



European  
University  
Institute

DEPARTMENT  
OF LAW

# The Application and Interplay of Humanitarian Law and Human Rights Law in Peace Operations, with a Particular Focus on the Use of Force

Cornelius Wiesener

Thesis submitted for assessment with a view to obtaining the degree of Doctor of Laws of the European University Institute

Florence, 14 December 2015



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## THESIS SUMMARY

This thesis examines the application and interplay of international humanitarian law (IHL) and human rights law (HRL) during peace operations. For the interaction of the different substantive provisions under both legal regimes, the thesis' focus is specifically on the circumstances and modalities under which physical force may be used against individuals.

As for the application of IHL, the ordinary threshold requirements (i.e. on intensity) constitute the primary tool for examining whether a peace operation has become a party to an armed conflict. This thesis, however, suggests an additional participation-based test for situations where the peace operation directly supports a party to a pre-existing armed conflict in the mission area. IHL continues to apply – without strict spatial limitation – until the overall armed conflict comes to an end or the peace operation ceases its hostile acts and support. The application of HRL in the mission area is, as this thesis argues, subject to a gradual test: negative obligations need to be observed at all times, while the application of positive HRL obligations is context-specific (e.g. degree of control). In addition, the thesis offers different models to overcome the legal challenges in relation to extra-territorial derogations and shows how the procedural requirements and additional safeguards may operate in the context of a peace mission.

As a consequence, IHL and HRL often apply to the same situation in the field – both in time and space. This leads to a potential conflict between the different sets of use-of-force rules applicable to peace operations. In a nutshell: while HRL only allows for killings in response to threats to life and limb, IHL provides for lethal targeting based on status and conduct (even absent such threats), but contains stricter rules on the use of specific weapons and methods. Neither the individual scopes of application, nor the traditional interaction models (i.e. *lex specialis* and most-favourable-protection principle) are able to overcome this norm conflict.

That is why this thesis suggests a model based on a distinction between two mutually exclusive paradigms: (1) the *paradigm of hostilities* involving active combat and governed by IHL, and (2) the *paradigm of law-enforcement*, which covers all remaining situations and is based on ordinary HRL standards. Usually, the IHL categories of the person in question (i.e. combatants vs. civilians) may give a first indication as to which paradigm applies. However, even for persons generally targetable under IHL, the use of force against them shifts towards the law-enforcement paradigm once the area in question is under the firm control of the peace operation or its allies. In addition, the specific IHL rules on certain weapons and methods provide for a sufficiently broad law-enforcement exception. This makes it even more necessary for commanders to provide careful planning and real-time instructions in order to fully operationalise the suggested distinction between the two paradigms.



## ACKNOWLEDGEMENTS

This doctoral thesis has been prepared at the European University Institute (EUI). I am grateful to both the EUI and the German Academic Exchange Service for providing me with an excellent academic environment and the necessary financial support throughout these years. I would also like to thank Katherine Meier for a speedy and thorough language correction, facilitated by the generous funding of the EUI.

I am especially indebted to my supervisor Professor Martin Scheinin. His confidence in my abilities, his availability for substantive advice and his patience over the years played an important role in developing and finalising this project. I would also like to thank the members of my jury: Professor Nehal Bhuta, Senior Research Fellow Emanuela-Chiara Gillard, and Professor Kjetil Mujezinović Larsen. I am truly grateful to them for taking their time to read and engage with my thesis. Their detailed, thoughtful and often critical comments were very much appreciated and I have tried, as much as possible, to address all of their suggestions and concerns in this final defence version. I am truly honoured to have them on my examining board and look forward to discussing many of the points raised in their reports during the defence.

I would also like to thank my former colleagues at the Legal Division of the International Committee of the Red Cross (ICRC) for the fruitful exchange of ideas during my internship in summer 2011, as part of the then newly established Commentary Project, headed by Jean-Marie Henckaerts. Likewise, I am grateful to Professor Terry Gill for his valuable feedback on some of my writings and ideas during my research stay at the Amsterdam Centre for International Law in summer 2013.

Writing a doctoral thesis is a solitary occupation. I am therefore immensely grateful to all my friends and former colleagues at the EUI for the emotional and intellectual support throughout the years. I would like to thank in particular Alexandre Galand, Alice Margaria and Emmanuel de Groof, who have been dear friends and with whom I had the pleasure of organising a great number of fascinating working group events at the EUI. Likewise, I am incredibly grateful to all my new friends and colleagues in Copenhagen. Your company has made a great difference to me during the last, most stressful months.

I would like to thank, once again, my mother as well as my five siblings and their families. Some of you are familiar with the arduous task of writing a doctoral thesis, and your constant emotional support and encouragement helped me to bring this project to an end. Finally, and above all, I would like to thank my girlfriend, Ditte, for standing by me throughout the last two years with unfailing love, support and understanding.



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# 1 INTRODUCTION

## 1.1 BACKGROUND

In the past few decades, the use of peace operations has rapidly increased, both in size and in structure. There are currently around 100,000 troops from various countries deployed as blue-helmet peacekeepers in operations directly commanded by the United Nations.<sup>1</sup> In addition, peace operations are also increasingly conducted by regional organisations, such as the African Union, the European Union and NATO. But the functions of peace operations and their mandates have also changed dramatically. Unlike the first missions, which were usually meant to serve as a buffer between former warring parties, today's peace operations almost always have a robust mandate, allowing them to use active force to carry out their tasks. These tasks may range from providing security and safety in certain areas, and protecting the civilian population to actively supporting local authorities. In some exceptional cases, they may even be part of an international territorial administration, which assumes the full governing authority in certain regions affected by state collapse or a breakdown of law and order, as in the case of Kosovo and East Timor in 1999. As a result, the use of force in peace operations may often involve crowd-control in a climate of inter-ethnic violence and offensive measures against criminal gangs or pirates.

On some occasions, however, they may also get involved in large-scale combat. Only in rare cases has this involved hostilities with regular state armed forces. Following earlier examples in Korea and Iraq, the most recent case was the NATO-led operation 'Unified Protector' in 2011, which involved several thousand air strikes against pro-Gaddafi forces in an effort to protect the civilian population during the unfolding Libyan Civil War. The far more likely enemy of today's peace operations, however, are non-state armed groups (including their various splinter groups) that actively resist local peace efforts and often pose a serious threat to the local population and the overall stability in the region. When taking measures against such groups, international forces usually cooperate closely with the security forces of the host states and may even embark on joint operations. Cases in point are, for instance, the former NATO-led ISAF

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<sup>1</sup> See more generally: <http://www.un.org/en/peacekeeping>.

mission in Afghanistan,<sup>2</sup> the African Union's mission in Somalia (AMISOM) and the UN-led operation in Democratic Republic of Congo (MONUSCO). One of the greatest challenges for the soldiers involved is the special nature of these missions. Unlike in the case of high-intensity warfare, for which they are normally trained, these overseas deployments usually involve a broad variety of different tasks.

This challenge is perhaps best illustrated by the concept of 'three-block warfare', coined by US General Charles Krulak. In a nutshell, forces deployed to such missions may be required to conduct fully-fledged combat, carry out security tasks and deliver humanitarian aid in three adjacent areas (or city blocks) at one and the same time.<sup>3</sup> The dilemma of being confronted with such a wide spectrum of different situations is a core aspect of modern counter-insurgency approaches, which are of great relevance for contemporary peace operations in their efforts against armed groups.<sup>4</sup> It undoubtedly poses a serious challenge for military trainers and operational planners, but the complexity of the mission scenarios may also have direct international legal ramifications. For instance, what measures are international forces allowed to take when they are part of a peace operation? When would it be permissible to use firearms against individuals, including direct lethal force? And does it make a difference whether they are armed, commit acts of violence or are even members of a hostile group?

These questions raise a number of complex legal issues which cannot be answered simply by reference to the mandate under which the mission operates. But these questions should not be avoided, because legal uncertainty among the relevant actors may greatly undermine the effectiveness of the peace operations and may in some cases even lead to mission failure. Identifying the relevant international legal rules and understanding their relationship is therefore a crucial first step before legal advisers and commanders can draft the specific rules of engagement for their forces in the field.

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<sup>2</sup> The ISAF mission in Afghanistan was completed at the end of 2014 and replaced by a smaller mission (code-named 'Resolute Support') to provide further training and assistance to the Afghan authorities and security forces.

<sup>3</sup> Gen. Charles Krulak, 'The Strategic Corporal: Leadership in the Three Block War', *Marines Magazine*, January 1999, [www.au.af.mil/au/awc/awcgate/usmc/strategic\\_corporal.htm](http://www.au.af.mil/au/awc/awcgate/usmc/strategic_corporal.htm). The concept was also specifically mentioned in Canada's defence policy planning: Welsh, 'The 2005 International Policy Statement: Leading with Identity?', 61 *International Journal* (2006), 909-28, p. 915.

<sup>4</sup> Department of the Army, Counterinsurgency, Field Manual, FM 3-24, December 2006, pp. 1-19; see also, Department of the Army, Operations, Field Manual, FM 3-0, February 2008.

## 1.2 TERMINOLOGY AND RELEVANT LEGAL REGIMES

For the purpose of this thesis, the term ‘peace operation’ is used in a very broad sense: it is meant to cover any international military operation that has received an explicit mandate from the UN Security Council to stabilise the security situation in a certain region. The exact mandates of these operations may differ (sometimes even considerably), which is why it has been common practice for decades to distinguish between peacekeeping and (peace) enforcement operations.<sup>5</sup> This distinction, however, is not based on strict legal concepts and has become increasingly meaningless in light of the more robust mandates of today’s peace operations.<sup>6</sup> The use of the term ‘peace operation’ is also not limited to missions directly commanded by the United Nations, but also covers those led by regional organisations or a handful of states forming a coalition of the willing. Indeed, practice shows that operations with different mandates and command arrangements may ultimately face exactly the same operational challenges and raise the same legal questions, which is why they should be considered together.

The mandates of the Security Council usually authorise the peace operation’s personnel to take a wide range of measures, including armed force, in order to discharge the functions entrusted to them. But they do not provide clear guidance on the circumstances under which (coercive) actions can be employed, including the use of military force. These are essentially matter of international humanitarian law and human rights law – the two fields of international law that govern the use of force and exercise of other forms of public power *vis-à-vis* individuals, across the full spectrum between war and peace.

Humanitarian law – also known as the *jus in bello*, the law of war or law of armed conflict – governs the conduct of the belligerent parties in times of armed conflict and during military occupations.<sup>7</sup> It reflects a careful balance between military necessity and considerations of humanity. Its major treaty provisions can be found in the four Geneva Conventions of 1949 and the two Additional Protocols of 1977, as well as a number of specific treaties on weapons and cultural property.

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<sup>5</sup> For a slightly different use of the terminology: Gill and Fleck (eds.), *The Handbook of the International Law of Military Operations* (OUP 2010), pp. 135-62 (featuring chapters under the heading ‘Peace Operations’) and pp. 81-133 (featuring chapters under the heading ‘Enforcement and Peace Enforcement Operations’).

<sup>6</sup> For an extensive discussion of the mandate and the use of force: see from p. 9.

<sup>7</sup> However, for the sake of consistency, we will almost exclusively use the term ‘humanitarian law’ and use the abbreviation ‘IHL’ in footnotes.

By contrast, human rights law has its origins in domestic constitutional law and is essentially based on the vertical relationship between the state and the individual. It is thus a much younger part of international law, which saw most of its development after the adoption of the *Universal Declaration of Human Rights* in 1948.<sup>8</sup> The first phase of human rights treaties codified what is widely known as civil and political rights, which are meant to shield an individual's fundamental freedoms and liberties (such as their right to life, to physical integrity as well as liberty) from undue and arbitrary state interference; but they also entail a duty to protect and fulfil.

This second element – of fulfilling the rights – became even more central in relation to what is often referred to as human rights of the 'second and third generation'.<sup>9</sup> These include economic, social and cultural rights as well as rights of specifically (vulnerable) groups, such as children, women and persons with disabilities.<sup>10</sup> The role of these rights in times of armed conflict and military operations has been a matter of increased scholarly attention in recent years.<sup>11</sup> Nevertheless, the use of physical force by military personnel – a central theme throughout this thesis – is much more likely to affect the category of civil and political rights, enshrined in general human rights treaties like the European Convention on Human Rights (1950) and the International Covenant on Civil and Political Rights (1966),<sup>12</sup> which will be the main focus throughout this study.

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<sup>8</sup> UNGA, *Universal Declaration of Human Rights*, 10 December 1948, 217 A (III).

<sup>9</sup> See more generally: De Schutter, *International Human Rights Law: Cases, Materials, Commentary* (2<sup>nd</sup> edn., CUP 2014), pp. 427-526 (on the duty to protect) and pp. 527-82 (on the duty to fulfil).

<sup>10</sup> In particular, the International Covenant on Economic, Social and Cultural Rights (ICESCR), and the Convention on the Rights of the Child (CRC), the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), the Convention on the Rights of Persons with Disabilities (CRPD).

<sup>11</sup> See, for instance: Gilles, *Economic, Social, and Cultural Rights in Armed Conflict* (OUP 2014); Riedel, 'Economic, Social, and Cultural Rights in Armed Conflict', in: Clapham and Gaeta (eds.), *The Oxford Handbook of International Law in Armed Conflict* (OUP 2014), 441-68; Mottershaw, 'Economic, Social and Cultural Rights in Armed Conflict: International Human Rights Law and International Humanitarian Law', 12 (3) *The International Journal of Human Rights* (2008), 449-70. Note also the effects that military operations and armed conflict situations may have on the protection of the environment, which may also (indirectly) affect the enjoyment of HRL in addition to the protection issues raised under IHL itself. The ILC included the topic in 2013 into its programme of work: ILC, Preliminary Report on the Protection of the Environment in Relation to Armed Conflicts, submitted by Marie Jacobsson, Special Rapporteur, 30 May 2014, A/CN.4/674, pp. 42-45 (on HRL alone); ILC, Second Report on the Protection of the Environment in Relation to Armed Conflicts, submitted by Marie Jacobsson, Special Rapporteur, 28 May 2015, A/CN.4/685.

<sup>12</sup> Convention for the Protection of Human Rights and Fundamental Freedoms, hereinafter: European Convention or ECHR in footnotes; International Covenant on Civil and Political Rights, hereinafter: International Covenant or ICCPR in footnotes.

## 1.3 RESEARCH QUESTION, METHODOLOGY AND STRUCTURE OF THE THESIS

The overall question that this thesis tries to answer is as follows: when and how do the regimes of humanitarian law and human rights law apply during a peace operation and how do their different sets of rules interact when they are both applicable?

Most of the underlying issues have been discussed for many years and there is a wealth of literature on the matter.<sup>13</sup> It is nevertheless apt to engage with the topic again in more detail. This allows us to take due regard of new case-law from international and national courts as well as relevant practice from the field. Moreover, there are still a number of under-researched questions that give rise to legal uncertainty and call for innovative and principled solutions. This thesis tries to take up the challenge and to fill some of the remaining gaps.

Throughout the thesis, the application of human rights and humanitarian law in peace operation will be examined in a comprehensive manner so as to capture as many mission scenarios as possible. However, when considering the substantive provisions and their interaction in situations when both regimes are applicable, the focus will be exclusively on the circumstances and modalities under which (potentially) lethal force may be used against individuals in non-custodial situations.<sup>14</sup> It is precisely on this topic that human rights law and humanitarian law differ the most, which is why it is the most relevant topic for the discussion on the regime interplay.<sup>15</sup> Certainly, the issue of detention is also of relevance. But it has been covered quite extensively in recent years,<sup>16</sup> including the adoption of the so-called *Copenhagen Process Principles and*

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<sup>13</sup> For instance: Mujezinović Larsen, *The Human Rights Treaty Obligations of Peacekeepers* (CUP 2012); 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* (Intersentia, 2010); Beruto (ed.), *International Humanitarian Law, Human Rights and Peace Operations. XXXIst Sanremo Round Table 2008* (IIHL 2009); Kolb, Porretto and Vité, *L'Application du Droit International Humanitaire et des Droits de l'Homme aux Organisations Internationales. Forces de Paix et Administrations Civiles Transitoires* (Bruylant 2005); Zwanenburg, *Accountability of Peace Support Operations* (Martinus Nijhoff 2005); Kolb, *Droit Humanitaire et Opérations de Paix Internationales* (Helbing & Lichtenhahn 2002); Seyersted, *United Nations Forces in the Law of Peace and War* (Sijthoff 1966).

<sup>14</sup> The main reason for excluding these situations for the legal analysis is because the limitations on the use of force against persons in custody are largely the same under both IHL and HRL. Among other misconduct, they clearly prohibit: torture; cruel, inhuman or degrading treatment or punishment; and extra-judicial executions. See, in particular: Rodley, *The Treatment of Prisoners under International Law* (3<sup>rd</sup> edn., OUP 2009).

<sup>15</sup> This is perhaps best exemplified by the title of the following article, at least in relation to NIACs: Sassòli and Olson, 'The Relationship between International Humanitarian and Human Rights Law Where It Matters: Admissible Killing and Internment of Fighters in Non-International Armed Conflicts', 90 *IRRC* (2008), 599-627.

<sup>16</sup> For a number of excellent contributions on this issue, with a special focus on peace operations and similar

*Guidelines* (2012), which deal specifically with the handling of detainees in international military operations.<sup>17</sup> Moreover, the task of status determination for detainees can be assigned to senior legal officers. By contrast, targeting decisions cannot be delegated entirely to higher command levels and ambiguity as to which set of rules applies may have serious, irreversible consequences for the victim. This is why it seems appropriate to focus exclusively on the circumstances and modalities under which (potentially) lethal force may be used.

This thesis follows a doctrinal positivist approach.<sup>18</sup> Positivism is the legal method *par excellence* for ascertaining the *lex lata*, i.e. the law as it is.<sup>19</sup> This is what is ultimately required for clarifying the specific issues raised by the overall research question. Moreover, unlike other more critical approaches,<sup>20</sup> positivism incorporates a degree of objectivity, which is essential for developing legal arguments on politically sensitive matters, such as the one at issue here. Nevertheless, this should not prevent us from critically examining the practice of states, international organisations and judicial bodies, and from identifying the underlying policy choices and driving forces behind certain decisions.<sup>21</sup>

The thesis considers primarily the most relevant humanitarian law and human rights conventions as well as the practice of the respective treaty bodies, namely the UN Human Rights Committee and its regional equivalents in Europe, the Americas and Africa.<sup>22</sup> It considers, however, also other legal sources, including general international law as well as the jurisprudence of some international criminal tribunals. Special attention will also be given to the work of the Interna-

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overseas military operations: Direk, *Security Detention in International Territorial Administrations: Kosovo, East Timor, and Iraq* (Brill 2015), pp. 58-216; Debuf, *Captured in War: Lawful Internment in Armed Conflict* (Hart Publishing 2013); Mujezinović Larsen (2012), *supra* note 13, pp. 393-418; Sassòli, 'The Role of Human Rights and International Humanitarian Law in New Types of Armed Conflicts' in: Ben-Naftali (ed.), *International Humanitarian Law and International Human Rights Law: Pas de Deux* (OUP 2011), 34-94; Naert (2010), *supra* note 13, pp. 624-33.

<sup>17</sup> See also: Copenhagen Process on the Handling of Detainees in International Military Operations – Principles and Guidelines, 19 October 2012.

<sup>18</sup> Hutchinson and Duncan, 'Defining and Describing What We Do: Doctrinal Legal Research', 17 (1) *Deakin Law Review* (2012), 83-119.

<sup>19</sup> See more generally: Kammerhöfer and D'Aspremont (eds.), *International Legal Positivism in a Post-Modern World* (CUP 2014).

<sup>20</sup> See, for instance: Tuori, *Critical Legal Positivism* (Ashgate 2002). Note, however, that democracy and civil-society participation, which Kaarlo Tuori considers the main ethical foundations of law, play a much less prominent role in the field of international law and international adjudication. For a more critical approach: Koskeniemi, *From Apology to Utopia: The Structure of International Legal Argument* (CUP 2005).

<sup>21</sup> See, for instance, more generally: Ratner and Slaughter, 'Appraising the Methods of International Law: A Prospectus for Readers', 93 *AJIL* (1999), 291-302; Slaughter and Ratner, 'The Method is the Message', 93 *AJIL* (1999), 410-23.

<sup>22</sup> Some weight is also given to the case-law of national courts to the extent that they refer directly to IHL and HRL. The most prominent group of cases have been decided by British courts on the basis of the UK Human Rights Act, which incorporates the ECHR (as interpreted by the ECtHR).

tional Law Commission in clarifying and developing international law and to the (quasi) authoritative interpretations that the International Committee of the Red Cross (ICRC) has provided on a number of IHL-related issues.

Moreover, rather than following an instrument-by-instrument approach, the analysis is structured along different themes. This allows us to see more closely to what extent the rules from different sources set similar standards and to clarify the merit of different approaches used by (quasi) judicial bodies in order to resolve the complex legal issues at stake and overcome inherent challenges.

This leads to the following structure of the thesis: Chapter 2 sets the scene for a more detailed enquiry in Chapters 3, 4 and 5. For that purpose, it provides a detailed outline on the authorisation of peace operations to use force under their respective mandates. This is followed by a discussion of the command and control arrangements and of the impact they may have on the distribution of international responsibility between international organisations and states involved in peace operations. Thereafter, Chapter 2 examines the obligations of such states and organisations under human rights law and humanitarian law, followed by an enquiry into the impact of the relevant Security Council mandate on the operation of both bodies of law. Chapters 3 and 4 consider the circumstances under which the application of the two legal regimes – humanitarian law and human rights law, respectively – will be triggered in the course of peace operations and to what extent its scope may be limited, before turning to the discussion on the interplay between both regimes in Chapter 5.

Chapter 3 begins with considering the relevant threshold requirements for the application of humanitarian law in view of the fact that it only applies in times of armed conflict and during military occupations. The key question is therefore whether and how a peace operation may become a party to an armed conflict and to what extent its special nature may have an impact on the classification of the conflict and the threshold of violence required to trigger the application of humanitarian law. In addition, this chapter will also examine if participation in a pre-existing armed conflict may serve as an additional test, which will be followed by an enquiry into the temporal and geographic scope of application once the peace operation has indeed become a party to an armed conflict. The chapter concludes by briefly examining the special case of military occupations and the approach of applying humanitarian law by analogy as a matter of policy.

Chapter 4 considers the modalities for the application of human rights law during peace operations. Most of the relevant human rights treaties contain jurisdiction clauses, which may pose an obstacle to the application of the relevant human rights treaties in overseas deployments. The chapter will therefore explore different models for their extra-territorial application. Moreover, even if human rights law applies in the midst of a peace operation, it may be subject to

far-reaching limitations. Chapter 4 will, therefore, examine the circumstances under which permissible restrictions and derogations may be available and the possible challenges that need to be addressed.

Chapter 5 is concerned with the likely scenario during peace operations when human rights and humanitarian law apply to the same situation – both in space and time. This may lead to a potential norm conflict between opposing rules. That is why this chapter focuses on the relevant use-of-force rules to clarify the interplay between both legal regimes. It will first consider the general features of norm interaction and the norm conflicts tools, which will then be applied to the concurrent application of human rights and humanitarian law. This will be followed by a detailed examination of the substantive rules on the use of force under both regimes to identify differences between them as a possible source of norm conflicts. Chapter 5 concludes with a survey of different models in order to identify the best solution for overcoming these apparent norm conflicts.

# 2 GENERAL ISSUES ON PEACE OPERATIONS

## 2.1 GENERAL OVERVIEW

The purpose of this chapter is to set the scene for the following three substantive chapters. It provides insights into a number of international law issues in relation to peace operations, all of which have received considerable scholarly attention in recent years. The chapter will sketch the most relevant aspects of the debate and consider some new trends in recent practice. It will first consider the authorisation of peace operations to use force under their respective mandates within the overall framework of the UN Charter. This will be followed by a discussion of the command and control arrangements and the impact they may have on the apportionment of international responsibility between international organisations and states involved in peace operations. Thereafter, we will closely examine the obligations of such states and organisations under human rights law and humanitarian law. The chapter concludes with examining the impact of the relevant Security Council mandate on the operation of both bodies of law.

## 2.2 MANDATE AND USE OF FORCE

On the basis of the definition adopted for this study, all peace operations are established by a resolution of the UN Security Council. Nevertheless, their mandates may differ considerably, especially on the extent to which they may resort to the use of armed force. The UN Charter provides a comprehensive system of collective security to enforce the universal prohibition on

the use of force.<sup>1</sup> In addition to the right of individual or collective self-defence, explicitly recognised in Article 51,<sup>2</sup> the UN Security Council may take measures under Chapter VII of the Charter. In case of a ‘threat to the peace, breach of the peace, or act of aggression’, and if other measures prove inappropriate,<sup>3</sup> it may use its powers under Article 42 to take military actions:

[T]he Security Council ... may take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security. Such action may include demonstrations, blockade, and other operations by air, sea, or land forces of Members of the United Nations.<sup>4</sup>

Originally, such enforcement actions were aimed at repelling aggressor states that had used force against another state in violation of the Charter. This option, however, has remained an exception. In fact, enforcement actions in the traditional sense have only been used twice: in response to North Korea’s invasion of South Korea in 1950 and to Iraq’s invasion of Kuwait in 1990. Both operations attracted the participation of a large number of UN member states, who placed their troops under US command. The Security Council’s authorisations complemented the right of collective self-defence on the part of South Korea and Kuwait, respectively.<sup>5</sup> Given the political stalemate in the Security Council during the Cold War period, for most of that time the United Nations had to rely on non-coercive measures for maintaining international peace and security, which in time became known under the term ‘peacekeeping’. The UN Emergency Force I (UNEF I) on the Sinai Peninsula was the first genuine peacekeeping force<sup>6</sup> and was meant to serve as a buffer between Egypt and Israel after the Suez crisis in 1956.<sup>7</sup> Traditional peacekeeping operations, like UNEF I, were often deployed as an interposition force between the parties to the conflict in order to prevent the resumption of hostilities. The UN forces in Cyprus (UNFICYP) and in the Golan Heights (UNDOF) are present-day examples of

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<sup>1</sup> Art. 2 (4) UN Charter (‘All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations’). See more generally: Weller (ed.), *The Oxford Handbook of the Use of Force in International Law* (OUP 2015).

<sup>2</sup> See, *infra* note 11.

<sup>3</sup> Arts. 39 and 41 UN Charter, respectively.

<sup>4</sup> Emphasis added.

<sup>5</sup> Strictly speaking, the Korea campaign was not authorised, as the relevant resolutions only *recommended* military assistance, although the forces were authorised to use the UN flag: S/RES/83 (Korea), 27 June 1950, and subsequent resolutions. For the US-led operation in Iraq: S/RES/678 (Iraq-Kuwait), 29 November 1990, para. 2 (‘Authorizes Member States co-operating with the Government of Kuwait ... to use all necessary means ... to restore peace and security in the area’).

<sup>6</sup> There had been some earlier observer missions, but these were small in size, had a very limited mandate and their personnel was usually unarmed: Bowett, *United Nations Forces. A Legal Study of United Nations Practice* (Stevens & Sons 1964), p. 71.

<sup>7</sup> This operation was also an exception in that it had been authorised by the UN General Assembly rather than the Security Council: GA Res. 998, 4 November 1956.

this traditional concept of peacekeeping. Not explicitly mentioned in the UN Charter, it constitutes a progressive reading of the UN Security Council's broad powers under Chapter VI to offer its services towards a peaceful settlement of disputes in conjunction with its right to establish its own subsidiary bodies.<sup>8</sup>

The so-called Capstone Doctrine, issued by the UN Department of Peacekeeping Operations in 2008,<sup>9</sup> defines three basic, inter-related and mutually reinforcing principles on which peacekeeping is premised:

1. Consent of the parties,
2. Impartiality,
3. Non-use of force except in self-defence and defence of the mandate.

Hence, as a matter of principle, all parties involved have to consent to the deployment of the operation, which in return is expected to implement its mandate without favour or prejudice to any of the parties concerned. In most cases, status-of-force agreements are concluded between the United Nations and the host state to define the status, rights and privileges of the mission. The third principle, which limits the use of force to situations of self-defence and defence of the mandate, has been extended to include also 'resistance to attempts by forceful means to prevent the force from discharging its duties'.<sup>10</sup> This goes far beyond the limits of inter-state self-defence, which would normally require an (imminent) attack.<sup>11</sup> The exact legal basis and scope of the right to use force in defence of the mandate remains unclear.<sup>12</sup> But it seems rather

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<sup>8</sup> Art. 29, UN Charter.

<sup>9</sup> Department of Peacekeeping Operations, 'Capstone Doctrine: United Nations Peacekeeping Operations. Principles and Guidelines', 18 January 2008, pp. 31-35. For earlier attempts to define these three principles: UN Department of Peacekeeping Operations, 'General Guidelines for Peacekeeping Operations', UN/210/TC/GG95, October 1995; Supplement to the Agenda for Peace: Position Paper of the Secretary-General on the Occasion of the Fiftieth Anniversary of the United Nations, A/50/60-S/1995/1, 3 January 1995, para. 33. Report of the High-Level Panel on Threats, Challenges and Change, A/59/565, 2 December 2004, para. 213.

<sup>10</sup> Report of the Secretary-General on the Implementation of Security Council resolution 340 (UNEF II), UN Doc. S/11052/Rev. 1, 27 October 1973, para. 5. This broad concept of self-defence has been confirmed in subsequent UN documents: General Guidelines for Peacekeeping Operations (1995), *supra* note 9, para. 35; Capstone Doctrine (2008), *supra* note 9, p. 34.

<sup>11</sup> In an inter-state context, the term (national) self-defence refers to the proportionate use of force in response to an (imminent) armed attack, in line with Art. 51 UN Charter and its customary law equivalent. It serves as an exception to the non-use of force principle in Art. 2 (4) UN Charter, and needs to be distinguished from personal self-defence by individuals as a criminal law defence. Yet, many incidents may involve both levels of self-defence, which continues to cause confusion as to the exact limits of self-defence in peacekeeping operations, *infra* note 12. See also: Knoops, *The Prosecution and Defense of Peacekeepers under International Criminal Law* (Transnational Publishers, Ardsley 2004), pp. 166-86 (providing a detailed outline of the limits of self-defence by individuals as a criminal law defence under domestic law and international criminal law).

<sup>12</sup> Findlay, *The Use of Force in UN Peace Operations* (OUP 2002), pp. 14-19 and 355-59; Sheeran, 'The Use of Force in United Nations Peace-keeping Operations', in: Weller (2015), *supra* note 1, 347-74, pp. 360-

unlikely that peacekeepers would invoke this overly broad concept to justify the use of force against state armed forces without further authorisation.<sup>13</sup>

With the end of the Cold War, the UN Security Council became increasingly involved in civil wars and authorised peacekeeping operations with increasingly robust mandates, thus blurring the traditional distinction between consent-based peacekeeping and coercive enforcement actions.<sup>14</sup> A precursor to this trend was the UN operation in the Congo (ONUC) in the early 1960s. In order to ensure the unity and territorial integrity of the Congo, the Security Council authorised ONUC forces already deployed in the area to take all appropriate measures, including ‘the use of force, if necessary, in the last resort’.<sup>15</sup> As a result, ONUC troops engaged in intense fighting with Katangese secessionist forces between 1961 and 1963.<sup>16</sup>

Thirty years on, the UN operations in the former Yugoslavia (UNPROFOR) and Somalia (UNOSOM I and II) followed a similar trend. Starting as traditional peacekeeping operations, they relied increasingly on mandates with references to Chapter VII powers and explicit authorisations to use force. Resolution 836 in June 1993 tasked UNPROFOR with the defence of a number of safe areas in Bosnia and Herzegovina<sup>17</sup> and even authorised a NATO-led coalition of

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65. See, in particular, the following comprehensive study: Gill et al., ‘General Report’, in: Horvat and Benatar (eds.), *Legal Interoperability and Ensuring Observance of the Law Applicable in Multinational Deployments. Conference Proceedings* (ISMLLW 2013), 121-71, pp. 140-43. The report concludes that the views of states on the precise legal basis of self-defence in peacekeeping operations differ greatly, including: (1) national/inter-state self-defence (Art. 51 UN Charter), (2) personal/individual self-defence (i.e. as criminal law defence under domestic law), and (3) more open-ended terms and concepts, e.g. unit defence, force protection and military self-defence.

<sup>13</sup> Two different ‘defence of the mandate’ scenarios must be distinguished here, depending on who is being targeted: (1) State armed forces: any use of force against the armed forces of a state (e.g. the host state) falls under Art. 2 (4) UN Charter (and its customary equivalent) and would be unlawful, unless there is an actual case of national/inter-state self-defence. Preventing peacekeepers from discharging their duties (e.g. by blocking roads) is hardly enough to meet that high threshold. The peacekeeping mission would thus have to refrain from using force, unless it operates under a robust mandate with Chapter VII authorisation. (2) Non-state armed groups: using force against recalcitrant armed groups (in UN jargon often referred to as ‘spoilers to the peace process’) in support of the host state raises no legal problem under the *jus ad bellum*, even absent a robust mandate with Chapter VII authorisation.

<sup>14</sup> Report of the High-Level Panel on Threats (2004), *supra* note 10, paras. 210-13; Gardam, *Necessity, Proportionality and the Use of Force by States* (CUP 2004), pp. 194-99; Gray, *International Law and the Use of Force* (2<sup>nd</sup> edn., OUP 2004), pp. 210-51.

<sup>15</sup> S/RES/161 (Congo), 21 February 1961, para. 1 (without any clear reference to Chapter VII, but finding a ‘threat to international peace and security’). See also: S/RES/169 (Congo), 24 November 1961, para. 4 (‘take vigorous action, including the use of the requisite measure of force, if necessary’).

<sup>16</sup> See generally: Draper, ‘The Legal Limitations upon the Employment of Weapons by the United Nations Force in the Congo’, 12 (2) ICLQ (1963), 387-413; Bothe, *Le Droit de la Guerre et les Nations Unies. A Propos des Incidents Armés au Congo* (IUHEI 1967), pp. 135-242.

<sup>17</sup> S/RES/836 (Bosnia and Herzegovina), 4 June 1993, para. 9 (‘to take the necessary measures, including the use of force, in reply to bombardments against the safe areas by any of the parties or to armed incursion into them’).

states to carry out air strikes in support of UNPROFOR forces on the ground.<sup>18</sup> This led to intense fighting with Bosnian-Serb forces and massive air raids against their targets. In Somalia, the Security Council tasked the Unified Task Force (UNITAF),<sup>19</sup> a multinational force under US command, with using all necessary means to provide a secure environment in support of UNOSOM I, before merging both operations into UNOSOM II under an extended and robust mandate.<sup>20</sup> In its effort to disarm local militia, UNOSOM II saw itself drawn into fierce battles with armed groups, leading to heavy casualties on both sides, and was subsequently withdrawn. While the Somalia campaign proved a failure, culminating in a hasty withdrawal, the United Nations and NATO eventually managed to secure peace in Bosnia and Herzegovina. A sizeable NATO-led Implementation Force (IFOR) was tasked with the enforcement of the 1995 Dayton Peace Accords, for which it was given a Chapter VII mandate,<sup>21</sup> but it never had to resort to its full power to use force. This approach – of giving robust Chapter VII mandates to a multinational operation, with a strong deterrent effect on local forces – had already been used for restoring peace and public order in Haiti in 1994.<sup>22</sup> The authorisation and deployment of the Kosovo Force (KFOR) and the International Force for East Timor (INTERFET) in 1999 followed the same pattern, in order to facilitate the establishment of UN-led territorial administrations in both regions.<sup>23</sup>

In August 2000, the Panel on United Nations Peace Operations issued its final report, better known as the ‘Brahimi Report’. In view of the failure of the UN mission in Rwanda (UNAMIR) to halt the Rwandan genocide in 1994 and the mixed performance of other UN peacekeeping forces, the report embraced a robust peacekeeping doctrine, aimed at the protection of civilians, and called for realistic mandates coupled with adequate resources and personnel.<sup>24</sup> Since then, virtually all new UN peace operations have been set up with a broad and robust mandate under Chapter VII of the UN Charter,<sup>25</sup> such as in the Democratic Republic of Congo, in Sudan, Ivory

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<sup>18</sup> Ibid, para. 10 (‘all necessary measures, through the use of air power, in and around the safe areas’). The use of airpower in defence of a no-fly zone had been authorised some time before, S/RES/816 (Bosnia and Herzegovina), 31 March 1993, para. 4.

<sup>19</sup> S/RES/794 (Somalia), 3 December 1992, para. 10.

<sup>20</sup> S/RES/814 (Somalia), 26 March 1993, paras. 5-6 (reference to SG’s report for use of force).

<sup>21</sup> S/RES/1031 (Bosnia and Herzegovina), 15 December 1995, paras. 14-17.

<sup>22</sup> Multinational Force Haiti, S/RES/940 (Haiti), 31 July 1994, para. 4 (‘use all necessary means to facilitate the departure from Haiti of the military leadership’).

<sup>23</sup> S/RES/1244 (Kosovo), 10 June 1999, paras. 7-9; S/RES/1264 (East Timor), 15 September 1999, para. 4.

<sup>24</sup> Report of the Panel on United Nations Peace Operations (‘Brahimi Report’), A/55/305-S/2000/809, 21 August 2000, paras. 48-64.

<sup>25</sup> Zacklin, ‘The Use of Force in Peacekeeping Operations’, in: Blokker and Schrijver (eds.), *The Security Council and the Use of Force: Theory and Reality – A Need for Change?* (Martinus Nijhoff 2005), 91-106, pp. 91-100.

Coast, Haiti as well as Mali.<sup>26</sup> Similar authorisations were also added to some of the existing operations.<sup>27</sup>

Robust mandates under Chapter VII have also been given to peace operations carried out by regional organisations: to the African Union missions in Somalia and Mali,<sup>28</sup> to the NATO-led operations in Kosovo (KFOR) and in Afghanistan (ISAF),<sup>29</sup> and a number of missions under the command of the European Union,<sup>30</sup> including its counter-piracy operation off the coast of Somalia.<sup>31</sup> The same is true for the US-led multinational force in Iraq, both during the occupation phase until June 2004 and thereafter.<sup>32</sup>

In peace operations with Chapter VII mandate, the use of force is authorised either explicitly by reference to ‘all necessary means’ or implicitly by assigning a wide range of tasks that may necessitate the use of force in certain situations, including the protection of civilians, the maintenance of law and order, disarmament of irregular fighters or support and training of the security forces of the host state.<sup>33</sup> Moreover, the Chapter VII authorisation is complemented by a number of other legal bases under international law: the mission’s inherent right to self-defence,<sup>34</sup> counter-piracy authorisations under the law of the sea<sup>35</sup> and the host state’s explicit consent to

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<sup>26</sup> MINUSCA (CAR): S/RES/2149, 10 April 2014; UNISMA (Mali): S/RES/2100, 25 April 2013; MONUSCO (DRC): S/RES/291, 24 February 2000; UNOCI (Ivory Coast): S/RES/1528, 27 February 2004; UNISFA (Abyei Sudan): S/RES/1990, 27 June 2011; MINUSTAH (Haiti): S/RES/1542 30 April 2004, para. 7; S/RES/2070, 12 October 2012; UNIMIL (Liberia): S/RES/1509, 19 September 2003; S/RES/2066, 17 September 2012; UNMIS (Sudan): S/RES/1590, 24 March 2005; UNAMID (Sudan Darfur): S/RES/1769, 31 July 2007.

<sup>27</sup> UNIFIL (Lebanon): S/RES/1701, 11 August 2006; MINURCAT (Central African Republic and Chad): S/RES/1861, 14 January 2009; UNAMSIL (Sierra Leone): S/RES/1270, 22 October 1999; S/RES/1389, 16 January 2002.

<sup>28</sup> AMISOM (Somalia): S/RES/1744, 21 February 2007; MISCA (CAR): S/RES/2127, 5 December 2013; AFISMA (Mali): S/RES/2085, 20 December 2012.

<sup>29</sup> S/RES/1244 (Kosovo), 10 June 1999, paras. 7-9; S/RES/1386 (Afghanistan), 20 December 2001.

<sup>30</sup> Althea (Bosnia and Herzegovina): S/RES/1575, 22 November 2004; Artemis (DRC): S/RES/1484, 30 May 2003.

<sup>31</sup> Atalanta (Somalia): S/RES/1851, 16 December 2008. EU Council Joint Action 2008/851, Article 2(d) (‘take the necessary measures, including the use of force, to deter, prevent and intervene in order to bring to an end acts of piracy and armed robbery’).

<sup>32</sup> S/RES/1483, 22 May 2003; S/RES/1546, 5 June 2004.

<sup>33</sup> Zacklin (2005), *supra* note 26, pp. 95-101. See also more generally: Mollard-Bannelier and Pison (eds.), *Le Recours à la Force Autorisé par le Conseil de Sécurité : Droit et Responsabilité* (Pedone 2014). For this reason, there is no pressing need to discuss in detail the legality of humanitarian interventions (without or in excess of a UN mandate). For an innovative contribution on this matter: Burke, *An Equitable Framework for Humanitarian Intervention* (Hart Publishing 2013).

<sup>34</sup> Knoops, ‘The Transposition of Inter-State Self-Defense and Use of Force onto Operational Mandates for Peace Support Operations’, in: Arnold (ed.), *Law Enforcement within the Framework of Peace Support Operations* (Martinus Nijhoff 2008), 3-21.

<sup>35</sup> Arts. 100-107 and 110 UNCLOS. See also, more generally: Treves, ‘Piracy, Law of the Sea, and Use of Force: Developments of the Coast of Somalia’, 20 (2) EJIL (2009), 399-414; Geiss and Petrig, *Piracy and Armed Robbery at Sea: The Legal Framework for Counter-Piracy Operations in Somalia and the Gulf of*

intervene.<sup>36</sup> As for the latter, this is especially so for the most likely case of actions against recalcitrant non-state armed groups,<sup>37</sup> who in UN jargon are usually referred to as ‘spoilers’ to the local peace process.<sup>38</sup> An illustrative case is Resolution 2098, adopted in March 2013, which set up an Intervention Brigade as part of the UN operation in the Democratic Republic of Congo (MONUSCO) explicitly authorised to:

carry out *targeted offensive operations* ... in a *robust, highly mobile and versatile manner* ... to prevent the expansion of all armed groups, *neutralize these groups*, and to disarm them in order to contribute to the objective of reducing the threat posed by armed groups on state authority and civilian security in eastern DRC and to make space for stabilization activities.<sup>39</sup>

Another passage of the same resolution, however, made clear that the explicit authorisation was only made as an exceptional measure and did not create ‘a precedent or any prejudice to the agreed principles of peacekeeping’.<sup>40</sup>

At the beginning of the Libyan Civil War (2011) between pro-Gaddafi forces and insurgents, the Security Council authorised member states to enforce a no-fly zone over Libya<sup>41</sup> and to take:

all necessary measures ... *to protect civilians and civilian populated areas under threat of attack* in the Libyan Arab Jamahiriya, including Benghazi, while excluding a *foreign occupation* force of any form on any part of Libyan territory ...<sup>42</sup>

This led to an intense air campaign by a NATO-led coalition against Gaddafi forces and has so far been the last example of international forces taking military actions against states with explicit authorisation of the Security Council.<sup>43</sup> The increased relevance of *civilian protection* is a distinguishing feature of the Libya campaign in comparison to the actions taken against Iraq and North Korea, solely motivated by the latters’ aggression against their neighbours. This

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*Aden* (OUP 2011), pp. 55-136.

