or international humanitarian law)** **applies**, because peace enforcement forces are belligerent forces engaged in ongoing conflict or **combatants** and so they are **lawful targets**. To PEOs the **1994 Convention on the safety of the UN and associated personnel** does **not apply**, so the attacker of a UN military is not a war criminal (art. 2, par. 2, of the 1994 Convention: "*The Convention does not apply to a United Nations operation authorized by the Security Council as an enforcement action under Chapter VII of the Charter of the United Nations in which any of the personnel are engaged as combatants against armed forces and to which the law of international armed conflicts applies.*"). Thus, even the applicability of the international humanitarian law to the UN peace enforcement forces is not uncontroversial. The **UN** is an international organization with international legal personality to engage in dealings or treaties that are not restricted to States, exercise rights and assume duties but it is not a State so it is **not part of the 1949 Geneva Conventions**, which provide for the participation only of states and not of international organizations. Nevertheless, the UN is still bound by the **Geneva Convention rules that have become international customary law** and the Member States that contribute forces to the UN operations are also bound (ICJ, 1949, *Reparations* case). The ICJ (*Nicaragua* case) stated that all Geneva Conventions regulations that repeat the Hague Regulations as well as all the Geneva Conventions setting out basic humanitarian standards for any armed conflict are customary international law and will bind all States whether they are State parties or not. Geneva Conventions provisions which may be considered as declaratory of international customary law are: the requirement to respect the honour, family rights, religious and other customs of protected persons and treat them without adverse distinction relating to race, religion or political opinion (art. 27); the prohibition of physical and moral coercion to obtain information from protected persons (art. 31); the **prohibition of murder**,

torture and other inhumane treatment (art. 32); the prohibition on collective penalties, pillage and reprisals (art.33); the prohibition on taking hostages (art. 34); the prohibition on deportations (art. 49); the prohibition on compelling protected persons to serve in the occupant's armed force (art. 51); the prohibition against the destruction of property unless required by military necessity (art. 53). The UN has frequently asserted that, as it lacks the mechanisms and resources of a state, it cannot assume many of the burdens flowing from international humanitarian law relevant to armed forces; this concern would appear not justified as UN is in fact uniquely placed to meet a significant level of responsibility, as its capacity is well beyond that of most states.

What happens in the case of violations of international humanitarian law? Again, there are two possible cases:

- 1 If a **violation of law of armed conflict** is committed **against** a **UN peace-enforcer**, the general law of armed conflict rules apply, so the *aut dedere aut iudicare* rule. The **aggressor country** will also be responsible for all the **damages** caused by the aggression and will have to restore them (example, United Nation Compensation Commission and Fund for the Iraqi's invasion of Kuwait: Security Council Resolution, 3 April 1993 n. 687: "*Iraq.....is liable under international law for any direct loss, damage, including environmental damage and the depletion of natural resources, or injury to foreign Governments, nationals and corporations, as a result of Iraq's unlawful invasion and occupation of Kuwait.*" Also art. 91 of the 1977 First Additional Protocol to the Geneva Conventions states that: "*La Partie au conflit qui violerait les dispositions des Conventions ou du present Protocole sera tenue a' indemnite', s'il y a lieu.*"
- 2 If a **violation of law of armed conflict** (*rectius*, of the law of armed conflict which has become international customary law) is committed **by** a **UN peace-enforcer** against a national military or civil, the general law of armed conflict rule apply, the *aut dedere aut iudicare* rule. The **national peace-enforcer country** will also be

responsible for all the **damages** caused by the violations of the law of armed conflict committed by its peace-enforcer and will have to restore the damages.

Local law

With respect to local law (national law of the occupied country) art. 43, 1907 Hague Regulations and art 64, 1949 Fourth Geneva Convention put an obligation on the Occupying Power to **respect local laws**: “*the occupant is to respect, unless absolutely prevented, the laws in force in the country*”(art. 43, 1907 Hague Regulations); “*the penal laws of the occupied territory shall remain in force, with the exception that they may be repealed or suspended by the Occupying Power in cases where they constitute a threat to its security or an obstacle to the application of the present Convention.*” (art 64, 1949 Fourth Geneva Convention). As the Convention does not permit racial, ethnic or religious discrimination and guarantees fundamental principles of legal process, **laws contrary to fundamental humanitarian standards may be repealed or suspended.**

For example in 1992 the UNTAC (UN Transitional Authority in Cambodia) rules of engagement for the first time specifically identified the prevention of crimes against humanity as warranting the use of "all available means", including armed force. After the Khmer Rouge decided to boycott the electoral process, UNTAC's military forces defended the elections, repulsing the Khmer Rouge and securing the safety of polling stations. Moreover, in January 1993, UNTAC appointed its own special prosecutor to issue warrants against suspected violators of human rights.