<sup>36</sup> Fox, ‘Intervention by Invitation’, in: Weller (2015), *supra* note 1, 816-40.

<sup>37</sup> Current, topical examples are: Afghanistan, the DRC, Mali and Somalia.

<sup>38</sup> Capstone Doctrine (2008), *supra* note 9, pp. 34-35.

<sup>39</sup> S/RES/2098 (DRC), 28 March 2013, para. 12 (b), emphasis added.

<sup>40</sup> *Ibid*, para. 9.

<sup>41</sup> S/RES/1973 (Libya), 17 March 2011, paras. 6-8.

<sup>42</sup> *Ibid*, para. 4, emphasis added.

<sup>43</sup> For the Russian claim that NATO acted *ultra vires*: Reuters, ‘NATO war in Libya Violates U.N. Mandate, Russia Says’, 19 April 2011, [www.reuters.com/article/2011/04/19/us-russia-libya-idUSTRE73I26D20110419](http://www.reuters.com/article/2011/04/19/us-russia-libya-idUSTRE73I26D20110419). For a more nuanced analysis: Bassiouni, *Libya: From Repression to Revolution. A Record of Armed Conflict and International Law Violations, 2011-2013* (Martinus Nijhoff 2013), pp. 223-30 (considering NATO strikes on military installations in Tripolis – far away from the frontline – and later against Gaddafi’s last stronghold around the city of Sirte at variance with S/RES/1973).

shows the once clear boundary between peacekeeping and enforcement has become ever more blurred.

Chapter VII authorisations give a great deal of flexibility to the relevant missions, but overall the use of force is limited by the terms of the mandate, including time and location, and the principle of necessity and proportionality.<sup>44</sup> Nevertheless, the mandates as such and the *jus ad bellum* as a whole, do not provide any guidance as to when and how force may be used against individuals. These questions are rather matters of human rights law and humanitarian law,<sup>45</sup> to which many of the more recent mandates explicitly refer.<sup>46</sup>

## 2.3 COMMAND AND CONTROL, AND INTERNATIONAL RESPONSIBILITY

### COMMAND-AND-CONTROL ARRANGEMENTS

Peace operations are either carried out directly by the United Nations or by a coalition of the willing, usually under the command of a regional organisation, such as NATO and the European Union. In addition, some operations, so-called hybrid missions, are run by two organisations together, such as UNAMID in Darfur, which is under the joint command of the United Nations and the African Union. As outlined above, command can also shift from one organisation to another; and it is also possible that two or more operations under different mandates and commands are deployed in the same area and cooperate closely.

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<sup>44</sup> Okimoto, *The Distinction and Relationship between Jus ad Bellum and Jus in Bello* (Hart 2011), pp. 173-83.

<sup>45</sup> It is for the same reason that the so-called ‘naked self-defence’ doctrine fails to provide sufficient guidance for lethal targeting operations against individuals, as claimed by the US administration: Harold Hongju Koh (US DoS Legal Adviser), ‘The Obama Administration and International Law’, Speech at the Annual ASIL Meeting, Washington DC, 25 March 2010, [www.state.gov/s/l/releases/remarks/139119.htm](http://www.state.gov/s/l/releases/remarks/139119.htm) (‘a state that is engaged in an armed conflict *or in legitimate self-defense* is not required to provide targets with legal process before the state may use lethal force’, emphasis added).

<sup>46</sup> For instance: S/RES/2246 (Somalia), 10 November 2015, para. 7 (‘measures undertaken pursuant to this paragraph shall be consistent with applicable international law, in particular international human rights law’); S/RES/2164 (Mali), 25 June 2014, para. 29 (‘calls upon MINUSMA ... to abide by international humanitarian, human rights and refugee law’); S/RES/2085 (Mali), 20 December 2012, para. 9 (‘take all necessary measures, in compliance with applicable international humanitarian law and human rights law’); S/RES/2073 (Somalia), 7 November 2012, para. 1 (‘take all necessary measures, in compliance with applicable international humanitarian and human rights law’).

One of the main challenges for the United Nations and regional organisations is that they do not possess their own armed forces. While they could potentially recruit their own troops in a similar way as their civilian staff members, this option has to date never been used by any organisation. Instead, these organisations have been relying on troop contributions from their member states. Articles 43 and 47 of the UN Charter were designated to regulate the acquisition and command of UN troops on a standby basis, but this legal mechanism never materialised. Instead, the Security Council has been depending on *ad hoc* measures from troop-contributing states to set up their operations.<sup>47</sup> The picture is the same for regional organisations, although there have been some attempts towards standby arrangements.<sup>48</sup>

When sending states contribute their troops, they place them at the disposal of the organisation or the lead nation in command. However, they usually delegate only ‘operational command’ or ‘operational control’ to the mission commander in question, which in military terminology means the authority to deploy, direct and command the forces for the accomplishment of the specific mission.<sup>49</sup> In other words, when contributing troops to operations commanded by the United Nations or by regional organisations, states almost never relinquish ‘full command’ over their troops.<sup>50</sup> They continue to exercise administrative and disciplinary authority – the most effective means for commanding military forces – as well as criminal jurisdiction over them. The command and control arrangements are further complicated by specific caveats that individual states may enter, thereby restricting the use of certain equipment or measures by their national contingents. Moreover, there are also cases – especially in UN-led operations – in which the chain of command existing within the operation is bypassed by the instructions of the national authorities to their respective contingents in the field,<sup>51</sup> which further undermines the effectiveness of unified command within the operation.

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<sup>47</sup> Zwanenburg, *Accountability of Peace Support Operations* (Martinus Nijhoff 2005), p. 35.

<sup>48</sup> For instance, the NATO Response Force, EU Battlegroups and the AU Standby Force.

<sup>49</sup> For the different definitions used by the UN and NATO: UN Department of Peacekeeping Operations and Department of Field Support, *Authority, Command and Control in UN Peacekeeping Operations*, 15 February 2008, Ref. 2008.4, p. 4; NATO Standardisation Agency (NSA), *NATO Glossary of Terms and Definitions*, AAP-06, 2013, p. 2-O-3.

<sup>50</sup> Cathcart, ‘Command and Control in Military Operations’ in: Gill and Fleck (eds.), *The Handbook of the International Law of Military Operations* (OUP 2010), 235-44, p. 235; Cammart and Klappe, ‘Authority, Command, and Control in United Nations-led Peace Operations’, in: Gill and Fleck (2010), *ibid*, 159-62, p. 159; Murphy, *UN Peacekeeping in Lebanon, Somalia and Kosovo. Operational and Legal Issues in Practice* (CUP 2007), p. 115-34.

<sup>51</sup> Zwanenburg (2005), *supra* note 47, pp. 37-41.

## ATTRIBUTION AND RESPONSIBILITY

The command and control arrangements pertaining to peace operations have a direct impact on the responsibility of the relevant states and international organisations involved, which is ultimately of relevance for the question as to whose obligations are engaged by the actions of the peace operation: the obligations of the individual states, the relevant international organisation or even both?

In addition to states, whose legal personality is beyond doubt, international organisations are generally considered to have an international legal personality distinct from their member states, for the purpose of carrying out their functions. Hence, they are capable of having rights and obligations under international law.<sup>52</sup> The International Law Commission considered the issue of responsibility for several decades and finally adopted its Articles on State Responsibility (ASR) in 2001 and its Articles on the Responsibility of International Organisations (ARIO) in 2011, respectively.<sup>53</sup> While not necessarily binding in the strict sense, they constitute an authoritative clarification of the responsibility of states and international organisations.<sup>54</sup>

As a general rule, states and international organisations incur responsibility under international law for wrongful conduct that is *attributable* to them.<sup>55</sup> This is most evidently the case in relation to acts and omissions of their own organs, as suggested by Articles 4 ARS and 6 ARIO, respectively.<sup>56</sup> As far as UN-led operations are concerned, they are subsidiary bodies of the

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<sup>52</sup> ICJ, *Reparations* (1949), *infra* note 129, p. 179. See also: Art. 2 (a) ARIO, *infra* (“‘International organization’ means an organization established by a treaty or other instrument governed by international law and possessing its own international legal personality. International organizations may include as members, in addition to States, other entities”).

<sup>53</sup> Usually both collections are referred to as ILC ‘draft articles’ (DARS and DARIO, respectively). However, having been endorsed by the UN GA (see *infra* note 54), it is more appropriate to use the term ‘articles’ instead. ILC, ‘Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries, Report of the International Law Commission’, Fifty-third session 2001, UN Doc. A/56/10, hereinafter: ARS with Commentaries. ILC, ‘Draft Articles on the Responsibility of International Organizations, with commentaries, Report of the International Law Commission’, Sixty-third session (26 April - 3 June and 4 July - 12 August 2011), UN Doc. A/66/10, hereinafter: ARIO with Commentaries.

<sup>54</sup> Both have been endorsed by the UN General Assembly: A/RES/56/83, 28 January 2002, para. 3 (‘Takes note of the articles on responsibility of States for internationally wrongful acts ... and commends them to the attention of Governments without prejudice to the question of their future adoption or other appropriate action’). A/RES/66/100, 27 February 2012, para. 3 (‘Takes note of the articles on the responsibility of international organizations ... and commends them to the attention of Governments and international organizations without prejudice to the question of their future adoption or other appropriate action’).

<sup>55</sup> Art. 3 ARS and Art. 4 ARIO, respectively.

<sup>56</sup> Art. 4 (1) ARS (‘The conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organization of the State, and whatever its character as an organ of the central Government or of a territorial unit of the State’); Art. 6 (1) ARIO (‘The conduct of an organ or agent of an international

UN Security Council and placed under the authority of the UN Secretary-General. Operations under the command of regional organisations follow the same pattern and usually become an organ within the institutional setting of the organisation in question.

However, as we have seen above, the national contingents of which the operations consist do not necessarily cease to be organs of their states. Indeed, in view of the complex command arrangements in multinational military operations, Article 7 of ARIO (2011) provides for a factual test:

The conduct of an organ of a State or an organ or agent of an international organization that is placed at the disposal of another international organization shall be considered under international law an act of the latter organization *if the organization exercises effective control over that conduct*.<sup>57</sup>

Thus, where the United Nations or a regional organisation exercises effective control over the relevant conduct, the latter is attributable to that international organisation. Conversely, the conduct can be attributed to the sending state if its troops acted under its effective control, for instance, by following instructions from their national command. The same test applies to the question of attribution when a national contingent is put at the disposal of a lead nation instead of an international organisation. Indeed, in order to be attributable to the receiving state, the ARS Commentaries require that such contingent act:

in conjunction with the machinery of that State and *under its exclusive direction and control*, rather than on instructions from the sending State.<sup>58</sup>

Yet, practice has not always been consistent with this test. For instance, in response to the works of the International Law Commission, the UN Office for Legal Affairs maintained that:

[F]orces placed at the disposal of the United Nations are “transformed” into a United Nations *subsidiary organ* and, as such, entail the responsibility of the Organization, just like any other subsidiary organ, regardless of whether the control exercised over all aspects of the operation was, in fact, “effective”. ... Mindful of the realities of peacekeeping operations but keen to maintain the integrity of the United Nations operation vis-à-vis third parties, the United Nations has struck a balance, whereby it remains responsible vis-à-vis third parties, but reserves the right in cases of gross negligence or wilful misconduct to revert to the lending State.<sup>59</sup>

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organization in the performance of functions of that organ or agent shall be considered an act of that organization under international law, whatever position the organ or agent holds in respect of the organization’).

<sup>57</sup> Emphasis added.

<sup>58</sup> ARS Commentaries, commentary to Art. 6 ARS (Conduct of Organs Placed at the Disposal of a State by Another State), p. 44, para. 2, emphasis added.

<sup>59</sup> ILC, ‘Responsibility of International Organizations: Comments and Observations Received from International Organizations’, 17 February 2011, UN Doc. A/CN.4/637/Add.1, pp. 13-14.

Thus in defiance of the factual test suggested by the International Law Commission, the United Nations seems to rely in principle on the attribution of UN peace operations as a whole. The same statement made, however, clear that this practice is mainly driven by political considerations and that the Secretariat indeed supported the inclusion of the ‘effective control’ test as a general guiding principle in the determination of responsibilities between the United Nations and the relevant state.<sup>60</sup>

The European Court of Human Rights developed its own test in *Behrami and Saramati* (2007), involving the actions and omissions of international forces in Kosovo. Based on the fact that KFOR was acting pursuant to a Chapter VII resolution, the Court held that the UN Security Council exercised ‘ultimate authority and control’ and thus attributed KFOR’s conduct to the United Nations.<sup>61</sup> Unlike UNMIK, however, KFOR is neither a subsidiary body of the organisation, nor has it ever been placed under the command of the United Nations. Instead, KFOR carries out the tasks entrusted to it by the Security Council under unified command of NATO. The Court’s decision has drawn strong criticism among scholars for confusing the delegation of powers with the issue of attribution.<sup>62</sup> Moreover, it has also been criticised by the UN Secretariat<sup>63</sup> and the International Law Commission.<sup>64</sup> But in the *Al-Jedda* case, concerning detention by British forces in post-occupation Iraq, the Court followed the view of the House of Lords<sup>65</sup> and distinguished the situation from the case of Kosovo.<sup>66</sup> Moreover, in the more recent

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<sup>60</sup> Ibid, p. 14.

<sup>61</sup> ECtHR, *Behrami v. France & Saramati v. Norway*, Decision, 2 May 2007, Application nos. 71412/01 and 78166/01, paras. 133-41.

<sup>62</sup> Milanović and Papić, ‘As Bad as It Gets: The European Court of Human Rights *Behrami* and *Saramati* Decision and General International Law’, 58 *International and Comparative Law Quarterly* (2009), 267-96, pp. 283-86; Mujezinović Larsen, ‘Attribution of Conduct in Peace Operations: The “Ultimate Authority and Control” Test’, 19 (3) *EJIL* (2008), 509-31; Krieger, ‘A Credibility Gap: The *Behrami* and *Saramati* Decision of the European Court of Human Rights’, 13 *Journal of International Peacekeeping* (2009), 159-80.

<sup>63</sup> ILC, *Comments and Observations Received from International Organizations* (2011), *supra* note 59, p. 12.

<sup>64</sup> ILC, Giorgio Gaja, ‘Seventh Report on Responsibility of International Organizations’, 27 March 2009, UN Doc. A/CN.4/610, pp. 10-12.

<sup>65</sup> UKHL, *Al-Jedda v. Secretary of State for Defence*, Opinions of the Lords, 12 December 2007, UKHL 58, paras. 22-24, 124, 131, 141-149. See also: UK EWHC, *Serdar Mohammed v. Ministry of Defence*, 2 May 2014, 1369 (QB), paras. 171-78 (considering the ‘ultimate authority and control’ test but distinguishing the facts in Afghanistan from those in Kosovo).

<sup>66</sup> ECtHR, *Al-Jedda v. United Kingdom*, Judgement, 7 July 2011, Application no. 27021/08, para. 56. The ECtHR maintained its verdict in only a few closely-related cases from Kosovo and Bosnia: ECtHR, *Kasumaj v. Greece*, Decision, 5 July 2007, Application no. 6974/05; ECtHR, *Gajić v. Germany*, Decision, 28 August 2007, Application no. 31446/02; ECtHR, *Berić v. Bosnia and Herzegovina*, Decision, 16 October 2007, Application nos. 36357/04 et al.

case of *Jaloud v. Netherlands* (2014), the Court dropped its reference to the ‘ultimate authority and control’ test altogether.<sup>67</sup>

What is more, the European Court had stopped its analysis in *Behrami and Saramati* once it had concluded that KFOR’s actions were attributable to the United Nations. It thus failed to consider the possible concurrent responsibility of NATO or the individual troop-contributing states. In its more recent case-law, however, the Court no longer rules out the possibility of dual or multiple attributions to other states and international organisations.<sup>68</sup> British and Dutch courts have also raised this possibility, but without considering it necessary to assess whether concurrent responsibility did in fact arise in the cases under review.<sup>69</sup> Also the International Law Commission refers to dual and multiple attribution, but says that it does ‘not frequently occur in practice’:

Thus, attribution of a certain conduct to an international organization does not imply that the same conduct cannot be attributed to a State; nor does attribution of conduct to a State rule out attribution of the same conduct to an international organization. One could also envisage conduct being simultaneously attributed to two or more international organizations, for instance when they establish a joint organ and act through that organ.<sup>70</sup>

A case in point is UNAMID, the hybrid mission in Darfur, jointly commanded by the United Nations and the African Union. This special case aside, it is rather unlikely that the attribution question can be answered for a peace operation *en bloque*. Instead, the assessment needs to be made on a case-by-case basis for each individual action or omission, regardless of whether they arise at the strategic, operational, or tactical level.<sup>71</sup> This is also evident in the recent jurisprudence of the European Court and national courts, which have engaged in a detailed analysis of

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<sup>67</sup> ECtHR, *Jaloud v. Netherlands*, Judgement, 20 November 2014, Application no. 47708/08.

<sup>68</sup> For instance, ECtHR, *Al-Jedda v. United Kingdom* (2011), *supra* note 66, para. 80; ECtHR, *Jaloud v. Netherlands* (2014), *supra* note 67, para. 153; ECtHR, *Hassan v. United Kingdom*, Judgement, 16 September 2014, Application no. 29750/09, para. 78 (albeit less explicit).

<sup>69</sup> UK EWHC, *Serdar Mohammed v. Ministry of Defence* (2014), *supra* note 65, para. 187 (deeming it unnecessary to consider the possibility of joint responsibility of ISAF i.e. NATO and the UN). Confirmed on appeal: UK EWCA, *Serdar Mohammed et al. v. Ministry of Defence*, Judgment, 30 July 2015, EWCA Civ 843, para. 72. Hague Appeals Court, *Mustafić-Mujić & Nuhanović* (2011), *infra* note 81, para. 5.9. Confirmed on appeal: Supreme Court of the Netherlands, *Mustafić-Mujić & Nuhanović* (2013), *infra* note 85, para. 3.11.2. Also maintained in: Hague District Court, *Mothers of Srebrenica* (2014), *infra* note 86, para. 4.34.

<sup>70</sup> ARIO Commentaries (2011), *supra* note 53, p. 16, para. 4, emphasis added. See also: ARS Commentaries (2001), *supra* note 53, p. 44, para. 3 (‘Situations can also arise where the organ of one State acts on the joint instructions of its own and another State, or there may be a single entity which is a joint organ of several States. In these cases, the conduct in question is attributable to both States’).

<sup>71</sup> Within NATO, for instance, target lists are usually approved at the highest level, i.e. by consensus among all NATO members represented in the North Atlantic Council, upon the recommendation of the Military Committee: [http://www.nato.int/cps/en/natolive/topics\\_49633.htm](http://www.nato.int/cps/en/natolive/topics_49633.htm) (‘In times of crises, tension or war, and

the factual circumstances in order to attribute the *specific* acts raised by the case in question, rather than the totality of the peace operation's acts *as a whole*.<sup>72</sup> Moreover, each action may be further divided into different sub-elements, which may possibly yield different results on attribution.<sup>73</sup> In other words, the more limited the conduct in question, the more likely its attribution to only one entity. Hence, wherever it is possible to identify distinct rather than overlapping areas of control, multiple attribution of the same conduct (or sub-element thereof) will be rather the exception than the norm. This may explain the reluctance of the International Law Commission and some academics to accept multiple attribution as the solution for apportioning responsibility in complex peace operations.<sup>74</sup>

Despite the broad acceptance of the 'effective control' test for the purpose of attribution, the International Law Commission does not provide a precise definition of 'effective control' and its constitutive elements.<sup>75</sup> According to James Crawford, the 'essential ambiguity of the term' was somewhat intended, coupled with the hope that its application would prove feasible in actual practice.<sup>76</sup> The ARIO Commentaries, however, acknowledge that retention of competences by the sending state for criminal and disciplinary matters is one of those cases.<sup>77</sup> Moreover, the detailed account of state practice and jurisprudence to which they refer shows that

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in relation to military operations undertaken by the Alliance ... [the Military Committee] advises the Council of the military situation and its implications, and makes recommendations on the use of military force, the implementation of contingency plans and the development of appropriate rules of engagement'). On the other end of the spectrum are those acts, usually occurring at the strategic level, that were either not taken pursuant to instructions from higher command levels or are even in clear violation of the latter.

<sup>72</sup> See, for instance, ECtHR, *Al-Jedda v. United Kingdom* (2011), *supra* note 66 (in relation to the detention of Mr. Al-Jedda); ECtHR, *Jaloud v. Netherlands* (2014), *supra* note 67, para. 147-51 (in relation to the use of force by Dutch soldiers in the specific area). See also: UK EWHC, *Serdar Mohammed v. Ministry of Defence* (2014), *supra* note 65, paras. 188-87 (in relation to detention by British forces in Afghanistan).

<sup>73</sup> See, in particular, the step-by-step assessment as to who was in effective control of a number of very different, specific acts and omissions at different points in time before and after the fall of Srebrenica: Hague District Court, *Mothers of Srebrenica* (2014), *infra* note 86, paras. 4.32-4.144 (concluding that only some of the acts and omissions were attributable to the Netherlands).

<sup>74</sup> Spijkers, 'The Netherlands' and the United Nations' Legal Responsibility for Srebrenica Before the Dutch Courts', 50 *Military Law and the Law of War Review* (2011), 517-34, pp. 528-29. Tsagourias, 'The Responsibility of International Organisations for Military Missions', in: Odello and Piotrowicz (eds.), *International Military Missions and International Law* (Martinus Nijhoff Publishers 2011), 245-66, pp. 253-60.

<sup>75</sup> Crawford, *State Responsibility. The General Part* (CUP 2013), pp. 203 ('Effective control' appeared first as a test of attribution in the Nicaragua case, and was influential in the drafting of ARSIWA Article 8. It was further elaborated on by the International Court in Bosnian Genocide. In describing the test of 'effective control' as it appears in DARIO Article 7, however, the ILC gave no indication as to the extent of the debt owed to these decisions').

<sup>76</sup> *Ibid.*, p. 205, footnote text.

<sup>77</sup> ARIO Commentaries (2011), *supra* note 53, p. 21, para. 7.

whenever national contingents act outside the usual chain of command, their conduct is attributable to the state in question rather than to the organisation.<sup>78</sup> It is therefore the actual authority over the specific conduct that needs to be assessed in each particular case.

Specifically insightful are the decisions of courts in Belgium and the Netherlands. In *Mukeshimana-Ngulinzira v. Belgium*,<sup>79</sup> the Brussels Court of First Instance had to assess whether the acts of the Belgian contingent to UNAMIR, the UN-led peacekeeping mission in Rwanda, were attributable to Belgium. In April 1994, at the beginning of the Rwandan Genocide, Belgian troops evacuated from their compound, where 2,000 Tutsis and moderate Hutus had sought refuge, thus leaving them unprotected against *Interhamwe* militiamen, who killed most of them shortly afterwards. The court concluded that the decision to evacuate was made by the Belgian contingent in close cooperation with the Belgian army's chiefs of staff and without consulting the UNAMIR force commander.<sup>80</sup> Similar questions had to be addressed by courts in the Netherlands in relation to the acts and omissions of the Dutch UNPROFOR contingent during the Srebrenica massacre in summer 1995. The Hague District Court in *Mustafić-Mujić & Nuhanović* found that the Dutch battalion had remained within the UN chain of command, making their actions thus only imputable to the United Nations. The Appeals Court, however, attributed the conduct to the Netherlands.<sup>81</sup> For the 'effective control' assessment, the Appeals Court held, particular attention should be given:

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.<sup>82</sup>

Hence, in the view of the court, the concept of 'effective control' also encompasses the *ability to prevent* misconduct, following the definition previously suggested by Tom Dannenbaum.<sup>83</sup> It is, however, unclear whether it was really necessary for the court to adopt such a broad con-

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<sup>78</sup> Ibid, p. 22, para. 8.

<sup>79</sup> Brussels Court of First Instance, *Mukeshimana and Others v. Belgian State and Others*, Interim Judgement, 8 December 2010, Case nos. RG 04/4807/A and 07/15547/A,

<sup>80</sup> Ibid, para. 38.

<sup>81</sup> Hague Appeals Court, *Mustafić-Mujić et al. v. Netherlands & Nuhanović v. Netherlands*, Judgement, 5 July 2011, Case nos. 200.020.173/01 and 200.020.174/01, para. 5.20 (in relation to the eviction of the victims from their compound).

<sup>82</sup> Ibid, para. 5.9, emphasis added.

<sup>83</sup> Dannenbaum, 'Translating the Standard of Effective Control into a System of Effective Accountability: How Liability Should Be Apportioned for Violations of Human Rights by Member State Troops Contingents as United Nations Peacekeepers', 51 *Harvard International Law Review* (2010), 113-192, pp. 157-92 ('control most likely to be effective in preventing the wrong in question').

cept of ‘effective control’, as it was able to clearly show on the basis of the facts that the evacuation of the refugees and the Dutch battalion from its compound in Srebrenica was carried out pursuant to decisions and instructions received from the Dutch government.<sup>84</sup>

The broadened concept of ‘effective control’, covering also the *ability to prevent* misconduct, was also upheld by the Dutch Supreme Court,<sup>85</sup> and subsequently applied in the related *Mothers of Srebrenica* case (2014).<sup>86</sup> Also here, however, it played no decisive role in the actual assessment of the facts, on the basis of which the court concluded that a number of Dutchbat acts and omissions after the fall of Srebrenica were indeed attributable to the Netherlands.<sup>87</sup> It is therefore unclear how much credit should be given to this broad ‘effective control’ concept. Indeed, the International Law Commission has so far refrained from endorsing it.<sup>88</sup> The verdict in academic circles on this broader concept of ‘effective control’, covering also the *ability to prevent* misconduct, has also been rather mixed,<sup>89</sup> with only few commentators expressing explicit support.<sup>90</sup> James Crawford sees in it a welcome step forward in securing a more effective regime of accountability for peace operations, but he cautions that it has the potential of:

making the distinction between the state and organization in terms of attribution – long maintained by the UN as an article of faith – effectively meaningless.<sup>91</sup>

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<sup>84</sup> Ibid, paras. 5.11-19.

<sup>85</sup> Supreme Court of the Netherlands, *Mustafić-Mujić et al. v. Netherlands & Nuhanović v. Netherlands*, Judgement, 6 September 2013, para. 3.12.2.

<sup>86</sup> Hague District Court, *Mothers of Srebrenica v. The Netherlands*, Judgement, 16 July 2014, Case no. C/09/295247, para. 4.46.

<sup>87</sup> Ibid, paras. 4.61-4.144.

<sup>88</sup> Indeed, the ILC only referred to it in a footnote, while reserving its opinion on the merit of this broad ‘effective control’ concept. ARIO Commentaries (2011), *supra* note 53, p. 25, para. 14. For an interesting account of the discussions on the matter: Crawford (2013), *supra* note 75, pp. 205-206 (‘Towards the end of the ILC’s consideration of the issue, questions emerged as to whether actual, positive control over the particular act (i.e. the giving of direct instructions) was required in order for attribution to occur, or whether the capacity to exercise control combined with a failure to prevent a particular act from taking place could be sufficient. Such comments were driven in large part by a *desire to ensure* that the law of responsibility for states and organizations constituted an *effective regime of accountability*’, emphasis added).

<sup>89</sup> Ryngaert, ‘Apportioning Responsibility between the UN and Member States in UN Peace Support Operations: An Inquiry into the Application of the ‘Effective Control’ Standard after Behrami’, 45 (1) *Israel Law Review* (2012), 151-78, pp. 173-74 (referring to the ‘power to prevent’ addition, but not explicitly discussing its merit *de lege lata* or *de lege ferenda*). Remaining silent on the ‘power to prevent’ aspect introduced by the *Nuhanović* case: Mujezinović Larsen (2012), *infra* note 185, pp. 143-44; Spijkers (2011), *supra* note 74, pp. 527-29.

<sup>90</sup> For instance: Direk, *Security Detention in International Territorial Administrations: Kosovo, East Timor, and Iraq* (Brill 2015), pp. 39-40; Boutin, ‘Responsibility of the Netherlands for the Acts of Dutchbat in Nuhanović and Mustafić: The Continuous Quest for a Tangible Meaning for ‘Effective Control’ in the Context of Peacekeeping’, 25 (2) *LJIL* (2012), 521-35, p. 529.

<sup>91</sup> Crawford (2013), *supra* note 75, p. 210. Indeed, the ‘power to prevent’ concept would mean for virtually all acts and omissions of peace operations to be attributable both to the sending states and to the international organisation involved. It would also create a similar duty for international organisations (e.g. UN or

Indeed, the characteristic retention of criminal and disciplinary jurisdiction by the sending state and right to request its troops' withdrawal from the mission at any time means that the state has virtually always the *power to prevent* acts or omissions by its troops. In view of this, it appears more reasonable to reject this broad concept and to base the attribution test instead on the traditional understanding of effective control: the question of who gave the direct order or instruction for the specific conduct.

There is certainly a significant overlap between the responsibility of states for conduct duly attributable to them and the issue of ancillary responsibility that states may incur by virtue of the acts of an international organisation,<sup>92</sup> including as a result of their membership in that organisation.<sup>93</sup> Its relevance for peace missions and other international military deployment has attracted a significant degree of scholarly attention. But, for the sake of brevity, it is fair to conclude that it is highly unlikely for a state to incur any considerable degree of responsibility for the acts of an international organisation of which it is a member in relation to military operations conducted abroad.<sup>94</sup> In view of the discussion on the application of humanitarian law and human rights law in the following chapters,<sup>95</sup> it should also be recalled that the application of both regimes is subject to certain threshold requirements: whether the entity in question is a party to an armed conflict or an occupying power, or whether it exercises jurisdiction, respectively. In relation to a state, the assessment can only be made on the basis of conduct that is duly attributable to it; ancillary responsibility of the state arising from the acts of an international organisation is simply not enough in order to meet the threshold requirements.<sup>96</sup>

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the relevant regional organisation) to take measures to prevent wrongful conduct by state armed forces with whom they operate.

<sup>92</sup> Ibid, p. 211 (acknowledging some practical overlap between the attribution of state conduct and ancillary state responsibility in relation to IO activities, despite the conceptual differences between both legal concepts).

<sup>93</sup> See, in particular: Art. 61 ARIIO (member state circumventing its own obligations by acting through IO) and Art. 62 ARIIO (member state accepting responsibility or having led the injured party to rely on its responsibility). See also: Art. 58 ARIIO (aid or assistance by a non-member state in the IO's commission of the wrongful act) and Art. 59 ARIIO (direction and control by a non-member over the IO's commission of the wrongful act). For a more detailed discussion of these articles and their merit *de lege lata* or *de lege ferenda*: Crawford (2013), *supra* note 75, pp. 395-434.

<sup>94</sup> Mujezinović Larsen (2012), *infra* note 185, pp. 156-64. For an excellent discussion on this issue in relation to the EU: 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* (Intersentia 2010), pp. 435-52 (on the secondary responsibility of member states for delegating powers without equivalent protection guarantees and for their conduct within the framework of that organisation), and pp. 506-14 (on IHL) and pp. 641-44 (on HRL).

<sup>95</sup> Chapters 3 and 4, respectively.

<sup>96</sup> The special duty under CA1 to ensure respect for IHL in all circumstances is often addressed in conjunction with the issue of attribution. However, CA1 concerns a substantive rule of IHL applicable to states (even to those not party to an armed conflict). Its effect will therefore be discussed in the following section below, from p. 45.

## CONCLUSION

The exercise of ‘effective control’ over specific acts and omissions is the appropriate yardstick for identifying areas of responsibility of states and international organisations involved in peace operations.<sup>97</sup> The detailed command and control arrangements considered above will usually be of help in order to provide an answer to the critical question: who gave the direct order or instruction for the specific conduct. While dual or multiple attribution – that is, attribution of the same act to two or more entities – cannot be excluded, it is rather the exception than the norm. Instead, a specific act or its different sub-elements will usually only be attributable to one entity. Taken together, however, the totality of all acts and omissions of the peace operation will typically engage the responsibility of a great number of actors. The picture is therefore very similar to a *mosaic*, where the different sets of coloured pieces represent those acts and omissions attributable to a specific entity, which may be one of the troop-contributing states or instead the relevant organisation. In more abstract terms, the states and the organisation do indeed *share* the responsibility for the peace operation, but *only* as a total sum of all specific individual acts, which will usually yield very different results on attribution.

## 2.4 OBLIGATIONS UNDER HUMANITARIAN LAW AND HUMAN RIGHTS LAW

Peace operations are authorised under increasingly robust mandates to take measures in their area of deployment. In addition, their mandates often require them to comply with human rights and humanitarian law. As the discussion in the previous section showed, the actions of peace operations may engage the responsibility of the sending states as well as the relevant organisation. It is therefore apt to consider in more detail the different obligations of states in both fields of law. Moreover, states have – at least as a matter of legal policy – a strong interest in ensuring that international organisations have similar obligations under human rights law and humanitarian law. This section will therefore specifically consider the source and the extent to which international organisations have genuine obligations under both legal regimes.

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<sup>97</sup> Note here that ‘effective control’ for the purpose of attribution is distinct from ‘effective control’ as a threshold requirement for the application of IHL (i.e. effective control over territory as an essential requirement of military occupations) and human rights law (i.e. effective control over territory or persons), which will be addressed in Chapters 3 and 4, respectively.

## OBLIGATIONS OF STATES

States remain undoubtedly the most important subjects of international law and are thus the primary addressees of the different legal sources of international law listed in Article 38 of the ICJ Statute.<sup>98</sup> This section will therefore first outline the different treaty law obligations of states before moving to other possible sources of obligations under human rights and humanitarian law.<sup>99</sup>

### Treaty Law

All states have become a party to the four Geneva Conventions (1949) and the vast majority of them have also ratified the two Additional Protocols (1977). However, some major contributors to international military operations are not party to the protocols, including India, Indonesia, Nepal, Turkey and the United States. Also the ratification of specific treaties on cultural property and weapons, including on anti-personnel mines and cluster munitions,<sup>100</sup> varies greatly from country to country.

The picture is even more fragmented in the field of human rights law. The vast majority of them are party to the International Covenant on Civil and Political Rights (1966)<sup>101</sup> as well as to other universal human rights treaties.<sup>102</sup> In addition, regional human rights systems have emerged with their own general human rights instruments, namely: the American Declaration on the

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<sup>98</sup> The sources explicitly listed under Art. 38 ICJ Statute are: (a) international conventions (i.e. treaties); (b) international custom, as evidence of a general practice accepted as law; (c) the general principles of law recognized by civilized nations; and (d) judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

<sup>99</sup> Note that unilateral acts by states are also capable of creating legally binding obligations for them, even though they are not specifically mentioned in Art. 38 ICJ Statute. See in particular: ILC, *Guiding Principles Applicable to Unilateral Declarations of States Capable of Creating Legal Obligations*, With Commentaries Thereon, 2 YILC (2006), p. 369-81. However, Hugh Thirlway sees the legal relevance of unilateral acts in the form of 'inchoate treaties': Thirlway, *The Sources of International Law* (OUP 2014), pp. 20-23. For the sake of brevity, the legal effects of unilateral acts will not be specifically discussed for the purpose of state obligations under IHL and HRL.

<sup>100</sup> Anti-Personnel Mine Ban Convention (1997) with 162 state parties; and the Convention on Cluster Munitions (2008) with 98 state parties. For a brief discussion on the challenges arising from coalition warfare see the section on inter-operationality and legal challenges further below, from p. 43.

<sup>101</sup> Prominent exceptions are: People's Republic of China, Fiji, Malaysia and Saudi Arabia.

<sup>102</sup> In particular, Convention against Torture (CAT) and those conventions dealing with economic, social and cultural rights, as well as rights of specifically (vulnerable) groups, such as children, women and persons with disabilities.

Rights and Duties of Man (1948)<sup>103</sup> and the American Convention on Human Rights (1969),<sup>104</sup> the European Convention on Human Rights (1950),<sup>105</sup> the African Charter on Human and Peoples' Rights (1981),<sup>106</sup> the CIS Convention on Human Rights and Fundamental Freedoms (1995),<sup>107</sup> and the Arab Charter on Human Rights (2004).<sup>108</sup> While they often differ as to the exact rights listed and their specific scope, they nevertheless share a relatively large core of rights.

## General International Law

In addition to the complex framework of treaty obligations, states are also bound by general international law. In line with the approach used in other academic treatises, the term 'general international law' refers here primarily to international customary law and general principles.<sup>109</sup> General principles are not only limited to those principles deriving from the domestic legal orders of states, to which Article 38 of the ICJ Statute refers, but also to general principles of international law, which may also derive from widely ratified multilateral treaties and general international practice.<sup>110</sup> There is therefore a high level of cross-fertilisation between general principles and customary law. Traditionally, a norm may only assume customary status if there is sufficiently wide practice and *opinio juris* to that effect. However, in the absence of clear and consistent state practice, a stronger emphasis is put on *opinio juris* expressed by states in international *fora*. Under this, more modern concept of custom evolution, state practice is either equated to *opinio juris* or plays a rather marginal role in identifying a customary norm.<sup>111</sup>

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<sup>103</sup> On the binding nature of the ADRDM, especially relevant for states not party to the ACHR: Cerna, 'Reflections on the Normative Status of the American Declaration of the Rights and Duties of Man', 30 (4) University of Pennsylvania Journal of International Law (2009), 1211-38.

<sup>104</sup> Twenty-three state parties from Latin-America.

<sup>105</sup> Forty-seven state parties from Europe, with the exception of Belarus and the Holy See.

<sup>106</sup> Parties are: all African states, with the exception of Morocco and South Sudan.

<sup>107</sup> Parties are: Russia, Belarus, Tajikistan and Kyrgyzstan.

<sup>108</sup> Parties are: Algeria, Bahrain, Iraq, Jordan, Kuwait, Lebanon, Libya, Palestine, Qatar, Saudi Arabia, Sudan, Syria, United Arab Emirates and Yemen

<sup>109</sup> Kamminga and Scheinin (eds.), *The Impact of Human Rights Law on General International Law* (OUP 2009), in particular, the following chapter: Wouters and Ryngaert, 'Impact on the Process of the Formation of Customary International Law', 111-132. In a very similar way: Rodley, *The Treatment of Prisoners under International Law* (3<sup>rd</sup> edn., OUP 2009), pp. 64-81 (being even more inclusive by extending it to cover also other, more subsidiary sources); Naert (2010), *supra* note 94, p. 5.

<sup>110</sup> Wouters and Ryngaert (2009), *ibid*, p. 119.

<sup>111</sup> Wouters and Ryngaert (2009), *ibid*, pp. 114-17.

On the basis of this approach, customary law has gained a particularly important role in the field of humanitarian law. The ICRC's *Customary IHL Study* (2005) brought some important clarification,<sup>112</sup> as it was long unclear which humanitarian law rules actually constitute customary law.<sup>113</sup> Despite some criticism,<sup>114</sup> the Study is widely accepted and has been cited by national courts.<sup>115</sup> It identifies 161 customary rules of humanitarian law, which reflect a great number of the provisions enshrined in the Geneva Conventions (1949), the Additional Protocols (1977) and more specific treaties. Most importantly, the Study considers the vast majority of these rules applicable also in non-international armed conflicts. A more cautious account of applicable customary rules is provided by the drafters of the *Sanremo Manual of the Law of Non-International Armed Conflict* (2006),<sup>116</sup> which nonetheless confirms the trend that most rules of the law of international armed conflict apply equally in non-international armed conflicts. Hence, customary law proves to be of utmost importance for this particular type of armed conflict. Moreover, it also levels quite significantly the differences that exist between those states that have ratified Additional Protocol I and other relevant treaties and those states that have not yet become a party.<sup>117</sup>

By contrast, there is no equally authoritative study on human rights law under general international law. Nevertheless, the approach taken by some early authors trying to clarify this field of law appears to be very similar to the methodology used by the authors of the *Customary IHL Study*.<sup>118</sup> Others have instead focussed on the crystallisation of human rights obligations as general principles, as they do not necessarily require uniform state practice: either as fundamental

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<sup>112</sup> Greenwood, 'Customary Law Status of the Protocols', in: Delissen and Tanja (eds.), *Humanitarian Law of Armed Conflict. Challenges Ahead* (1991), 93-114.

<sup>113</sup> Henckaerts and Doswald-Beck, *Customary International Humanitarian Law. Volume I Rules* (CUP 2005), hereinafter: CIHL Study.

<sup>114</sup> Bothe, 'Customary International Humanitarian Law: Some Reflections on the ICRC Study', 8 YIHL (2005), 143-78; Wilmschurst and Breau (eds.), *Perspectives on the ICRC Study on Customary International Humanitarian Law* (CUP 2007); Bellinger and Haynes, 'A US Government Response to the International Committee of the Red Cross Study Customary International Humanitarian Law', 89 IRRC (2007), 443-71.

<sup>115</sup> Among others: Supreme Court of Israel, *The Public Committee against Torture in Israel v. the Government of Israel*, Judgement, 14 December 2006, paras. 23-46.

<sup>116</sup> IHL, *The Manual on the Law of Non-International Armed Conflict. With Commentary*, drafted by Michael Schmitt, Charles Garraway and Yoram Dinstein, Sanremo, 2006, hereinafter: Sanremo NIAC Manual.

<sup>117</sup> In addition, specific rules on the law of occupation are contained in the co-called Hague Regulations of 1907 (HRLW). While not universally ratified, their customary status was explicitly recognised by the Nuremberg Tribunal: IMT Nuremberg, *USA et al. v. Göring et al.*, Judgment, 1 October 1946, p. 219.

<sup>118</sup> Sohn, 'Ideal to Law to Practice: The Universal Declaration Today and Tomorrow', 11 (1) *Pace International Law Review* (1999), 71-78; Humphrey, 'The Universal Declaration of Human Rights: Its History, Impact and Juridical Character' in: Ramcharan (ed.), *Human Rights. Thirty Years after the Universal Declaration* (Martinus Nijhoff 1979), 21-37; American Law Institute, *Restatement (Third) Foreign Relations Law of the United States* (American Law Institute Publishers 1987), para. 702; Meron, *Human Rights and Human-*

principles of humanity,<sup>119</sup> referred to by the International Court of Justice,<sup>120</sup> or as general principles deriving from the domestic legal orders of states.<sup>121</sup> As noted above, however, the distinction between the different sources of general international law has become somewhat blurred in legal writing and jurisprudence. For instance, the Hague Appeals Court found that the right to life and the prohibition of inhuman treatment contained in human rights conventions:

belong to the most *fundamental legal principles of civilized nations* [and] need to be considered *as rules of customary international law* that have universal validity and by which the State is bound.<sup>122</sup>

While some authors regard the entire set of rights listed in the Universal Declaration of Human Rights (1948) as part of general international law,<sup>123</sup> others have been more cautious.<sup>124</sup> There is, however, strong support that at least the following rights fall into that category: the prohibition of arbitrary deprivation of life; the prohibition of torture or cruel, inhuman or degrading treatment or punishment; the prohibition of slavery; the prohibition of arbitrary deprivation of liberty; and – albeit in somewhat more limited terms – the right to non-discrimination, fair trial rights, the right to free movement, and the most basic political rights.