The occupant is given the authority to promulgate provisions which are essential to enable it to fulfil its obligations under the Convention, maintain orderly government and ensure its security and lines of communication (art. 64, 1949 Fourth Geneva Convention). Penal

provisions enacted by the occupant must first be published and effectively disseminated in the local language before coming into force and they may not be retrospective (art. 65, 1949 Fourth Geneva Convention). The occupant is given the power to establish military courts (art. 66, 1949 Fourth Geneva Convention). The Fourth Geneva Convention contains guidelines as to the minimum standards that will apply to the trials established by the occupying power: the prosecuted persons must be informed in writing in their language of the charges against them and must be brought to trial as rapidly as possible (art. 71, 1949 Fourth Geneva Convention); accused persons have the right to present evidence, call witnesses and be assisted by qualified counsel of their choice with access to them and unless the right is waived by the accused an interpreter must be provided (art. 72, 1949 Fourth Geneva Convention); the accused is to have the right of appeal in accord with the procedures of the military court and is to be fully informed of these rights and of applicable time limits and when there is no provision for appeal in the military court process the convicted person has the right to petition the competent authority of the occupant (art. 73, 1949 Fourth Geneva Convention). The occupant is given the right to remove public officials, such as judges or law officers when they are corrupt or politically influenced (art. 54, 1949 Fourth Geneva Convention). Offences can only be dealt with by the occupying power's courts in accordance with laws in existence at the time of the offence (art. 67, 1949 Fourth Geneva Convention). Death penalty is available to the occupant for offences involving espionage, serious acts of sabotage against military installations or intentional offences causing death, provided that the death penalty was available in the local law for these offences prior to the occupation (art. 67, 1949 Fourth Geneva Convention); the status of the death penalty according to general principles of law may be in transition: until 1989 the legitimacy of the death penalty for the most serious crimes was acknowledged not only in the Fourth Convention but also in art. 6 of the 1966 International Covenant on Civil and Political Rights; the 1989 Second Optional Protocol to the 1966 ICCPR Aiming at the Abolition of the Death Penalty, entered into force on

1991, sought the end of the death penalty for all crimes except "*in time of war pursuant to a conviction for a most serious crime of a military nature committed during wartime*" (art. 2). The occupying power is given the authority to arrest and prosecute for war crimes, as an exception to the prohibition against trying persons for crimes committed prior to the occupation (art. 70, 1949 Fourth Geneva Convention), but the establishment of the ICC will open the option of removing the person suspected of having committed war crimes or crimes against humanity from the area of occupation, to be tried in front of the ICC. Notwithstanding the obligation to respect the local laws, the occupying power, including all its personnel, are immune from them; they are not subject to any court or law of the territory unless expressly made subject to them by the occupation authorities themselves (jurisdictional immunity).

3) ROBUST PEACEKEEPING

In recent times the UN authorized active and **robust peacekeeping** operations, also referred as **Chapter VI and three quarters**. By the second half of the 1990s it had become clear that there was a need to revise peacekeeping doctrine, especially in the intra-state conflicts. It had to provide for situations in which a party's consent had been given in general terms but the peacekeepers could nevertheless expect to encounter armed resistance from some of that party's adherents or, in states without effective government, from armed bandits with no political agenda. The essence of the new doctrine is that force is, if necessary, used against armed persons because of what they do, not because of the side they belong to. The most frequent scenarios in recent years have been of internal armed conflicts (and no more of international armed conflicts) where the main task for peacekeepers has not been to monitor a cease-fire but to grant security and order to a collapsed state and to establish the conditions for sustainable security for the civilian

population. A dilemma arises: whether to regard spoilers that challenge the new regime as political opponents, criminal elements, or military elements.