Some of these rights are also likely to qualify as peremptory rules of general international law (also known as *jus cogens*), which are generally defined as follows:

[A] peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is

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*itarian Norms as Customary Law* (Clarendon Press 1989), pp. 79-135; Hannum, 'The Status of the Universal Declaration of Human Rights in National and International Law', 25 *Georgia Journal of International and Comparative Law* (1995-1996), 287-395.

<sup>119</sup> Simma and Alston, 'The Sources of Human Rights Law: Custom, Jus Cogens, and General Principles', 12 *Australian Yearbook of International Law* (1992), 82-108.

<sup>120</sup> ICJ, *Corfu Channel (United Kingdom v. Albania)*, Judgement, 9 April 1949, ICJ Reports (1949), 4, p. 22. See also: Declaration of Minimum Humanitarian Standards (Turku Declaration), UN Doc. E/CN.4/1995/116, 2 December 1990. As a follow-up to this document, the UN Secretary-General issued reports seeking to identify fundamental standards of humanity applicable in times of peace and war. This process was discontinued following the CIHL Study's publication in 2005: Report of the Secretary-General, UN Doc. E/CN.4/2006/87, 3 March 2006.

<sup>121</sup> Wouters and Ryngaert (2009), *supra* note 109, pp. 121-22.

<sup>122</sup> Hague Appeals Court, *Mustafić-Mujić et al. v. Netherlands & Nuhanović v. Netherlands*, Judgement, 5 July 2011, Case no. 200.020.174/01, para. 6.3, emphasis added.

<sup>123</sup> Sohn (1999), *supra* note 118, pp. 71-78; Humphrey (1979), *supra* note 118, p. 37.

<sup>124</sup> American Law Institute (1987), *supra* note 118, para. 702; Lillich (1995-1996), *supra* note 118, pp. 1-30; Hannum (1995-1996), *supra* note 118, pp. 340-46; Meron (1989), *supra* note 118, pp. 79-135. Schachter, *International Law in Theory and Practice* (Recueil des Cours, Martinus Nijhoff 1982), pp. 333-42. For an even more cautious view on HRL as part of customary law and general principles: Thirlway (2014), *supra* note 99, pp. 175-81; Goldsmith and Posner, *The Limits of International Law* (OUP 2005), pp. 132-133.

permitted and which can be modified only by a subsequent norm of general international law having the same character.<sup>125</sup>

It has been a matter of extensive debate as to exactly which rights fall into this hierarchically superior category.<sup>126</sup> Trying to provide additional clarification on this issue may be a laudable endeavour but would go far beyond the scope of this thesis, but it is also unnecessary for the question at issue. As the definition above makes clear, the term *jus cogens* does not denote a special, independent legal source, but simply a more exclusive part of general international law. Having found the above-listed human rights to be part of general international law is in itself sufficient to prove that states are directly bound by these standards, irrespective of additional treaty obligations they may have entered into. Certainly, their *jus cogens* character may have an impact on the question of derogation. However, much of this question would in turn depend on the exact formulation of the rights in question and their built-in limitations and exceptions.<sup>127</sup> Likewise, it is not necessary to engage in a detailed analysis as to which rules of humanitarian law qualify as *jus cogens*.<sup>128</sup> For the purpose of this thesis, it is sufficient to note that most humanitarian law provisions that can be found in a number of multilateral treaties, including the Geneva Conventions (1949) and the two Protocols (1977), are equally binding on states as a matter of general international law.

## OBLIGATIONS OF INTERNATIONAL ORGANISATIONS

The inquiry into the obligations of international organisations is particularly challenging due to the fact that they are not states. Nevertheless, the International Court of Justice found in its advisory opinion on *Reparations for Injuries Suffered in the Service of the United Nations*

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<sup>125</sup> Art. 53 VCLT.

<sup>126</sup> For an outline of which human rights may have *jus cogens* status: Orakhelashvili, *Peremptory Norms in International Law* (OUP 2006), pp. 53-60; Hannikainen, *Peremptory Norms (Jus Cogens) in International Law* (Finnish Lawyers' Publishing Company 1988), pp. 425-520. More generally: ILC, Report of the Study Group of the International Law Commission, Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law, finalized by Martti Koskenniemi, 13 April 2006, UN Doc. A/CN.4/L.682 (hereinafter: ILC Fragmentation Report), para. 33 ('most frequently cited examples of *jus cogens* norms are the prohibition of aggression, slavery and the slave trade, genocide, racial discrimination apartheid and torture, as well as basic rules of international humanitarian law applicable in armed conflict, and the right to self-determination').

<sup>127</sup> On the issue of derogation from human rights law, see the discussion from p. 170.

<sup>128</sup> Orakhelashvili (OUP 2006), *supra* note 126, pp. 61-64; ILC Fragmentation Report (2006), *supra* note 126, para. 33 (referring to the most basic rules of IHL without further explanation).

(1949) that the United Nations Organisation possesses the necessary international personality in order to effectively discharge the functions entrusted to it by its members:

That is not the same thing as saying that it is a State, which it certainly is not, or that its legal personality and rights and duties are the same as those of a State. ... What it does mean is that it is a subject of international law and capable of possessing international rights and duties, and that it has capacity to maintain its rights by bringing international claims.<sup>129</sup>

The same holds true for any other international organisation that has been entrusted with far-reaching functions by their member states, including the European Union, the African Union, and NATO. Consequently, they are bound by those international agreements to which they are parties.<sup>130</sup>

## Treaty Law

Humanitarian law and human rights conventions are generally not open to international organisations, because their accession clauses are usually restricted to states.<sup>131</sup> Moreover, many of their substantive provisions presuppose the existence of a state apparatus. Hence, international organisations have not become parties to any of the relevant treaties, with the exception of the European Union, which has already ratified the Convention on the Rights of Persons with Disabilities (2007)<sup>132</sup> and is currently in the process of acceding to the European Convention. For

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<sup>129</sup> ICJ, *Reparations for Injuries Suffered in the Service of the United Nations*, Advisory Opinion, 11 April 1949, ICJ Reports 1949, p. 179.

<sup>130</sup> ICJ, *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt*, Advisory Opinion, 20 December 1980, ICJ Rep. (1980), para. 37.

<sup>131</sup> GC I-IV and AP I-II use the term 'power', but it is widely held that it only covers states: Schindler, 'United Nations Forces and International Humanitarian Law', in: Swinarski (ed.), *Studies and Essays on International Humanitarian Law and Red Cross Principles in Honour of Jean Pictet* (Martinus Nijhoff 1984), 521-30, p. 529.

<sup>132</sup> Arts. 41-44 of the Convention explicitly allows for the accession of 'regional integration organizations'.

the latter case, it was necessary to amend the Convention.<sup>133</sup> Moreover, an accession agreement<sup>134</sup> will set out in detail the modifications with which certain provisions will apply to account for the non-state character and the limited competences of the European Union.<sup>135</sup>

No such amendments have ever been adopted for humanitarian law conventions to allow for the accession of international organisations. In fact, the United Nations rejected the idea of including a specific provision to that effect in the Additional Protocols (1977), as it considered itself unable to observe the provisions in their entirety.<sup>136</sup> It is probably for the same reason that the United Nations and other organisations have never issued a declaration to be bound by any of the Conventions and Protocols.<sup>137</sup> There has been much debate as to whether and how an international organisation could ever comply with the often very technical provisions designed for states as duty holders.<sup>138</sup> However, this should not pose an insurmountable obstacle. Many provisions may simply be irrelevant to international organisations, while others may use terminology that can easily be interpreted as a reference to international organisations or their personnel and equipment. Moreover, the organisation in question may also delegate certain functions to troop-contributing states or host states, for instance, for duties in relation to disciplinary and criminal matters, for which it may lack competence.<sup>139</sup>

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<sup>133</sup> Protocol 14 to the ECHR, 13 May 2004, which specifically allows for the accession of the EU.

<sup>134</sup> Draft Revised Agreement on the Accession of the European Union to the Convention for the Protection of Human Rights and Fundamental Freedoms, Final Report to the CDDH, 5 April 2013, 47+1(2013)008. In December 2014, the CJEU struck down the draft accession agreement for being incompatible with the EU Treaties: CJEU, *Compatibility of the Draft Agreement with the EU and FEU Treaties*, Opinion 2/13, 18 December 2014. While Opinion 2/13 led to the suspension of the accession process, it is by no means impossible to draft a new accession agreement that takes due regard of the CJEU's concerns (especially to safeguard the autonomy of EU law): Lock, 'The Future of EU Accession to the ECHR after Opinion 2/13: Is It Still Possible and Is It Still Desirable?', *EU Constitutional Law Review* ([http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2616175](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2616175), forthcoming 2015), pp. 23-27 (explicitly discussing the CJEU's concerns in relation to the ECtHR's jurisdiction to review acts of the EU under its common foreign and security policy).

<sup>135</sup> For instance, Art. 44 (1) of the Disabilities Convention leaves it to the regional integration organisations to declare 'the extent of their competence with respect to matters governed by this Convention'. See also: De Schutter, 'Human Rights and the Rise of International Organisations: The Logic of Sliding Scales in the Law of International Responsibility', in: Wouters et al. (eds.), *Accountability for Human Rights Violations by International Organisations* (Intersentia 2010), 51-128, pp. 113-16, who calls for a distinction between negative obligations (which can always be observed by simply abstaining from a certain act) and positive obligations (for which the organisation would need extra competences).

<sup>136</sup> Schindler, *supra* note 131, p. 525.

<sup>137</sup> For this option: CA2 (3) GC I-VI and Art. 96 (2) AP I

<sup>138</sup> Some early authors were extremely sceptical on this point: Draper (1963), *supra* note 16, pp. 408-10; Bowett (1964), *supra* note 5, pp. 511-16.

<sup>139</sup> Bothe (1967), *supra* note 16, 135-242, pp. 198-204; Risse, *Der Einsatz Militärischer Kräfte durch die Vereinten Nationen und das Kriegsvölkerrecht* (Peter Lang 1988), pp. 80-104; Kolb, *Droit Humanitaire et Opérations de Paix Internationales* (Helbing & Lichtenhahn 2002), pp. 60-61 and 80-87.

As an alternative solution, some authors have considered the possibility that international organisations could be bound by the treaty obligations of their member states as a *functional succession* due to the significant transfer of powers by these states. While this approach may be of some limited relevance in other areas of law, practice does not support its application to human rights and humanitarian law conventions, especially considering the great disparity of member states treaty obligations in both fields.<sup>140</sup>

Another but closely related approach focuses on the treaty obligations of the host states on whose territory the United Nations perform state-like functions through an international territorial administration, as in the case of UN Mission in Kosovo (UNMIK).<sup>141</sup> However, while it is true that UNMIK committed itself to observe the human rights standards reflected in a number of human rights treaties,<sup>142</sup> and even participated in the reporting procedure before the Human Rights Committee, it made clear that it considered itself in no way bound by any of these conventions.<sup>143</sup> Such practice may, however, be indicative of the existence or evolution of obligations under general international law.<sup>144</sup>

## General International Law

According to the International Court of Justice, international organisations are not only bound by the treaty obligations that they have undertaken, but also by those ‘obligations incumbent upon them under general rules of international law’.<sup>145</sup> This is a clear reference to the field of

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<sup>140</sup> For humanitarian law: Schindler (1984), *supra* note 131, p. 528. For human rights law: Naert, ‘Binding International Organisations to Member State Treaties or Responsibility of Member States for Their Own Actions in the Framework of International Organisations’, in: Wouters et al. (eds.), *Accountability for Human Rights Violations by International Organisations* (Intersentia 2010), 129-168, pp. 138-39; De Schutter (2010), *supra* note 135, pp. 57-68; Reinisch, ‘Securing the Accountability of International Organizations’ 7 (2) *Global Governance* (2001), 131-149, p. 143.

<sup>141</sup> John Cerone held that this was the case for UNMIK and KFOR in Kosovo: Cerone, ‘Minding the Gap: Outlining KFOR Accountability in Post-Conflict Kosovo’, 12 *EJIL* (2001), 469-88, pp. 474-75. There is no indication that a similar approach has been invoked for humanitarian law treaties. If territorial control was to trigger succession in treaty obligations, occupying powers would be directly bound by the humanitarian law conventions to which the occupied state had previously become a party – an assertion for which there is no support in state practice.

<sup>142</sup> Sect. 1 (3), UNMIK/REG/1999/24, 12 December 1999, listing also conventions to which Yugoslavia was not yet a party when UNMIK was established in 1999.

<sup>143</sup> HRC, Report Submitted by UNMIK to the HRC on the Human Rights Situation in Kosovo since June 1999, CCPR/C/UNK/1, 13 March 2006, paras. 110-24.

<sup>144</sup> See the brief discussion on unilateral acts and decisions of international organisations by Thirlway, who sees their legal relevance mainly in the form of inchoate treaties and practice (contributing to general international law): Thirlway (2014), *supra* note 99, pp. 20-23.

<sup>145</sup> ICJ, *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt*, Advisory Opinion, 20 December 1980, ICJ Rep. (1980), para. 37 (‘International organizations are subjects of international law

general international law considered above.<sup>146</sup> In other words, international organisations can be equated to newly independent states, which are *born* into an existing legal order and therefore bound by its rules.<sup>147</sup> The fact that international organisations are established by states and enjoy far-reaching immunities from their jurisdiction further strengthens the argument that they are bound by the same rules as states under general international law.

The difficulty with this analogy, however, is that international organisations are structurally very different from states. It is therefore rather unclear whether rules of general international law that have evolved in relation to states can – without further ado – have a binding effect on international organisations.<sup>148</sup> To visualise the problem more clearly: it would seem utterly absurd to argue that the European University Institute has obligations under humanitarian law simply because it is an international organisation and thus *automatically* bound by any rule of general international law.<sup>149</sup> What seems much more important is the potential scope of addressees envisaged by the relevant set of rules.

The scope of addressees may be difficult to ascertain for norms of customary law or general principles, which are generally formulated in more abstract terms and whose determination may be driven by a more limited agenda. This is particularly apparent in the structure and methodology of the above-mentioned *Customary IHL Study*, which was primarily meant to clarify the set of customary rules applicable to armed conflicts between states and to non-international armed conflicts, involving at least one non-state armed group. Quite understandably, the focus is (nearly) exclusively on state practice.<sup>150</sup> The practice of international organisations plays some role but only in relation to states as norm addressees.<sup>151</sup> However, the vast majority of the rules identified simply spell out the relevant prohibition or duty or are addressed to ‘parties to the conflict’ rather than states alone.<sup>152</sup> In other words, their scope of addressees is open-ended

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and, as such, are bound by any obligations incumbent upon them under general rules of international law, under their constitutions or under international agreements to which they are parties’).

<sup>146</sup> See again, for further guidance, from p. 30.

<sup>147</sup> Cahin, *La Coutume Internationale et les Organisations Internationales* (Pedone 2001), pp. 485-512.

<sup>148</sup> Schermers and Blokker, *International Institutional Law: Unity Within Diversity* (5<sup>th</sup> edn., Martinus Nijhoff 2011), para. 1579.

<sup>149</sup> That is why Andrew Clapham’s conclusion – that international organisations are automatically bound by customary law by virtue of their independent legal personality alone – is too broad: Clapham, *Human Rights Obligations of Non-State Actors* (OUP 2006), p. 111.

<sup>150</sup> CIHL Study, Introduction, p. xlii (‘The practice of armed opposition groups, such as codes of conduct, commitments ... and other statements, does not constitute State practice as such. While such practice may contain evidence of the acceptance of certain rules in non-international armed conflicts, its *legal significance is unclear*’, emphasis added).

<sup>151</sup> The notable exception (mentioned in *ibid*, p. xli) is a brief reference to the UN Secretary-General’s Bulletin (1999), which is discussed extensively at p. 41.

<sup>152</sup> Only very few are addressed only to ‘states’, which are mainly those concerned with the implementation

and thus directed at any entity capable of becoming a party to an armed conflict. While this capacity was traditionally reserved to states and non-state armed groups, there is no obvious reason to exclude international organisations, which (as public agents) share many institutional features with states.

Hence, it is the capacity of the organisation to fall within the material scope (*ratione materiae*) of the relevant rule or body of law that determines whether it is bound by it (*ratione personae*). We will discuss the modalities of this question in greater detail in the following chapter. However, the fact alone that certain international organisations (like the United Nations and NATO, as opposed to the EUI) may establish and command military operations is a strong indication that these organisations may become a party to an armed conflict or an occupying power and must therefore be bound by the relevant law in the same way as states or non-state armed groups. It is therefore the *functional capacity* of these organisations to engage in pertinent activities that gives rise to their humanitarian law obligations under general international law.<sup>153</sup>

The same reasoning applies to human rights law, which is primarily concerned with constraining the power of the state *vis-à-vis* individuals – most visibly exercised through its security forces and other executive agents. Thus, if international organisations that command military operations may become a party to an armed conflict, then *a fortiori* they can also exercise power over individuals to the detriment of the latter. Moreover, established by their member states and having many institutional features of modern bureaucracies usually associated with states, international organisations are able to (and indeed often do) exercise public authority over individuals in a state-like manner, either through their own security forces or other executive agents. In view of this functional capacity, they must be considered to have genuine human rights obligations binding on them as a matter of general international law.<sup>154</sup>

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of IHL (CIHL Rules 141-44, 149-50, 157-58 and 161).

<sup>153</sup> This argument is largely based on the following, excellent treatise: Kolb, Porretto and Vité, *L'Application du Droit International Humanitaire et des Droits de l'Homme aux Organisations Internationales. Forces de Paix et Administrations Civiles Transitoires* (Bruylant 2005), pp. 127-29. In a similar way: Sams, 'IHL Obligations of the UN and other International Organisations Involved in International Missions' in: Odello and Piotrowicz (eds.), *International Military Missions and International Law* (Martinus Nijhoff 2011), 45-71, pp. 52-57; Bothe (1967), *supra* note 16, p. 191; Emanuelli, *Les Actions Militaires de l'Organisation des Nations Unies et le Droit International Humanitaire* (Wilson & Lafleur 1995), pp. 41-43; Greenwood, 'International Humanitarian Law and United Nations Military Operations', 1 *YIHL* (1998), 3-34, p. 16. See also: Kolb (2002), *supra* note 139, pp. 27-30.

<sup>154</sup> This position is largely supported by: Kolb et al. (2005), *supra* note 153, pp. 237-45; Mégret and Hoffmann, 'The UN as Human Rights Violator? Some Reflections on the United Nations Changing Human Rights Responsibilities' 25 *Human Rights Quarterly* (2003), 314-342, p. 317; Quénivet, 'Human Rights Law and Peacekeeping Operations' in: Odello and Piotrowicz (eds.), *International Military Missions and International Law* (Martinus Nijhoff 2011), 99-143, pp. 125-26; Cerone, 'Reasonable Measures in Unreasonable Circumstances: A Legal Responsibility Framework for Human Rights Violations in Post-Conflict Territories under UN Administration', in: White and Klaasen (eds.), *The UN, Human Rights and Post-Conflict*

General practice in peace operations tends to support the finding that international organisations are bound by human rights and humanitarian law alongside states.<sup>155</sup> Moreover, rather than being only bound by the pre-existing legal order, international organisations may also actively contribute to the evolution and crystallisation of general international law.<sup>156</sup>

During the UN operation in Congo (ONUC) in the early 1960s, the Secretary-General instructed his forces to ‘observe principles and spirit of the general international conventions applicable to the conduct of military personnel’.<sup>157</sup> Similar instructions were given in subsequent operations and the commitment to observe the ‘principles and spirit’ of the conventions was formalised in the Model Participating State Agreement (1991)<sup>158</sup> and more recent status-of-force agreements.<sup>159</sup> The exact meaning of the ‘principles and spirit’ formula remained vague, but it was widely seen as a reference to customary law.<sup>160</sup> The wording of the Convention on the Safety of United Nations and Associated Personnel (1994) seems to reflect a broader concept of humanitarian law binding on UN forces,<sup>161</sup> insofar as it refers to ‘international humanitarian law and universally recognized standards of human rights as contained in international instruments’, without limiting it to the ‘principles and spirit’.<sup>162</sup>

An important breakthrough was the promulgation of the *Secretary-General’s Bulletin on the Observance by United Nations Forces of International Humanitarian Law* (1999),<sup>163</sup> which abandoned the vague ‘principles and spirit’ formulation. Instead, it sets out the ‘fundamental

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*Situations* (Manchester University Press 2005), 42-80, p. 66. See also: ILA, Final Report, Berlin Conference on Accountability of International Organisations (2004), pp. 22-25.

<sup>155</sup> As we have seen above in the section on treaty law, international organisations may face difficulties in observing all rules to the letter of the law, which makes it necessary to allow for some flexibility and certain modifications. As a matter of principle, this should be less of an issue for rules of general international law as they are often termed in a more abstract manner. As mentioned above, some CIHL Rules (i.e. Rules 141-44, 149-50, 157-58 and 161) refer specifically to ‘states’, as they are mainly concerned with the implementation of IHL, which would usually require state-like structures. Nonetheless, with the exception of those referring to criminal prosecutions, they could also be observed by the UN and other international organisations without great difficulty.

<sup>156</sup> Klein, *La Responsabilité des Organisations Internationales dans les Ordres Juridiques Internes et en Droit des Gens* (Bruylant 1998), p. 364.

<sup>157</sup> Art. 43, Regulations Issued by the Secretary-General for the United Nations Forces in the Congo (ONUC), UN Doc. ST/SGB/ONUC/1, 15 July 1963.

<sup>158</sup> Art. 28, Model Participating State Agreement, 1991, UN Doc. A/46/185, 23 May 1991.

<sup>159</sup> For instance, Art. 7, Agreement between the United Nations and the Government of the Republic of Rwanda on the Status of the United Nations Assistance Mission for Rwanda, 5 November 1993.

<sup>160</sup> Seyersted, *United Nations Forces in the Law of Peace and War* (Sijthoff 1966), p. 187-196.

<sup>161</sup> Convention on the Safety of United Nations and Associated Personnel, 17 February 1995.

<sup>162</sup> Art. 20 (‘Nothing in this Convention shall affect: (a) The applicability of international humanitarian law and universally recognized standards of human rights as contained in international instruments ... or the responsibility of such personnel to respect such law and standards’).

<sup>163</sup> Secretary-General’s Bulletin on the Observance by United Nations Forces of International Humanitarian Law, UN Doc. ST/SGB/1999/13, 6 August 1999, hereinafter: SG Bulletin.

principles and rules' of humanitarian law.<sup>164</sup> Issued as an internal administrative order, the Bulletin is intended as a teaching tool rather than a restatement of all rules binding on the United Nations.<sup>165</sup> It therefore only summarises those principles and rules that are considered most fundamental.<sup>166</sup>

There is also reported practice of regional organisations engaged in peace operations that have committed themselves to the respect for humanitarian law. For instance, the African Union has followed the example of the United Nations and has pledged compliance with humanitarian law in their status-of-force agreements.<sup>167</sup> Moreover, both the NATO Allied Joint Doctrine on Peace Support Operations (2011)<sup>168</sup> and the Salamanca Presidency Declaration on EU Operations (2002) call for respect of humanitarian law in the course of their respective peace operations.<sup>169</sup> This supports the view that regional organisations engaged in peace operations are bound by humanitarian law obligations along similar lines as as the United Nations.<sup>170</sup>

Regrettably, there has been no similarly detailed instruction on the observance of human rights law from the UN headquarters to this day.<sup>171</sup> Nevertheless, the fact that the United Nations is expected under its own Charter to promote respect for human rights may be seen as evidence that it considers itself bound by human rights law.<sup>172</sup> The above-mentioned announcement by

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<sup>164</sup> Ibid, Preamble and Section 1 (1).

<sup>165</sup> Gillard, 'The International Committee of the Red Cross Perspective: Applicable Law and Operational Interaction', in: Ravasi and Beruto (eds.), *Protection of Human Beings in Disaster Situations: Application of International Humanitarian Law, Human Rights and Refugee Law* (IIHL 2006), 138-44, p. 140-41.

<sup>166</sup> Sect. 1 (1) SG Bulletin ('The present provisions do not constitute an exhaustive list of principles and rules of international humanitarian law binding upon military personnel').

<sup>167</sup> Art. 9 (a) SOFA between the Transitional Federal Government of the Somali Republic and the AU, 6 March 2007 ('The African Union shall ensure that the mission conducts its operation in Somalia with full respect for the principles and rules of the international Conventions applicable to the conduct of military and diplomatic personnel').

<sup>168</sup> NATO Allied Joint Doctrine, Peace Support Operations, July 2001, AJP-3.4.1, para. 4B6. For a discussion as to whether NATO has genuine obligations under IHL. See also: Zwanenburg (2005), *supra* note 47, pp. 179-82.

<sup>169</sup> 2002 Salamanca Presidency Declaration on EU Operations. For a comprehensive outline of IHL obligations on the part of the EU: Naert (2010), *supra* note 94, pp. 641-52; Falco, 'The Internal Legal Order of the European Union As a Complementary Framework for its Obligations under IHL', 42 (1) *Israel Law Review* (2009), 168-205.

<sup>170</sup> Kolb et al. (2005), *supra* note 153, pp. 92-95; Zwanenburg (2005), *supra* note 47, pp. 179-182.

<sup>171</sup> Gillard (2006), *supra* note 165, p. 141 (stressing this gap and lack of legal clarity, especially in relation to international territorial administrations).

<sup>172</sup> Arts. 1 (3) and 55 (c) UN Charter.

UNMIK in Kosovo to comply with the human rights standards laid down in a number of conventions has probably been the clearest commitment so far.<sup>173</sup> However, human rights compliance has also become increasingly important in other peace operations. For instance, the Capstone Doctrine (2008) emphasised that:

United Nations peacekeeping personnel – whether military, police or civilian – *should act in accordance with international human rights law ...*<sup>174</sup>

Moreover, appeals for compliance with human rights law and humanitarian law have been included in a number of recent resolutions establishing peace operations. This was the case for the ongoing mission in Mali (MINUSMA), which is commanded by the United Nations.<sup>175</sup> Its African-led precursor mission (AFISMA) received the same instruction.<sup>176</sup> Moreover, the Human Rights Due Diligence Policy, issued by the UN Secretary-General in 2013,<sup>177</sup> clearly states that:

Support by United Nations entities to non-United Nations security forces must be consistent with the Organization's purposes and principles as set out in the Charter of the United Nations and *with its obligations* under international law to respect, promote and encourage respect for *international humanitarian, human rights and refugee law*.<sup>178</sup>

This confirms that the Secretary-General considers the United Nations bound by human rights and humanitarian law and that the same obligations attach to regional organisations involved in peace operations.<sup>179</sup>

## INTEROPERABILITY AND CHALLENGES ARISING FROM DIFFERENT STANDARDS

States have undertaken very different treaty obligations under human rights and humanitarian law. While some multilateral agreements – like the four Geneva Conventions (1949) and the

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<sup>173</sup> See *supra* note 104.

<sup>174</sup> Capstone Doctrine (2008), *supra* note 9, p. 14, emphasis added.

<sup>175</sup> S/RES/2164 (Mali), 25 June 2014, para. 29 ('calls upon MINUSMA ... to abide by international humanitarian, human rights and refugee law').

<sup>176</sup> S/RES/2085 (Mali), 20 December 2012, para. 9 ('take all necessary measures, in compliance with applicable international humanitarian law and human rights law'). The fact that it is addressed to the AU and ECOWAS confirms the claim that the UN Security Council considers both regional organisations to be equally bound by human rights law and humanitarian law.

<sup>177</sup> UNSG, 'Human Rights Due Diligence Policy on United Nations Support to Non-United Nations Security Forces', 5 March 2013, A/67/775 - S/2013/110.

<sup>178</sup> *Ibid.*, para. 1, emphasis added.

<sup>179</sup> Indeed, the term 'non-United Nations security forces' includes not only national security forces, but also 'Peacekeeping forces of regional international organizations', para. 7.

International Covenant on Civil and Political Rights (1966) – enjoy (nearly) universal ratification, there is great disparity between states when it comes to other, more specific treaties, including a number of different arms control conventions and regional human rights treaties. However, as the foregoing sections have tried to show, these differences are to a large extent levelled out by the fact that many of the substantive treaty provisions form also part of general international law, binding on all states. General international law, which covers both customary law and general principles, is also the primary source of obligations for international organisations, as they have largely abstained from becoming parties to human rights and humanitarian law treaties. Hence, despite the fragmented ratification record under treaty law, states and international organisations share a wide range of similar obligations in the field of human rights and humanitarian law.

Certain differences may, however, remain and may affect the way in which different troop-contributing states and international organisations operate effectively together in the course of a peace mission. The problem is not new, as it may arise in any other multinational military coalition, and has therefore received considerable scholarly attention. The term often referred to in this context is ‘interoperability’, which is generally understood as the ability to operate in synergy by exchanging services with other units and forces.<sup>180</sup> The perhaps most illustrative example of the legal dilemma can be found in Article 1 of the Anti-Personnel Mine Ban Convention (1997), which does not only prohibit the use of anti-personnel mines but also *assisting* in such activities. While this may indeed create operational challenges, it does not necessarily prevent state parties from participating in combined operations with non-party states.<sup>181</sup>

It is also worth recalling that the Mine Ban Convention (1997) and the more recent Convention on Cluster Munitions (2008) are not humanitarian law treaties *sensu stricto*. Indeed, like other arms control agreements, their scope is much broader and does not only prohibit the use but also the development, production, stockpiling, retention or transfer of anti-personnel mines and cluster munitions, including in peacetime. At the same time, many forms of their use are also prohibited for non-party states, as they would violate more general humanitarian law rules, including the principle of distinction and the duty to take feasible precautions.<sup>182</sup> Susan Breau illustrates by reference to detailed practice from coalition warfare in Kosovo, Afghanistan and

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<sup>180</sup> Walsh, ‘Interoperability of United States and Canadian Armed Forces’, 15 *Duke Journal of Comparative and International Law* (2005), 315-31, p. 316.

<sup>181</sup> Watkin, ‘Coalition Operations: A Canadian Perspective’, 84 *International Law Studies* (2008), 251-62, p. 254 (under the condition that the state’s own forces ‘may not use anti-personnel mines and cannot request, directly or indirectly, the protection of those mines’).

<sup>182</sup> See also CIHL Study: Rule 71 (on weapons that are by nature indiscriminate) and Rules 80-83 (on limitations and duties in relation to booby-traps and landmines).

Iraq that it was not the alleged difference of obligations that created interoperability problems, but rather the misapplication of and blatant disregard for existing customary obligations binding on all coalition members.<sup>183</sup> She therefore concludes that joint military operations have the tendency of clarification towards the highest normative denominator of existing rules.<sup>184</sup>

Kjetil Mujezinović Larsen sees relatively little room for interoperability problems in relation to human rights law:

If a particular conduct is recognised as a violation of the right to life under the ECHR but not under other conventions, then a troop contributing state that is a state party to the ECHR must refrain from the conduct even if the conduct is not considered as a human rights violation under the conventions applicable to another troop contributing state that is not a state party to the ECHR.<sup>185</sup>

As we concluded above, there is strong support for the assertion that, irrespective of their individual treaty obligations, all states and international organisations are bound by a set of human rights obligations, deriving from general international law, most importantly: the right to life, the ban on torture and slavery and the right to liberty. Determining the exact formulation of these rights, including their built-in limitations and exceptions, would require a more detailed discussion better conducted at a different place in this treatise.<sup>186</sup> A topical case where interoperability questions arise concerns the transfer of detainees to coalition partners or the host state authorities, which is why it has received particular attention in recent years,<sup>187</sup> in particular the so-called *Copenhagen Process Principles and Guidelines* (2012), which deal specifically with the handling of detainees in international military operations.<sup>188</sup>

It is also necessary to mention the special role of Common Article 1 to the Geneva Conventions:

The High Contracting Parties undertake to respect and to *ensure respect* for the present Convention in all circumstances.<sup>189</sup>

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<sup>183</sup> Breau, 'A Single Standard for Coalitions: Lowest Common Denominator or Highest Standard?', in: Odello and Piotrowicz (eds.), *International Military Missions and International Law* (Martinus Nijhoff 2011), 73-97, pp. 90-96 (in particular the excessively broad definition of 'military objectives' and disregard for the fundamental guarantees of detainees by US forces).

<sup>184</sup> Ibid, pp. 96-97. In a similar way: Stein, 'Coalition Warfare and Differing Legal Obligations of Coalition Members Under International Humanitarian Law', 78 *International Law Studies* (2003), 315-35, p. 335.

<sup>185</sup> Mujezinović Larsen, *The Human Rights Treaty Obligations of Peacekeepers* (CUP 2012), p. 356 ('interoperability appears not to raise particular problems from a human rights perspective').

<sup>186</sup> See, in particular, the detailed discussion of the different right-to-life provisions in Chapter 5, from p. 220.

<sup>187</sup> Droege, 'Transfers of Detainees – Legal Framework, Non-Refoulement and Contemporary Challenges', 871 *IRRC* (2008), 669-701.

<sup>188</sup> *Copenhagen Process on the Handling of Detainees in International Military Operations – Principles and Guidelines*, 19 October 2012.

<sup>189</sup> The same formulation can be found in Art. 1 (1) of AP I (1977). It is also considered a norm of customary IHL: CIHL Study, Rule 144 (Ensuring Respect for International Humanitarian Law Erga Omnes).

Hence, states are also required to take active measures to *ensure respect* for humanitarian law by armed forces other than their own, including forces belonging to third states and international organisations with whom they may be cooperating closely.<sup>190</sup> The above-mentioned Human Rights Due Diligence Policy (2013) is evidence of the existence of a similar duty to ensure respect under human rights law. It provides clear guidance on the circumstances under which support to the security forces of states and other international organisations may be given and when it must be withheld.<sup>191</sup>

## 2.5 IMPACT OF THE MANDATE AND ARTICLE 103 OF THE UN CHARTER

This section will briefly consider to what extent the specific mandate of the peace operation may obstruct the application of humanitarian law or human rights law: either of the legal regimes as a whole or of their specific rules. This inquiry is premised on the hierarchy of the UN Charter and its overriding effect *vis-à-vis* other obligations under international law, as enshrined in Article 103 of the UN Charter:

In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail.<sup>192</sup>

This conflict clause raises a number of complex legal issues in relation to peace operations, which shall be considered here. First, one may wonder whether Article 103 refers only to the Charter text itself or whether it also covers decisions by competent UN bodies (secondary law). On the basis of Article 25,<sup>193</sup> it is widely accepted that Article 103 applies at least to UN Security Council resolutions adopted under Chapter VII of the Charter.<sup>194</sup> The case, however, is less

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<sup>190</sup> CIHL Study, Rule 144 ('... They must exert their influence, to the degree possible, to stop violations of international humanitarian law', emphasis added). Boisson de Chazournes and Condorelli, 'Common Article 1 of the Geneva Conventions Revisited: Protecting Collective Interests', 837 IRRC (2000), 68-86, pp. 73-74.

<sup>191</sup> Art. 1 of the Human Rights Due Diligence Policy speaks of 'obligations under international law to respect, promote and encourage respect for international humanitarian, human rights and refugee law' (emphasis added).

<sup>192</sup> Emphasis added.

<sup>193</sup> Article 25 UN Charter states that 'The Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter'.

<sup>194</sup> Paulus and Leiß, 'Article 103' in: Simma et al. (eds.), *The Charter of the United Nations: A Commentary Vol II* (3<sup>rd</sup> edn, OUP 2012), 2110-37, pp. 2124-25; Mujezinović Larsen (2012), *supra* note 185, p. 318. See

clear for other decisions of the Security Council, including those setting up more traditional peacekeeping missions without a Chapter VII mandate.<sup>195</sup>

Second, the resolutions setting up peace operations are not phrased in mandatory terms. Indeed, they usually only *authorise* states and regional organisations to provide troops and to carry out the tasks under the mandate. This practice is a result of the way in which the framework developed, which left the Security Council without its own forces on standby as initially planned during the drafting process of the UN Charter. In view of the drafters' intention to establish an effective system of international security and to relieve states participating in that effort of undue legal constraints, it seems fair to presume that Article 103 also applies to authorisations rather than obligations alone. This is also widely accepted among legal scholars and finds some support in practice.<sup>196</sup>

Third, Article 103 only refers to the obligations of UN member states and does not directly affect the obligations of international organisations, such as the African Union or NATO, which may be acting alongside states in peace operations. However, the UN Charter also enjoys an increasing recognition as a constitutional framework for the international legal order as evidenced by the practice of international organisations to accept its binding and supreme nature. Hence, Article 103 may – at least indirectly – have a very similar effect on the obligations of international organisations that may be in conflict with the UN Charter and Security Council resolutions adopted under Chapter VII.<sup>197</sup>

Finally, due to the very same constitutional considerations, the overriding effect of Article 103 is not only limited to treaty law as the wording 'other international agreement' may suggest. Indeed, since many treaty law rules have an equivalent in general international law (customary law and general principles), Article 103 would serve no purpose if it only relieved member states of their treaty law obligations. It is therefore well accepted that the Charter, including binding Security Council resolutions, also prevails over conflicting obligations under general

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also: ICJ, *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v US)*, Order, 14 April 1992, para. 42; Kolb, *L'Article 103 de la Charte des Nations Unies* (Recueil des Cours, Martinus Nijhoff 2013).

<sup>195</sup> Peters, 'Article 25' in: Simma et al. (eds.), *The Charter of the United Nations: A Commentary Vol I* (3<sup>rd</sup> edn, OUP 2012), 787-854, pp. 793-94 (arguing that Art. 25 UN Charter does not only apply to Chapter VII resolutions but also to those adopted under Chapter VI of the UN Charter).

<sup>196</sup> Paulus and Leiß (2012), *supra* note 194, pp. 2125-27; Mujezinović Larsen (2012), *supra* note 194, pp. 320; Kolb, 'Does Article 103 Apply to Authorizations', 64 *Zeitschrift für Ausländisches Öffentliches Recht und Völkerrecht* (2004), 21-35; Sarooshi, *The United Nations and the Development of Collective Security: The Delegation by the UN Security Council of its Chapter VII Powers* (OUP 1999), pp. 149-51.

<sup>197</sup> Paulus and Leiß (2012), *supra* note 194, pp. 2130-32.

international law,<sup>198</sup> with the important exception of those constituting peremptory norms of international law (*jus cogens*).<sup>199</sup> In the latter case, the *jus cogens* rule would invalidate the resolution with which it stands in conflict. Consequently, not even the Security Council can derogate from peremptory norms.

As we have seen in the previous section, Security Council resolutions often explicitly require respect for human rights law and humanitarian law. Since the application of both legal regimes is a matter of the law *itself* – including certain threshold requirements, as we will see below – it is highly doubtful that the Security Council could possibly modify the application of human rights law and humanitarian law as a whole.<sup>200</sup> There may, however, be a conflict between some of the measures contained in the mandate and a specific obligation under one of the two regimes. The only relevant case in relation to a peace operation for which a conflict with humanitarian law has been discussed is the political transformation of Iraq during the coalition-led occupation (2003-04). In a number of resolutions,<sup>201</sup> the Security Council allowed for far-reaching changes to the political and legal landscape of Iraq in preparation for the post-occupation period, which would perhaps not have been possible under the preservation rule enshrined in Article 43 of the Hague Regulations (1907).<sup>202</sup> But the case seems rather inconclusive, partly due to the vague meaning of Article 43 itself.<sup>203</sup>

The discussion on the effects of Article 103 has played a much greater role in relation to human rights law.<sup>204</sup> In the *Al-Jedda* case, British courts had previously found that Resolution 1546 (2004) had allowed for administrative detentions by the Multi-National Force in post-occupation Iraq, because an accompanying letter by Colin Powell had explicitly mentioned internment where this was ‘necessary for imperative reasons of security’ among other possible activities.<sup>205</sup>

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<sup>198</sup> Ibid, pp. 2132-33.

<sup>199</sup> It is very likely that the drafters of the UN Charter rejected any reference to customary law precisely because they wanted to avoid a possible conflict with peremptory norms.

<sup>200</sup> Nevertheless, there has been some discussion on the effects of certain resolutions adopted on the occupation of Iraq (2003-04), namely on the limited group of occupying powers and the exact duration of the occupation: Fox, ‘The Occupation of Iraq’ 36 (2) *Georgetown Journal of International Law* (2005), 195-297.

<sup>201</sup> In particular, S/RES 1483, 22 May 2003, para. 4; S/RES 1500, 14 August 2003, para. 1.

<sup>202</sup> Art. 43 HRLW obliges the occupying power to respect, ‘unless absolutely prevented, the laws in force in the country’.

<sup>203</sup> Scheffer, ‘Beyond Occupation Law’, 97 (4) *AJIL* (2003), 842-60, pp. 844-47; Sassòli, ‘Legislation and Maintenance of Public Order and Civil Life by Occupying Powers’, 16 *EJIL* (2005), 661-94, p. 681; Fox, ‘Transformative Occupation and the Unilateralist Impulse’, 94 *IRRC* (2012), 237-66.

<sup>204</sup> For a detailed account of relevant case-law on the UN terror-listing practice: Scheinin, ‘Is the ECJ Ruling in *Kadi* Incompatible with International Law?’, 28 (1) *Yearbook of European Law* (2009), 637-53; Scheinin and Ginsburg, ‘You Can’t Always Get What You Want: The *Kadi* II Conundrum and the Security Council 1267 Terrorist Sanctions Regime’, 8 (1) *Essex Human Rights Review* (2011), 7-19.

<sup>205</sup> UKHL, *Al-Jedda v. Secretary of State for Defence* (2007), *supra* note 65, paras. 30-35.

The European Court, however, did not find this language sufficiently clear for a *genuine* conflict of obligations to arise, since other parts of the same resolution had called for the respect of human rights law. The Court therefore concluded that:

In the absence of clear provision to the contrary, the *presumption* must be that the Security Council intended States within the Multi-National Force to contribute towards the maintenance of security in Iraq *while complying with their obligations under international human rights law*.<sup>206</sup>

The presumption of compatibility employed by the Court made the operation of Article 103 unnecessary, which allowed the Court to find that the European Convention applied in an unmodified way.<sup>207</sup> The same approach was recently used by a British court in *Serdar Mohammed v. Ministry of Defence* (2014) with regard to administrative detention by British forces as part of the ISAF mission in Afghanistan.<sup>208</sup> It follows that the relevant resolution needs to use very explicit language in order to rebut the presumption that the mandate is fully compatible with human rights law. The same approach seems warranted in relation to humanitarian law; in other words, there is a rebuttable presumption of compatibility between the mission's mandate and the obligations under humanitarian law.

There is no indication that the overriding effect of Article 103 has ever been invoked for rules relevant to the use of force against individuals, either under human rights or humanitarian law.<sup>209</sup> Indeed, in view of the foregoing it is rather unlikely that there could ever be sufficient support for such an assertion in the relevant resolution or related documents attached thereto.<sup>210</sup> For these reasons, we will proceed on the assumption that the mandate – in particular the specific resolution authorising the peace operation in question – does not set aside the application of human rights law and humanitarian law as such, nor any specific rule relevant for our study. The mandate may, however, play an important role for clarifying the scope of certain provisions

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<sup>206</sup> ECtHR, *Al-Jedda v. United Kingdom* (2011), *supra* note 66, paras. 105-106, emphasis added.

<sup>207</sup> On the question of norm conflict and presumption of compatibility: Paulus and Leiß (2012), *supra* note 194, pp. 2118-19, and the chapter below, p. 210.

<sup>208</sup> UK EWHC, *Serdar Mohammed v. Ministry of Defence* (2014), *supra* note 65, paras. 188-227. Confirmed on appeal: UK EWCA, *Serdar Mohammed et al. v. Ministry of Defence*, Judgment, 30 July 2015, EWCA Civ 843, paras. 138-63.

<sup>209</sup> For instance: UK EWHC, *Serdar Mohammed v. Ministry of Defence* (2014), *supra* note 65, para. 219 (where the Court simply referred to the use of force authorisation under the mandate: 'the UNSCRs relating to Afghanistan were plainly intended to authorise the use of lethal force at least for the purposes of self-defence').

<sup>210</sup> See, however: Wills, 'The Law Applicable to Peacekeepers Deployed in Situations where there is No Armed Conflict', EJIL talk, 10 April 2013, [www.ejiltalk.org/the-law-applicable-to-peacekeepers-deployed-in-situations-where-there-is-no-armed-conflict/](http://www.ejiltalk.org/the-law-applicable-to-peacekeepers-deployed-in-situations-where-there-is-no-armed-conflict/) (who entertains the idea that a peace operation not party to an armed conflict may be using force in a way similar to humanitarian law, simply because of its robust Chapter VII mandate).

and resolving obstacles in the application of the law. It will therefore be used for the purpose of interpretation throughout this thesis.

## 2.6 CONCLUSION

This chapter shows that the traditional distinction between peacekeeping and peace-enforcement has become increasingly blurred. Today, almost all peace operations operate under a robust mandate based on a Security Council resolution adopted under Chapter VII of the UN Charter. This allows for significant levels of military force to be used, especially in support of the host states' authorities against members of non-state armed groups.

The exercise of 'effective control' over specific acts and omissions is the appropriate yardstick for identifying areas of responsibility of states and international organisations involved in peace operations. The detailed command and control arrangements considered above will usually be of help in order to provide an answer to the critical question: who gave the direct order or instruction for the specific conduct. While dual or multiple attribution be excluded, it is rather the exception than the norm. Instead, a specific act or its different sub-elements will usually only be attributable to one entity. Taken together, however, the totality of all acts and omissions of the peace operation will typically engage the responsibility of a great number of actors, usually the international organisation in command as well as the different sending states.

States have undertaken very different treaty obligations under human rights and humanitarian law. While some multilateral agreements – like the four Geneva Conventions (1949) and the International Covenant on Civil and Political Rights (1966) – enjoy (nearly) universal ratification, there is great disparity between states when it comes to other, more specific treaties, including a number of different arms control conventions and regional human rights treaties. However, these differences are to a large extent levelled out by the fact that many of the substantive treaty provisions form also part of general international law, binding on all states. General international law, which covers both customary law and general principles, is also the primary source of obligations for international organisations, as they have largely abstained from becoming parties to human rights and humanitarian law treaties. Hence, despite the fragmented ratification record under treaty law, states and international organisations share a wide range of similar obligations in the field of human rights and humanitarian law.

Even though the mandates have been adopted under Chapter VII of the UN Charter, they do not obstruct the application of human rights and humanitarian law, either as a whole or of some of their specific rules. Whether the obligations of the states and the organisations actually apply

in the context of a peace operation depends on their specific actions and whether they meet the threshold requirements set by the regimes themselves for their application.



# 3 APPLICATION OF HUMANITARIAN LAW IN PEACE OPERATIONS

## 3.1 GENERAL OVERVIEW

States have undertaken very different treaty obligations under humanitarian law. But these differences are to a large extent levelled out by the fact that many of the substantive treaty provisions form also part of general international law, binding on all states. Humanitarian law obligations under general international law are also binding on international organisations with a military capacity like the United Nations and certain regional organisations. But are these obligations actually triggered during peace operations?

Humanitarian law applies only in times of armed conflict and military occupations. A key question is therefore whether and how international forces involved in a peace operation may become a party to an armed conflict and to what extent its special nature may have an impact on the classification of the conflict and the threshold of violence required to trigger the application of humanitarian law. In addition, this chapter will also examine whether participation in a pre-existing armed conflict may serve as an additional test. This will be followed by an enquiry into the temporal and geographic scope of application once the peace operation has indeed become a party to an armed conflict. The chapter concludes with a brief examination of the special cases of military occupations and of applying humanitarian law by analogy as a matter of policy.

## 3.2 PEACE OPERATIONS AS PARTIES TO AN ARMED CONFLICT

### MANDATE AND LEGITIMACY CONSIDERATIONS

The scope of application of humanitarian law is premised on the notion of ‘armed conflict’. Hence, once a situation of armed conflict arises, the law applies. It makes no difference which side resorted to force in the first place. Rather, international law clearly distinguishes between the *jus ad bellum* (the law on the use of force) and the *jus in bello* (the law of armed conflict or humanitarian law). The strict distinction between both regimes has been widely accepted, because it follows a sound logic: if the primary rule (the *jus ad bellum*) is violated, there are still remedial rules (the *jus in bello*) that ensures the protection of war victims on both sides.<sup>1</sup> This principle can also be found in the preamble of Additional Protocol I, which calls on the parties to apply the rules:

without any adverse distinction based on the nature or origin of the armed conflict or on the causes espoused by or attributed to the Parties to the conflict.

Therefore, in a situation of armed conflict, humanitarian law applies equally to both parties to the conflict irrespective of who is considered the aggressor. When it comes to peace operations, however, this clear distinction between *jus ad bellum* and *jus in bello* has not always been upheld – both by representatives of states and the United Nations, and among academics. Indeed, in the wake of the Korea campaign, the American Society of International Law made the following statement:

The Committee agrees that the use of force by the United Nations to restrain aggression is of a *different nature from war-making* by a State. The purposes for which the laws of war were instituted *are not entirely the same* as the purposes of regulating the use of force by the United Nations. This we may decide without deciding whether the United Nations enforcement action is *war, police enforcement* or *sui generis*. In the present circumstances, then, the proper answer would seem to be, for the time being, that the United Nations should

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<sup>1</sup> Sassòli, ‘Ius ad Bellum and Ius in Bello – The Separation between the Legality of the Use of Force and Humanitarian Rules to Be Respected in Warfare: Crucial or Outdated?’, in: Schmitt and Pejic (eds.), *International Law and Armed Conflict: Exploring the Faultlines* (Martinus Nijhoff 2007), 241-64.

not feel bound by all the law of war, but should *select such of the laws of war* as may seem to fit its purposes.<sup>2</sup>

There is no indication that this advice was followed either in Korea or during the Gulf War against Iraq (1991). Moreover, the position that peace operations under the aegis of the United Nations could cherry-pick the humanitarian law rules as they see fit has also been explicitly rejected by the Institute de Droit International.<sup>3</sup> However, in more recent times, similar arguments have been advanced. Indeed, during the NATO air campaign in support of the UN mission in Bosnia (UNPROFOR) against recalcitrant Bosnian-Serb forces, some NATO states even held that their pilots were not combatants at all but rather ‘experts on mission’ and thus immune from attacks when conducting air strikes.<sup>4</sup>

Similar claims have been made in relation to the air campaign over Libya in 2011 due to their UN mandate.<sup>5</sup> It appears, however, that such statements need to be taken with caution, as they are mainly driven by political considerations and aimed at the national audience rather than constituting a real legal assessment. Indeed, some military manuals clearly stress the need to distinguish between the *jus ad bellum* and *jus in bello* during peace operations. A good example is the New Zealand Manual:

Military operations by or on behalf of the United Nations will only be taken against a State regarded as an aggressor, or otherwise in breach of its obligations under international law. To the extent that the law of armed conflict applies to such operations, 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 the law.<sup>6</sup>

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<sup>2</sup> ASIL, Report of the Committee on the Study of Legal Problems of the United Nations, 46 ASIL Proceedings (1952), p. 220, emphasis added. For similar suggestions, see also: Wright, ‘Outlawry of War and the Laws of War’, 47 AJIL (1953), 365-76; Bivens, ‘Restatement of the Laws of War as Applied to the Armed Forces of Collective Security Arrangements’, 48 AJIL (1954), 141-45.

<sup>3</sup> IDI, ‘Conditions of Application of Humanitarian Rules of Armed Conflict to Hostilities in which United Nations Forces May be Engaged’, Zagreb Session III, 3 September 1971; IDI, ‘Conditions of Application of Rules, other than Humanitarian Rules, of Armed Conflict to Hostilities in Which United Nations Forces May be Engaged’, Wiesbaden Session II, 13 August 1975.

<sup>4</sup> Reported by: Sassòli (2007), *supra* note 1, p. 260 (when captured, the pilots should not be considered prisoners of war and should be released immediately).

<sup>5</sup> Reported by: Engdahl, ‘Multinational Peace Operations Forces Involved in Armed Conflict: Who Are the Parties?’, in: Mujezinović Larsen et al. (eds.), *Searching for a ‘Principle of Humanity’ in International Humanitarian Law* (CUP 2013), 233-71, p. 259 (‘Prime Minister stated that Norway was, in terms of international law, not participating in war. If that had been the case, Norwegian soldiers would have been legitimate targets. Norwegian soldiers executed a UN mission and were therefore not legitimate targets for the soldiers of the regime in Libya’).

<sup>6</sup> New Zealand Defence Force, Interim Law of Armed Conflict Manual, DM112, Directorate of Legal Services, New Zealand, 1992, p. 19-3, para. 1902.

However, this does not mean that such considerations have fully disappeared. Especially in relation to peacekeeping operations, they continue to be popular. Traditionally, the United Nations maintained that:

UN peacekeeping forces which carry with them the stamp of international legitimacy should be, and be seen to be impartial, objective and neutral, their sole interest in the conflict being the restoration and maintenance of international peace and security.<sup>7</sup>

Gert Van Hegelsom – currently Legal Adviser to the Director-General of the EU Military Staff – held in 1993 that the application depends on the mandate of the peace operation, arguing that a traditional peacekeeping operation can never become a party to a conflict; only where it obtains a robust mandate under Chapter VII may it be required to observe humanitarian law.<sup>8</sup> This position is, however, hardly convincing. In view of the current common use of robust mandates with Chapter VII powers, this categorical distinction between peacekeeping and enforcement can hardly be maintained. Moreover, not every Chapter VII operation will be drawn into combat, as its strong mandate, troop strength and equipment may already serve as an effective deterrent. Moreover, Finn Seyersted noted already in 1966 that peacekeeping forces can be ‘involved in genuine hostilities with another organised force, even if this was not expected when the force was set up’.<sup>9</sup> This view has been shared by many scholars for a long time.<sup>10</sup> The irrelevance of the exact mandate terms is also reflected in the Secretary-General’s Bulletin. Section 1.1 states that the rules of humanitarian law are applicable to UN personnel:

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<sup>7</sup> Documented by: Shraga, ‘The United Nations as an Actor Bound by International Humanitarian Law’, 5 (2) *International Peacekeeping* (1998), 64-81, p. 67.

<sup>8</sup> Van Hegelsom, ‘The Law of Armed Conflict and UN Peace-keeping and Peace-enforcing Operations’, 6 *Hague Yearbook of International Law* (1993), 45-58, pp. 54-57. Similarly: Rosas, *The Legal Status of Prisoners of War: A Study in International Humanitarian Law Applicable in Armed Conflicts* (2<sup>nd</sup> edn, Institute for Human Rights 2005), p. 238, footnote text. A similar view was held by a Canadian court which found that the UN operation in Somalia (UNOSOM II) in 1993 was not involved in an armed conflict: Court Martial Appeal Court of Canada, *Her Majesty the Queen v. Private DJ Brocklebank*, 2 April 1996, Court File No. CMAAC-383. Similar considerations drawing on impartiality and intention have also been expressed by a minority of experts: ICRC, Expert Meeting on Multinational Peace Operations. Applicability of International Humanitarian Law and International Human Rights Law to UN Mandated Forces, organized by the International Committee of the Red Cross in Cooperation with the University Centre for International Humanitarian Law, Geneva, 11-12 December 2003, report prepared and edited by Alexandre Faite and Jérémie Labbé Grenier, pp. 9-10.

<sup>9</sup> Seyersted, *United Nations Forces in the Law of Peace and War* (Sijthoff 1966), p. 210.

<sup>10</sup> Bothe, *Le Droit de la Guerre et les Nations Unies. A Propos des Incidents Armés au Congo* (IUHEI 1967), p. 215; Risse, *Der Einsatz Militärischer Kräfte durch die Vereinten Nationen und das Kriegsvölkerrecht* (Peter Lang 1988), pp. 112-14; Schindler, ‘United Nations Forces and International Humanitarian Law’, in: Swinarski (ed.), *Studies and Essays on International Humanitarian Law and Red Cross Principles in Honour of Jean Pictet* (Martinus Nijhoff 1984), 521-30, p. 527; Oeter, ‘Civil War, Humanitarian Law and the United Nations’, 1 *Max Planck Yearbook of United Nations Law* (1997), 195-230, p. 217; Emanuelli, *Les Actions Militaires de l’Organisation des Nations Unies et le Droit International Humanitaire* (Wilson & Lafleur 1995), pp. 31-32.

when in situations of *armed conflict* they are actively engaged therein *as combatants*, to the extent and for the duration of their engagement. They are accordingly applicable in *enforcement actions*, or in *peacekeeping operations* when the use of force is permitted in *self-defence*.<sup>11</sup>

UN Secretary-General Ban Ki-Moon gave, however, a different assessment at the final stage of the Ivorian Civil War in spring 2011, when UN attack helicopters were used to shell the last positions held by pro-Gbagbo forces:

Let me emphasise that UNOCI is not a party to the conflict. ... In line with its Security Council mandate, the mission has taken this action in self defence and to protect civilians.<sup>12</sup>

Despite these inconsistencies,<sup>13</sup> it appears clear that the assessment as to whether the peace operation has become a party to an armed conflict has to be made on the basis of the facts on the ground. While considering this question in the following sections, we will continue to encounter similar arguments based on mandate and legitimacy considerations.<sup>14</sup>

## ORDINARY THRESHOLDS OF ARMED CONFLICT

The application of humanitarian law is generally premised on the existence of an armed conflict.<sup>15</sup> This section will therefore examine the two types of armed conflict with their respective threshold requirements in order to clarify the circumstances under which a peace operation may become a party to an armed conflict.

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<sup>11</sup> Sect. 1.1, SG Bulletin, emphasis added. For a discussion on the shortcomings of this provision: Gillard, 'The International Committee of the Red Cross Perspective: Applicable Law and Operational Interaction', in: Ravasi and Beruto (eds.), *Protection of Human Beings in Disaster Situations: Application of International Humanitarian Law, Human Rights and Refugee Law* (IIHL 2006), 138-44, pp. 140-41; Zwanenburg, 'The Secretary-General's Bulletin on Observance by United Nations Forces of International Humanitarian Law: A Pyrrhic Victory?', 39 *Military Law and Law of War Review* (2000), 13-43, pp. 20-24.

<sup>12</sup> Reuters, 'Ban Ki-Moon says U.N. Not Party to I. Coast Conflict', 4 April 2011, [www.reuters.com/article/2011/04/04/uk-ivorycoast-un-ban-idUKTRE73364Z20110404](http://www.reuters.com/article/2011/04/04/uk-ivorycoast-un-ban-idUKTRE73364Z20110404).

<sup>13</sup> Again, some of the statements referred to above need to be taken with caution. Rather than implying a different, more privileged status for peace operations under IHL, they may also be driven by the (mistaken) belief that the application of IHL is only triggered in case of large-scale, high-intensity attacks, even when they involve state armed forces on the enemy side. As the following section tries to show, this is a misreading of the relevant thresholds of armed conflict, especially for IACs.

<sup>14</sup> For a strong position in that direction *de lege ferenda*: Sharp, 'Revoking an Aggressor's License to Kill Military Forces Serving the United Nations: Making Deterrence Personal', 22 *Maryland Journal of International Law & Trade* (1998), 1-80.

<sup>15</sup> Belligerent occupations constitute another ground for triggering the application of humanitarian law, even in the absence of hostilities. We will consider this question in a separate section below from p. 110.

## International Armed Conflicts

International armed conflicts were historically initiated by a declaration of war, issued by one state against another. Common Article 2 to the four Geneva Conventions, however, states that declarations of war are no longer required for there to be an armed conflict between states,<sup>16</sup> which is reflective of the fact that such declarations have virtually disappeared<sup>17</sup> and that the notion of armed conflict is essentially based on facts. The term of armed conflict in the law of international armed conflict has been a matter of debate, as all conventional texts failed to provide a definition. The ICRC Commentary to the 1949 Geneva Conventions states that:

Any difference arising between two States and leading to *the intervention of armed forces* is an armed conflict within the meaning of Article 2, even if one of the Parties denies the existence of a state of war. It makes *no difference how long the conflict lasts*, or how much slaughter takes place. The respect due to human personality is not measured by the number of victims. Nor, incidentally, does the application of the Convention necessarily involve the intervention of cumbrous machinery. It all depends on circumstances. If there is only a single wounded person as a result of the conflict, the Convention will [apply].<sup>18</sup>

This so-called *first-shot approach* sets an explicitly low threshold for conflicts arising between states. It is, however, far from clear whether the *first-shot approach* is supported by state practice, as states seem reluctant to openly acknowledge the application of the law of international armed conflict to isolated and low-intensity incidents involving their armed forces.<sup>19</sup> In light of this, it has been argued by some legal scholars<sup>20</sup> and the Study Group of the International Law Association<sup>21</sup> that a high level of intensity is required in order to trigger an armed conflict be-

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<sup>16</sup> CA2 ('the present Convention shall apply to *all cases of declared war or of any other armed conflict* which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them', emphasis added).

<sup>17</sup> Note, however, that states do issue statements to the effect that they consider themselves involved in an armed conflict with another state.

<sup>18</sup> Pictet, *The Geneva Conventions of 12 August 1949, Commentary I* (ICRC 1952), p. 32; *ibid*, *Commentary III* (ICRC, Geneva 1960), p. 23; *ibid*, *Commentary IV* (ICRC 1958), p. 20.

<sup>19</sup> Greenwood raises doubts as to whether state practice supports the low threshold advocated by the ICRC. As a rare case confirming the first-shot approach, he refers to Lieutenant Goodman, a US air force pilot who was shot down over Lebanon and captured by Syrian forces in 1983 and for whom the US government invoked GC III: Greenwood, 'Scope of Application of Humanitarian Law', in: Fleck (ed.), *The Handbook of International Humanitarian Law* (2<sup>nd</sup> edn., OUP 2008), 45-78, p. 48, para. 202.

<sup>20</sup> Dahl and Sandbu, 'The Threshold of Armed Conflict', 45 *Military Law and War Review* (2006), 369-88, p. 378 ('We believe that States may use a certain amount of force, even deadly force, in their inter-State relations, without applying the Law of Armed Conflict').

<sup>21</sup> ILA, Final Report on the Meaning of Armed Conflict in International Law, Hague Conference 2010 (which applies the same high-intensity requirement to international and non-international armed conflicts). The methodology of the study is, however, highly questionable: it appears that public announcements by state officials on highly sensitive issues, such as the existence of an armed conflict with another state, are rather

tween states. However, to subject the law of international armed conflicts to an intensity requirement overlooks the protective purpose of this body of law to provide a coherent legal framework for any form of inter-state use of force.<sup>22</sup> This appears to be also the prevailing view in the legal literature.<sup>23</sup> This is also reflected in the jurisprudence of the *ad hoc* international criminal tribunals, which have played a key role in clarifying and developing the threshold of armed conflict. In its *Tadić* decision on jurisdiction, the ICTY Appeals Chamber held that an international armed conflict exists ‘whenever there is a resort to armed force between States’.<sup>24</sup> This standard follows the low threshold suggested by the *first-shot approach* and has also been used by the ICRC and the ILC.<sup>25</sup> It can also be found in some military manuals, including the Australian Air Force Manual:

A state of international armed conflict exists when states *resort to the use of armed force* against another or others. The *duration and intensity* of the conflict are not relevant to whether an armed conflict exists.<sup>26</sup>

In conclusion, there appears to be strong support for a low threshold of international armed conflict, whereby any use of force by one state against another will amount to an international armed conflict and will trigger the application of this body of international humanitarian law.

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a matter of policy and thus do not necessarily carry real weight in terms of practice and *opinio juris*. Moreover, it seems even less appropriate to refer to proceedings of national immigration tribunals in asylum cases (pp. 22-23), as their notion of armed conflict may differ considerably from the one used under international humanitarian law.

<sup>22</sup> Some authors suggest that while isolated and short-lived incidents involving state armed forces (e.g. the capture of foreign military personnel) may give rise to an IAC, they will not necessarily trigger the full application of the full plethora of humanitarian law, but only those provisions at stake (e.g. on prisoners of war as enshrined in GC III): Kleffner, ‘Human Rights and International Humanitarian Law: General Issues’, in: Gill and Fleck (ed.), *Handbook of the International Law of Military Operations* (OUP 2010), 51-77, p. 52; Dinstein, *War, Aggression and Self-Defence* (CUP 2005), pp. 17-18. However, such a fragmentation runs counter to the aim of humanitarian law to provide a comprehensive legal framework for situations of international armed conflict.

<sup>23</sup> Schmitt, ‘Classification in Future Conflict’, in: Wilmschurst (ed.), *International Law and the Classification of Conflicts* (OUP 2012), 455-77, pp. 459-60 (confirming the definitions provided by the ICRC Commentaries and the ICTY); Kolb and Hyde, *An Introduction to the International Law of Armed Conflicts* (Hart Publishing 2008), pp. 75-76; David, *Principes de Droit des Conflits Armés* (4<sup>th</sup> edn, Bruylant 2008), pp. 122-124, para. 156 (referring to the Shat-Al Arab incident in June 2004, involving an exchange of fire and subsequent capture of British servicemen by Iranian naval forces).

<sup>24</sup> ICTY, *Prosecutor v. Tadić*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, Case No. IT-94-1-AR72, 2 October 1995, para. 70. See also: ICTY, *Prosecutor v. Zdravko Mucić et al.*, Judgment, Case No. IT-96-21-T, 16 November 1998, para. 184 (‘the existence of armed force between States is sufficient of itself to trigger the application of international humanitarian law’).

<sup>25</sup> ICRC, How Is the Term “Armed Conflict” Defined in International Humanitarian Law?, Opinion Paper, March 2008, p. 5.

<sup>26</sup> Royal Australian Airforce, Operations Law for RAAF Commanders, AAP 1003, Second Edition, May 2004, p. 42, para. 5.6, emphasis added. See also: German Federal Ministry of Defence, Law in Armed Conflict – Manual, Joint Service Regulation (ZDv) 15/2, issued in May 2013, p. 29, para. 203 (‘An international armed conflict triggering the applicability of LOAC exists if one State Party to a conflict uses armed force against another State’).

This may involve any form of armed engagement between the armed forces of one state against another, any capture of foreign armed forces personnel and any unauthorised penetration by armed forces into foreign territory. Eric David, however, suggests an additional requirement to exclude situations of violence involving soldiers acting in their private capacity rather than pursuant to orders from higher command levels.<sup>27</sup> Such a requirement may also prove useful to exclude situations of accidental use of force by one state against another.<sup>28</sup>

### Non-International Armed Conflicts

In non-international armed conflicts, the threshold of application is much higher. The principle of sovereignty has been a major obstacle to promptly applying the law of non-international armed conflict to situations of intra-state violence. It has been in the interest of states to maintain a vertical relationship *vis-à-vis* those challenging their power within their own borders. Common Article 3 to the Geneva Conventions (1949) was the first treaty provision to regulate the conduct of non-international armed conflicts and can be considered a *convention en miniature*. It failed, however, to adequately define such conflicts.<sup>29</sup> The scope of the Additional Protocol II (1977) is confined to armed conflicts between state armed forces and armed groups with control over territory and thus very restrictive.<sup>30</sup> The ICTY Appeals Chamber clarified the threshold in the *Tadić* decision, by stating that a non-international armed conflict exists whenever there is:

protracted armed violence between governmental authorities and organized armed groups or between such groups within a State.

Following this standard, the two essential elements are: the level of *intensity* (protracted armed violence) and *organisation* (organised armed groups). These elements distinguish a non-international armed conflict from mere internal disturbances, which have to be addressed by law-

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<sup>27</sup> David (2008), *supra* note 23, p. 124, para. 1.57 (making clear that otherwise, bar brawls would also be included in the IAC concept).

<sup>28</sup> See, for instance: UK Ministry of Defence, The Joint Service Manual of the Law of Armed Conflict, Joint Service Publication 383, 2004 edition, para. 3.3.1 ('... an accidental border incursion by members of the armed forces would not, in itself, amount to an armed conflict, nor would the accidental bombing of another country').

<sup>29</sup> Moir, The Law of Internal Armed Conflict (CUP 2002), pp. 33-34.

<sup>30</sup> Art. 1 (1) AP II ('shall apply to all armed conflicts ... which take place in the territory of a High Contracting Party between *its armed forces* and dissident armed forces or other organized armed groups which, under *responsible command*, exercise such *control over a part of its territory* as to enable them to carry out sustained and concerted military operations and to implement this Protocol', emphasis added).

enforcement measures, usually subject to human rights standards. In the recent *Dorđević* judgment (2011), the ICTY defined the two terms ‘intensity’ and ‘organisation’, by providing an illustrative list of indicative factors.<sup>31</sup> Accordingly, *intensity* may be reflected by:

The seriousness of attacks and whether there has been an increase in armed clashes, the spread of clashes over territory and over a period of time, any increase in the number of government forces and mobilisation and the distribution of weapons among both parties to the conflict, as well as whether the conflict has attracted the attention of the United Nations Security Council, and whether any resolutions on the matter have been passed.<sup>32</sup>

On the *organisation* of armed groups, the ICTY held that they do not necessarily need to be as organised as state armed forces, but that their leadership must have at least the ability to exercise some control over its members,<sup>33</sup> which may be reflected by different groups of factors:

First, are the factors signalling the presence of a command structure. Secondly, are factors indicating that an armed group could carry out operations in an organised manner. Thirdly, are factors indicating a level of logistics have been taken into account. Fourthly, are factors relevant to determining whether an armed group possessed a level of discipline and the ability to implement the basic obligations of Common Article 3. A fifth group includes factors indicating that the armed group was able to speak with one voice.<sup>34</sup>

The test based on intensity and organisation is now the most accepted standard of application for those customary humanitarian law rules applicable in non-international armed conflicts.<sup>35</sup> The above-mentioned *Customary IHL Study* and the *Sanremo NIAC Manual* found that the vast majority of customary rules of humanitarian law apply to both categories of armed conflict. Yet, despite this convergence, there is still an important difference between international and non-international armed conflicts, the most essential being the lack of a combatant status in

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<sup>31</sup> Partly building on: ICTY, *Prosecutor v. Haradinaj et al.*, Judgement, Case no. IT-04-84-T, 3 April 2008, paras. 49 and 60.

<sup>32</sup> ICTY, *Prosecutor v. Dorđević*, Judgement, 23 February 2011, Case no. IT-05-87/1, para. 1523, references omitted. Nevertheless, it seems that a high level of organisation on the part of the armed group can outweigh the lack of high-intensity confrontations. For instance, where an armed group is organised in a state-like manner or controls territory along a demarcation line following an effective cease-fire, even short-lived or low-intensity use of force will likely trigger a (new) armed conflict, similar to the case of inter-state use of force.

<sup>33</sup> *Ibid.*, para. 1525, references omitted.

<sup>34</sup> *Ibid.*, para. 1526, references omitted.

<sup>35</sup> Article 8 (2) (c) and (f) of the ICC Statute uses two different thresholds: paragraph (c) essentially follows CA3, while paragraph (f) mirrors the *Tadić* test, using ‘protracted armed conflict’. Despite the different wording, however, both paragraphs are materially the same, supporting the claim that there is only one body of the law of non-international armed conflict: Fleck, ‘The Law of Non-International Armed Conflict’, in: Fleck (ed.), *The Handbook of International Humanitarian Law* (2<sup>nd</sup> edn., OUP 2008), 581-610, pp. 587-89; Cullen, ‘Key Developments Affecting the Scope of Internal Armed Conflict in International Humanitarian Law’, 183 *Military Law Review* (2005), 66-109. For a different view: Bothe, ‘Customary International Humanitarian Law: Some Reflections on the ICRC Study’, 8 *YIHL* (2005), 143-78, p. 175.

internal armed conflicts.<sup>36</sup> In other words, fighters involved in a non-international armed conflict have no *combatant privilege* – i.e. the right to participate directly in hostilities.<sup>37</sup> Quite the opposite, states have reserved the right to hold members of armed groups criminally responsible for their participation in hostilities.<sup>38</sup>

## CHARACTER OF ARMED CONFLICTS INVOLVING PEACE OPERATIONS

### Introduction

On the basis of the two types of armed conflict just outlined, it is apt to consider how they apply to the reality of peace operations. This analysis is crucial, as both regimes strongly differ on the threshold requirement, namely the level of intensity to trigger the application of humanitarian law. Depending on the operational circumstances, the nature of the armed conflict thus has an impact on the question as to whether and when humanitarian law becomes applicable in the course of a peace operation. Moreover, as concerns the scope of protection, the most crucial difference between both regimes remains the lack of combatant status in non-international armed conflicts. Given these important differences, this section will examine the nature of armed conflicts involving peace operations.

The most essential question that needs to be answered at the outset is the following: which entity involved in the peace operation should be seen as the (potential) party to the armed conflict, the different sending states or the organisation (i.e. United Nations, AU, NATO or EU)? Early authors held that it should in fact be both: the sending states *and* the international organisation. But they failed to explain in detail the reasoning behind that conclusion.<sup>39</sup> In more re-

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<sup>36</sup> Hellestveit, 'The Geneva Conventions and the Dichotomy Between International and Non-International Armed Conflict: Curse or Blessing for the 'Principle of Humanity'?', in: Mujezinović Larsen et al. (eds.), *Searching for a 'Principle of Humanity' in International Humanitarian Law* (CUP 2012), 86-123, p. 103. For a more critical view on this distinction: Crawford, 'Unequal Before the Law: The Case for the Elimination of the Distinction between International and Non-international Armed Conflicts', 20 *Leiden Journal of International Law* (2007), 441-65.

<sup>37</sup> Art. 43 (2) AP I (Members of the armed forces of a Party to a conflict (other than medical personnel and chaplains ...) are combatants, that is to say, they have the *right to participate directly in hostilities*', emphasis added).

<sup>38</sup> On many occasions, they are charged with treason, which often carries the death penalty.

<sup>39</sup> Bothe (1967), *supra* note 10, p. 51; Seyersted (1966), *supra* note 9, p. 323; Schindler (1984), *supra* note 10, p. 524; Risse (1988), *supra* note 10, pp. 133-50. For a different view: Bowett, *United Nations Forces*.

cent years, legal commentators tend to argue instead that it will be *either* the state *or* the international organisation that will be the party to the armed conflict, but usually *not both* at the same time.<sup>40</sup> Their assessment is largely based on the attribution test in conjunction with the command-and-control arrangements, which we have covered at great length in Chapter 2 above.<sup>41</sup> While it is true that attribution is usually only possible to one entity instead of two or more, this refers only to a specific act or omission, but *not* to all activities of the peace operation *en bloque*. Taken together – as we concluded above – the totality of all acts and omissions of the peace operation will typically engage the responsibility of a great number of actors. The picture is therefore very similar to a *mosaic*, where the different sets of coloured pieces represent those acts and omissions attributable to a specific entity, which may be one of the different sending states or instead the relevant organisation.

Hence, it is possible and indeed very likely that both the states *and* the organisation are to be considered the relevant parties to the conflict. But again, in a specific peace mission the assessment cannot be made in general terms but only on the basis of the specific acts attributable to the relevant state or organisation. This means that the question – whether a state has become a party to an armed conflict or not – can differ greatly from sending state to sending state. That was indeed the reasoning behind the position maintained by Germany and Sweden until 2009 that humanitarian law did not apply to their forces in Afghanistan, because (unlike other ISAF contingents) they were deployed in the more peaceful north of the country and did not engage in fighting with the Taliban.<sup>42</sup> A clear shortcoming of this focus on the respective conflict relationships of each individual state is that it may provide a highly fragmented picture as to which state (involved in the relevant peace mission) is in fact a party to an armed conflict. What is more, the picture is highly fluid, as the facts may change at any time. This makes it difficult not only for the personnel of the peace operation, but also for (potential) enemy forces as well as humanitarian actors (like the ICRC) to assess the situation and the status of the parties. The dilemma is one of the reasons why this thesis suggests an additional test, in one of the later

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*A Legal Study of United Nations Practice* (Stevens & Sons 1964), p. 503.

<sup>40</sup> Zwanenburg, ‘International Organisations vs. Troop Contributing Countries: Which Should Be Considered As the Party to an Armed Conflict during Peace Operations?’, Proceedings of the 12<sup>th</sup> Bruges Colloquium, International Organisations’ Involvement in Peace Operations: Applicable Legal Framework and the Issue of Responsibility, 20–21 October 2011, Collegium No. 42, Autumn 2012, College of Europe-ICRC, 23–28, p. 27; Debuf, *Captured in War: Lawful Internment in Armed Conflict* (Pédone 2013), p. 135. In a similar, albeit less categorical, way: Engdahl (2013), *supra* note 5; Ferraro (2013), *supra* note 5, pp. 586–95 (stressing, however, the special case of command and control in NATO, which means that it will usually be NATO and the participating states that need to be considered as a party to the conflict).

<sup>41</sup> See, in particular: sub-section 2.3, from p. 17.

<sup>42</sup> See the positions of both governments as documented by: Engdahl (2013), *supra* note 5, pp. 235–36.

sections of the present chapter,<sup>43</sup> to complement the ordinary threshold requirements, which are solely based on the use of armed force between the potential parties.

Hence, when it comes to a peace operation whose personnel is engaged in hostilities, both the participating states and the organisation may possibly (depending on the facts) qualify as the parties to the conflict. This will trigger the application of their respective humanitarian law obligations, which they have to observe neatly while carrying out their own military actions. By contrast, the peace operation as such cannot *sensu stricto* be considered a party to the conflict, because it has *no* distinct legal personality. Nevertheless, and despite this important clarification, it is appropriate – for the sake of simplicity throughout this chapter – to refer to a peace operation as the party to the conflict (covering states and the organisation, as the case may be). Only where the distinction between the states and the organisation as the party to the conflict is of actual relevance for the application of humanitarian law, will the distinction be explicitly raised in the following subsections.

### **Armed Conflicts with States**

As far as the sending states are concerned, any military engagement of the peace operation with the armed forces of another state would fall squarely within the international armed conflict regime, subject to the low threshold requirement outlined above. The case is, however, more challenging for international organisations, as the notion of international armed conflict contained in the Geneva Conventions (1949) and interpreted in recent jurisprudence is essentially based on states as opponents. Consequently, only the regime of non-international armed conflicts appears to be available to international organisations.<sup>44</sup> This would, however, lead to a rather *absurd* solution, which seems to have no support in international practice. Indeed, it is rather unlikely that states would treat forces belonging to an international organisation any differently from state armed forces or question their *combatant privilege* if captured. Set up initially by states, such organisations have their grounding in the sovereign powers of states and enjoy privileges and immunities to accomplish their mandates. Hence, from the perspective of states who engage in fighting with the forces of an international organisation, it would seem reasonable to apply the same logic as to conflicts with other states. In the same vein, the international organisation has little interest in applying the law of non-international armed conflict. To argue otherwise would imply a hierarchically higher status for the international organisation

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<sup>43</sup> See the subsection dealing with participation in a pre-existing armed conflict, from p. 84.

<sup>44</sup> According to the wording and logic of the Geneva Conventions, armed conflicts between a state and an international organisation do not amount to an IAC within the meaning of CA2. Consequently, they would only be regulated by CA3 as a ‘case of armed conflict not of an international character’.

as opposed to the state in question, which we have rightly rejected in the section above. Hence, the concept of international armed conflicts applies equally to the United Nations and other international organisations as it does in relation to states.

On the basis of this determination, it seems reasonable to conclude that any use of armed force between a peace operation and the armed forces of a state will trigger an international armed conflict between them. A single exchange of fire or the capture of enemy forces will be enough for that matter. Hence, peacekeeping forces will become involved in an international armed conflict when they come under hostile fire from state armed forces, however unprovoked this incident may be. Whether they return fire in self-defence has no bearing on the existence of an armed conflict in that case. As we concluded above, the mandate may give an indication on the likelihood and the extent to which the operation may resort to force; but the determination of whether or not an armed conflict exists will depend on the facts on the ground. By the same token, a Chapter VII mandate is in itself not enough to trigger the application of an international armed conflict in the absence of hostilities with state armed forces.<sup>45</sup>

Apart from the cases of Korea and Iraq, peace operations will usually not get involved in protracted and large-scale hostilities with state armed forces. Such confrontations are rather rare and short-lived, as usually neither side has an interest in prolonged hostilities and further escalation.<sup>46</sup> Two more recent exceptions to this rule are the NATO air strikes carried out against pro-Gaddafi forces in Libya in 2011, and actions taken by the UN mission in Ivory Coast (UNOCI) and French troops against forces loyal to Laurent Gbagbo in spring of the same year.<sup>47</sup> What complicates the characterisation of these actions was the question of whether at the time of the events the regimes of Colonel Muhammad Gaddafi and Laurent Gbagbo could still be regarded as *legitimate governments* of Libya and Ivory Coast, respectively. Only some states

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<sup>45</sup> It could perhaps be argued that Security Council resolutions authorising enforcement operations against an aggressor state – as in the case of Korea (1950-53) and Iraq (1991) – qualify as a *declaration of war* and thus as a self-standing ground for the application of the law of international armed conflicts within the meaning of CA2. However, the declaration of war would *sensu stricto* be made by the United Nations rather than the relevant states (or regional organisation) carrying out the operations (as in case of Korea and Iraq). It is also unclear whether there is an armed conflict between states if the declaration of war is not followed by hostilities. A textual interpretation would lead to an affirmative answer to this question. Nevertheless, it could be argued that in the absence of ensuing hostilities, the duration of the armed conflict is reduced to almost nothing – similar to a single, isolated air strike in an otherwise peaceful situation – which raises the issue of the temporal scope of application of humanitarian law, which will be considered further below.

<sup>46</sup> The exact end of the armed conflict and the application of humanitarian law is governed by the temporal scope of application discussed further below.

<sup>47</sup> BBC, 'Ivory Coast: UN Forces Fire on Pro-Gbagbo Camp', 5 April 2011, [www.bbc.co.uk/news/world-africa-12960308](http://www.bbc.co.uk/news/world-africa-12960308).

participating in the NATO-led air campaign had recognised the Benghazi-based National Transitional Council as the legitimate government of Libya. By contrast, Laurent Gbagbo was no longer considered the president of Ivory Coast after the elections and a resolution by the Security Council.<sup>48</sup> Hence, only where there has been a universal shift towards recognising a different authority as the official government (as in the case of Ivory Coast) does a requalification of the conflict appear appropriate. However, the determination in these two specific cases is only of real relevance if there is indeed a difference in characterising armed conflicts against non-state armed groups compared to those against states.

### **Armed Conflicts with Non-State Armed Groups**

As we have seen in the previous chapter, armed confrontations are much more likely to occur between the peace operation and members of non-state armed groups. On some occasions, international forces provide direct support to the armed forces of the host states or even carry out joint manoeuvres with them. Practice from earlier peace operations that had gotten involved in heavy fighting with members of armed groups is rather inconclusive as to the nature of the conflict, because the United Nations or the states involved often denied that they had become a party to an armed conflict. The above-mentioned *Secretary-General's Bulletin* (1999) acknowledges at least that the United Nations may be engaged in hostilities, but fails to distinguish between the two categories of armed conflicts, which has led to different interpretations.<sup>49</sup> In the section on the treatment of detained persons, the Bulletin deems numerous provisions of Geneva Convention III applicable; these are, however, limited to treatment only and do not mention prisoner-of-war status at all. In other words, captured fighters do not necessarily enjoy combatant privilege, which leaves open the question of the nature of armed conflict.

It was traditionally held among most scholars and the ICRC that any conflict involving the United Nations or other peace operations would be, by default, international in nature and may

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<sup>48</sup> S/RES/1962 (Ivory Coast), 20 December 2010, para. 1 ('Urges all the Ivorian parties and stakeholders to respect the will of the people and the outcome of the election in view of ECOWAS and African Union's recognition of Alassane Dramane Ouattara as President-elect of Côte d'Ivoire and representative of the freely expressed voice of the Ivorian people as proclaimed by the Independent Electoral Commission').

<sup>49</sup> Kolb et al., *L'Application du Droit International Humanitaire et des Droits de l'Homme aux Organisations Internationales. Forces de Paix et Administrations Civiles Transitoires* (Bruylant 2005), p. 186 (holding that this means that it must always be the law of IAC that applies). By contrast: Ryniker, 'Respect du Droit International Humanitaire par les Forces des Nations Unies. Quelques Commentaires Apropos de la Circulaire du Secrétaire Général des Nations Unies du 6 Août 1999', 81 *IRRC* (1999), 795-805, p. 800 (who claims that the Bulletin does not rule out the application of the law of NIAC).

even in certain cases internationalise the pre-existing armed conflict between the local parties.<sup>50</sup> It is less clear to what extent this option also includes the low threshold of international armed conflicts outlined above. A major argument refers to the international character of peace operations, often involving the United Nations or regional organisations, which in principle *internationalises* the armed conflict.<sup>51</sup> However, this view is seriously flawed. There is simply no support for the claim that an international force changes *qua persona* the nature of an armed conflict in which it may get involved.<sup>52</sup> As a general rule of interventional conflicts, the classification depends rather on the adversary of the intervening force. Only armed conflicts with state armed forces or forces of another intervening state are considered international, while armed conflicts with insurgents are to be considered non-international in nature.<sup>53</sup> The same logic should be applied to conflicts between a peace operation and an organised armed group. This position has found increasing support in recent years among legal scholars<sup>54</sup> and has also been adopted by the ICRC, as expressed in its 2011 Challenges Report.<sup>55</sup>

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<sup>50</sup> For the ICRC: Bouvier (1995), *infra* note 90, p. 652. See also: Benvenuti, 'The Implementation of International Humanitarian Law in the Framework of UN Peace-Keeping', 1 *Law in International Crisis* (1995), 83-119, p. 96; David (2008), *supra* note 10, p. 152.