For example, in 1960 when ONUC (UN Operation in the Congo) was launched, although it started up like a classical PKO, soon after the reality of civil war and collapsed state institutions led the operation to interpret more broadly the self defence to protect civilians of risk of death, injury, or gross violation of human rights. Congo was the first occasion on which basic responsibility for law and order fell ultimately to personnel under UN command. In the absence of an effective government, ONUC assumed many of the law and order of a civilian police force, including the apprehension and detention of criminals, as well as establishing and enforcing curfews, and conducting short and long range patrols. This expanded use of force in self defence led to a discussion inside the Security Council and almost bankrupted the UN.

The distinction between peacekeeping and peace enforcement has been blurred as UN peacekeeping forces are given more robust operational contingencies causing peacekeeping missions to creep toward peace-enforcement. This has the highly undesirable effects of eroding the credibility of the mission and endangering peacekeepers. If a classical peacekeeping mission begins to change and take on the character of a peace-enforcement operation, the UN should formally change the mission, withdraw its non-combatant peacekeepers, modify its previous mandate to a chapter VII operation, and deploy a more appropriately trained and equipped combat force to accomplish the mission (see UNOSOM I and UNOSOM II).

In the recent robust peacekeeping operations the definition of **self-defence** have been **expanded** to **defence of the mission** together with the duties put on the peacekeepers and the **rules of engagement** have become **more vigorous and robust**.

For instance, in 1992 UNPROFOR (United Nations Protection Force in Bosnia Herzegovina) was given the mandate to protect convoys and supplies designed for humanitarian purposes. The Secretary General declared that peacekeepers in Bosnia Herzegovina "*would follow normal peacekeeping rules of engagement and would thus be authorized to use force in self-defence....It is noted that in this context self*

defence is deemed to include situations in which armed persons attempt by force to prevent UN troops from carrying out their mandate." He also said that UN peacekeepers would protect convoys, if requested to do so by the UN High Commissioner for Refugees and accompany repatriated prisoners of war to safe areas, if requested to do so by the International Committee of the Red Cross. A UN force may protect itself in self-defence, and it may prevent another armed force from interfering with it, while it is carrying out a UN mandate.

Law Of Armed Conflict

It is very **problematic to determine if and when the law of armed conflict applies** to the new generation of **robust peace keeping operation**. From the reading and interpretation of the main sources of the law of armed conflict it could be argued that to robust peace keeping operations the international humanitarian law applies when the forces **cross the common art. 2 Geneva Convention threshold**, *id est* when there is an international armed conflict and the forces become party to an armed conflict through the **use of force for reasons other than self defence**. In that case, UN peacekeepers become combatants and lawful targets, instead of internationally protected persons. A UN force that limits its use of force strictly to self-defence will not cross the common art. 2 threshold. However, a military force attacking a UN peacekeeping force, combined with the force used by the peace-keepers in self-defence and subsequent offensive counter-attack, might reach the threshold of international armed conflict that invokes common art. 2. Once the parties reach this level of conflict the rights and obligations of the law of armed conflict apply. In some recent peacekeeping operations, peacekeepers in pursuing their mandate missions have more frequently and robustly used military force. This increase in the use of force has raised a great deal of concern about whether such force is in accordance with the law of armed conflict.

For example, the United Nations Operation in Somalia (UNOSOM) illustrates the difficulties and