<sup>51</sup> See, for instance: Hampson, 'States' Military Operations Authorized by the United Nations and International Humanitarian Law' in: Condorelli et alia (eds.), *Les Nations Unies et le Droit International Humanitaire Actes du Colloque International, 19-21 Octobre 1995, Genève* (Pedone 1996), 371-426, pp. 390-91 ('It seems no more sensible, however, to regard a group of foreigners fighting to protect a «safe area» as engaged in a non-international conflict. The very involvement of the United Nations and its determination that an internal situation constitutes a threat to *international* peace and security would seem to deny such a characterization'). Note, however, that the author seems to have changed her view in the meantime: Hampson, 'Afghanistan 2001-2010', in: Wilmshurst (ed.), *International Law and the Classification of Conflicts* (OUP 2012), 242-79.

<sup>52</sup> Admittedly, CA3 refers to non-international armed conflicts 'occurring in the territory of one of the High Contracting Parties' and Article 1 (1) AP II requires that the armed conflict take 'place in the territory of a High Contracting Party between its armed forces', which gives the impression that non-international armed conflicts can only exist on the territory of one state and thus rules out situations in which multinational forces could be involved in a NIAC taking place abroad. Nevertheless, while this may be a possible reading of the plain text of the two treaty provisions, practice seems to support the view that a state can also be involved in a NIAC taking place entirely outside of its own territory.

<sup>53</sup> Schindler (1979), *supra* note 10, p. 150-55.

<sup>54</sup> Cho, 'International Humanitarian Law and United Nations Operations in an Internal Armed Conflict', 26 *Korean Journal of International and Comparative Law* (1998), 85-111, p. 93; McCoubrey and White, *International Organizations and Civil Wars* (Dartmouth Publishers 1995), p. 172; Tittmore, 'Belligerents in Blue Helmets: Applying International Humanitarian Law to United Nations Peace Operations', 33 *Stanford Journal of International Law* (1997), 61-117, p. 110; 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* (Intersentia, 2010), pp. 478-92. See also: Faite, 'Multinational Forces Acting Pursuant to a Mandate of the United Nations: Specific Issues on the Applicability of International Humanitarian Law', 11 *International Peacekeeping* (2007), 143-157, pp. 146-48 (mainly pointing at the issue of POW status); Federal Prosecutor General (Germany), *Final Report on Preliminary Investigations against Colonel Klein and Sergeant Wilhelm*, 16 April 2010, 3 BJs 6/10-4, pp. 41-42.

<sup>55</sup> ICRC, *International Humanitarian Law and the Challenges of Contemporary Armed Conflicts*, Report Prepared for the 31<sup>st</sup> International Conference of the Red Cross and Red Crescent, Geneva, Switzerland, 28

There are a number of reasons that have facilitated this development. First, as we have seen above, a great number of customary humanitarian rules are today considered to be equally applicable in non-international armed conflicts. This has effectively removed the bias among scholars and the ICRC in favour of the law of international armed conflicts. At the same time, states have remained reluctant to grant fighters of non-state armed groups the *combatant* privilege, that is to say a *licence to kill* members of the states' own armed forces. This is one of the main reasons why states and international organisations involved in peace operations have often been unwilling to acknowledge the existence of an armed conflict altogether, running the risk of undermining the application of humanitarian law in such situations. Moreover, the increased clarification of the threshold of non-international armed conflicts has made sure that armed conflicts with armed groups will normally only start once the violence reaches a high level of intensity.

Despite this development, there remains a group of legal scholars that adheres to the traditional view, whereby armed conflicts between international forces and non-state armed groups are by default international in nature.<sup>56</sup> According to a major argument advanced by them, the distinction between both types of armed conflicts has its origin in the principle of sovereignty. Since peace operations do not enjoy territorial sovereignty over the area of deployment, they cannot invoke the right to put down any form of rebellion and punish the insurgents, which is inherent in the law of non-international armed conflicts. As a consequence, only the international armed conflict regime would be available to them.<sup>57</sup>

This argument seems, however, to overlook that many peace operations do indeed embark on combat missions alongside the armed forces of the host states. Illustrative cases are the ISAF mission in Afghanistan or the UN operation in the Democratic Republic of Congo (MONUC and later MONUSCO). Captured fighters are usually handed over to the local authorities and prosecuted for their acts. It is precisely the respect for the sovereignty of the host state that would seem to prevent the granting of prisoner-of-war status to such detainees, who in the eyes of local authorities are mere criminals.<sup>58</sup> Admittedly, the case becomes more challenging where

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November – 1 December 2011, p. 31. Critical of the novel ICRC view: Lagot, *Quel Droit International Humanitaire pour les Conflits Armés Actuels?* (L'Harmattan 2010), pp. 25-28.

<sup>56</sup> La Haye, *War Crimes in Internal Armed Conflicts* (CUP 2008), p. 19-21; David, 'How Does the Involvement of a Multinational Peacekeeping Force Affect the Classification of a Situation?', 95 IRRC (2013), 659-79.

<sup>57</sup> Glick, 'Lip Service to the Laws of War: Humanitarian Law and United Nations Armed Forces', 17 *Michigan Journal of International Law* (1995), 53-108, p. 91; Bothe (1967), *supra* note 10, p. 212.

<sup>58</sup> The same would appear to be the case for peace operations who conduct their actions more independently, but on the basis of a status-of-force agreement concluded with the host state.

any form of central government has collapsed in the host state. A case in point is the UN presence in Somalia following the overthrow of the Barre regime in 1991 and where none of the local groups could be considered to represent the state as such. However, in view of the broad mandate peace operations usually enjoy in such cases, it is fair to say that they assume the role of a quasi-sovereign.<sup>59</sup> Consequently, just like state governments, the mission is entitled to enforce law and order and if necessary to crack down on civil unrest. If the violence reaches a higher level of intensity and involves organised armed groups, the law of non-international armed conflicts becomes applicable.<sup>60</sup>

Nevertheless, there are a number of exceptions to the general rule just outlined. For instance, the non-state armed group opposing the peace operation may claim to be a national liberation movement within the meaning of Article 1 (4) Additional Protocol I holds, which would mean that the armed conflict would have an international character, including the full *combatant* privilege for the freedom fighters and subject to the low intensity threshold. But it is highly questionable whether Article 1 (4) can really be considered a rule of customary law, rather than only binding on those states party to Additional Protocol I.<sup>61</sup> Most importantly, however, it is rather unlikely that a peace operation that has been authorised by the UN Security Council would engage in fighting with a group that can reasonably be considered a ‘national liberation movement’.

Cases in which the non-state armed group acts on behalf of a third state forms another exception to the general rule. Hence, any use of force between the peace operation and members of such armed groups would trigger an international armed conflict. What remains at issue is the level of control required for this to be the case. In the *Tadić* judgment, the ICTY Appeals Chamber held that the Bosnian-Serb forces had acted under the *overall control* (and thus as an agent) of the Federal Republic of Yugoslavia.<sup>62</sup> Hence, by reverse logic, also the NATO air strikes against Bosnian-Serb positions amounted to an international armed conflict.<sup>63</sup> The ICRC followed the same reasoning when claiming prisoner-of-war status for pro-Indonesian militiamen

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<sup>59</sup> The same conclusion seems warranted for cases of international territorial administrations (like previously in Kosovo or East Timor).

<sup>60</sup> Consequently, the peace operation would not have to grant prisoner-of-war status to captured fighters, but rather retains the right to have them prosecuted for committing hostile acts against their forces.

<sup>61</sup> Akande, ‘Classification of Armed Conflicts: Relevant Legal Concepts’, in: Wilmschurst (ed.), *International Law and the Classification of Conflicts* (OUP 2012), 32-79, p.49

<sup>62</sup> ICTY, *Prosecutor v. Tadić*, Judgement, 15 July 1999, Case No. IT-94-1-T, paras. 146-62.

<sup>63</sup> This is also reflected by the fact that France secured prisoner-of-war status for its pilots that had been shot down during these strikes, as reported above: Sassòli (2007), *supra* note 1, p. 260. Note, however: Shraga (2009), *infra* note 146, p. 362 (who claims in relation to a different incident involving French UNPROFOR soldiers that the ‘Bosnian-Serbs captured by the French Force, not being “members of the armed forces of

captured by the International Force for East Timor (INTERFET), since they had acted under the *overall control* of Indonesia and had thus been captured in the context of an international armed conflict.<sup>64</sup> Nevertheless, recent jurisprudence seems to require a much higher control level for similar cases,<sup>65</sup> which may be reflective of the fact that international courts no longer see a pressing need to argue for an internationalisation of an otherwise non-international armed conflict, coupled with the concern among states to grant members of armed groups full combatant privilege.<sup>66</sup>

Even though an armed conflict between a peace operation and a non-state armed group will under normal circumstances take a non-international character, both parties are free to agree by means of special agreements to mutually apply (some or all of the) additional rules of the law of international armed conflicts.<sup>67</sup> Such agreements may grant full prisoner-of-war status (including full combatant privilege) to captured fighters and may thus prove useful in cases where a considerable number of the peace operation's own personnel have been captured. Where no such agreement can be reached, the peace operation may also unilaterally internationalise the existing armed conflict with the non-state armed group by formally recognising belligerency,<sup>68</sup> even though such recognitions appear to have fallen out of practice.<sup>69</sup> Yet, given the great number of different actors involved – namely the contributing states, international organisations and

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a Party to the conflict” within the meaning of the 1949 Third Geneva Convention, were not entitled to a “prisoner of war” status; pending their release and for the duration of their detention, however, they were entitled to common Article 3 minimum standards of humane treatment’).

<sup>64</sup> Levrat, ‘Le Droit International Humanitaire au Timor Oriental: Entre Théorie et Pratique’, 841 IRRC (2001), 77-100, pp. 92-95.

<sup>65</sup> SCSL, *Prosecutor v. Sesay et al.*, Trial Chamber Judgement, 2 March 2009, Case No. SCSL-04-15-T, paras. 974-77 (holding that the control exercised by Charles Taylor over the RUF was not sufficient to make the latter an agent of the Republic of Liberia for the purpose of internationalising the non-international armed conflict in Sierra Leone); ICC, *Prosecutor v. Lubanga Dyilo*, Trial Chamber Judgement, 14 March 2012, Case No. ICC-01/04-01/06, paras. 552-67 (finding no support for the Pre-trial Chamber’s previous classification of the armed conflict as international, as there was insufficient control exercised by Uganda, Rwanda and the DRC over their ‘proxy’ armed groups engaged in fighting with each other).

<sup>66</sup> Note, however, that even if the armed conflict were deemed international in character, members of the armed group in question could still forfeit their right to full prisoner-of-war status by failing to meet the minimum requirements of regular combatants, including to wear a distinctive emblem and to carry their weapons openly.

<sup>67</sup> Parties to the conflict are particularly encouraged to conclude such special agreements by CA3 (2) para. 2 (‘The Parties to the conflict should further endeavour to bring into force, by means of special agreements, all or part of the other provisions of the present Convention’). Also suggested by McCoubrey and White (note), p. 172.

<sup>68</sup> Sassòli, ‘The Role of Human Rights and International Humanitarian Law in New Types of Armed Conflicts’ in: Ben-Naftali (ed.), *International Humanitarian Law and International Human Rights Law: Pas de Deux* (OUP 2011), 34-94, p. 89.

<sup>69</sup> The doctrine of recognition of belligerency is, however, explicitly mentioned in ICRC Commentary: Commentary to GC III, p. 36. More generally on recognition of belligerency: Akande (2012), *supra* note 61, pp. 49-50; Cullen, *The Concept of Non-international Armed Conflict in International Humanitarian Law*

the host state – the question remains as to who is entitled to recognise belligerency in the case at hand. Moreover, both options are obviously only available where the level of violence has already reached the intensity required for the existence of a non-international armed conflict and thus do in no way affect the threshold requirement.

In sum, it appears more reasonable to apply the law of non-international armed conflict to situations of armed conflict between a peace operation and non-state armed groups. In other words, where the peace operation in question is involved in fighting of sufficient intensity with well-organised armed groups – e.g. currently in Afghanistan, Mali, Somalia and the Democratic Republic of Congo – there is a non-international armed conflict. Conversely, where one or both of these requirements is not met, humanitarian law does not apply. This was arguably the case with the UN Stabilisation Mission in Haiti (MINUSTAH), whose forces clashed frequently with local criminal gangs in certain areas of the capital Port-au-Prince between 2004 and 2007.<sup>70</sup> Since the clashes did not lead to sustained fighting and involved only poorly organised groups, they qualified rather as internal disturbances. A similar conclusion can be drawn from the activities of the EU-led anti-piracy mission (Atalanta), operating off the coast of Somalia: clashes with pirate vessels have been rather short-lived and do not involve sophisticated weaponry, nor do the individual pirate groups seem sufficiently organised for qualifying as a party to an armed conflict.

## Conclusion

The foregoing shows clearly that the characterisation of the armed conflict in which a peace operation may become involved has to be based on the ordinary test. Hence, when states and international organisations acting as part of a peace operation engage in fighting with state armed forces, however sporadic and short-lived this may be, there will be an international armed conflict. By contrast, violence with non-state armed groups may (only) qualify as a non-international armed conflict, provided that it reaches a high level of intensity and that the group in question is sufficiently organised. Even though the law of non-international armed conflict is more limited and does not guarantee a combatant immunity to captured enemy fighters, there are circumstances under which the full set of rules may become applicable, most notably by

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(CUP 2010), pp. 5-24.

<sup>70</sup> BBC, 'UN Troops Flood into Haiti Slum', 11 February 2007, [http://www.bbc.co.uk/caribbean/news/story/2007/02/070211\\_unhaiti.shtml](http://www.bbc.co.uk/caribbean/news/story/2007/02/070211_unhaiti.shtml).

mutual agreement between the parties. Becoming parties to an armed conflict triggers the application of their respective humanitarian law obligations, which they have to observe neatly while carrying out their own military actions.<sup>71</sup> By contrast, the peace operation as such cannot *sensu stricto* be considered a party to the conflict, because it has *no* distinct legal personality.

## PROTECTION REGIME AND HIGHER THRESHOLD

As shown above, UN and national officials have been reluctant to acknowledge that their troops, involved in a peace operation, have become a party to an armed conflict. This view reflects the intention of raising the threshold of armed conflict for peace operations so as to keep their troops immune from attack for as long as possible. It is, however, doubtful whether this practice has given rise to a *sui generis* threshold for peace operations as part of the *lex lata*, as suggested by some authors.<sup>72</sup> Nevertheless, the tendency of raising the threshold of humanitarian law could perhaps be reinforced by a recently developed regime to enhance the protection and safety of peacekeeping personnel.

### Safety Convention

In response to increasing attacks on peacekeepers in the early 1990s, states adopted the Convention on the Safety of United Nations and Associated Personnel (1994).<sup>73</sup> Under the Safety Convention, states are prohibited from attacking United Nations or associated personnel, their equipment and premises, or otherwise preventing them from discharging their mandate; they are also under an obligation to take all appropriate measures to ensure their safety and security.<sup>74</sup>

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<sup>71</sup> For both scenarios, the different participating states and the organisation may (depending on the facts) qualify as the parties to the conflict, but *sensu stricto* not the peace operation as such, because it has *no* distinct legal personality.

<sup>72</sup> Greenwood, 'International Humanitarian Law and United Nations Military Operations', 1 YIHL (1998), 3-34, pp. 24-25 ('It appears, therefore, that a United Nations force and national units operating in association with it but under national command will be regarded as parties to an armed conflict only when they have engaged in hostilities on a scale ... *considerably higher* than that which is used to define an armed conflict for other purposes').

<sup>73</sup> For a detailed description of the drafting process of the 1994 Safety Convention and its main features: Engdahl, Protection of Personnel in Peace Operations: The Role of the 'Safety Convention' against the Background of General International Law (Martinus Nijhoff 2007), pp. 205-92.

<sup>74</sup> Art. 7, Safety Convention (1994).

If captured or detained, such personnel are to be promptly released and returned.<sup>75</sup> The Convention defines a range of hostile acts against the personnel of peace operations as crimes, namely murder, kidnapping or other attacks upon the person or their liberty,<sup>76</sup> and obliges states to enact criminal statutes penalising these acts at the domestic level.<sup>77</sup>

Hence, the Safety Convention (1994) runs the risk of prohibiting acts by state armed forces that would otherwise be permissible in times of armed conflict – namely attacks against or detention of enemy forces – and for which members of their armed forces are shielded from criminal prosecution.<sup>78</sup> The term ‘United Nations or Associated Personnel’ is broad enough to cover the military personnel of a wide range of different peace operations,<sup>79</sup> including those carried out by regional organisations or states that may be more likely to become involved in fighting organised armed forces. The relationship between the Safety Convention (1994) and humanitarian law was therefore specifically discussed during the drafting process, with most delegates arguing that both regimes should be mutually exclusive. For this purpose, the drafters included Article 2 (2), which serves as an exclusion clause:

This Convention shall *not apply* to a United Nations operation authorized by the Security Council as an *enforcement action under Chapter VII* of the Charter of the United Nations in which any of the personnel are *engaged as combatants against organized armed forces* and to which the *law of international armed conflict* applies.<sup>80</sup>

In other words, peace operations are excluded from the scope of the Safety Convention (1994), if they meet the following three cumulative requirements:

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<sup>75</sup> Art. 8.

<sup>76</sup> Art. 9.

<sup>77</sup> Art. 10, *ibid*. Furthermore, states party to the Convention have the duty to prevent the commission of such acts and to ensure the prosecution or extradition of the offenders, as well as to co-operate with the UN and other states for this purpose, Arts. 11-16, Safety Convention (1994).

<sup>78</sup> This would obviously presuppose that the attacked side had already been the enemy before the attack, or that the attack itself triggers the armed conflict between the attacking and attacked side. In view of the extremely low IAC intensity threshold (i.e. ‘first-shot’ approach), such a scenario is indeed not unlikely.

<sup>79</sup> UN personnel includes members of the military component of a UN operation, i.e. conducted under UN authority and control, whereas the term ‘associated personnel’ may be broadly interpreted, covering also members of peace operations carried out by regional organisations or individual states, provided they are accompanied by a UN presence (e.g. SFOR in Bosnia Herzegovina, KFOR in Kosovo and ISAF in Afghanistan). On this issue: Engdahl (2007), *supra* note 73, pp. 218-33. UNGA, Official Records 49<sup>th</sup> Session, UN Doc. A/49/PV.84, 9 December 1994, p. 15 (US delegate: ‘all recent operations authorized by the Security Council would be covered, including the current operations in Haiti, Rwanda and Bosnia and the prior operation in Somalia. Thus, both United Nations forces and associated forces would be covered, including for example, the multinational force in Haiti and assistance provided by the North Atlantic Treaty Organization (NATO) to the United Nations Protection Force (UNPROFOR) in Bosnia’).

<sup>80</sup> Emphasis added.

1. The UN operation is authorised by the Security Council as an enforcement action under Chapter VII;
2. Its personnel are engaged as combatants against organised armed forces; and
3. The law of international armed conflict applies to the operation.

To begin with the third criterion, it has been suggested that this reference is only of declarative nature, since the drafters believed that any armed conflict in which the United Nations becomes involved would be international in character.<sup>81</sup> This reasoning is, however, hardly convincing. As we have seen above, it is perfectly possible for a peace operation to become a party to an armed conflict with organised armed groups, to which the law of non-international armed conflict would normally be applicable. Christiane Bourloyannis-Vrailas calls it doubtful why such cases should remain protected under the Convention.<sup>82</sup> It is, however, reported that the United States<sup>83</sup> and some other delegations<sup>84</sup> explicitly called for the inclusion of non-international armed conflicts within the scope of the Convention so as to compensate for the perceived protection gap under the few humanitarian law provisions applicable to this type of conflict. More importantly, even considering the recent convergence of customary rules for both types of armed conflict, there is no norm conflict between the provisions of the Safety Convention (1994) and those under the law of non-international armed conflicts. First, the obligation under the Convention to refrain from attacks against UN and associated personnel is only addressed to states and not to armed groups. Moreover, the combatant privilege only applies in international armed conflicts and thus does not prevent the criminalisation and subsequent prosecution of hostile acts committed by insurgents against the peace mission's personnel, as explicitly required under the Convention. There is thus no need to exclude situations of non-international

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<sup>81</sup> Kirsch, 'The Convention on the Safety of the United Nations and the Associated Personnel', 2 *International Peacekeeping* (1995), 102-106, p. 105 ('it was generally agreed that it was impossible for the UN itself to be involved in an internal armed conflict since once UN or associated personnel became engaged in conflict with a local force (as opposed to merely acting in self-defence), the conflict becomes, by definition, 'international' in character'); Kolb et al. (2005), *supra* note 49, p. 186-87.

<sup>82</sup> Bourloyannis-Vrailas, 'The Convention on the Safety of United Nations and Associated Personnel', 44 (3) *ICLQ* (1995), 560-90, p. 568.

<sup>83</sup> Lepper, 'The Legal Status of Military Personnel in United Nations Peace Operations: One Delegate's Analysis', 18 *Houston Journal of International Law* (1996), 359-464, p. 395. See also the comments by the US delegate during adoption of the Safety Convention: UNGA, Official Records of the 49<sup>th</sup> session, 84<sup>th</sup> Meeting, UN Doc. A/49/PV.84, 9 December 1994, p. 15 ('When common article 2 of the Geneva Conventions does not apply, for example in non-combat situations or in *internal armed conflicts*, the Convention we are adopting today will apply and will fill any gap in the law by criminalizing attacks on United Nations and associated personnel', emphasis added).

<sup>84</sup> Arsanjani, 'Defending the Blue Helmets: Protection of United Nations Personnel', in: Condorelli et al. (1996), *supra* note, 115-147, p. 143, footnote 77 ('Apparently, during the negotiation of the Convention, a number of Third World States opposed [sic] to any reference to internal armed conflicts. It seems, however, clear that the negotiators of the Convention were aware of the consequences of the language').

armed conflict from the scope of the Safety Convention. On the contrary, it may even prove particularly useful to extend this special protection regime to such situations.<sup>85</sup> Hence, it seems reasonable to conclude that the Safety Convention (1994) continues to protect UN and associated personnel engaged in an armed conflict with a non-state armed group.<sup>86</sup>

This finding also has an impact on the operation of the second requirement of the exclusion clause in Article 2 (2), namely that the personnel be ‘engaged as combatants against organized armed forces’. While this passage could be read as referring to an involvement in any armed conflict, regardless of its nature,<sup>87</sup> the third criterion makes clear that only those operations that have become a party to an international armed conflict lose their protection under the Convention. This conclusion is further restricted by the first criterion of the exclusion clause, referring only to operations ‘authorised by the Security Council as an *enforcement action under Chapter VII* of the Charter of the United Nations’.<sup>88</sup> As we have seen above, however, the mandate of a peace operation should have no bearing on the application of humanitarian law. Indeed, a traditional peacekeeping operation with a Chapter VI mandate has to be considered a party to an international armed conflict if it comes under deliberate attack from state armed forces. Certainly, almost all of the more recent peace missions operate under robust Chapter VII mandates; but it remains unclear whether they can be considered ‘enforcement actions’ as required by the exclusion clause. In other words, Article 2 (2) fails to properly exclude all cases in which a peace operation could become involved in an international armed conflict. The Safety Convention (1994) thus runs the risks of potentially clashing with some of the provisions under the law of international armed conflict. However, this dilemma seems to be mitigated by the following saving clause in Article 20 of the Convention, which ensures that:

Nothing in this Convention shall affect: (a) The applicability of international humanitarian law ... in relation to the protection of United Nations operations and United Nations and

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<sup>85</sup> First, under the Convention states would be obliged to take appropriate measures to prevent armed groups from attacking UN and associated personnel or committing other hostile acts against them. Second, states would be enabled to vest universal jurisdiction in their courts to prosecute members of armed groups responsible for crimes as defined by the Convention.

<sup>86</sup> Engdahl (2007), *supra* note 73, p. 237-241. For a different view: Report of the Secretary-General, ‘Scope of Legal Protection under the Convention on the Safety of United Nations and Associated Personnel’, UN Doc. A/55/637, 21 November 2000, p. 9, endnote 3; Glick (1995), *supra* note 57, p. 82-83; Rowe, ‘Maintaining Discipline in United Nations Peace Support Operations: The Legal Quagmire for Military Contingents’, 5 JCSL (2000), 45-62, p. 53-54.

<sup>87</sup> Along the same lines as Sect. 1 (1) SG Bulletin, which also uses the term ‘combatants’ without, however, limiting its application to international armed conflicts alone.

<sup>88</sup> Art. 2 (2), Safety Convention (1994), emphasis added. By reverse logic, Chapter VII operations that are not a party to an international armed conflict remain under the protection of the Convention.

associated personnel or the responsibility of such personnel to respect such law and standards.<sup>89</sup>

Hence, despite the flawed wording of its exclusion clause in Article 2 (2), the Safety Convention (1994) cannot be invoked by states for deviating from their obligations under humanitarian law, which prohibits any possible prosecution of members of state armed forces for attacking the personnel of the peace operations, regardless of their exact mandate. This shows that the Safety Convention and humanitarian law are two distinct legal regimes.<sup>90</sup>

As a consequence, the Convention does in no way raise the threshold of humanitarian law for international armed conflicts involving peace operations.<sup>91</sup> This conclusion is also supported by the poor ratification record of the Safety Convention, especially among host states, who are the most likely candidates for states becoming involved in (sporadic) fighting with members of a peace operation.<sup>92</sup> Moreover, as we have already seen above, there is no obvious conflict between the Safety Convention and the law of non-international armed conflict, whose application is already subject to a higher gravity threshold.

### **Special Protection under Humanitarian Law**

In addition to the Safety Convention (1994), a special protection regime has evolved in the field of international criminal law and humanitarian law. In the lead-up to the adoption of the Rome Statute, the International Law Commission issued in 1996 a ‘Draft Code of Crimes Against the Peace and Security of Mankind’. In Article 19, the Draft Code introduced a new category of ‘Crimes Against United Nations and Associated Personnel’,<sup>93</sup> which was essentially modelled

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<sup>89</sup> Emphasis added.

<sup>90</sup> Bouvier, ‘Convention on the Safety of United Nations and Associated Personnel’, 35 IRRC (1995), 638-66, p. 664; Kolb, *Droit Humanitaire et Opérations de Paix Internationales* (Helbing & Lichtenhahn 2002), p. 46

<sup>91</sup> See also: Kellenberger, ‘Keynote address at the 31<sup>st</sup> Round Table on Current Issues of International Humanitarian Law’, International Institute of Humanitarian Law, San Remo, 4 September 2008, p. 36. For the opposite view: Glick (1995), *supra* note 57, pp. 81-96 (who criticises the Convention for criminalising acts that are covered by the combatant privilege); Greenwood (2008), *supra* note 19, p. 53 (‘It seems highly unlikely that those who drafted this Convention intended it to cease application as soon as there was any fighting, however low-level, between members of a UN force and members of other organized armed forces as this would reduce the scope of application of the Convention to almost nothing. There is, therefore, an inevitable tension between the very broad definition of armed conflict ... and the policy behind the 1994 Convention’).

<sup>92</sup> For an excellent outline of the ratification record: Fleck, ‘The Legal Status of Personnel Involved in United Nations Peace Operations’, 891-92 IRRC (2013), 613-36, pp. 627-29.

<sup>93</sup> ILC, Draft Code of Crimes against the Peace and Security of Mankind, 2 YILC (1996), p. 7.

on the Safety Convention (1994).<sup>94</sup> However, the drafters of the Rome Statute (1998) followed a different approach and criminalised attacks on peacekeeping missions under the general war crimes section. Accordingly, the following acts constitute a war crime in both international and non-international armed conflicts:

Intentionally directing attacks against personnel, installations, material, units or vehicles involved in a humanitarian assistance or *peacekeeping mission* in accordance with the Charter of the United Nations, as long as they are entitled to the protection given to civilians or civilian objects under the international law of armed conflict.<sup>95</sup>

The same war crime was also included in the statutes of the East Timor Panels<sup>96</sup> and of the Special Court for Sierra Leone.<sup>97</sup> In this context, the UN Secretary-General emphasised that:

Attacks against peacekeeping personnel, to the extent that they are entitled to protection recognized under international law to civilians in armed conflict, *do not represent a new crime*. Although established for the first time as an international crime in the Statute of the International Criminal Court, it was not viewed at the time of the adoption of the Rome Statute as adding to the *already existing customary international law crime of attacks against civilians and persons hors de combat*. Based on the distinction between peacekeepers as civilians and peacekeepers turned combatants, the crime defined in article 4 of the Statute of the Special Court is a specification of a targeted group within the generally protected group of civilians which because of its humanitarian or peacekeeping mission deserves special protection.<sup>98</sup>

In other words, the personnel of peacekeeping missions are already protected under the generic protection of civilians under humanitarian law. Moreover, this specification also clarifies that the protection does not only cover civilian staff involved in a peacekeeping mission, but also

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<sup>94</sup> It reproduces the crimes listed in paras. (a) and (b) of Art. 9 (1) and the exclusion clause in Art. 2 (2) of the Safety Convention.

<sup>95</sup> Art. 8 (b) (iii) and (e) (iii), ICC Statute. The wording differs considerably from the *treaty crime* set out in Article 19 of the above mentioned ILC Draft Code (*supra* note 93), which would have created a new crime in its own right.

<sup>96</sup> Sect. 6 (1) (b) (iii) and (e) (iii), UNTAET Reg. No. 2000/15 on the Establishment of Panels with Exclusive Jurisdiction Over Serious Criminal Offences, 6 June 2000.

<sup>97</sup> Art. 4 (b), SCSL Statute, as adopted by agreement between the United Nations and Sierra Leone, 16 January 2002.

<sup>98</sup> UN Secretary-General, Report on the Establishment of a Special Court for Sierra Leone, UN Doc. S/2000/915, 4 October 2000, para. 16.

extends to military personnel,<sup>99</sup> unless they have forfeited their protected status.<sup>100</sup> This is also reflected in the wording of the Secretary-General's Bulletin (1999).<sup>101</sup>

The view that peacekeepers deployed in a zone of armed conflict enjoy *prima facie* the same protection as civilians is supported by the recent jurisprudence in the field of international criminal law.<sup>102</sup> Moreover, this position is also shared by the ICRC, whose *Customary IHL Study* contains a special rule on the protection of peacekeepers, modelled on the wording of the war crime.<sup>103</sup>

That peacekeeping missions that are not a party to an ongoing conflict enjoy civilian status is widely accepted in the literature.<sup>104</sup> Some authors have, however, raised doubts as to whether military personnel could ever enjoy civilian status under humanitarian law. Tania Bolaños Enríquez, for instance, contends that peacekeeping units maintain their military character when deployed to crisis regions and thus qualify at all times as combatants – thus ruling out any possible civilian protection – regardless of whether they take part in hostilities or not.<sup>105</sup> It does indeed appear difficult to reconcile the military character of such personnel with the status of civilians.

Yet, the essential question – seemingly overlooked by those sceptics – is whether soldiers of a state not party to the armed conflict in question qualify as *armed forces* within the meaning of humanitarian law. Under the law of international armed conflicts, Article 43 of Additional Protocol I and Article 4 (A) of Geneva Convention III only provide a definition of (members of)

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<sup>99</sup> Cottier, 'Article 8 War Crimes - para. 2 (b) (iii)' in: Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court - Observers' Notes, Article by Article* (2<sup>nd</sup> edn, Nomos Verlagsgesellschaft 2008), 187-96; Bothe, 'War Crimes', in: Cassese et al. (eds.), *The Rome Statute of the International Criminal Court: A Commentary* (Vol. I, OUP 2002), 379-425, pp. 410-12 and 422.

<sup>100</sup> The exact modalities of losing the protection of civilians will be examined in the following section.

<sup>101</sup> Section 1.2, Secretary-General's Bulletin, *supra* note ('The promulgation of this bulletin does not affect the protected status of members of peacekeeping operations ... as non-combatants, as long as they are entitled to the *protection given to civilians* under the international law of armed conflict', emphasis added).

<sup>102</sup> See *infra* notes 141-143.

<sup>103</sup> Rule 33, CIHL Study ('Directing an attack against personnel and objects involved in a peacekeeping mission in accordance with the Charter of the United Nations, as long as they are entitled to the protection given to civilians and civilian objects under international humanitarian law, is prohibited'). This rule applies to international and non-international armed conflicts.

<sup>104</sup> Dörmann, *Elements of War Crimes under the Rome Statute of the International Criminal Court* (CUP 2003), pp. 153-160 and 452-457; Engdahl (2007), *supra* note 73, pp. 293-307; and the authorities cited above, *supra* note 99.

<sup>105</sup> Bolaños Enríquez, *Anwendung des Humanitären Völkerrechts auf Militärische Interventionen der Vereinten Nationen in Internen Bewaffneten Konflikten* (Hartung-Gorre 2011), pp. 126-28. For a similar view: Kolb et al. (2005), *supra* note 49, p. 182 ('[L]eur statut de membres de forces armées ne permet pas de leur octroyer la protection que prescrit le droit international humanitaire pour les civils').

armed forces *belonging to a party to the conflict*.<sup>106</sup> Hence, soldiers that do not belong to a party to the conflict are not covered by this term. Consequently, they can only be considered civilians.<sup>107</sup> The requirement of ‘belonging to a party to the conflict’ is also part of the definition of armed forces under customary law as reflected by the *Customary IHL Study*.<sup>108</sup> The same conclusion can be drawn from the ICRC’s Interpretative Guidance on the Notion of Direct Participation in Hostilities (2009),<sup>109</sup> which makes clear that only members of armed forces or organised armed groups *belonging to a party to the conflict* are excluded from the category of civilians, both in international armed conflicts<sup>110</sup> and non-international armed conflicts.<sup>111</sup>

The position that armed forces not belonging to a party to the armed conflict must be considered civilians is further supported by the definition of perfidy under humanitarian law,<sup>112</sup> which contains a list of examples constituting acts of perfidy, including:

*the feigning of protected status by the use of signs, emblems or uniforms of the United Nations or of neutral or other States not Parties to the conflict.*<sup>113</sup>

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<sup>106</sup> Art. 43 AP I, (‘1. The *armed forces of a Party to a conflict* ... 2. Members of the *armed forces of a Party to a conflict* (other than medical personnel and chaplains covered by Article 33 of the Third Convention) are combatants ...’, emphasis added). See also Art. 4 (A) Geneva Convention III, where the requirement of ‘belonging to a party to the conflict’ is explicitly stated for the categories mentioned in paras. 1, 2 and 5, and implicit for the remaining ones.

<sup>107</sup> Art. 50 (1) AP I, (‘A civilian is any person who does not belong to one of the categories of persons referred to in Article 4 A (1), (2), (3) and (6) of the Third Convention and in Article 43 of this Protocol. In case of doubt whether a person is a civilian, that person shall be considered to be a civilian’).

<sup>108</sup> Rule 4, CIHL Study (‘The armed forces of a party to the conflict consist of all organized armed forces, groups and units which are under a command responsible to that party for the conduct of its subordinates’). Also the accompanying commentary stresses the requirement of ‘belong to a party to the conflict’, see pp. 14-15. Armed forces of a state (or organisation) that has not (yet) become a party to the conflict would thus enjoy the protection of civilians, although this conclusion is less evident under Rule 5, which simply defines civilians as persons who are not members of the armed forces, without clarifying whether such forces have to belong to a party to the conflict.

<sup>109</sup> ICRC, Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law, prepared and edited by Nils Melzer, May 2009.

<sup>110</sup> Ibid, p. 20 (‘all persons who are neither *members of the armed forces of a party to the conflict* nor participants in a *levée en masse* are civilians’, emphasis added). Also the accompanying commentary stresses the ‘belonging to a party to the conflict’ requirement, see pp. 23-24.

<sup>111</sup> Ibid, p. 27 (‘all persons who are not members of State armed forces or organized armed groups of a party to the conflict are civilians’, emphasis added).

<sup>112</sup> Art. 37 (1) AP I and Rule 65 of CIHL Study (applicable in international and non-international armed conflicts), Vol. I, pp. 223-24, define perfidy as follows: ‘Acts inviting the confidence of an adversary to lead him to believe that he is entitled to, or is obliged to accord, protection under the rules of international law applicable in armed conflict, with intent to betray that confidence’.

<sup>113</sup> Art. 37 (1) (d) AP I, emphasis added.

This implies that the armed forces of the United Nations or of neutral or other states not parties to the conflict<sup>114</sup> – namely those usually entitled to use such signs, emblems or uniforms – enjoy a protected status under humanitarian law.<sup>115</sup>

Based on this contextual interpretation of the relevant rules and categories under humanitarian law, it is reasonable to conclude that military personnel deployed in the theatre of an armed conflict but *not belonging* to any of the parties to that conflict enjoy *prima facie* the same protection as civilians. The protection applies to the armed forces of neutral states as well as to the armed forces of any other state or international organisation that has not (yet) become a party to the conflict in question.<sup>116</sup> This clarification is an important contribution to the discussion on the protection of peace operations: Civilian protection is thus not only limited to the personnel of operations qualifying as ‘peacekeeping missions in accordance with the Charter of the United Nations’, however broadly or narrowly this term may be interpreted in practice.<sup>117</sup> Rather, the protection extends to the personnel of *all* peace operations, provided that they have not (yet) become a party to the conflict. This finding also helps to demystify the whole concept of civilian protection of peacekeepers, since the same protection applies to any other type of armed forces of a state or organisation not party to the armed conflict in question.

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<sup>114</sup> This fact is also mentioned by Greenwood without, however, specifying the nature of the protection: Greenwood, ‘Protection of Peacekeepers: The Legal Regime’, 7 *Duke Journal of Comparative and International Law* (1996), 185-208, p. 190.

<sup>115</sup> The provision remains unclear as to the exact nature and origin of this status. Yet, in the absence of any other possible category, it is fair to say that it can only refer to the status of civilians. There are indeed a number of alternatives that could possibly give rise to special protection under IHL. None of them seems, however, available to armed forces of a state or organisation not party to the armed conflict. First, they cannot be considered non-combatant members of the armed forces protected under IHL, because such protection only covers medical and religious personnel (Arts. 24-26 GC I, 36 GC II, and Rules 25 and 27 CIHL Study) and members of the armed forces assigned to civil defence organisations (Art. 67 AP I), and includes the requirement to belong to a party to the conflict. Second, they cannot be considered persons *hors de combat* (as suggested by Shruga (2009), *infra* note 146, p. 363), because this status presupposes that they have previously taken part in hostilities or are otherwise linked to the armed forces of a party to the conflict: Art. 41 AP I and Rule 47 ICRC Study. Third, they can also not be considered parlementaires, as this status also presupposes that the person in question acts on behalf of a party to the conflict: Art. 32 HRLW (‘A person is regarded as a parlementaire who has been authorized by one of the belligerents to enter into communication with the other, and who advances bearing a white flag. He has a right to inviolability ...’).

<sup>116</sup> The analogous status of UN military personnel with neutral armed forces has also been highlighted by: De Mulinen, *Handbook on the Law of War for Armed Forces* (ICRC 1987), pp. 56-57, para. 248.

<sup>117</sup> The personal scope of Art. 8 (b) (iii) and (e) (iii) of ICC Statute has been a matter of debate. Cottier defines the term ‘peacekeeping mission in accordance with the Charter of the United Nations’ narrowly, excluding operations established under Chapter VII (Cottier (2008), *supra* note 99, p. 191). This view is rejected by Engdahl, who believes that the wording ‘in accordance with the Charter of the United Nations’ suggests a wider meaning of the term ‘peacekeeping missions’: Engdahl (2007), *supra* note 73, p. 301. The CIHL Study supports this claim in Rule 33; the volume on practice includes a variety of peacekeeping operations differing both in mandate and command structure, ranging from traditional to robust peacekeeping and including both UN-led and UN-authorized missions: CIHL Study, Volume II, Practice 2, Section on Rule 33, pp. 640-59, paras. 43-121. For a comprehensive outline of practice, including military manuals and pronouncements by international organisations: [www.icrc.org/customary-ihl/eng/docs/v2\\_rul\\_rule33](http://www.icrc.org/customary-ihl/eng/docs/v2_rul_rule33).

## Conclusion

As we have seen above, the Safety Convention (1994) does in no way raise the threshold of humanitarian law for international armed conflicts involving peace operations. The same conclusion can be drawn for the special protection of peacekeepers under humanitarian law. The protection ends once the peacekeeping personnel *do* become a party to the conflict, which is a question entirely governed by humanitarian law itself. This will most evidently be the case where violence crosses the threshold of armed conflict. Hence, the civilian protection does in no way raise the threshold of armed conflict in relation to peacekeepers or members of other peace operations. Quite the contrary: the concept of civilian protection and the modalities under which it ends may help to identify *additional* circumstances under which international forces may become involved in a pre-existing armed conflict.

## PARTICIPATION IN A PRE-EXISTING ARMED CONFLICT

The previous sections considered the scenario in which a peace operation becomes a party to an armed conflict from the very outset, either in the form of an international or non-international armed conflict, by crossing the required threshold of intensity. This section will consider the specific situation where there is already a pre-existing armed conflict in the area of deployment and will examine the additional modalities under which the peace operation may become involved in that armed conflict.

## Introduction

Given that most peace operations are deployed to countries where there already is an ongoing armed conflict between local armed forces or armed groups, the existence of an armed conflict in the mission area is a very likely scenario. It is clear that the mere presence of international forces in an area affected by an armed conflict does not turn them automatically into a party to the conflict. Although this fact is not always clearly stressed in the literature,<sup>118</sup> it is reflected in the practice pertaining to peace operations. The above-mentioned Secretary-General's Bulletin (1999) states that:

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<sup>118</sup> See, however: Naert (2010), *supra* note 54, p. 470; Bothe and Dörschel, 'The UN Peace-keeping Experience' in: Fleck (ed.), *The Handbook of the Law of Visiting Forces* (OUP 2001), 487-506, pp. 501-502.

The fundamental principles and rules of international humanitarian law set out in the present bulletin are applicable to United Nations forces when *in situations of armed conflict* they are actively *engaged therein as combatants*.<sup>119</sup>

This formulation may give rise to varying interpretations,<sup>120</sup> but it seems evident that an engagement in the conflict as combatants is tantamount to belonging to a party to the conflict.<sup>121</sup>

The ordinary thresholds of armed conflict provide relatively little guidance for assessing when and how a peace operation may become a party to a pre-existing conflict. Admittedly, the low threshold of international armed conflict may blur a clear distinction in this regard, as any use of force – even of low intensity and short duration – between state armed forces and the peace operations will give rise to an international armed conflict, either as part of a pre-existing armed conflict or in addition thereto.

The case is, however, more complex in relation to an organised armed group involved in a pre-existing non-international armed conflict. In order to turn the peace operation into a party to the conflict, would the violence taking place between the peace operation and the armed group will have to reach the high level of intensity as required at the outset of the conflict, i.e. threshold of non-international armed conflicts? Or would a single exchange of fire perhaps be enough? Moreover, even absent any use of force involving the peace operation, the latter may also become involved in the ongoing conflict by other means. In order to ascertain when and how a peace operation may become a party to a pre-existing conflict, it is necessary to apply a more nuanced approach that takes into account the status and conduct of the peace operation in the field.

For this purpose, one may be tempted to examine the law of neutrality for guidance. This field of international law applies, however, only to international armed conflicts and even then it seems only of little help for identifying the circumstances under which a neutral state may become involved in a pre-existing armed conflict. While it is obvious that neutral states should abstain from *acts of war* against any of the parties to the conflict, it is much less clear what this term actually entails, apart from active fighting.<sup>122</sup> Overall, as poignantly put by Christopher Greenwood:

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<sup>119</sup> Section 1.1, UN Secretary-General's Bulletin (1999), *supra* note.

<sup>120</sup> See the discussion in the following sections on the temporal and geographic scope of application below.

<sup>121</sup> The UK Joint Service Manual (2004) seems to be more explicit in this regard. UK Ministry of Defence, Joint Service Manual of the Law of Armed Conflict, 2004, para. 14.6 ('A PSO force which does not itself take an active part in hostilities does not become subject to the law of armed conflict simply because it is operating in territory in which an armed conflict is taking place between other parties').

<sup>122</sup> Some authors have, however, provided some useful guidance: Bothe, 'The Law of Neutrality', in: Fleck

The line between participation in an armed conflict and neutrality is no longer as clear as it once was. Between the two there is now a grey area in which a state engages in non-neutral service without overtly becoming a party to the conflict.<sup>123</sup>

Consequently, the law of neutrality fails to provide a useful test for the modalities of becoming a party to a pre-existing armed conflict, both of international and non-international nature. It may therefore be more appropriate to examine the recent judicial practice in relation to the war crime of attacking peacekeeping missions, which we considered in the previous section.

### Origin and Constitutive Elements of the Test

In the *Sesay* case (2009), the Special Court for Sierra Leone (SCSL) had to ascertain whether members of the UN Mission in Sierra Leone (UNAMSIL) were entitled to civilian protection when they were attacked by fighters of the Revolutionary United Front (RUF) at the end of Sierra Leone's civil war in May 2000.<sup>124</sup> In doing so, it considered the totality of the circumstances existing at the time of the attacks, based on a non-exhaustive list including:

the relevant Security Council resolutions for the operation, the specific operational mandates, the role and practices actually adopted by the peacekeeping mission during the particular conflict, their rules of engagement and operational orders, the nature of the arms and equipment used by the peacekeeping force, the interaction between the peacekeeping force and the parties involved in the conflict, any use of force between the peacekeeping force and the parties in the conflict, the nature and frequency of such force and the conduct of the alleged victim(s) and their fellow personnel.<sup>125</sup>

While these are all relevant aspects to be considered, the over-inclusiveness of this list prevents it from providing a workable framework for participation in an ongoing armed conflict.

If the personnel of a peace operation not party to the conflict enjoy the same protection as civilians, it is reasonable to argue that the same modalities of losing their protection should apply.<sup>126</sup> Civilians forfeit their immunity from attack when they take a direct part in hostilities.

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(ed.), *The Handbook of International Humanitarian Law* (OUP 2013), 549-80, p. 562, para. 1111 ('A neutral state may in no circumstances participate in acts of war by a party to the conflict ... It may be questionable what is considered to be forbidden participation in a particular case. If the neutral state takes part by engaging its own military forces, this is a clear example. Another example might be the supply of military advisors to the armed forces of a party to the conflict'); Greenwood (2008), *supra* note 19, p. 58, para. 214 ('Support for a third party's acts of war shall generally be rated as an act of war of the supporting state if it is directly related, i.e. closely related in space and time, to measures harmful to the adversary').

<sup>123</sup> Greenwood (2008), *supra* note 19, p. 58, para. 214.

<sup>124</sup> SCSL, *Prosecutor v. Sesay et al.* (2009), *supra* note 65, paras. 213-235 and 1749-1944.

<sup>125</sup> *Ibid.*, para. 234.

<sup>126</sup> For a similar view: Tittmore (1997), *supra* note 54, p. 107; Lee, 'The United Nations – Peacekeeping Successes But Peace Enforcement Failures', 8 *Australian International Law Journal* (2000), 180-99, p. 195.

In 2009, the ICRC issued its *Interpretive Guidance* clarifying the notion of direct participation in hostilities. The last chapter of this thesis will consider in detail the circumstances under which specific acts of civilians may qualify as direct participation in hostilities.<sup>127</sup> It suffices here to note that a specific act must meet the three following cumulative criteria: (1) threshold of harm, (2) direct causation, and (3) belligerent nexus.<sup>128</sup>

Admittedly, these criteria are primarily designed to define the conduct entailing loss of protection for individual civilians rather than persons organised in a military command structure. They may nevertheless provide guidance for clarifying when individual soldiers belonging to a state or international organisation may become involved in a pre-existing conflict. Some major caveats must, however, be made: First, unlike combatants or members of organised armed groups with a continuous combat function, civilians only lose their protection from direct attack for the duration of their acts amounting to direct participation in hostilities.<sup>129</sup> Yet, it appears difficult to apply this reasoning to soldiers who are only afforded civilian protection for the mere fact that they do not (yet) belong to a party to the conflict. Hence, it would seem more appropriate to subject their loss of protection to stricter rules, for instance, by analogising them to the medical and religious personnel and other non-combatant members of the armed forces, whose loss of protection for committing hostile acts is permanent.<sup>130</sup> Second, when troops commit acts amounting to direct participation in hostilities, this will arguably have direct consequences for the status of the force as a whole. Indeed, actions undertaken by individual troops do not occur in an operational vacuum but are usually the result of decisions at higher command levels (e.g. unit, contingent, and headquarters). Moreover, in many situations they are based on the specific tasks assigned to them in their mandate as laid down in the relevant Security Council resolution or other publically available operational documents. Finally, it is difficult to imagine that the party to the conflict directly affected by the actions of such troops would be willing to distinguish between those soldiers that take a direct part in hostilities and those that do not; rather, it may treat the entire peace operation as an enemy. Hence, the loss of protection of individual troops will rapidly lead to the involvement of the entire force as a party to the conflict.

Hence, the three-prong test for acts amounting to direct participation in hostilities may help – in addition to the ordinary thresholds of armed conflicts – to examine whether and when the

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<sup>127</sup> See the discussion below, p. 236.

<sup>128</sup> ICRC, *Interpretive Guidance* (2009), p. 46. See the detailed explanations of the three criteria, pp. 47-64.

<sup>129</sup> *Ibid.*, pp. 70-73.

<sup>130</sup> They are protected against direct attacks (and enjoy a number of other privileges), unless they take a direct part in hostilities or engage in other acts harmful or hostile to the enemy. For an excellent discussion on the loss of their protection as opposed to civilians: Melzer, *Targeted Killing in International Law* (OUP 2008), pp. 329-30

armed forces of third states or international organisations, including peace operations, become a party to a pre-existing armed conflict.

### Different Mission Scenarios

As shown below, this test may be applied to four different mission scenarios involving peace operations in the field. First, all elements are clearly met where peace forces are present in an area affected by an armed conflict and participate directly in genuine combat on the side of a party to the armed conflict. The direct participation test proves especially useful in the context of a non-international armed conflict, if the violence involving the peace forces has not yet reached the high level of intensity normally required by the ordinary threshold for triggering the application of humanitarian law. Hence, if they support the host government forces in their fight against members of an organised armed group, the peace operation will become a party to the ongoing armed conflict, regardless of the level of intensity. In view of this, it is difficult to understand the statements in relation to attacks against the UN mission in the Democratic Republic of Congo (MONUSCO), which must be clearly seen as a party to the armed conflict there in support of the Congolese government.<sup>131</sup>

Second, the test proves even more useful in cases where the peace operation is not necessarily engaged in any form of combat, but provides significant support to the armed forces of one party to the armed conflict; such support may range from joint planning of military operations, the training of troops or provision of logistical support (transport of troops, arms and ammunition to the frontline) to the gathering and sharing of military intelligence. These acts readily meet the three constitutive criteria for the direct participation in hostilities. Moreover, the provision of operational support to a party to the conflict is normally part of a policy approved at high command levels, which can already be reflected in the mandate of the peace operation in question, at least in general terms.<sup>132</sup> Hence, a peace operation providing such support to one

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<sup>131</sup> Statement by the French Government, 'RDC - Bombardements dans la Région de Goma', 23 August 2013, [www.diplomatie.gouv.fr/fr/dossiers-pays/republique-democratique-du-congo/la-france-et-la-republique-1219/evenements-3672/article/rdc-bombardements-dans-la-region](http://www.diplomatie.gouv.fr/fr/dossiers-pays/republique-democratique-du-congo/la-france-et-la-republique-1219/evenements-3672/article/rdc-bombardements-dans-la-region) ('La France condamne ... en particulier les *attaques perpétrées par le M23 contre les populations civiles et les installations de la MONUSCO, qui constituent des crimes de guerre*', emphasis added). See also, S/RES/2211 (DRC), 26 March 2015, para. 15 ('Strongly condemns all armed groups operating in the region and their violations of international humanitarian law as well as other applicable international law, and abuses of human rights including attacks on the civilian population, MONUSCO peacekeepers and humanitarian actors').

<sup>132</sup> See for instance the mandate of MONUC: S/RES/1856, 22 December 2008, para. 3 (g), ('Coordinate operations with the FARDC [Forces Armées de la République Démocratique du Congo] integrated brigades deployed in the eastern part of the Democratic Republic of the Congo and support operations led by and jointly planned with these brigades ... with a view to: Disarming the recalcitrant local armed groups ...').

side becomes itself a party to the existing armed conflict.<sup>133</sup> The same logic applies to a peace operation providing support to another peace mission involved in an armed conflict in the same area.<sup>134</sup>

The situation may be slightly different where the peace operation conducts a number of tasks aimed at maintaining law and order, which are usually carried out by the police forces of the host state. Assuming *arguendo* that a peace operation could be analogised to police forces (despite their military nature), this would not necessarily prevent the forces from becoming a party to the conflict by virtue of their conduct. While there is a clear distinction under the law of international armed conflicts between the armed forces and the police (unless they are formally incorporated into the armed forces),<sup>135</sup> the status of police forces is more controversial in non-international armed conflicts. The *travaux préparatoires* of Additional Protocol II suggest that they fall under the broad concept of the armed forces.<sup>136</sup> In any case, they must be normally presumed to have functions involving direct participation in hostilities, for instance, when they set up checkpoints or carry out cordon-and-search operations in order to arrest members of organised armed groups.<sup>137</sup> Hence, where the personnel of peace operations engage in such activities, they may also be considered to take a direct part in hostilities and thus have to be considered a party to the conflict.<sup>138</sup>

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<sup>133</sup> For a very similar position taken by the ICRC: Ferraro (2013), *supra* note 5, pp. 583-87 (calling it the ‘support-based approach’ based on a 4-prong test). See also: Chatham House, Discussion Summary: The Applicability and Application of International Humanitarian Law to Multinational Forces, 20 November 2014, [www.chathamhouse.org/sites/files/chathamhouse/field/field\\_document/20141120\\_IHLMultinational\\_Forces.pdf](http://www.chathamhouse.org/sites/files/chathamhouse/field/field_document/20141120_IHLMultinational_Forces.pdf), pp. 5-7 (generally supportive with some participants, however, expressing concern over the unclear legal basis of this new test).

<sup>134</sup> UNPROFOR in Bosnia is a case in point: to the extent that UNPROFOR provided NATO forces engaged in air strikes against Bosnian-Serb position (as part of Operation Deliberate Force) with vital military intelligence, it would appear that UNPROFOR was also a party to the conflict.

<sup>135</sup> See Art. 43 (3) AP I.

<sup>136</sup> Sandoz et al., *Commentary on the Additional Protocols* (ICRC), Art. 1 AP II, para. 4462, p. 1352, (‘The term ‘armed forces’ of the High Contracting Party should be understood in the broadest sense. In fact, this term was chosen in preference to others suggested such as, for example, ‘regular armed forces’, in order to cover all the armed forces, including those not included in the definition of the army in the national legislation of some countries (national guard, customs, police forces or any other similar force)’).

<sup>137</sup> Summary Report of the Fifth Expert Meeting on the Notion of Direct Participation in Hostilities, co-organised by the ICRC and the TMC Asser Institute, Geneva, 5-6 February 2008, p. 54. For a similar conclusion: Römer, *Killing in a Gray Area Between Humanitarian Law and Human Rights. How Can the National Police of Colombia Overcome the Uncertainty of Which Branch of International Law to Apply?* (Springer 2010), pp. 26-28.

<sup>138</sup> In view of this, it is difficult to understand the following statement in relation to attacks on UN personnel in Mali (MINUSMA): UNSC, Statement by the President of the Security Council, 6 February 2015, S/PRST/2015/5, p. 2 (‘The Security Council reiterates its strongest condemnation of all attacks against MINUSMA peacekeepers, personnel and property, and underlines that attacks targeting peacekeepers may constitute war crimes under international law’).

Third, situations also often arise in which the personnel of a peace operation have to resort to the use of force in response to an unprovoked attack by one of the parties to the pre-existing armed conflict. Provided that they have not yet become a party to the armed conflict or otherwise participate directly in hostilities, the peace forces enjoy *prima facie* the same protection as civilians. It is clear that the use of force by civilians to defend themselves or others against an unlawful attack may *directly cause* the required *level of harm* to the attacking party but lacks *belligerent nexus*, as it is not the purpose of such use of force to favour a specific party to the conflict. Moreover, if self-defence were to lead to the loss of protection, this ‘would have the absurd consequence of legitimizing a previously unlawful attack’.<sup>139</sup> It is thus accepted that cases of individual self-defence by civilians do not amount to direct participation in hostilities, provided the force used does not exceed what is strictly necessary and proportionate in such situations.<sup>140</sup> This limitation is common to the concept of individual self-defence under domestic criminal law in a great number of states.

It is here where cases of self-defence by the personnel of peace operations may prove most problematic – for practical and conceptual reasons. Due to their genuine military capacities, peace forces hold a far greater firepower than individual civilians and can call for back-up from other units and contingents. Most troublesome is, however, the concept of self-defence itself. As outlined in Chapter 2, self-defence in peacekeeping missions is normally not confined to situations of individual self-defence, but may also include the resistance against attempts by forceful means to prevent the discharge of their duties under the mandate, including restrictions to their freedom of movement. Resort to self-defence in such an expansive manner would be clearly unnecessary and disproportionate and thus qualify as direct participation in hostilities, making the peace operation a party to the armed conflict. The SCSL Trial Chamber did not take the limitations of self-defence in relation to direct participation in hostilities sufficiently into account when dealing with the RUF attacks on UNAMSIL peacekeepers:

As with all civilians, their protection would not cease if the personnel use armed force only in exercising their right to individual self-defence. Likewise, the Chamber opines that the use of force by peacekeepers in *self-defence in the discharge of their mandate*, provided that it is limited to such use, would not alter or diminish the protection afforded to peacekeepers.<sup>141</sup>

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<sup>139</sup> ICRC, Interpretative Guidance (2009), p. 61.

<sup>140</sup> Ibid. See also, 2003 DPH report, p. 6 (‘All the experts who spoke on the subject stressed that individual civilians using a *proportionate amount of force* in response to an unlawful and imminent attack against themselves or their property should not be considered as directly participating in hostilities’, emphasis added).

<sup>141</sup> SCSL, *Prosecutor v. Sesay et al.* (2009), *supra* note 65, para. 233.

This seems to be a conflation of the notion of individual self-defence acceptable under humanitarian law.<sup>142</sup> It is, however, noteworthy that in a similar case – concerning a rebel attack against the base of the AU Mission in Sudan (AMIS) in Darfur in 2007, which left twelve peacekeepers killed – the International Criminal Court made no reference to self-defence in the ‘discharge of their mandate’.<sup>143</sup> An important caveat must be made for situations in which peace operation personnel are attacked by forces belonging to other states. Due to the extremely low intensity threshold, such attacks will usually trigger an international armed conflict. Hence, regardless of how much force is used in response to the attack, the peace operation will invariably become a party to an international armed conflict, either as part of the pre-existing armed conflict or in addition thereto.

## Conclusion

The foregoing shows that in addition to the ordinary threshold of armed conflict, a participation test can be used in order to ascertain whether and when a peace operation becomes a party to the pre-existing armed conflict. Hence, where the personnel engage in acts meeting the three constitutive elements, they directly participate in hostilities, with the potential of making the entire peace operation a party to the conflict. As a consequence, attacks against the military personnel involved in the peace operation will no longer be unlawful under humanitarian law, while the peace operation itself will be bound to observe the detailed provisions of this body of law.

As a welcome side-effect, the same test may be used also for qualifying the interaction between the different actors involved in the peace operation itself. Indeed, some states may manage to keep their contingents away from active fighting and claim – as the Swedish and German governments did for a long time during their deployment in Afghanistan – not to be a party to the ongoing conflict, as opposed to other sending states, whose forces are involved in battles on a

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<sup>142</sup> Ibid. paras. 1926-1937. This view was also upheld on appeal: SCSL, *Prosecutor v. Sesay*, Appeals Chamber, Judgement, 26 October 2009, SCSL-04-15-A, paras. 524-32. Nevertheless, the facts of the case indicate that the actual response by the UNAMSIL peacekeepers to counter the attacks did not go so far and probably stayed within the limits of what would have been necessary and proportionate in cases of individual self-defence by civilians *stricto sensu*. A similar conclusion can be drawn from two other cases involving attacks against peacekeeping personnel in Rwanda: ICTR, *Prosecutor v. Theoneste Bagosora, Gratién Kabiligi, Aloys Ntabakuze and Anatole Nsengiyumva*, Trial Chamber I, Judgement and Sentence of 18 December 2008 (ICTR-98-41-T). The case involved the lynch killing of ten Belgian peacekeepers belonging to the United Nations Assistance Mission for Rwanda (UNAMIR) by Rwandan government soldiers in April 1994. See in particular para. 2239 (‘The fact that one of the Belgians was able to obtain a weapon and use it for self-defence during the course of the attack does not alter their status. This happened only after the mob of soldiers at the camp began brutally beating the peacekeepers to death’).

<sup>143</sup> ICC, *Prosecutor v. Abu Garda*, Pre-Trial Chamber I, Decision on the Confirmation of Charges, 8 February 2010, ICC-02/05-02/09-243-Red.

near-daily basis. If the forces of the first state do in fact provide direct support (along the lines described above) to their colleagues from other sending states who perform a clear belligerent role, the former will also become a party to the ongoing armed conflict and must observe the humanitarian law obligations of their sending state in respect of their own actions. The test may help – in addition to the ordinary threshold of armed conflict – to clarify as to which sending states can be considered a party to the armed conflict.

## TEMPORAL SCOPE OF APPLICATION

### Introduction

The foregoing sections outlined under which circumstances a peace operation – or more precisely, the states and international organisation involved therein – may become a party to an armed conflict. This raises the question as to how long humanitarian law applies, once its application has been triggered, and on which requirements the end of application depends. This question is particularly pertinent in the context of peace operations, for which states and international organisations involved have been trying to limit the application of humanitarian law and thus the targetability of their own forces. The Secretary-General's Bulletin states that it applies to:

United Nations forces when in situations of armed conflict they are *actively engaged* therein as combatants, to the extent and for *the duration of their engagement*.<sup>144</sup>

The last part of the provision seems to imply that a UN peace operation can switch between belligerency and non-belligerency from one moment to another, depending on whether they are actively engaged in actual combat or not.<sup>145</sup> This interpretation was indeed supported by Daphna Shrager, then principal legal officer at the UN Office of the Legal Advisor, who claimed that humanitarian law as a whole – not only the Bulletin – only applies for the short duration of

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<sup>144</sup> Sect. 1.1, SG Bulletin, emphasis added.

<sup>145</sup> Such an interpretation has been criticised by some authors as incompatible with the *jus in bello*: Zwanenburg, *Accountability of Peace Support Operations* (Martinus Nijhoff 2005), p. 190; Sams, 'IHL Obligations of the UN and other International Organisations Involved in International Missions' in: Odello and Piotrowicz (eds.), *International Military Missions and International Law* (Martinus Nijhoff 2011), 45-71, p. 64.

combat involving the UN peace operation.<sup>146</sup> Referring to a brief engagement between French UNPROFOR troops and Bosnian-Serb forces, she states that:

[T]he French counter attack to re-take the bridge was a “combat mission” ... and was governed in its entirety, but *for its duration only*, by international humanitarian law.<sup>147</sup>

However, humanitarian law does not allow for such a flexible concept of intermittent belligerency. The temporal scope of application is essentially linked to its material scope. In other words, humanitarian law applies whenever and for so long as there is a situation triggering its application: an armed conflict or an occupation. Hence, it generally applies from the beginning until the end of such situations.

The full picture is even more complex and perhaps best illustrated by Article 3 of Additional Protocol I (1977). While it only defines the temporal scope of the Protocol I and the four Geneva Conventions with regard to international armed conflicts and occupations, it shows the full complexity of the temporal scope of application, which is equally relevant for customary humanitarian law and situations of non-international armed conflict:

Without prejudice to the provisions which are applicable at all times:

- (a) the Conventions and this Protocol shall *apply from the beginning* of any situation referred to in Article 1 of this Protocol;
- (b) the application of the Conventions and of this Protocol *shall cease*, in the territory of Parties to the conflict, *on the general close of military operations* and, in the case of occupied territories, on the termination of the occupation, except, in either circumstance, for those persons whose final release, repatriation or re-establishment takes place thereafter. These persons shall continue to benefit from the relevant provisions of the Conventions and of this Protocol until their final release, repatriation or re-establishment.<sup>148</sup>

The *chapeau* reminds us that certain rules have to be observed at all times, even in times of peace.<sup>149</sup> Yet, the full set of humanitarian law only applies from the beginning of an armed

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<sup>146</sup> Shraga, ‘The Secretary-General’s Bulletin on the Observance by United Nations Forces of International Humanitarian Law: a Decade Later’, 39 Israel Yearbook on Human Rights (2009), 357-77, pp. 359-60 (‘Conditioned upon a “double-key” test, international humanitarian law applies to UN operations for the duration of the Force engagement and for as long as both elements are present. *When the UN combat mission ends* – regardless of whether or not the situation as a whole still qualifies as an armed conflict – *international humanitarian law ceases to apply* to the UN operation’, emphasis added).

<sup>147</sup> Ibid, pp. 361-62, emphasis added.

<sup>148</sup> Art. 3 of AP I, emphasis added. This provision is essentially modelled on Article 6 of Geneva Convention IV. There is merit to claim that Article 3 of Additional Protocol I defines the temporal scope of the Geneva Conventions even for states not party to Additional Protocol I by virtue of subsequent practice or subsequent agreement, see *infra* note.

<sup>149</sup> CA2 refers to ‘provisions which shall be implemented in peacetime’. These are mainly provisions involving

conflict or an occupation. For the end of application, there are three different stages. In the territories of the parties to the conflict the application ends on the *general close* of military operations, whereas in occupied territories humanitarian law ceases to apply on the *termination of the occupation*.

As a special case, the instruments continue to apply – even after the general end of their application – to persons pending ‘final release, repatriation or re-establishment’, for instance, prisoners of war or civilian internees.<sup>150</sup> Additional Protocol II (1977) contains a similar provision with regard to persons whose liberty has been restricted in the context of a non-international armed conflict.<sup>151</sup> It is already here where the wording of the *Secretary-General’s Bulletin* appears too restrictive; if humanitarian law only applied for the duration of combat, captured enemy forces would lose their protection immediately once the engagement ends.<sup>152</sup> Hence, what needs to be stressed is that also in the context of a peace operation humanitarian law continues to apply to persons until their final release, repatriation or re-establishment.

### General End of Application

The general end of application is marked by the general close of military operations.<sup>153</sup> This notion is, however, not defined and its relationship with other terms used in the instruments remains ambiguous. For instance, the ICRC Commentary on the Additional Protocols tries to distinguish the general close of military operations from the cessation of hostilities,<sup>154</sup> a term used in other provisions of the Geneva Conventions.<sup>155</sup> This would lead to the absurd result where the parties to the conflict have to release and repatriate prisoners of war even before the actual end of the armed conflict. There is, however, ample support in the *travaux préparatoires*

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preparatory measures and rules on implementation and enforcement. For a detailed list of provisions applicable at all times: Sandoz et al., *Commentary on the Additional Protocols* (ICRC 1987), pp. 66-67, para. 149.

<sup>150</sup> The following provisions contain a similar standard: Arts. 5 GC I, 5 (1) GC III and 6 (4) GC IV.

<sup>151</sup> Art. 2 (2) AP II (‘At the end of the armed conflict, all the persons who have been deprived of their liberty or whose liberty has been restricted for reasons related to such conflict, as well as those deprived of their liberty or whose liberty is restricted after the conflict for the same reasons, shall enjoy the protection of Articles 5 and 6 until the end of such deprivation or restriction of liberty’). By contrast, CA3 does not contain an analogous provision nor any other rule on the general end of its application.

<sup>152</sup> This example is provided by: Zwanenburg (2005), *supra* note 145, p. 190.

<sup>153</sup> As mentioned above, this is only the case for the territories of the parties to the conflict.

<sup>154</sup> Sandoz et al., *Commentary on the Additional Protocols* (ICRC 1987), pp. 67-68, para. 153 (‘The general close of military operations *may occur after* the “cessation of active hostilities” referred to in Article 118 of the Third Convention’, emphasis added).

<sup>155</sup> The cessation or close of hostilities triggers the duty to release and repatriate prisoners of war and internees, and to end other restrictive measures (Art. 118 GC III, and Arts. 133 and 46 GC IV, respectively).

of the Geneva Conventions<sup>156</sup> as well as in military manuals<sup>157</sup> and in scholarly writing<sup>158</sup> that the term ‘general close of military operations’ has the same meaning as ‘cessation of hostilities’ and ‘end of the armed conflict’, and that these terms are based on a factual test. The same logic arguably applies to non-international armed conflicts, even though the relevant instruments contain less explicit language on the end of application.<sup>159</sup> Hence, once fighting related to an armed conflict comes to an end, for instance by the total defeat of the adversary or by (tacit) mutual agreement between the parties, this will also mark the end of the armed conflict itself. Formal acts, such as cease-fire agreements or peace treaties, are not required, but may be evidence of the intentions of the parties and may help to determine the exact moment when hostilities come to an end. Yet, if fighting goes on, humanitarian law will continue to apply.

In the *Tadić* case, the ICTY appears to have taken a broader view with regard to the temporal limits of armed conflicts and the end of application of humanitarian law. After a detailed review of the respective treaty provisions, the Appeals Chamber held that:

International humanitarian law applies from the initiation of such armed conflicts and extends *beyond* the cessation of hostilities *until a general conclusion of peace* is reached; or, in the case of internal conflicts, a *peaceful settlement* is achieved.<sup>160</sup>

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<sup>156</sup> For instance, the initial ICRC draft of the same provision used the term ‘close of hostilities’: Swiss Federal Political Department, *Final Record of the Diplomatic Conference of Geneva of 1949, Vol. I*, Bern, 1963, p. 114. For a discussion of the reason why the delegates eventually chose the term ‘close of military operations’, see *ibid.*, Vol. II-A, p. 815 and *ibid.*, pp. 624-25. Also Pictet uses the terms synonymously: Pictet, *Commentary on Geneva Convention I* (1952), p. 65 (Article 5), and *Commentary on Geneva Convention IV* (1958), pp. 62-63.

<sup>157</sup> Australian Airforce Manual (2004), p. 43, para. 5.8; New Zealand Defence Force, *Interim Law of Armed Conflict Manual*, DM 112, 1992, para. 313. UK Joint Service Manual (2005), para. 3.10.

<sup>158</sup> Greenwood (2008), *supra* note 19, pp. 70-72, paras. 246-49 (‘Nowadays, armed conflicts are often terminated merely by a ceasefire without any peace treaty, or by mere cessation of hostilities. It is not clear whether a formal instrument is needed to terminate an armed conflict ... Since armed conflict is not a technical, legal concept but a recognition of the fact of hostilities, the cessation of active hostilities should be enough to terminate the armed conflict’); Kolb and Hyde (2008), *supra* note 23, pp. 101-102 (‘An effective and final cessation of hostilities, whether set out in writing or merely de facto, is enough to bring the applicability of the LOAC to a close’). See also David (2008), *supra* note 23, p. 261, para. 1235; Sassòli et al., *How Does Law Protect in War?* (3<sup>rd</sup> edn, ICRC 2011), p. 134.

<sup>159</sup> Sandoz et al., *Commentary on the Additional Protocols* (ICRC 1987), p. 1360, para. 4492, which states that AP II ‘does not contain any indication as regards the end of its applicability. Logically this means that the rules relating to armed confrontation are no longer applicable after the end of hostilities’. A similar proposal had been made during the drafting process, whereby the Protocol should cease ‘to apply upon the general cessation of military operations’, but was eventually not adopted: Swiss Federal Political Department, *Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, Geneva (1974-1977), Vol IV*, Bern, 1978, p. 12. See also: Sivakumaran, *The Law of Non-International Armed Conflict* (OUP 2012), pp. 251-53 (who fails, however, to clarify how the different terms interact).

<sup>160</sup> ICTY, *Prosecutor v. Dusko Tadic* (1995), *supra* note 24, para. 70, emphasis added.

The wording has been criticised by some commentators for being overly expansive<sup>161</sup> and it seems unclear on what the Tribunal has based its finding. The only passage in the entire decision discussing the reach of humanitarian law beyond the end of hostilities merely refers to the fact that humanitarian law continues to apply to persons pending final release, repatriation or re-settlement.<sup>162</sup> By reverse logic, this reinvigorates rather the general rule that the end of application of humanitarian law coincides with the cessation of hostilities. It is unclear whether the Tribunal had this specific exception in mind when using the terms ‘general conclusion of peace’ and ‘peaceful settlement’. However, if these terms were supposed to have another meaning – for instance, the conclusion of a peace agreement – the legal basis for such a claim is rather ambiguous, because humanitarian law instruments do not contain such a requirement for bringing the application of humanitarian law to an end.<sup>163</sup> Moreover, practice shows that nowadays armed conflicts are virtually never concluded by a peace agreement; even less so where a peace operation has become involved in hostilities.<sup>164</sup>

The *Tadić* formula, requiring a ‘general conclusion of peace’ or ‘peaceful settlement’, has also been used in subsequent jurisprudence<sup>165</sup> as well as in submissions by the ICC Prosecutor,<sup>166</sup>

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<sup>161</sup> See, for instance: Quéguiner, ‘Dix Ans Après la Création du Tribunal Pénal International Pour l’Ex-Yougoslavie: Evaluation de l’Apport de sa Jurisprudence au Droit International Humanitaire’, 85 (850) *IRRC* (2003), 271-311, pp. 282-83.

<sup>162</sup> ICTY, *Prosecutor v. Dusko Tadic* (1995), *supra* note 24, para. 67, (‘With respect to the temporal frame of reference of international armed conflicts, each of the four Geneva Conventions contains language intimating that their application may extend *beyond the cessation of fighting*. For example, both Conventions I and III apply until protected persons who have fallen into the power of the enemy have been released and repatriated’, emphasis added).

<sup>163</sup> The common article on denunciation in the four Geneva Conventions uses similar language, stating that ‘until peace has been concluded’, see Arts. 63 (3), 62 (3), 142 (3) and 158 (3) of GC I-IV, respectively. According to the Commentary, this refers to the ‘formal conclusion of a peace treaty’ or, in the case of a non-international armed conflict, the ‘effective re-establishment of a state of peace’ (Pictet, *Commentary on Geneva Convention IV* (1958), p. 625, footnote 3). By contrast, the denunciation provision in Art. 99 (1) AP I uses the terms ‘end of the armed conflict or occupation’, due to the often delayed conclusion or total absence of a peace treaty (see *Commentary on the Additional Protocol* (1987), *supra* note, p. 1109, para. 3843). In any event, the fact that a denunciation has not yet taken effect only means that the Geneva Conventions remain on stand-by (*ratione personae*), without prejudice to the applicability of its provisions to an actual situation (*ratione materiae*).

<sup>164</sup> Note that neither the Korean War (1950-1953) nor the Gulf War for the liberation of Kuwait (1991) ended with an official peace agreement, but only with armistice agreements. Moreover, although the Dayton Peace Agreement (1995) finally ended the war in Bosnia in 1995, neither NATO and its participating states nor the UN – both previously involved in hostilities with Bosnian-Serb forces – were a party to that agreement.

<sup>165</sup> ICTY, *Prosecutor v. Ljube Bošković and Johan Tarčulovski*, Trial Chamber, Judgement, IT-04-82-T, 10 July 2008, paras. 293-94 (‘This finding [i.e. the *Tadić* formula] is not to be understood as limiting the jurisdiction of the Tribunal to crimes committed until a peace agreement between the parties was achieved; rather, if armed violence continues even after such agreement is reached, an armed conflict may still exist and the laws and customs of war remain applicable ... Further, the temporal scope of the armed conflict covered and extended beyond 12 August and the Ohrid Framework Agreement of 13 August to at least the end of that month’).

<sup>166</sup> ICC, *Situation in the Republic of Côte d’Ivoire*, Office of the Prosecutor, Request for Authorisation of an

but it remains unclear to what extent the use of these terms serves as a real alternative to the factual test based on the end of hostilities. It may, however, ensure greater continuity for a judicial body in applying humanitarian law, regardless of the changing intensity of the hostilities. This may be particularly relevant for non-international armed conflicts. For instance, in the *Haradinaj* case the ICTY noted that:

[S]ince according to the *Tadić* test an internal armed conflict continues until a peaceful settlement is achieved, and since there is no evidence of such a settlement during the indictment period, there is no need for the Trial Chamber to explore the *oscillating intensity* of the armed conflict in the remainder of the indictment period.<sup>167</sup>

Likewise, the Court in the *Gotovina* case cautioned against a ‘revolving door between applicability and non-applicability’ of humanitarian law.<sup>168</sup> The Chamber thus rejected the Defence’s submission, which had argued that the ostensibly non-international armed conflict between the Croatian army and Serb-Krajina separatist forces had come to a sudden end shortly after the beginning of Operation Storm, due to a significant fall in the intensity of the fighting in the area.<sup>169</sup> A similar Defence argument had been rejected by the ICC Prosecutor in the *Lubanga* case concerning the duration of the armed conflict in the Congolese Ituri region between 2002 and 2003.<sup>170</sup> This highlights the difficulties in determining the end of non-international armed conflicts as opposed to inter-state conflicts. Given the extremely low threshold of intensity, it is possible that an international armed conflict only lasts for a very short time<sup>171</sup> and may come

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Investigation Pursuant to Article 15, ICC-02/11, 23 June 2011, para. 171 (‘In one instance, the relevant crimes were committed in the immediate aftermath of the cessation of the armed hostilities, but prior to reaching a general conclusion of peace’); ICC, *Situation in Mali*, Office of the Prosecutor, Article 53(1) Report, 16 January 2013, para. 86 (‘The armed conflict started on or around 17 January 2012 and is ongoing, since no peace settlement has been reached at the time of writing’).

<sup>167</sup> ICTY, *Prosecutor v. Haradinaj et al.*, Trial Chamber, Judgement, Case No. IT-04-84-T, 3 April 2008, para. 100, emphasis added.

<sup>168</sup> ICTY, *Prosecutor v. Gotovina et al.*, Trial Chamber, Judgement, Case No. IT-06-90-T, 15 April 2011, para. 1694. The Trial Chamber found that military operations, including large-calibre shelling and search operations, had continued throughout the indictment period and therefore concluded that there had not been a general close of military operations or general conclusion of peace (paras. 1695-97).

<sup>169</sup> ICTY, *Prosecutor v. Gotovina et al.*, Defence Counsel for Mladen Markač, Final Trial Brief, Case No. IT-06-90-T, 8 September 2010, paras. 32-37. Note, however, that the Trial Chamber rightly classified the conflict as an international armed conflict and that hostilities moved into Bosnia and Herzegovina, where they continued for several months (*supra* note 326, para. 1693-1697).

<sup>170</sup> ICC, *Prosecutor v. Lubanga Dyilo*, Office of the Prosecutor, Prosecution’s Reply to the « Conclusions finales de la Défense », Case No. ICC-01/04-01/06, 1 August 2011, para. 125 (‘It is also established that non-international armed conflicts cease only upon “peaceful settlement”. Reduction in hostilities is not peaceful settlement’, references removed).

<sup>171</sup> For instance, in the case of an incidental attack or capture of an enemy soldier not followed by other hostilities.

to a sudden end. If hostilities between the same parties resume at a later stage, this may be considered the beginning of a new, separate international armed conflict.

The issue is far more complicated in relation to non-international armed conflicts. At first sight, it would appear that an armed conflict comes to an end once the violence falls below the high level of intensity required at the outset. As a consequence, the application of humanitarian law would only be triggered once the intensity level has been reached again. Meanwhile, civilians would no longer be protected by humanitarian law.<sup>172</sup> This would cause a serious protection gap, especially for those affected by acts of armed groups: even where such groups are in control of territory, they are no longer bound by humanitarian law, as the law of occupation does not apply to non-international armed conflicts; moreover, there is continuous controversy as to the obligations of armed groups under human rights law.<sup>173</sup> For these reasons, there is a strong presumption that a non-international armed conflict continues to exist despite low intensity violence or protracted lulls in fighting. Only where there have been no hostile acts for a considerable period of time can the armed conflict be considered to be over.

In addition to the intensity element, the organisation element of one of the parties – the second constitutive requirement of a non-international armed conflict – may also disappear and prompt the end of the armed conflict and the applicability of humanitarian law. This is relatively unproblematic in the case of a total defeat of one of the parties, as it will generally lead to an immediate end of hostilities.<sup>174</sup> Yet, it is also possible that after the conclusion of a peace settlement a faction of the armed group breaks away and continues fighting. It thus appears that as long as that splinter group is sufficiently organised to commit acts of violence amounting to hostilities, the armed conflict continues between this newly formed armed group and its previous adversary.

## Conclusion

What follows from the considerations above is that humanitarian law ceases to apply to a peace operation when there is no longer an armed conflict between its own and enemy forces, which boils down to the question of whether hostilities have come to an end; this may be more difficult

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<sup>172</sup> Unless their liberty has been restricted in relation to the preceding armed conflict.

<sup>173</sup> See, in particular: Henckaerts and Wiesener, ‘Human Rights Obligations of Non-State Armed Groups: A Possible Contribution from Customary International Law?’, in: Kolb and Gaggioli (eds.), *Handbook of Human Rights and Humanitarian Law* (Elgar Publishing 2013), 146-169 (showing that up until now international practice only confirms the existence of human rights obligations on the part of armed groups when they have control over territory, allowing them to exercise *de facto* government functions).

<sup>174</sup> The end of the civil war in Sri Lanka following the defeat of the LTTE in 2009 is a case in point: Report of the Secretary-General’s Panel of Experts on Accountability in Sri Lanka, 31 March 2011, p. 53, para. 185.

to ascertain when the armed conflict involves a non-state armed group on the opposing side. What needs to be emphasised is that as much as an armed conflict may be initiated by only one side against the will of the other, it may also persist for as long as one of the parties so desires and continues fighting. Hence, there needs to be mutual agreement among the parties opposing each other to bring the conflict to an end. Although this analysis is essentially based on an *objective test*, the conclusion of formal agreements between the parties may be evidence of the intentions of the parties. Practice shows, however, that peace operations (or the states and organisations involved therein) only rarely become a party to official cease-fire and peace agreements,<sup>175</sup> although they may often play the role of a facilitator for the adoption of such agreements among local actors.

A special case exists when international forces fight an armed conflict together with co-belligerents (for instance, the host state) against another state or armed group. While the ICRC Commentaries require a complete cessation of hostilities between all belligerents involved to bring the application of humanitarian law to an end,<sup>176</sup> it seems more reasonable to consider each individual conflict relationship between the opposing parties to determine the end stage for each party involved. Hence, a peace operation may also *leave* an armed conflict that continues between the other parties, provided that hostilities involving its forces come to an effective end and it refrains from any acts *amounting to participation* in that conflict. It goes without saying that irrespective of the exact moment of the general end of application, humanitarian law continues to bind peace forces as well as their adversary with regard to persons deprived of their liberty, such as captured enemy fighters or civilians, until their final release, repatriation or re-establishment.

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<sup>175</sup> Besides the armistice agreements ending the conflict in Korea in 1953 and the Gulf War in 1991, the few reported cases include, for instance, a formal cease-fire signed between high-level representatives of the Congolese army and ONUC, ending a series of armed clashes between Congolese forces and members of a Sudanese detachment of ONUC in March 1961 (Report to the Secretary-General from his Special Representative on the Congo, S/4761, 8 March 1961, paras. 11-42 and Annex II) and a similar agreement concluded between Katanga and ONUC in January 1963, marking the end of the armed conflict there (Report to the Secretary-General from the Officer-In-Charge of the United Nations Operation in the Congos, S/5053/Add. 15, Annex IX).

<sup>176</sup> Pictet, *Commentary on Geneva Convention IV* (1958), p. 62 ('It must be agreed that in most cases the general close of military operations will be the final end of all fighting between all those concerned'); Sandoz et al., *Commentary on the Additional Protocols* (1987), *supra* note, p. 68, para. 153 ('the general close of military operations could mean the complete cessation of hostilities between all belligerents, at least in a particular theatre of war'). This requirement is, however, unnecessarily restrictive, and is not supported by the *travaux préparatoires* of the instruments or by state practice; moreover, it has been rightly rejected by a number of scholars, for instance: Bothe et al., *New Rules for Victims of Armed Conflicts* (Martinus Nijhoff 1982), p. 58.

## GEOGRAPHIC SCOPE OF APPLICATION

### Introduction

Closely related to the temporal scope of application is the question of where humanitarian law applies once there is a situation of armed conflict. This issue is especially relevant in the context of a peace operation which has become a party to an armed conflict. Is the *jus in bello* only applicable where armed confrontations take place, or does it also apply in the entire theatre of operation or even beyond? So far, these questions have received rather limited scholarly attention.<sup>177</sup> This is somewhat surprising, given the direct impact they might have on a number of related operational and legal issues, such as the exact geographical location where peace forces may have to observe the humanitarian law rules in their targeting decisions and where they may themselves be targeted by enemy forces under such rules.