controversies inherent when attempting to determine whether a peacekeeping force has crossed the threshold into armed conflict and has therefore become a party to it. In 1993 **UNOSOM I** started up as a **Chapter VI** operation (without a clear host nation consent, as there was no government in place at that time in Somalia) tasked to protect the delivery and distribution of humanitarian aid. In Somalia, different interpretations of the law and order responsibilities of foreign troops turned on whether UNOSOM I was regarded as an occupation force. This varied between the different troop contributors. Australia, for example, argued that the presence of foreign troops (UNITAF, Unified Task Force) was governed by the Fourth Geneva Convention, giving rise to an obligation to restore and maintain public order. As part of a civil affairs programme, the Australian UNITAF contingent in Baidoa re-established the local police force and legal system, including jails and courts. UNITAF command rejected this interpretation: since this was a humanitarian rather than military operation, it argued that the military presence could not be regarded as an army of occupation; virtually no action was taken at the national level to re-establish a Somali police force or judiciary. When an **ambush** in June 1993 resulted in the **deaths of 24 Pakistani peacekeepers and another 57 wounded** (the highest number of casualties in a single day in UN peacekeeping history) it became clear that the UNOSOM I would not be able to fulfil the assigned tasks and the Security Council authorized the **UNOSOM II** mission, based on **Chapter VII**, "to take all necessary measures against all those responsible, including their arrest and detention for prosecution, trial and punishment". On October 3, 1993, the Unified Task Force (UNITAF) abandoned its previously impartial role and took military action against a specific Somali warlord, **General Aideed**; when attempting to **arrest** him, at the Olympia Hotel in Mogadishu, intense fighting ensued and 3 US helicopters were shot down with **18 U.S. soldiers and 1 Malaysian soldier killed** and many others wounded. The **UN Commission** established to investigate the attack concluded that once UNITAF began taking action against General Aideed, they crossed the threshold and were no longer persons taking no active part in the hostilities and hence became **parties to the conflict**. However, the **UN Secretary General** and the United States concluded the opposite: "*it is the U.S. and UN...opinion that their forces did **not** become **combatants**, despite carrying out some offensive type operations.*"

CONCLUSIONS

The distinction between traditional peacekeeping and traditional peace enforcement has

recently been blurred by the recourse to a third model of peace support operation, the robust peacekeeping, which stands borderline between them. This evolution, together with a lack of willing by the international community to converge on a definite set of rules to apply to the peace support operations have created a vacuum in the rule of law and has opened space to ambiguous situation resulting sometimes in tragic incidents. In particular, as to the international humanitarian law, it should be noticed that although **peace keeping** and **peace enforcement** differ in nature and legal sources the international community has applied similar rules of international humanitarian law to both of them. In fact, notwithstanding that the **starting legal principles** seem to be **opposite** (international humanitarian law is not applicable to peace keeping while it is applicable to peace enforcement) the **evolution** has brought now to a substantial **convergence** on the **limits of applicable international humanitarian law for all peace support operations**. Indeed, talking of “principles and spirit of international humanitarian law” (peace keeping) and talking of international humanitarian law which has become “international customary law” (peace enforcement) is speaking the same language. If that is the case, the confusion on the nature of the peace support operations and the applicable law in any given situation has led to incidents such as the one occurred in Somalia.

To solve those problems related to the application of the law of armed conflict to the PSOs there have been different suggestions ranging from the amendments that should be made to the Geneva Conventions to affirm in clear terms that peace operations are governed by them to the creation of an entirely new Convention designed specifically for peace operations. In **1996** the UN adopted the **Guidelines for UN forces regarding respect for international humanitarian law** and in the **1999** the Secretary General Kofi Annan issued a Bulletin, the **Code of Conduct for UN peacekeepers**. Both documents provide a directive that specifies the **very minimum standards of behaviour** expected of UN peace operations personnel. The three page Bulletin succinctly restates what amount to uncontroversial and nearly universal principles of customary international humanitarian

law. The UN military personnel "*shall respect the rules prohibiting or restricting weapons and methods of combat.*" Civilians will be "*treated humanely*" and women and children are afforded special protections from attack. If the UN forces detain military personnel or civilians, the detained persons must be "*treated in accordance with the relevant provisions of the Third Geneva Convention of 1949.*" "*Members of the armed forces and other persons in the power of the UN who are wounded or sick shall be treated humanely and protected in all circumstances.*" However, this set of minimum standards of behaviour is only half a solution with a one-size-fits-all code of conduct regarding all peace operations as it does **not** provide any **guidelines** as to when and **how a non combatant UN peacekeeper may become a combatant**. The UN should first articulate a cogent definition of armed conflict. With this definition there would be an unambiguous threshold of when a UN military operation becomes an armed conflict in which UN personnel become combatants and lose protection of the 1994 Safety Convention.

As the adoption of a legal definition of armed conflict will probably have to follow a long and awkward path, the more practical and feasible tool at the given moment still remains an **extension** of the **Security Council resolution**. The Security Council resolution have tended to be rather limited documents setting out the broad mandate for missions (ex. Somalia resolutions: "*use all necessary means to establish a secure environment for humanitarian relief operations*"), but the possibility exists to extend the simple broad mandate approach to one that endorses or promulgates more prescriptive guidelines.

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