It is thus not surprising that states and international organisations have tried to restrict the geographical scope of armed conflicts in which their forces may become involved in the course of a peace operation so as to limit the application of humanitarian law. For instance, the *Secretary-General's Bulletin* (1999) – besides its temporal limitation already discussed above – also seems to suggest a spatially limited application when it states that its principles and rules are applicable to:

United Nations forces when in situations of armed conflict they are actively engaged therein as combatants, to *the extent* and for the duration of their *engagement*.<sup>178</sup>

Another prominent example concerns some ISAF contingents in Afghanistan. Up until 2009, both the German and the Swedish governments maintained that humanitarian law did not apply to their forces, because they were deployed in the more peaceful north of the country, which was allegedly not affected by the armed conflict between the Taliban and international forces in other parts of the country.<sup>179</sup>

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<sup>177</sup> For instance: Sams (2011), *supra* note 145, pp. 65-66 (who discusses the issue only in a short paragraph). See also: Tristan (2013), *supra* note 5, pp. 608-12. For an early contribution on the spatial scope of IHL: Gillard, 'International Humanitarian Law and Extraterritorial State Conduct', in: Coomans and Kamminga (eds.), *Extraterritorial Application of Human Rights Treaties* (Intersentia 2004), 25-39, pp. 31-32 (raising many issues of continuous relevance, e.g. spill-over scenarios).

<sup>178</sup> Sect. 1.1, SG Bulletin, emphasis added.

<sup>179</sup> See the positions of the German and the Swedish governments as documented by: Engdahl (2013), *supra* note 5, pp. 235-236. See also: Hampson (2012), *supra* note 51, p. 257 (who argues with regard to Afghanistan 'that it is indeed possible to have different classifications of armed conflict in different parts of a territory').

## Areas of Active Fighting or Territories of the Parties

Treaty-based humanitarian law is rather silent on the precise geographical scope of application, but the provisions discussed above in relation to the temporal reach seem to provide some guidance. Both Article 6 (2) of Geneva Convention IV and Article 3 (b) of Additional Protocol I stipulate that humanitarian law ceases to apply in *the territories of the parties to the conflict* on the general close of military operations. By reverse logic, this implies that humanitarian law must have previously been applicable in these territories. The ICTY Appeals Chamber used the same legal construction in the *Tadić* case, in which it held that humanitarian law applies:

in the *whole* territory of the warring States or, in the case of internal conflicts, the whole territory under the control of a party, *whether or not actual combat* takes place there.<sup>180</sup>

This statement is remarkable for two reasons. First, it extends the territory-based concept to non-international armed conflicts, whose treaty law provisions are rather silent on the spatial scope of application.<sup>181</sup> As a matter of law, non-state armed groups do not possess their *own* territory; the Tribunal had thus to rely on a slightly modified term, namely the ‘whole territory *under the control* of a party’, in order to secure the same outcome. Yet, it remains unclear what degree of control is required for this purpose. Is it enough that members of an armed group are merely present in one area or sporadically patrol it? Or is it necessary to have virtually exclusive control over the area in question?

Second and more importantly, the Tribunal made clear that humanitarian law applies in the *whole territory* ‘whether or not actual combat takes place there’. It thus rejected the Defence’s submission arguing that the concept of armed conflict and the application of humanitarian law should be limited to the area of active fighting.<sup>182</sup> The Appeals Chamber showed that, while some provisions are bound up with the hostilities, many others must clearly apply outside the actual theatre of combat operations.<sup>183</sup> Likewise, the ICTR held in the *Akayesu* case that:

the mere fact that Rwanda was engaged in an armed conflict meeting the threshold requirements of Common Article 3 and Additional Protocol II means that these instruments would

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<sup>180</sup> ICTY, *Prosecutor v. Dusko Tadic* (1995), *supra* note 24, para. 70, emphasis added.

<sup>181</sup> As we have seen above, *supra* note 52, both CA3 and Art. 1 (1) AP II refer to the territory of the state party. However, while both provisions may restrict the way in which CA3 and AP II apply to certain conflict scenarios, neither of them defines the geographical scope of the armed conflict or the reach of the humanitarian law once the conditions have been met.

<sup>182</sup> *Ibid.*, para. 66.

<sup>183</sup> *Ibid.*, para. 68-69. See in particular para. 69 (‘This conception is reflected in the fact that beneficiaries of common Article 3 of the Geneva Conventions are those taking no active part (or no longer taking active part) in the hostilities. This indicates that the rules contained in Article 3 also apply outside the narrow geographical context of the actual theatre of combat operations’).

apply over the *whole territory* hence encompassing massacres which occurred away from the war front.<sup>184</sup>

The position that humanitarian law applies to the whole territory of the parties to the conflict finds support in the legal literature.<sup>185</sup> Reference is generally made to Article 29 of the Vienna Convention on the Law of Treaties (1969), which states that '[u]nless a different intention appears from the treaty or is otherwise established, a treaty is binding upon each party in respect of its entire territory'.<sup>186</sup> Furthermore, the approach based on the unity of territory also prevents fragmentation of the applicable law and thus ensures greater legal certainty for the actors involved.<sup>187</sup>

Nevertheless, recent international practice on the subject remains ambiguous. The territory-based approach has been confirmed by the ICC Prosecutor in the case of Mali. By contrast, the UN Commission of Inquiry on Ivory Coast<sup>188</sup> and the UN Special Rapporteur on Human Rights and Counter-Terrorism<sup>189</sup> have taken the position that non-international armed conflicts and the applicable humanitarian law are limited in scope to areas of active fighting. The issue and its relevance in the context of a peace operation has been explicitly discussed in a report of the German Federal Prosecutor-General's on preliminary investigations against a German commander who had authorised a NATO air strike in September 2009 against two Taliban high-jacked fuel trucks in the Kunduz region (Afghanistan), which is believed to have caused dozens

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<sup>184</sup> ICTR, *Prosecutor v. Akayesu*, Trial Chamber, Judgement, Case No. ICTR-96-4-T, 2 September 1998, para. 636, emphasis added.

<sup>185</sup> Greenwood (2008), *supra* note 19, p. 59, para. 216; Kolb and Hyde (2008), *supra* note 23, p. 94; David (2008), *supra* note 23, pp. 256-60, paras. 1231-32. Kolb, *Ius in Bello: Le Droit International des Conflits Armés* (2nd edn, Bruylant 2009), pp. 218-19.

<sup>186</sup> It remains unclear whether the same can be said about customary international humanitarian law. Moreover, as will be shown further below, hostilities may also take place outside the territory of the parties to the armed conflict, such as on the high seas or on the territory of other states.

<sup>187</sup> Cullen (2010), *supra* note 69, p. 142. Schöberl, 'Konfliktpartei und Kriegsgebiet in Bewaffneten Auseinandersetzungen – Zur Debatte um den Anwendungsbereich des Rechts Internationaler und Nicht-Internationaler Bewaffneter Konflikte', 25 (3) *Journal of International Law of Peace and Armed Conflict* (2012), 128-138, p. 133.

<sup>188</sup> HR Council, *Rapport de la Commission d'Enquête Internationale Indépendante sur la Côte d'Ivoire*, 1 July 2011, A/HRC/17/48, p. 20, para. 89, ('Il est à noter que le conflit ne s'est pas déroulé sur toute l'étendue du pays, le droit international humanitaire s'appliquant donc *uniquement au territoire où un conflit armé non international a effectivement eu lieu*', emphasis added).

<sup>189</sup> Statement by Ben Emmerson, UN Special Rapporteur on Counter-Terrorism and Human Rights, Concerning the Launch of an Inquiry into the Civilian Impact, and Human Rights Implications of the Use Drones and other Forms of Targeted Killing for the Purpose of Counter-terrorism and Counter-insurgency, 24 January 2013, p. 4 ('[W]ithin a country like Yemen, there may be *parts of the country* in which some would take the view that *there is an internal armed conflict* taking place, whilst in *other parts* of the country this is clearly not the case', emphasis added).

of civilian casualties.<sup>190</sup> The Prosecutor-General did not see a general need to address the question of whether an internal armed conflict like in Afghanistan can be limited to specific regions of the territory of a State, because due to military activities of the insurgents in northern Afghanistan, where the German federal armed forces are based, the armed conflict threshold was also crossed there. Nevertheless, the report went on to say that:

[T]he basic *fundamental intentions* of international humanitarian law and *hardly surmountable factual problems* of differentiation support the view that a subject of international law like Afghanistan – including its allies – can only ever be involved as a whole in a non-international armed conflict. The dynamics immanent to the developments of conflicts, which are characterized by an increase and decrease of the intensity of the confrontations and by the reaching of different levels of escalation, as well as the *connected geographical shiftings and dislocations of combat zones*, targets of attacks, areas of deployment, retreat and logistics, make attempts, which within the territory of a State want to differentiate legally between areas of conflict and areas of peace, necessarily on the basis of daily events, look rather theoretical and interest-oriented.<sup>191</sup>

It thus rejected the approach of limiting the application of humanitarian law to areas of active fighting.<sup>192</sup> Despite the advantages of applying humanitarian law to the *whole* territory of the parties to the conflict – without having to consider the oscillating intensity levels and shifting locations of combat – this approach may be too broad and too narrow at the same time, especially in the context of a peace operation involved in an armed conflict. To the extent that the troop-contributing states can be considered the parties to the armed conflict, humanitarian law does also apply in the territories of these states,<sup>193</sup> even though they usually remain unaffected by the hostilities related to that conflict.<sup>194</sup>

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<sup>190</sup> Guardian, ‘NATO Air Strike in Afghanistan Kills Scores’, 4 September 2009, [www.theguardian.com/world/2009/sep/04/afghanistan-taliban](http://www.theguardian.com/world/2009/sep/04/afghanistan-taliban).

<sup>191</sup> Federal Prosecutor General (Germany), Final Report on Preliminary Investigations against Colonel Klein und Sergeant Wilhelm, 3 BJs 6/10-4, 16 April 2010, p. 44, emphasis added, unofficial translation by the author.

<sup>192</sup> A similar position has been taken by Dieter Weingärtner, then Head of the Legal Division of the German Federal Ministry of Defence: Weingärtner, ‘Bundeswehr und “Neue Formen des Krieges”’, 23 (3) Journal of International Law of Peace and Armed Conflict (2010), 141-145, p. 144 (‘According to the prevailing view, a non-international armed conflict can only exist on the *entirety of the territory* of a State. Consequently, the Federal Government rejected it, with respect to the existence of an armed conflict, to differentiate between the different regions in northern Afghanistan’, emphasis added, unofficial translation by the author).

<sup>193</sup> In the hypothetical case that only the international organisation (United Nations, NATO or ECOWAS) could be considered the party to the armed conflict on the part of the peace operation, the application of humanitarian law would hardly extend beyond the territory of the host state.

<sup>194</sup> Note, however, that Al-Shabab has also carried out numerous attacks on the territory of Uganda and Kenya, both major troop-contributors to the African Union Mission in Somalia (AMISOM): Al Jazeera, ‘Al-Shabab Claims Uganda Bombings’, 13 July 2010, [www.aljazeera.com/news/africa/2010/07/2010711212520826984.html](http://www.aljazeera.com/news/africa/2010/07/2010711212520826984.html); BBC, ‘Why Is Al-Shabab Targeting Kenya?’, 3 April 2015, <http://www.bbc.com/news/world-africa-32174235>, (‘Al-Shabab says it has been at war with Kenya ever since Kenyan forces entered Somalia in October 2011 in an effort to crush the militants’).

By contrast, the *ratione loci* application in the mission area may be more challenging. Certainly, if the host state is also involved in the armed conflict in question – either against the peace mission forces or together with them against insurgents – humanitarian law applies in the whole territory of that state. The picture becomes, however, more complicated where there is an armed conflict without the involvement of the host state, like in Somalia in the early 1990s, when international forces were engaged in hostilities with several armed factions. In areas of the host state that cannot be considered to be under the control of either the armed groups or the peace mission, humanitarian law does not apply, which seems to defeat the purpose of the expansive ‘in the whole territory’ formula.

### **Unrestricted Battlefield**

The shortcomings of the territory-based approach become even more apparent when hostilities extend beyond state borders. As widely accepted in the literature, the law has to follow the facts. In other words, the *jus in bello* also applies to the high seas – where naval battles usually occur – as well as to the territories of third states to the extent that actual hostilities take place there.<sup>195</sup> Nevertheless, this extension is subject to additional constraints from other branches of international law.<sup>196</sup> Such an extension of the reach of humanitarian law seems unproblematic for an international armed conflict, since any military engagement between state armed forces – regardless of its intensity, duration or location – would in itself be enough to trigger a separate, free-standing armed conflict.

It is, however, unclear whether the same solution can be applied to the realm of non-international armed conflicts, which often spill over into the territory of neighbouring states, even if the violence there remains sporadic and of low intensity. The issue essentially boils down to the question of whether humanitarian law follows armed groups and their individual members wherever they go. Otherwise, the law would only apply if the group had control over the area abroad in which it is present or, alternatively, if the level of violence passes the threshold to trigger a stand-alone non-international armed conflict.

The Inter-American Commission on Human Rights seems to have accepted the application of humanitarian law in the case of a non-international armed conflict spilling across the border into a neighbouring country. Indeed, in the interstate case of *Ecuador v. Colombia* (2010), the Commission had to deal with a cross-border raid by the Colombian military against a training camp of the Revolutionary Armed Forces of Colombia (FARC) in March 2008, during which

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<sup>195</sup> David (2008), *supra* note 23, pp. 256-60, paras. 1231-32; Kolb (2009), *supra* note 185, pp. 218-19.

<sup>196</sup> For instance, under the *jus ad bellum* and the law of neutrality.

FARC leader Raúl Reyes and twenty-four other guerrilla fighters were killed. However, despite the fact that the camp was based in Ecuador rather than on Colombian territory, the Commission accepted Colombia's claim that the raid was governed by humanitarian law, resort to which needs to be had when interpreting the relevant human rights provisions at the merit stage.<sup>197</sup> The ICRC has been more explicit in recognising the application of humanitarian law in such spill-over scenarios:

[C]ertain NIACs originating within the territory of a single state between government armed forces and one or more organized armed groups have also been known to "spill over" into the territory of neighbouring states. ... [I]t is submitted that the relations between parties whose conflict has spilled over remain at a minimum governed by Common Article 3 and customary IHL. This position is based on the understanding that the spill over of a NIAC into adjacent territory cannot have the effect of *absolving the parties of their IHL obligations simply because an international border has been crossed*. The ensuing legal vacuum would deprive of protection both civilians possibly affected by the fighting, as well as persons who fall into enemy hands.<sup>198</sup>

The ICRC fails, however, to explain whether the extension of the reach of humanitarian law is based on the mere presence of fighters across the border or whether it is dependent on their exercise of control where they are based or on the existence of cross-border fighting reaching a certain intensity. Nevertheless, the ICRC's emphasis on the need for humanitarian law to provide effective protection and to avoid a legal vacuum seems to imply that it attaches no importance to such additional requirements.

Yet, what remains unclear is whether the same logic also applies beyond spill-over cases to scenarios involving an even greater geographical disjunction between the initial battlefield and the new location (of parts) of the armed group. In other words, can a non-international armed conflict also stretch across the borders of a number of different states or even across continents? An example of significant relevance for peace operations is the Lord's Resistance Army (LRA), which has been roaming the territory of a number of African states, including Uganda, the Central African Republic, South Sudan and the Democratic Republic of Congo. Would humanitarian law still govern the actions of the LRA and its opponents – including MONUSCO and its Intervention Brigade, specifically tasked with neutralising the group<sup>199</sup> – if the group was present in a location not directly affected by any fighting? Giving an affirmative answer to this

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<sup>197</sup> IACmHR, *Ecuador v. Colombia* ('Franklin Guillermo Aisalla Molina'), Decision, 21 October 2010, Case IP-02, Report No. 112/10, OEA/Ser.L/V/II.140 Doc. 10, paras. 113-25.

<sup>198</sup> ICRC, *International Humanitarian Law and the Challenges of Contemporary Armed Conflicts*, Report prepared for the 31st International Conference of the Red Cross and Red Crescent, 31IC/11/5.1.2, Geneva, 2011, p. 9.

<sup>199</sup> For instance, S/RES/2211 (DRC), 26 March 2015, para. 28 ('Recognizes the ongoing contribution of

question is just a small step away from the US view that the United States is involved in an armed conflict of global dimension with Al-Qaeda and associated forces.<sup>200</sup> This position has been strongly rejected by the ICRC:

It should be reiterated that the ICRC does not share the view that a conflict of global dimensions is or has been taking place. ... [T]he ICRC has taken a *case by case approach* to legally analyzing and classifying the various situations of violence that have occurred in the fight against terrorism. Some situations have been classified as an IAC, other contexts have been deemed to be NIACs, while various acts of terrorism taking place in the world have been assessed as being *outside any armed conflict*. It should be borne in mind that IHL rules governing the use of force and detention for security reasons are *less restrictive than the rules applicable outside of armed conflicts* governed by other bodies of law.<sup>201</sup>

The ICRC position finds support among a number of commentators that are concerned with the effects of an ever increasing battlefield.<sup>202</sup> However, these concerns are already addressed by other fields of international law, including the *jus ad bellum* and international human rights law, both of which may provide additional limitations to an otherwise unrestricted application of humanitarian law.

The position of the ICRC and a number of legal scholars in favour of a spatial limitation of humanitarian law along state borders also seems to overlook the fact that the term ‘armed conflict’ denotes a functional *relationship* between two opposing actors. In other words, the law of armed conflict governs *that relationship* whenever these actors meet, regardless of the exact location of the encounter. Indeed, states often have a significant number of troops deployed in third states, where they may also have air and naval bases or other military installations, far away from any actual hostilities. In addition, the very nature of non-state armed groups and the increased use of modern technology for warfare makes the dislocation of fighters and weaponry from the zone of initial fighting a likely occurrence.

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MONUSCO in the fight against the LRA, encourages further efforts of the AU-Regional task force (AU-RTF), and *urges* greater cooperation, including operational cooperation, and information-sharing between MONUSCO, other United Nations Missions in the LRA-affected region, the AU-RTF, regional forces, national governments, international actors and non-governmental organizations, as appropriate, in tackling the threat of the LRA’).

<sup>200</sup> US DoJ, ‘White Paper on the Lawfulness of a Lethal Operation Directed Against a U.S. Citizen Who Is a Senior Operational Leader of Al-Qa’ida or An Associated Force’, made available on 4 February 2013, [http://msnbcmedia.msn.com/i/msnbc/sections/news/020413\\_DOJ\\_White\\_Paper.pdf](http://msnbcmedia.msn.com/i/msnbc/sections/news/020413_DOJ_White_Paper.pdf), pp. 2-5.

<sup>201</sup> ICRC, Challenges Report 2011, *supra* note 198, p. 10.

<sup>202</sup> For instance: O’Connell, ‘Combatants and the Combat Zone’, 43 *University of Richmond Law Review* (2009), 845-63, p. 857-59; Heinsch, ‘Unmanned Aerial Vehicles and the Scope of the “Combat Zone”’: Some Thoughts on the Geographical Scope of Application of International Humanitarian Law’, 25 (4) *Journal of International Law of Peace and Armed Conflict* (2012), 184-192, p. 192 (‘[W]e need to stick to a strict standard when judging the existence of an armed conflict and its geographical scope of application. By extending the combat zone lightly one would make it easier to allow for a wider range of targeted killings, circumventing the stricter human rights regime’).

It also seems rather unprincipled to argue for a strict geographical limitation of non-international armed conflicts, while at the same time admitting an exception in the case of spill-over conflicts so as to avoid a legal vacuum that would undermine the effective protection of affected persons. Indeed, confining the reach of humanitarian law in spatial terms runs the risk of relieving armed groups in certain locations of their obligations. As has been argued above in relation to the temporal scope, this would cause a serious protection gap for those persons directly affected by the acts of armed groups. When the ICTY Appeals Chamber rendered its decision in the *Tadić* case with its territory-based *ratione loci* concept, it was not about restricting the application of humanitarian law, but rather about expanding its reach beyond areas of active fighting so as to avoid any *lacunae*.

With this rationale in mind, one may be tempted to delineate the geographical scope of humanitarian law by distinguishing between prohibitive and permissive rules: prohibitions, such as the ban on attacks against civilians or on mistreatment of detainees, should apply as broadly as possible and without any spatial limitations; by contrast, belligerent rights, like the authority to target or detain enemy combatants, do not serve any protective purpose and should therefore only be available in areas of active fighting. The problem with this distinction is, however, that it overlooks a number of challenges. For instance, it may be difficult in practice to neatly distinguish between prohibitions and rights, since many rules of humanitarian law appear to entail both elements, which cannot be easily disentangled from each other. More importantly, however, the whole existence of belligerent rights under humanitarian law has been increasingly challenged in recent years, especially in relation to non-international armed conflicts, and will be discussed at greater detail in Chapter 5, concerned with the interplay between humanitarian law and human rights law.<sup>203</sup>

In view of this, the US Department of Justice seems to be correct in claiming that there is nothing in the law of armed conflict as such that would in any way restrict its application to certain territories.<sup>204</sup> Indeed, legal scholars have increasingly acknowledged the arbitrariness of delineating the application of humanitarian law along state borders and instead point to the fact that

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<sup>203</sup> See below, p. 208.

<sup>204</sup> See also: US DoJ, White Paper on the Lawfulness of a Lethal Operations (2013), *supra* note 200, p. 4 ('The Department has not found any authority for the proposition that when one of the parties to an armed conflict plans and executes operations from a base in a new nation, an operation to engage the enemy in that location cannot be part of the original armed conflict, and thus subject to the laws of war governing that conflict, unless the hostilities become sufficiently intense and protracted in the new location').

the geographic reach should depend on whether or not there is a nexus between the armed conflict and the actions of the parties to the conflict.<sup>205</sup>

## Conclusion

What follows from the above is that the forces of a peace operation that has become a party to an armed conflict in the mission area have to observe the rules of humanitarian law for the full duration of that conflict or for as long as they are a party thereto. Humanitarian law not only applies in areas directly affected by hostilities, but also governs the actions of peace forces in other areas. It may even apply outside the mission area to the extent that they have a nexus with the armed conflict in question. However, the relevance of this finding is limited, as forceful measures in spill-over scenarios and cases involving an even further dislocation would most likely need an additional authorisation under the mandate as well as the consent of the affected states. But as a matter of principle, humanitarian law would also govern such situations.

## 3.3 PEACE OPERATIONS AS OCCUPYING POWER

### INTRODUCTION

A number of humanitarian law provisions only apply in occupied territories. They form a special legal regime known as the law of occupation.<sup>206</sup> Generally recognising the role of the occupying power as *de facto* administrator for maintaining law and order in the territory at stake, the law of occupation assigns a number of restrictions and duties aimed at protecting the territory's inhabitants and at maintaining the *status quo ante*. For the application of these provisions,

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<sup>205</sup> Schmitt, 'Charting the Legal Geography of Non-International Armed Conflict', 90 *International Law Studies* (2014), 1-19; Lubell and Derejko, 'A Global Battlefield?: Drones and the Geographical Scope of Armed Conflict', 11 (1) *Journal of International Criminal Justice* (2013), 65-88; Daskal, 'The Geography of the Battlefield: A Framework for Detention and Targeting Outside the "Hot" Conflict Zone', 161 (5) *University of Pennsylvania Law Review* (2013), 1165-234; Arimatsu, 'Territory, Boundaries and the Law of Armed Conflict', 12 *YIHL* (2009), 157-92; Sivakumaran (2012), *supra* note 159, pp. 250-52; Corn and Talbot Jensen, 'Untying the Gordian Knot: A Proposal for Determining Applicability of the Laws of War to the War on Terror', 81 *Temple Law Review* (2008), 787-830, p. 799.

<sup>206</sup> These are in particular, Arts. 42-56 HRLW and Arts. 47-78 GC IV.

it is thus an important question during an armed conflict as to which areas can be considered ‘occupied territories’.

What is, however, of much greater relevance for the discussion at hand is the fact that situations of belligerent occupation also constitute a *separate ground* for the application of humanitarian law. Common Article 2 states that in addition to cases of international armed conflicts:

The Convention shall also apply to all cases of *partial or total occupation of the territory* of a High Contracting Party, even if the said occupation meets with no armed resistance.<sup>207</sup>

Military occupations of foreign territory are thus governed by humanitarian law, even in the absence of an armed conflict.<sup>208</sup> Nowadays, many occupations are not (or no longer) accompanied by hostilities.<sup>209</sup> This is why, by extending the reach of humanitarian law to such cases, Common Article 2 fills a protection gap for the inhabitants of such areas under foreign military control. This extension may also be of relevance for peace operations administering territory, provided that the situation amounts to a military occupation. This section will therefore discuss whether and under which circumstances international forces involved in a peace operation assume the role of an occupying power and what that means for the resulting scope of application of humanitarian law.<sup>210</sup>

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<sup>207</sup> CA2 (2), emphasis added.

<sup>208</sup> It is important to note that a belligerent occupation does not constitute an armed conflict in itself, but that the law of international armed conflict merely applies to cases of occupation. The distinction is also evident in the wording of other provisions: Art. 6 (1) of GC IV (‘beginning of any conflict or occupation’) and Art. 99 (1) of AP I (‘end of the armed conflict or occupation’). The term ‘armed conflict’ denotes essentially a dynamic concept, as it is bound up with the notion of hostilities; by contrast, the term ‘occupation’ refers to a rather static concept. Hence, while the invasion and subsequent occupation of foreign territory is in itself enough to trigger an international armed conflict, the latter will come to an end once hostilities cease, even if the occupation continues. Unfortunately, this conceptual distinction between international armed conflicts *stricto sensu* and belligerent occupations is not always clearly made in the existing legal literature.

<sup>209</sup> Cases in point are: the occupations of Crimea by Russia, the Golan Heights and the West Bank by Israel, Northern Cyprus by Turkey, and Western Sahara by Morocco.

<sup>210</sup> Similar to the discussion above, a peace operation as such cannot *sensu stricto* be considered an occupying power, because it has *no* distinct legal personality. Such role can only be performed by the different states and the organisation involved in the peace operation. Nevertheless, and despite this important clarification, it is appropriate – for the sake of simplicity throughout this chapter – to refer to a peace operation as the potential occupying power (covering the different states and the organisation, as the case may be). Only where the distinction between the states and the organisation as an occupying power is of actual relevance for the application of humanitarian law, will that distinction be explicitly raised in the following subsections.

## MILITARY OCCUPATIONS AND PEACE OPERATIONS

The existence of a military occupation is generally accepted for cases in which a peace operation engages in combat with the armed forces of a state and brings parts of the latter's territory under its control, as was the case during the Korea campaign in the early 1950s.<sup>211</sup> While this is more likely to happen during an enforcement operation, the mandate does not necessarily matter, because it cannot be ruled out that a peacekeeping mission becomes involved in an international armed conflict and occupies parts of its enemy's territory. In their definitions of occupations, Eyal Benvenisti and Adam Roberts also explicitly include international organisations, like the United Nations, in the group of possible occupants alongside states.<sup>212</sup>

Nonetheless, the *Secretary-General's Bulletin* (1999) does not refer to occupations, nor does it list any provision of the law of occupation. This has prompted some commentators to believe that the United Nations considers this body of law inapplicable in UN peace operations.<sup>213</sup> For Daphna Shrager, however, the Bulletin's recognition that UN forces may become a party to an international armed conflict implies the potential relevance of the law of occupation.<sup>214</sup> Yet, this limits the possibility of occupations involving the United Nations to those few cases in which its forces are (or have been) engaged in actual hostilities with state armed forces and seems to rule out the application of occupation law to all other peace operations, including multi-dimensional peacekeeping missions and international territorial administrations under the auspices of the United Nations. It has been a matter of debate among academics and other legal experts whether the law of occupation could possibly apply to peace missions administering foreign territory without having been involved in an international armed conflict. Opponents of the *de jure* applicability in such cases stress that peace operations differ considerably from typical military occupations, as their presence and exercise of authority is based on a Security Council mandate rather than on a military invasion. They also stress conceptual differences, since peace operations are generally premised on the cooperation with the local population and thus lack the notorious conflict relationship that characterises *ordinary* military occupations.<sup>215</sup>

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<sup>211</sup> Greenwood (1998), *supra* note 72, pp. 28-31.

<sup>212</sup> Benvenisti, *The International Law of Occupation* (2<sup>nd</sup> edn, OUP 2012), pp. 62-66; Roberts, 'What is a Military Occupation?', 55 BYIL (1984), 249-306, pp. 291-92.

<sup>213</sup> For instance: Zwanenburg (2000), *supra* note 11, pp. 23-24.

<sup>214</sup> Shrager (2009), *supra* note 146, pp. 374-75.

<sup>215</sup> Shrager, 'Military Occupation and UN Transitional Administrations – The Analogy and its Limitations', in: Kohen (ed.), *Promoting Justice, Human Rights and Conflict Resolution through International Law* (Martinus Nijhoff 2007), 479-98, pp. 494-95; Shrager (1998), *supra* note 7, pp. 69-70; This was also the position of two experts during the first and second expert meetings in May and December 2008: ICRC, Expert Meetings on Occupation (2012), *infra* note 216, p. 33 (on peace operations and other multinational forces)

During two expert meetings on occupation convened by the ICRC in May and December 2008,<sup>216</sup> most participants agreed that the law of occupation may be relevant to the conduct of peace operations and other missions entailing the exercise of functions and powers over territory as it would be addressing ‘the tension between the suspended sovereignty and the new administering authority’.<sup>217</sup> Most of the experts agreed that such missions are not prevented from becoming occupying powers simply because of their special mandates, their legitimacy and altruistic intentions, as these aspects fall under the *jus ad bellum* and need to be distinguished from the *jus in bello*.<sup>218</sup> A case in point is the US-led occupation of Iraq between 2003 and 2004. In Resolution 1483 in May 2003, the Security Council explicitly mentioned the coalition members’ role as occupying powers and called for full compliance with the Geneva Conventions (1949) and the Hague Regulations (1907).<sup>219</sup> It also called for changes to the political and legal landscape of Iraq in preparation for the post-occupation period,<sup>220</sup> which shows that transformative occupations are indeed possible despite the apparent rigour of the preservation rule,<sup>221</sup> if they are supported by the international community.<sup>222</sup> The Security Council may, however, also exclude the possibility of military occupations, as it did in the case of Libya in March 2011, when it authorised member states:

to take all necessary measures ... to protect civilians and civilian populated areas under threat of attack in the Libyan Arab Jamahiriya, including Benghazi, while excluding a *foreign occupation force* of any form on any part of Libyan territory ...<sup>223</sup>

Yet, this would not have prevented the application of the law of occupation, had the NATO-led coalition used ground troops and seized parts of Libyan territory – even though in violation of

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and p. 78 (on international territorial administrations, ITAs). The fact that the term ‘occupation’ generally has a negative connotation is certainly a main reason for the reluctance among UN and state officials towards using it for peace operations.

<sup>216</sup> ICRC, Expert Meeting on Occupation and Other Forms of Administration of Foreign Territory. Report of the Three Experts Meetings Held in May and December 2008 and in October 2009, prepared and edited by Tristan Ferraro, June 2012, hereinafter: ICRC, Expert Meetings on Occupation (2012).

<sup>217</sup> Ibid, p. 33.

<sup>218</sup> Ibid, pp. 33-35 (on peace operations and other multinational forces) and pp. 78-81 (on international territorial administrations, ITAs). Similarly: Sassòli, ‘Legislation and Maintenance of Public Order and Civil Life by Occupying Powers’, 16 EJIL (2005), 661-94, pp. 688-89.

<sup>219</sup> S/RES 1483, 22 May 2003, fourteenth unnumbered preambular and para. 5.

<sup>220</sup> Ibid, para. 4. Similarly, S/RES 1500, 14 August 2003, para. 1.

<sup>221</sup> Art. 43 HRLW obliges the occupying power to respect, ‘unless absolutely prevented, the laws in force in the country’. Arts. 47 and 64 GC IV provide for similar restrictions on the power to legislate in occupied territory.

<sup>222</sup> For an excellent discussion on the issue: Fox, ‘Transformative Occupation and the Unilateralist Impulse’, 94 IRRC (2012), 237-66. For a more critical view on transformative occupations: Bhuta, ‘The Antinomies of Transformative Occupation’, 16 (4) EJIL (2005), 721-40.

<sup>223</sup> S/RES/1973 (Libya), 17 March 2011, para. 4, emphasis added.

the mandate. Hence, the assessment as to whether there is a military occupation needs to be based on the factual test as in other cases of armed forces exercising control over foreign territory. Article 42 of the Hague Regulations (1907) states that:

Territory is considered occupied when it is *actually placed under the authority of the hostile army*. The occupation extends only to the territory where such authority has been established and can be exercised.<sup>224</sup>

On the basis of this definition, we can identify three cumulative requirements for the existence of a belligerent occupation:

1. Military forces of another state or international organisation are present on foreign territory,
2. the sovereign of that territory has not given its consent to the foreign military presence, and
3. the territory in question is under the authority of these foreign forces.

The first element is relatively unproblematic, as most peace operations have a strong military capacity, regardless of the exact mandate as an enforcement or peacekeeping operation. Some missions have, however, a significant civilian component, especially in the case of international territorial administrations. Is it thus enough that the military contingents are merely present in the area or do they have to actively engage in the administration of the territory in question? In Kosovo, for instance, the civilian presence (UNMIK) and its military counterpart (KFOR) are both independent from each other and there seems to be no hierarchy between both components.<sup>225</sup> While it is certainly possible that many tasks of the occupying power are carried out by civilian authorities, it seems necessary for a belligerent occupation that there be armed forces present in the territory. This flows directly from the wording of Article 42, requiring an ‘army’. Furthermore, the reason why humanitarian law applies not only in the midst of an armed conflict but also to an occupation that ‘meets with no armed resistance’ is precisely the military character of such occupations.<sup>226</sup> Due to the presence of troops on the ground, the occupying power can be expected to confront and possibly overcome any form of armed resistance.<sup>227</sup> It

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<sup>224</sup> Emphasis added. See also the French version, which is the only authentic one: ‘Un territoire est considéré comme occupé lorsqu’il se trouve placé de fait sous l’autorité de l’armée ennemie. L’occupation ne s’étend qu’aux territoires où cette autorité est établie et en mesure de s’exercer’.

<sup>225</sup> By contrast, UNTAET in East Timor incorporated both functions in one mission after INTERFET had handed over command of military operations to UNTAET in February 2000.

<sup>226</sup> See, for instance: Pictet, *Commentary on Geneva Convention IV* (1958), p. 20 (‘[T]he Government of the occupied country considering that armed resistance was useless’).

<sup>227</sup> Sassòli (2005), *supra* note 218, pp. 688-89; ICRC, Expert Meetings on Occupation (2012), *supra* note 216, pp. 17-19. Ferraro, ‘Determining the Beginning and End of an Occupation under International Humanitarian Law’, 94 *IRRC* (2012), 133-63, pp. 143-47. Nevertheless, it could perhaps be argued that that police

follows that a peace operation needs to have a significant security component – in addition to meeting the other two requirements – in order to qualify as an occupying force within the meaning of humanitarian law.<sup>228</sup>

The second requirement for the existence of a military occupation – the lack of consent by the sovereign – may pose a greater challenge for applying the law of occupation to peace operations. This prerequisite is based on the use of the term ‘*hostile army*’ in Article 42,<sup>229</sup> which denotes a non-consensual relationship between the sovereign and the occupying power. Hence, for as long as the peace operation’s presence and exercise of authority in the territory meets with the genuine consent of the host government, there is no military occupation.<sup>230</sup> By reverse logic, where the consent of the sovereign is absent or in doubt, the international presence will most likely qualify as an occupying power, subject to the fulfilment of the other two requirements. This is clearly the case where a peace operation engages in combat with the armed forces of a state and brings parts of the latter’s territory under its control.

The case is different for other peace operations, especially peacekeeping missions, which are generally based on consent as one of their guiding principles.<sup>231</sup> As a general rule, such operations are established following the conclusion of status-of-force agreements with the host state and on many occasions similar arrangements are made with other parties involved. A problem arises in failed state situations, where there is no functioning host state government to conclude an agreement or otherwise consent to the deployment of the peace mission.<sup>232</sup> This was reportedly the case in Somalia following the overthrow of the regime of Siad Barre in 1991. It was against this background that the Australian forces involved in UNITAF considered themselves as an occupying force in the Bay Province, Australia’s area of operation:

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and other security forces are enough rather than military personnel in the strict sense.

<sup>228</sup> For obvious reasons, it is highly unlikely that an international presence may be established in a foreign territory without the necessary security personnel to respond to challenges of its authority on the ground.

<sup>229</sup> The authoritative French text of Art. 42 uses the term ‘*l’armée ennemie*’ (emphasis added).

<sup>230</sup> For the opposite view: Kelly, *Restoring and Maintaining Order in Complex Peace Operations. The Search for a Legal Framework* (Kluwer 1999), pp. 149-67 (who claims that Art. 2 (2) GC I-IV also covers cases of ‘*pacific occupation*’ and ‘*occupation by agreement*’).

<sup>231</sup> Bowett (1964), *supra* note 39, p. 490 (claiming that peacekeepers with a SOFA can never become an occupying force).

<sup>232</sup> Faite, ‘*Multinational Forces Acting Pursuant to a Mandate of the United Nations: Specific Issues on the Applicability of International Humanitarian Law*’, 11 *International Peacekeeping* (2007), 143-57, pp. 148-50.

Australian troops found this to be the case when they were deployed into and given responsibility for, the Bay Province during Operation Restore Hope in 1993. Following a determination that the Fourth Convention applied to that intervention, the Australian force relied on the Convention to provide answers to, and a framework for many initiatives.<sup>233</sup>

The other contributing states, including the United States, Canada and Belgium, did not agree with that assessment,<sup>234</sup> but it is unlikely that this disagreement led to any actual legal or operational challenges between Australia and its UNITAF partners.<sup>235</sup> It remains unclear whether the lack of consent can be compensated by the mere fact that the major armed groups on the ground agree to the deployment of the peace operation. In the case of Somalia, the armed factions quickly renounced their initial support for the presence of UNOSOM I and engaged the international forces in intensive fighting.<sup>236</sup>

Even where the host state's consent was obtained prior to the deployment of the international force, the situation may quickly change. For instance, the central government that had initially invited the peace operation may suddenly collapse as a consequence of an ongoing civil war, while no other authority can credibly claim to represent the state.<sup>237</sup> The host state may also suddenly withdraw its consent and demand the prompt departure of the international force. This option also seems to exist where a status-of-forces agreement is in place, even though such agreements usually do not contain termination clauses.<sup>238</sup> Hence, if the international forces do

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<sup>233</sup> Australian Government Statement for the Meeting of Contracting Parties to the Fourth Geneva Convention, Geneva, 27-29 October 1998, 2 YIHL (1999), 450-51.

<sup>234</sup> Faite (2008), *supra* note 232, p. 151.

<sup>235</sup> Indeed, as the above-cited statement shows (*supra* note 233), Australia did not consider the law of occupation (esp. GC IV) as an undue constraint, but rather as a source for answers and initiatives.

<sup>236</sup> The interesting point in the Somalia case is that there was a military occupation occurring at the same time as a non-international armed conflict. The reason for this arguably counter-intuitive finding rests on the way in which a military occupation is defined, as opposed to an international armed conflict. While the latter requires the resort to force between states (including entities acting on behalf of states), the concept of occupation is premised on the mere absence of consent of the legitimate government of the host state (or any other authority credibly claiming to represent it) to the presence of foreign armed forces.

<sup>237</sup> The Multinational Force in Lebanon (1982-84) found itself in such a situation and arguably assumed the role of an occupying force in those areas under its control. See, for instance: Roberts, 'What is a Military Occupation?', 55 BYIL (1984), 249-306, pp. 289-91 (arguing that ONUC in the Congo (1960-64) provided a similar case, as it was at times unclear which authority represented the legitimate government in the country).

<sup>238</sup> The case is, however, not as clear-cut as described by: Ferraro, 'The Applicability of the Law of Occupation to Peace Forces', in: Beruto (ed.), *International Humanitarian Law, Human Rights and Peace Operations. XXXIst Sanremo Round Table 2008* (IIHL 2009), 120-39, 120-39, p. 138 (who argues that host states are at liberty under the law of treaties to terminate the status-of-force agreement). It is, however, unclear whether the host state has a right – either intended by the parties or implied – to unilaterally denounce the status-of-forces agreement or whether the withdrawal of consent to the presence of foreign troops may be considered a fundamental change of circumstances. Nevertheless, there is some practice confirming the host state's right to unilaterally terminate the status-of-forces agreement, even in the absence of an explicit provision in the agreement, and to demand the withdrawal of foreign troops. For a detailed discussion of the legal aspects of Egypt's withdrawal of consent concerning the presence of UNEF I in 1967: Di Blasi,

not leave the territory as requested, they will most likely take on the role of an occupying power in the area under their control.<sup>239</sup> Also, the questionable legal value of the consent may perhaps lead to the same outcome. In the case of Kosovo, for instance, NATO's ten-week air campaign forced Yugoslavia to accept the presence of KFOR and UNMIK. John Cerone has therefore argued that the consent should be seen as null and void.<sup>240</sup> In the case of East Timor, political pressure certainly played a major role in securing Indonesia's withdrawal and its consent to the deployment of international forces. Moreover, Indonesia was itself an occupying power and therefore not entitled to transfer sovereign rights over East Timor to a third party.<sup>241</sup> In sum, serious doubts as to the validity of the consent may possibly lead to the conclusion that the peace operation's presence amounts to a military occupation, provided that the other two requirements are duly met.

The third requirement – exercise of authority over the territory – is essentially a question of control. In other words, only where the foreign forces have in fact replaced the authority of the legitimate government can the area in question be considered occupied.<sup>242</sup> A military occupation does not require a long duration and can also exist in a very small area.<sup>243</sup> What is essential is the existence of factual control enabling the occupying power to exercise elements of government authority over the area and its population. In complex peace operations with troops from different sending states and civilian components operating alongside military ones, it may

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'The Role of Host State's Consent with regard to Non-Coercive Actions by the United Nations', in: Cassese (ed.), *United Nations Peace-keeping Legal Essays* (Sijthoff & Noordhoff International Publishers 1978), 55-94.

<sup>239</sup> For a more cautious view: Sassòli (2005), *supra* note 218, p. 689; Ratner, 'The Law of Occupation and UN Administration of Territory: Mandatory, Desirable or Irrelevant?', in: ICRC, *Expert Meetings on Occupation* (2012), *supra* note 216, 96-104, p. 98.

<sup>240</sup> Cerone, 'Minding the Gap: Outlining KFOR Accountability in Post-Conflict Kosovo', 12 *EJIL* (2001), 469-88, p. 484. For the opposite view: Ratner (2012), *supra* note, p. 97.

<sup>241</sup> Levrat (2001), *supra* note 64, pp. 96-97. The same can be said about the Vietnam-imposed government in Cambodia that agreed to the deployment of UNTAC. Note, however, that at least in the case of East Timor all other parties had also given their consent, including the liberation movement FRETELIN and Portugal, the former colonial power. It would appear artificial to wait until a new, internationally recognised government is formed as a result of the international presence and to apply the law of occupation in the meantime.

<sup>242</sup> Local authorities may continue to operate, but only at the mercy of the occupying power.

<sup>243</sup> In times of IAC, however, the level of control will usually not be reached during the invasion phase or short-lived incursions. In order to close the resulting protection gap, the official commentary suggests to broaden the notion of 'occupied territory' so as to make the relevant protections applicable as soon as possible: *Commentary on Geneva Convention IV*, *supra* note, Art. 6 (1), pp. 60-61. This approach was largely approved by the majority of experts during the first expert meeting in May 2008: ICRC, *Expert Meetings on Occupation* (2012), *supra* note 216, pp. 24-26. It is, however, important to stress that this does in no way broaden the term of 'military occupations' and has no impact on the question as to when and how international forces involved in a peace operation can be considered an occupying power, in the absence of an armed conflict.

be difficult to make this assessment with sufficient precision. Where individual troop-contributing states are in control of different areas, they can be identified as the respective occupying power for each of these areas without greater difficulty.<sup>244</sup>

Moreover, where there is a significant overlap of competences, an additional test may complement the assessment. Indeed, similar to the participation-based test suggested above in relation to a pre-existing armed conflict, states and international organisations may also qualify as occupying powers on the basis of their contribution to the military occupation by another entity.<sup>245</sup> This is particularly relevant in cases of occupation by a coalition of states (e.g. US-led occupation of Iraq between 2003 and 2004) where the physical presence of troops and their capacity greatly differs among the states. According to the participants of the ICRC expert meeting in May 2008, there are two different, but complementary approaches to identify the occupying powers in such coalitions:

The *first* consisted of applying, to each Member State separately, the legal criteria for occupation identified during the previous working sessions. Each member of the coalition would need to have troops deployed on the ground without the local government's consent and would have to be able to exert authority over the parts of the occupied territory to which it had been assigned in order to be defined as an occupying power. The *second option* was to use a functional approach based on the tasks performed within the coalition. Those member States performing tasks that would typically be carried out by an occupying power within the framework of IHL should be labelled as such and be bound by the rules contained in the relevant instruments of occupation law.<sup>246</sup>

In other words, even if a state cannot be said to be in control of territory, its contribution to the functioning of a military occupation is capable of turning it into an occupying power in its own right.<sup>247</sup>

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<sup>244</sup> See, for instance, the above-mentioned case of Australia's presence in the Bay region, as part of its UNITAF deployment in Somalia, *supra* note 233.

<sup>245</sup> Shraga (2007), *supra* note 215, p. 497 'The laws of occupation can also apply to UN operations indirectly or "by association", when the UN operation cooperates or carries out activities in an occupied territory under the authority and in support of an Occupying Power ... To the extent, therefore, that the mandate of the UN presence did not provide otherwise, it would have been bound to carry out its activities within the limits of international customary laws of occupation').

<sup>246</sup> This approach found the support of most experts: ICRC, Expert Meetings on Occupation (2012), *supra* note 216, pp. 34-35. See also specifically on the distinction between different tasks, p. 35 ('It was also pointed out that any task performed by a coalition member, even if not a core one in terms of occupier's duties under IHL, would contribute to the running of the occupation, since it would – if nothing else – free the "uncontested" occupying powers from doing secondary tasks and allow them to focus on the main ones, such as enforcing law and order. Consequently, the actions of "cooperating" member States would appear to be in support of the occupying power and would make the task of determining coalition members' legal status particularly difficult, at least from the enemy's perspective. ... Thus, a presumption – albeit rebuttable – of occupier's status for those States participating in a coalition enforcing effective control over a foreign territory was put forward').

<sup>247</sup> The above-mentioned case of the Australian presence in Somalia (*supra* note 233) is less relevant here, as

## GEOGRAPHIC AND TEMPORAL SCOPE OF APPLICATION

Once the international forces involved in the peace operation qualify as an occupying power, the law of international armed conflict applies. However, in the absence of actual hostilities, only the law of occupation – emanating from Geneva Convention IV, the Hague Regulations (1907) and corresponding customary law – applies. Moreover, unlike the geographical reach of humanitarian law as a whole, the application of the law of occupation is confined to occupied areas alone.<sup>248</sup> This follows clearly from Article 42 of the Hague Regulations, which states that the ‘occupation extends only to the territory where such authority has been established and can be exercised’.

The temporal scope of application is particularly complex in occupied territories. As we have seen above, the end of the general application of humanitarian law is essentially based on the end of hostilities and of the armed conflict as a whole. By contrast, Article 6 (3) of Geneva Convention IV states that:

In the case of occupied territory, the application of the present Convention shall cease *one year after the general close* of military operations; however, the Occupying Power shall be bound, for the *duration of the occupation*, to the extent that such Power exercises the *functions of government* in such territory, by the provisions of the following Articles of the present Convention: 1 to 12, 27, 29 to 34, 47, 49, 51, 52, 53, 59, 61 to 77, 143.<sup>249</sup>

Hence, if an occupation continues to exist one year after the hostilities have come to an end, only a limited set of rules applies.<sup>250</sup> Yet, the one-year rule has been superseded by Additional Protocol I, because Article 3 of the Protocol states that:

the application of the *Conventions* and of this Protocol shall cease, ... in the case of occupied territories, on the *termination of the occupation* ...<sup>251</sup>

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the other states (US, Belgium, Canada etc.) were arguably also in effective control of their respective areas of deployment and thus assumed the role as occupying powers in a same way as Australia.

<sup>248</sup> A notable exception are removals or transfers of protected persons to other states, which leads to the extension of the protection to the new location, in line with Art. 6 (4) GC IV.

<sup>249</sup> Emphasis added.

<sup>250</sup> This means that 10 provisions contained in Section I and Section III of GC IV no longer apply, which includes mainly positive obligations on social welfare and limitations of restrictive measures: Arts. 28 (rules on danger zones), 48 (right to leave the territory), 50 (duty to provide care of children), 54 (prohibition on altering the status of public officials and judges), 55 (duty to provide food and medical supplies), 56 (duty to ensure hygiene and public health), 57 (limitations on the requisitioning of hospitals), 58 (duty to give spiritual assistance), 60 (limitations on the use of relief consignments) and 78 (rules on security measures, internment and assigned residence).

<sup>251</sup> Art. 3 (b) AP I, emphasis added. It also includes a special clause on the continued application in relation to persons pending final release, repatriation or re-establishment.

The continued validity of the one-year rule is also contested in relation to states not party to Protocol I. While the rule was briefly mentioned in the *Wall* advisory opinion of the International Court of Justice in 2004,<sup>252</sup> it is today considered largely obsolete among legal scholars.<sup>253</sup> Indeed, they point at the original intentions of the drafters of the Geneva Conventions,<sup>254</sup> the fact that most occupation rules enjoy customary status,<sup>255</sup> and the wide acceptance of Article 3 as a general standard during the drafting of Protocol I and in recent practice.<sup>256</sup> This was also the widely shared view at the ICRC expert meeting in December 2008.<sup>257</sup>

In the context of a peace operation that has become an occupying power, this means that humanitarian law ceases to apply when the occupation comes to an end. Three scenarios can be distinguished here: First, the peace operation can lose its control over the territory in question, either as a result of active resistance to its presence or due to unilateral withdrawal. Second, the state whose territory has been occupied may also give its genuine consent to the presence of international forces and their exercise of authority there. Third, the military occupation can also come to an end, because of an act of self-determination and the establishment of a new state, as we have seen in the case of East Timor in 2003. It should, however, be recalled that irrespective of the exact end of occupation, humanitarian law continues to bind peace forces with regard to persons deprived of their liberty until their final release, repatriation or re-establishment.<sup>258</sup>

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<sup>252</sup> ICJ, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 9 July 2004, para. 125.

<sup>253</sup> For the opposite view: Dinstein, *The International Law of Belligerent Occupation* (CUP 2009), pp. 280-83 (who seems to support the continuous validity of the one-year rule).

<sup>254</sup> Kolb and Hyde (2008), *supra* note 23, p. 104 (highlighting the fact that the drafters had mainly the case of Germany and Japan in mind, where most powers had quickly been transferred to the new national authorities).

<sup>255</sup> *Ibid.*, p. 104; Kolb and Vité, *Le Droit de l'Occupation Militaire. Perspectives Historiques et Enjeux Juridiques Actuels* (Bruylant 2009), pp. 165-66.

<sup>256</sup> *Ibid.*, p. 165; Koutroulis, *Le Début et la Fin de l'Application du Droit de l'Occupation* (Pedone 2010), p. 170-81; Ben-Naftali, 'A La Recherche du Temps Perdu': Rethinking Article 6 of the Fourth Geneva Convention in the Light of the Construction of the Wall Advisory Opinion', 38 *Israel Law Review* (2005), 211-229, p. 217.

<sup>257</sup> ICRC, *Expert Meetings on Occupation* (2012), *supra* note 216, pp. 31-33.

<sup>258</sup> Art. 3 (b) AP I; Art. 6 (4) GC IV.

### 3.4 APPLICATION OF HUMANITARIAN LAW BY ANALOGY

The previous sections have outlined the criteria for the application of humanitarian law to peace operations, namely if they are a party to an armed conflict or an occupying power in the area of operation. This means that armed confrontations between peace operations and an armed group are not formally governed by humanitarian law, if they are only of a low intensity or if the armed group is insufficiently organised. In the same vein, the law of occupation does not apply to a peace operation administering the area of operation in its entirety, if it has obtained the explicit consent of the host state authorities to this effect.

However, even if humanitarian law does not apply *de jure*, it may still play a significant role in regulating the conduct of the peace operation in question. Some authors have suggested that in such cases humanitarian law should be applied by analogy.<sup>259</sup> A similar approach is reflected in the practice of states and international organisations involved in peace operations. The assurance given by the United Nations since the early 1950s to abide by the ‘spirit and principles’ of the Geneva Conventions follows the idea of applying humanitarian law as a matter of policy. Similar language can be found in military manuals of the United States<sup>260</sup> and the United Kingdom.<sup>261</sup> Moreover, the NATO Allied Joint Doctrine on Peace Support Operations also stipulates

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<sup>259</sup> For instance by Ulf Häußler, who asserts that even below the threshold of application of humanitarian law, ‘its essence is nevertheless applicable, namely by way of analogy’, to the conduct of peace operations: Häußler, *Ensuring and Enforcing Human Security. The Practice of International Peace Missions* (Wolf Legal Publishers 2007), p. 64. See also Ben Klappe, who suggests for that the fundamental principles of the 1999 SG Bulletin be applied at all times during a peace operation, whether or not IHL formally applies: Klappe, ‘International Peace Support Operations’, in: Fleck (ed), *The Handbook of International Humanitarian Law* (2<sup>nd</sup> edn., OUP 2008) 635-74, p. 647, para. 1308. See also: Oswald et al., *Documents on the Law of UN Peace Operations* (OUP 2010), p. 196 (‘[E]ven if the GCs are not applicable as a matter of law to a particular operation, many provisions in the GCs are useful in establishing best practice standards when dealing with the civilian population of the host country’).

<sup>260</sup> Stability Operations and Support Operations, FM 3-07 (FM 100-20), Headquarters, Department of the Army, Washington, February 2003, [www.dtic.mil/doctrine/jel/service\\_pubs/fm3\\_07.pdf](http://www.dtic.mil/doctrine/jel/service_pubs/fm3_07.pdf), Appendix B, para. B-25 (‘... Although the law of war does not apply to these operations, the US, UN, and NATO have their forces apply the “principles and spirit” of the law of war in these operations’). In the meantime, the US has adopted a more nuanced position with regard to the application of IHL to peace operations as a matter of law, while maintaining the same approach to the application of IHL by analogy in situations where it does not formally apply to the conduct of the peace operation in question. Condron (ed.), *Operational Law Handbook*, JA 22, International and Operational Law Department, Judge Advocate General’s Legal Center and School, Charlottesville, Virginia, 2011, p. 14.

<sup>261</sup> Joint Service Manual of the Law of Armed Conflict, United Kingdom, 2004, pp. 379-80, paras. 14.9-14.10 (‘It follows that, below that threshold, members of a PSO force may be involved in fighting without being subject to the law of armed conflict ... Nevertheless, such fighting does not take place in a legal vacuum. Quite apart from the fact that it is governed by national law and the relevant provisions of the rules of engagement, *the principles and spirit of the law of armed conflict remain relevant*,’ emphasis added).

that certain provisions of international humanitarian law may be applied where the peace operation is not a party to an armed conflict.<sup>262</sup> For the personnel on the ground, this may have the advantage that they are not confronted with two different sets of applicable rules and would subsequently diminish the role of the threshold of international humanitarian law.

Moreover, there is wide support among scholars and practitioners to apply the law of occupation by analogy to peace operations performing tasks similar to those of occupying powers, for instance the military components of international territorial administrations.<sup>263</sup> Although in most of these cases, the law of occupation will generally not be applicable as a matter of law, this legal regime offers practical solutions to many problems which such missions may encounter and for which the resolutions of the Security Council do not provide sufficient guidance.<sup>264</sup> The operation in East Timor is a case in point: when INTERFET deployed under Australian command, it made extensive use of the law of occupation to re-establish order and to set up an interim justice system.<sup>265</sup> Nevertheless, the United Nations have so far refrained from making explicit use of the law of occupation in any of their peace operations.<sup>266</sup>

The approach to apply humanitarian law as a matter of policy is partly motivated by the aim to close the protection gap that might otherwise arise and to provide individuals affected by the conduct of peace operations with at least some protection under international law. Applying

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<sup>262</sup> NATO Allied Joint Doctrine, Peace Support Operations, July 2001, AJP-3.4.1, para. 4B6 ('The Law of Armed Conflict (LOAC) is the body of international law that governs the conduct of hostilities during an armed conflict. *The PSF will not generally be a party to the conflict, yet certain LOAC principles may be applied.* Individual civilians along with the civilian population must never be purposefully targeted unless they have taken active part in the armed conflict. When military force is used, every effort should be taken to minimise the risk of civilian casualties.' Emphasis added).

<sup>263</sup> ICRC, Expert Meetings on Occupation (2012), *supra* note 216, pp. 33 and 84-87; Sassòli (2005), *supra* note 218, pp. 691-93; Vité, 'L'Applicabilité du Droit International de l'Occupation Militaire aux Activités des Organisations Internationales', 853 IRRC (2004), 9-35, pp. 29-33; Kelly (1999), *supra* note 230, p. 70; Faite (2008), *supra* note 232, pp. 154-56; Kolb and Vite (2009), *supra* note 255, pp. 227-29.

<sup>264</sup> In particular, the right under the law of occupation to use administrative detentions can prove helpful when facing a volatile security situation, including inter-community violence. Moreover, the law is widely accepted and applies irrespective of the legitimacy of the international presence or the predecessor government. Furthermore, unlike evolving concepts for the international administration of territories, the law of occupation is an established, ready-to-operate legal framework that can be applied immediately, at least for the early stages of the operation in question. Furthermore, extra training is not needed, as all armed forces and their military lawyers are familiar with the set of rules. See, in particular: Sassòli (2005), *supra* note 218, p. 691.

<sup>265</sup> Kelly et al., 'Legal Aspects of Australia's Involvement in the International Force for East Timor', 841 IRRC (2001), 101-139, p. 115.

<sup>266</sup> Shraga (2009), *supra* note 146, pp. 374-75. This reluctance may be explained by the objections against the *de jure* applicability of the law of occupation, namely the generally negative connotation associated with occupation regimes as well as with certain limitations (e.g. on the possibility to legislate effectively) stemming from the law of occupation.

humanitarian law by analogy is, however, not without difficulties. Many provisions are specifically designed for situations of armed conflict (or occupation) and are consequently more permissive than those applicable in times of peace, for instance with regard to the use of (lethal) force, the restriction of liberty or the seizure or destruction of property. Jann Kleffner and Frederik Naert, therefore, caution against applying humanitarian law as a matter of policy and stress that states and international organisations are not free to replace the legal framework applicable in peacetime (i.e. international human rights law) with the more lenient rules of humanitarian law, unless the conditions for their application are met.<sup>267</sup> It thus seems more appropriate to limit the application by analogy to the protective rules of humanitarian law.<sup>268</sup> Nonetheless, even some of these rules may prove inadequate for operational purposes. In fact, certain rules on the means and methods of warfare, such as the prohibition of certain weapons and certain forms of deception, may unnecessarily restrain the personnel of peace operations that have not yet become a party to an armed conflict.<sup>269</sup>

### 3.5 CONCLUSION

This chapter considered the circumstances under which humanitarian law applies to the conduct of international forces involved in a peace operation. It rejected the arguments whereby peace operations should be treated differently from other belligerents because of their special mandates or their international nature. As a result, the determination of whether the peace operation – or to be precise, the states and the organisation involved therein – is a party to an armed conflict has to be based on the ordinary test: When its forces engage in fighting with state armed forces, however sporadic and short-lived this may be, there will be an international armed conflict. By contrast, violence with non-state armed groups qualifies as a non-international armed conflict, provided that it reaches a high level of intensity and that the group in question is sufficiently organised. Even though the law of non-international armed conflicts is more limited

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<sup>267</sup> Kleffner (2010), *supra* note 22, 51-77, p. 61, para. 20; Naert (2010), *supra* note 54, pp. 468-69. ICRC, Expert Meetings on Occupation (2012), *supra* note 216, pp. 86-87 (raised by a few experts).

<sup>268</sup> This seems to be the policy of the Netherlands as referred to by: Naert (2010), *supra* note 54, p. 469.

<sup>269</sup> The use of such means and methods (of warfare), especially expanding bullets, riot control agents and covert operations will be addressed at great length in Chapter 5, from p. 244. However, the rules on the treatment of civilians and other protected persons, especially the fundamental guarantees, could be applied by analogy without major difficulties.

and does not guarantee a combatant privilege to captured enemy fighters, there are circumstances under which the full set of rules may become applicable, most notably by mutual agreement between the parties.

This chapter also concluded that the special protection regime that has evolved in the last two decades in no way raises the threshold of violence required for triggering an armed conflict involving a peace operation. Rather, it shows the need for a participation-based test – in addition to the ordinary threshold of armed conflict – in order to ascertain whether and when a peace operation (or the individual states and international organisations engaged therein) becomes a party to a pre-existing armed conflict. Hence, where the personnel engage in acts amounting to direct participation in hostilities it will arguably make the entire peace operation a party to the conflict. This test is of particular relevance in situations in which the peace operation has not yet (or only sporadically) been involved in fighting and whose activities are mainly focused on supporting the host state authorities. The test may also be used for qualifying the interaction between the different actors involved in the peace operation itself. The test may help – in addition to the ordinary threshold of armed conflict – to clarify as to which sending states can be considered a party to the armed conflict.

The chapter also considered the temporal and geographical scope of application, once the peace operation has become a party to an armed conflict. It concludes that humanitarian law continues to apply for as long as the armed conflict lasts or for as long as the peace operation participates in it by committing acts amounting to direct participation in hostilities. Although this analysis is essentially based on an *objective test*, the conclusion of formal agreements between the parties may be evidence of the intentions of the parties to bring the conflict to an end. In the meantime, humanitarian law does not only apply in areas directly affected by hostilities, but governs also the actions of the international forces in other areas. It may even apply outside the mission area to the extent that there exists a nexus with the armed conflict in question, including spill-over scenarios and cases involving an even further dislocation from the initial battlefield. The lawfulness of forceful measures in such situations would, however, also depend on the terms of the mandate, the *jus ad bellum* as a whole and other applicable restrictions under international law, including human rights law.

The last part of the chapter considered the case of military occupations absent hostilities as a self-standing ground for the application of humanitarian law in peace operations. It concludes that mandate-based considerations do not matter and that the assessment rests entirely on a factual test. Hence, whenever international forces involved in a peace operation are deployed to an area over which they exercise sufficient control without the explicit and genuine consent of the host state, they assume the role of an occupying power. This test is further complemented by a participation-based test to capture cases in which the peace operation (or the individual

states and international organisations engaged therein) renders direct support to the military occupation of another entity in the mission area. In the absence of armed hostilities, only those humanitarian law rules that are part of the law of occupation will be of relevance. These rules remain applicable in the territory in question until the military occupation comes to an end, for instance, when the troops are withdrawn or when their presence has received the genuine consent of the host state.

The law of occupation is also the primary candidate for the approach of applying humanitarian law by analogy. However, while states and international organisations are generally free to commit themselves to higher standards, they cannot invoke such standards to justify measures that are at odds with otherwise applicable obligations under international law, including human rights law. Indeed, the approach of applying humanitarian law by analogy is partly driven by the misconception that human rights law is not applicable in the mission area and not tailored to the challenging security situation prevailing there. These questions will be addressed at great length in the following chapter.

# 4 APPLICATION OF HUMAN RIGHTS LAW IN PEACE OPERATIONS

## 4.1 GENERAL OVERVIEW

The foregoing chapter examined the circumstances under which humanitarian law applies in the course of a peace operation. In this chapter, we will consider the same question in relation to human rights law. As noted above in Chapter 2, states are bound by a number of different human rights treaties. Despite some differences in wording and structure, they greatly overlap as to the content of the same rights. Many of these rights do also exist under general international law (either as customary law or general principles), which is also the main source of human rights obligations of an international organisation. There is strong support that at least the following rights fall into that category:

- the prohibition of arbitrary deprivation of life;
- the prohibition of torture or cruel, inhuman or degrading treatment or punishment;
- the prohibition of slavery; the prohibition of arbitrary deprivation of liberty; and
- in more limited terms: the right to non-discrimination, fair trial rights, the right to free movement, and the most basic political rights.

In this chapter we will examine the circumstances under which these human rights obligations apply in the context of a peace operation. This is mainly motivated by the fact that some human rights treaties appear to have a restricted geographical scope. It should be recalled that responsibility only arises for the respective duty-bearer. For example, a sending state's human rights obligations are only triggered for acts and omissions in the peace operation duly attributable to that state. Moreover, even if human rights law applies in the midst of peace operations, it is subject to a complex framework of limitations. Hence, we will also consider the circumstances under which permissible limitations and derogations may be available and possible challenges that need to be addressed.

## 4.2 GEOGRAPHIC SCOPE OF HUMAN RIGHTS LAW

### INTRODUCTION

As peace operations invariably take place outside the territory of the sending states, a major challenge to the application of human rights treaties to which they are a party is the fact that many of them contain jurisdiction clauses. For instance, Article 1 of the European Convention states that:

The High Contracting Parties shall *secure to everyone within their jurisdiction* the rights and freedoms defined in Section I of this Convention.<sup>1</sup>

In the same vein, Article 1 (1) of the American Convention reads as follows:

The States Parties to this Convention undertake to *respect the rights and freedoms* recognized herein and *to ensure to all persons subject to their jurisdiction* the free and full exercise of those rights and freedoms.<sup>2</sup>

Similar jurisdiction clauses can be found in a number of other human rights treaties.<sup>3</sup> By contrast, the International Covenant's clause seems to contain two separate requirements:

Each State Party to the present Covenant undertakes to respect and to ensure to all individuals *within its territory* and *subject to its jurisdiction* the rights recognized in the present Covenant ...<sup>4</sup>

If the two elements 'within its territory' and 'subject to its jurisdiction' were cumulative requirements, which both need to be fulfilled, the clause would effectively rule out any extra-territorial application of the Covenant. However, in the case of *Lopez Burgos v. Uruguay* (1981)

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<sup>1</sup> Emphasis added.

<sup>2</sup> Emphasis added.

<sup>3</sup> See, for instance: Art. 1 CIS Convention ('The Contracting Parties shall *secure to everyone within their jurisdiction* the rights and freedoms set out in the present Convention', emphasis added); Art. 3 (1) Arab Charter ('Each State party to the present Charter undertakes to *ensure to all individuals subject to its jurisdiction* the right to enjoy the rights and freedoms set forth herein ...', emphasis added); Art. 2 (1) CRC ('States Parties shall *respect and ensure the rights* set forth in the present Convention to each child within their jurisdiction', emphasis added).

<sup>4</sup> Art. 2 (1) ICCPR, emphasis added.

the Human Rights Committee adopted a *disjunctive* reading of the text and confirmed this position in its subsequent jurisprudence and follow-up documents,<sup>5</sup> including its General Comment 31.<sup>6</sup> Both Israel and the United States have rejected this interpretation.<sup>7</sup> As Noam Lubell notes, however, they did not enter reservations to that effect, although both states had been aware of the Committee's position when they acceded to the Covenant in the early 1990s.<sup>8</sup> The disjunctive interpretation has also been confirmed by the International Court of Justice.<sup>9</sup> Whether the relevant human rights treaties containing a jurisdiction clause apply to the actions of states during a peace operation generally depends on when and where states may be considered to exercise jurisdiction abroad. The same question may arise in the future for international organisations to the extent that they become parties to such a human rights treaty.<sup>10</sup>

A number of other human rights instruments do not contain any jurisdiction clause, including the American Declaration (1948), the African Charter (1981) and the International Covenant on Economic, Social and Cultural Rights (1966).<sup>11</sup> This begs the question of whether they are

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<sup>5</sup> HRC, *Lopez Burgos v. Uruguay*, View, 29 July 1981, Communication no. R.12/52, para. 12.3 ('Article 2 (1) ... does not imply that the State party concerned cannot be held accountable for violations of rights under the Covenant which its agents commit upon the territory of another State, whether with the acquiescence of the Government of that State or in opposition to it ... In line with this, it would be unconscionable to so interpret the responsibility under article 2 of the Covenant as to permit a State party to perpetrate violations of the Covenant on the territory of another State, which violations it could not perpetrate on its own territory').

<sup>6</sup> HRC, General Comment 31, 'Nature of the General Legal Obligation Imposed on States Parties to the Covenant', 29 March 2004, CCPR/C/21/Rev 1/Add 13, para. 10 ('States Parties are required by article 2, paragraph 1, to respect and to ensure the Covenant rights to all persons who may be within their territory and to all persons subject to their jurisdiction').

<sup>7</sup> HRC, Fourth Periodic Report, Israel, 12 December 2013, CCPR/C/ISR/4, para. 48 ('Israel believes that the Convention, which is territorially bound, does not apply, nor was it intended to apply, to areas beyond a state's national territory'). HRC, Follow-up State Party's Report, USA, 1 April 2015, No. 038-15, para. 33, ('United States again asserts its longstanding position that obligations under the Covenant apply only with respect to individuals who are both within the territory of the State Party and within its jurisdiction'). Hence, the US government did not the reasoning expressed in: US DoS, Memorandum Opinion on the ICCPR, prepared by Harold Koh (2010), *infra* note 104 (calling for a far-reaching recognition of the ICCPR's extra-territorial reach).

<sup>8</sup> Lubell, *Extraterritorial Use of Force against Non-State Actors* (OUP 2010), p. 198.

<sup>9</sup> ICJ, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 9 July 2004, ICJ Reports 2004, paras. 108-11. ICJ, *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, Judgment, 19 December 2005, ICJ Reports 2005, para. 216.

<sup>10</sup> A case in point is the EU, which is currently in the process of negotiating its accession to the ECHR. Art. 1 (6), Draft Revised Agreement on the Accession of the European Union to the Convention for the Protection of Human Rights and Fundamental Freedoms, 5 April 2013, 47+1(2013)008 ('Insofar as that term ['everyone within their jurisdiction'] refers to persons outside the territory of a High Contracting Party, it shall be understood, with regard to the European Union, as referring to persons which, if the alleged violation in question had been attributable to a High Contracting Party which is a State, would have been within the jurisdiction of that High Contracting Party').

<sup>11</sup> The same is true for the Convention on the Elimination of All Forms of Discrimination against Women (1979) and the Convention on the Rights of Persons with Disabilities (2007).

subject to any geographical limitations. The African Commission did not discuss the issue of jurisdiction when considering the interstate case initiated by the Democratic Republic of Congo (DRC) against Burundi, Rwanda and Uganda for their armed activities in the Congo.<sup>12</sup> However, in the related *Armed Activities on the Territory of the Congo* case, the International Court of Justice held that:

international human rights instruments are applicable in respect of acts done by a State in the exercise of its jurisdiction outside its own territory, particularly in occupied territory<sup>13</sup>

It referred to, among others, the African Charter. The Court has also applied a spatial limitation to the International Covenant on Social, Economic and Cultural Rights (1966) when applying it to Israel with regard to its obligations in the Palestinian Occupied Territories.<sup>14</sup> Likewise, the Inter-American Commission has read a jurisdictional limitation into the American Declaration.<sup>15</sup> In conclusion, it seems that the territorial reach of these instruments is indeed very similar to the geographical scope of application of human rights treaties with an explicit jurisdiction clause. They would thus equally govern the conduct of state armed forces in the context of a peace operation.

Whether a similar conclusion can be drawn for human rights under general international law (especially customary law) is a matter of debate. While some authors have argued that no limitation attaches to the application of human rights obligations stemming from sources other than treaties,<sup>16</sup> Marko Milanović is more cautious and calls it ‘quite unlikely that states have assumed more extensive obligations under customary human rights law than they have done under treaty law’.<sup>17</sup> The official US Operational Law Handbook (2012) for JAG officers, however, stresses the distinction between these two sources:

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<sup>12</sup> ACmHPR, *Democratic Republic of Congo v. Burundi, Rwanda and Uganda*, Decision, Communication 227/1999, 27 May 2003, para. 64 (‘The effect of the alleged activities of the rebels and armed forces of the Respondent State Parties to the Charter, which also back the rebels, fall not only within the province of humanitarian law, but also within the mandate of the [African] Commission’).

<sup>13</sup> ICJ, *Armed Activities case* (2005), *supra* note 9, para. 216.

<sup>14</sup> ICJ, *Wall Opinion* (2004), *supra* note 9, paras. 112.

<sup>15</sup> IACmHR, *Coard et alia v. United States*, Decision, Case 10.951, 29 September 1999, para. 37 (‘Given that individual rights inhere simply by virtue of a person’s humanity, each American State is obliged to uphold the protected rights of any person subject to its jurisdiction’).

<sup>16</sup> Lubell, ‘Challenges in Applying Human Rights Law to Armed Conflict’, 860 IRRC (2005), 737-54, p. 741; Frostad, ‘The Responsibility of Sending States for Human Rights Violations during Peace Support Operations and the Issue of Detention’, 50 *Military Law and the Law of War Review* (2011), 127-88, p. 134 (claiming that those parts of human rights law ‘which have acquired the status of customary international law ... apply always and everywhere, and thus without the limitations which treaties tend to set up for the application of their provisions’); Melzer, *Targeted Killing in International Law* (OUP 2008), p. 76.

<sup>17</sup> Milanović, *Extraterritorial Application of Human Rights Treaties. Law, Principles, and Policy* (OUP 2011), p. 3.

IHRL [international human rights law] exists in two forms: treaty law and *customary international law (CIL)*. IHRL established by treaty generally only binds the State in relation to persons within its territory and subject to its jurisdiction ... If a specific human right falls within the category of CIL, it is a “fundamental” human right binding on U.S. forces *during all overseas operations* ... Therefore, it is the CIL status of certain human rights that renders respect for them a legal obligation on the part of U.S. forces conducting operations *outside the United States*.<sup>18</sup>

Hence, differing from its position on the extra-territorial reach of human rights treaty obligations, the United States considers its own troops to be bound by customary human rights law during overseas missions.<sup>19</sup> A similar approach was taken by a court in the Netherlands in a case regarding the actions of Dutch peacekeepers during the Srebrenica massacre in July 1995. As the Dutch government had challenged the *ratione loci* applicability of human rights treaty law, the Hague Appeals Court relied on the apparently unlimited reach of human rights law stemming from customary international law:

Additionally, the Court will test the alleged conduct against the legal principles contained in articles 2 and 3 ECHR and articles 6 and 7 ICCPR (the right to life and the prohibition of inhuman treatment respectively), because these principles, which belong to the most fundamental legal principles of civilized nations, need to be considered *as rules of customary international law* that have universal validity and by which the State is bound. The Court assumes that, by advancing the argument in its defense that these conventions are not applicable, the *State did not mean to assert that it does not need to comply with the standards* that are laid down in art. 2 and 3 ECHR and art. 6 and 7 ICCPR in peacekeeping missions like the present one.<sup>20</sup>

This confirms at least the claim that customary human rights law may apply extra-territorially, but the question remains to what extent? This is particularly relevant for the different types of obligations. Indeed, customary human rights law provides arguably for a much more limited set of positive obligations than human rights treaties. It seems also unlikely that states would have accepted to be bound by a set of positive obligations that apply virtually all around the

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<sup>18</sup> International and Operational Law Department – Judge Advocate General’s Legal Center and School, *The US Operational Law Handbook* (2012), [www.loc.gov/rr/frd/MilitaryLaw/pdf/operational-law-handbook-2012.pdf](http://www.loc.gov/rr/frd/MilitaryLaw/pdf/operational-law-handbook-2012.pdf), pp. 45-48, emphasis added.

<sup>19</sup> The examples of customary human rights that the Handbook provides entail, however, only negative obligations: *ibid*, p. 48 (among others, the prohibition of ‘slavery or slave trade, murder or causing the disappearance of individuals, torture or other cruel, inhuman, or degrading treatment or punishment, prolonged arbitrary detention ... violence to life or limb, hostage taking, punishment without fair trial’). Likewise: US DoS, Memorandum Opinion on the ICCPR, prepared by Harold Koh (2010), *infra* note 104 (‘many obligations to *respect* rights recognized by the ICCPR already apply to U.S. conduct overseas through the operation of other international legal obligations – including ... customary international law rules’, emphasis added).

<sup>20</sup> Hague Appeals Court, *Nuhanović v. Netherlands & Mustafić-Mujić v. Netherlands*, 5 July 2011, Case no. 200.020.174/01, para. 6.3, emphasis added. Indeed, the court was uncertain how the ECtHR would decide *Al-Skeini v. United Kingdom* (2011), *infra* note 42, two days later.

globe.<sup>21</sup> Hence, their extra-territorial reach raises questions that are somewhat similar to those arising under treaty law, despite the absence of a formal jurisdictional requirement. This is why the following subsection on the different models for extra-territorial application are equally relevant for the set of human rights stemming from general international law (i.e. custom and general principles). Since general international law constitutes the main source of their obligations under human rights law, this discussion is also of key relevance for international organisations involved in a peace operation.

## MODELS FOR EXTRA-TERRITORIAL APPLICATION

### Introduction

The term ‘jurisdiction’ may be used in different ways and its meaning is highly context-specific. This has been explicitly acknowledged by Ian Brownlie, who notes that certain terminology:

is not employed very consistently in legal sources such as works of authority or opinions of law officers, or by statesmen, who naturally place political meanings in the foreground. The terminology as used by lawyers is also unsatisfactory in that the complexity and diversity of the rights, duties, powers, liberties, and immunities of states are obscured by the liberal use of omnibus terms like ‘sovereignty’ and ‘jurisdiction’.<sup>22</sup>

It is thus surprising that the Grand Chamber of the European Court referred to an ‘ordinary meaning’ of jurisdiction when interpreting the meaning of the term in its decision on *Banković v. Belgium et al.* (2001), involving the NATO-bombing of a Belgrade TV station during the Kosovo war in 1999:

As to the “ordinary meaning” of the relevant term in Article 1 of the Convention, the Court is satisfied that, from the standpoint of public international law, the jurisdictional competence of a State is primarily territorial. While international law does not exclude a State’s exercise of jurisdiction extra-territorially, the suggested bases of such jurisdiction (including nationality, flag, diplomatic and consular relations, effect, protection, passive personality and universality) are, as a general rule, defined and limited by the sovereign territorial rights of the other relevant States.<sup>23</sup>

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<sup>21</sup> Similarly: Kretzmer, ‘Targeted Killing of Suspected Terrorists: Extra-Judicial Executions or Legitimate Means of Defence?’, 16 (2) EJIL (2005), 171-212, p. 185 (‘The duty to respect the right to life is surely one of these norms [of customary international law]. A State’s duty to *respect* the right to life (as *opposed to its duty to ensure* that right) follows its agents, wherever they operate’, emphasis added).

<sup>22</sup> Brownlie, *Principles of Public International Law* (OUP 2003), pp. 105-106.

<sup>23</sup> ECtHR, *Banković v. Belgium et al.*, Decision, 12 December 2001, Application no. 52207/99, para. 59.

Consequently, the Court found that a state's exercise of jurisdiction beyond its own borders was exceptional, requiring specific justification under public international law.<sup>24</sup> However, as rightly pointed out by Martin Scheinin, the Court discusses the permissibility of exercising extra-territorial jurisdiction, but not the 'consequences of the exercise of authority abroad', whether lawful or not.<sup>25</sup> The Court's legality-based concept of jurisdiction surfaces again at a later stage of the decision:

In sum, the case-law of the Court demonstrates that its recognition of the exercise of extra-territorial jurisdiction by a Contracting State is exceptional: it has done so when the respondent State, through the effective control of the relevant territory and its inhabitants abroad as a consequence of military occupation or *through the consent, invitation or acquiescence* of the Government of that territory, *exercises all or some of the public powers normally to be exercised by that Government.*<sup>26</sup>

However, while grounds for lawful exercise of extra-territorial jurisdiction under public international law may help in clarifying the scope of positive obligations, e.g. the duty to investigate the death of their own nationals occurring abroad, extra-territorial jurisdiction for the purpose of human rights law has to be based on factual rather than legal terms alone. This is supported by the practice of most human rights treaty bodies, which have all interpreted the notion of 'jurisdiction' as a factual concept based on control. Both the European Commission and the European Court have used the control standard with regard to territory and persons,<sup>27</sup> while the Inter-American Commission has referred to 'authority and control'.<sup>28</sup> The Human Rights Committee used a similar notion in its General Comment 31:

[A] State party must respect and ensure the rights laid down in the Covenant to anyone *within the power or effective control* of that State Party, even if not situated within the territory of the State Party.<sup>29</sup>

It also added that:

This principle also applies to those within the power or effective control of the forces of a State Party acting outside its territory, regardless of the circumstances in which such power

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<sup>24</sup> Ibid, paras. 60-61.

<sup>25</sup> Scheinin, 'Extraterritorial Effect of the International Covenant on Civil and Political Rights', in: Coomans and Kamminga (eds.), *Extraterritorial Application of Human Rights Treaties* (Intersentia 2004), 73-81, p. 79.

<sup>26</sup> ECtHR, *Banković v. Belgium* (2001), *supra* note 23, para. 71, emphasis added.

<sup>27</sup> ECmHR, *Cyprus v. Turkey* (1975), *infra* note 62, para. 10. ECtHR, *Loizidou v. Turkey* (1995), *infra* note 38, para. 62.

<sup>28</sup> IACmHR, *Alejandre v. Cuba* (1999), *infra* note 82, para. 24.

<sup>29</sup> HRC, General Comment 31 (2004), *supra* note 6, para. 10, emphasis added.

or effective control was obtained, such as forces constituting a *national contingent* of a State Party assigned to an *international peace-keeping or peace-enforcement operation*.<sup>30</sup>

Despite this clear reference to peace operations, the statement does not prove very helpful, as it fails to explain under which circumstances this level of control may be reached.<sup>31</sup> Unfortunately, no individual complaint has so far been lodged with the Committee in relation to misconduct during peace operations, which would have allowed it to apply the above-mentioned control test to an actual case. The Committee tried, however, to address the issue by including references to peace operations in its concluding opinions to state reports.<sup>32</sup> But it failed to outline in detail the different mission scenarios that entail an exercise of jurisdiction and trigger the application of the Covenant in relation to the relevant troop-contributing state. In the same vein, follow-up responses by states have remained rather elusive and somewhat circular:

Wherever its police or armed forces are deployed abroad, in particular when participating in peace missions, Germany ensures to all persons that they will be granted the rights recognized in the Covenant, *insofar as they are subject to its jurisdiction*.<sup>33</sup>

What is necessary is to consider closely the jurisprudence of the other relevant human rights bodies and courts in order to identify the circumstances under which states' human rights obligations will apply in the context of a peace operation. The jurisprudence, especially of the European Court, is rather inconsistent. Nevertheless, the following four models for extra-territorial application can be distinguished.<sup>34</sup>

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<sup>30</sup> Ibid, para. 10.

<sup>31</sup> For a similar view: Mujezinović Larsen, *The Human Rights Treaty Obligations of Peacekeepers* (CUP 2012), p. 181; For a less critical position on this passage: Quéniwet, 'Human Rights Law and Peace-keeping Operations', in: Odello and Piotrowicz (eds.), *International Military Missions and International Law* (Martinus Nijhoff 2011), 99-143, pp. 106-107.

<sup>32</sup> For a very detailed discussion of the HRC's concluding observations on the state reports from Italy, Poland, Norway, the Netherlands, Belgium, Germany and the UK: Mujezinović Larsen (2012), *supra* note 31, pp. 181-85.

<sup>33</sup> HRC, Comments by the Government of Germany to the Concluding Observations, 11 April 2005, CCPR/CO/80/DEU/Add.1. See also: HRC, Fifth Periodic Report, Belgium, 17 July 2009, CCPR/C/BEL/5, p. 15. But see: HRC, Replies of the United Kingdom, 25 March 2015, para. 6 ('the UK's human rights obligations are primarily territorial and the ICCPR can only have effect outside the territory of the UK in exceptional circumstances. Similarly, the ECtHR has held that the ECHR only applies extra-territorially in exceptional circumstances, although international human rights treaties do not necessarily have the same scope of application. The UK seeks to comply with its human rights obligations in relation to *all persons detained* by its Armed Forces', emphasis added).

<sup>34</sup> In support of the claim that the standards under the ECHR and ICCPR have largely converged: Hague District Court, *Mothers of Srebrenica v. Netherlands* (2014), *infra* note 46, paras. 4.153 ('Although the concept of jurisdiction in both conventions [i.e. ECHR and ICCPR] is not identical it is accepted that both concepts be interpreted in the same way and parties do not argue otherwise. In respect of both conventions it holds that only in very extreme cases does a state have jurisdiction beyond the borders of its own territory').

## Spatial Model

Based on the premise that jurisdiction is primarily territorial, the clearest case giving rise to extra-territorial jurisdiction for the purpose of human rights law exists when a state exercises control over territory abroad, most pertinently as a result of a military occupation. That human rights treaties apply also to occupied territories has been confirmed by the Human Rights Committee and other human rights treaty bodies – e.g. concerning the Iraqi occupation of Kuwait<sup>35</sup> and the Israeli occupation of Lebanon<sup>36</sup> – as well as by the International Court of Justice in the *Wall* and the *Congo v. Uganda* cases.<sup>37</sup> It is, however, the European Court that has greatly contributed to the conceptualisation of the spatial model based on territorial control. In the case of *Loizidou v. Turkey* (1995), concerning Turkey’s occupation of Northern Cyprus, it stated that:

Bearing in mind the object and purpose of the Convention, the responsibility of a Contracting Party may also arise when as a consequence of military action – whether lawful or unlawful – it *exercises effective control of an area outside its national territory*. The obligation to secure, in such an area, the rights and freedoms set out in the Convention derives from the fact of such control whether it be exercised directly, through its armed forces, or through a subordinate local administration.<sup>38</sup>

In the closely related case of *Cyprus v. Turkey* (2001), the Court further explained that Turkey’s jurisdiction over Northern Cyprus:

must be considered to extend to securing the *entire range of substantive rights* set out in the Convention and those additional Protocols which she has ratified, and that violations of those rights are imputable to Turkey.<sup>39</sup>

A state that exercises control over foreign territory is thus required to observe the Convention to the same extent as on its own territory, including positive obligations, which implies that the degree of control over the territory occupied must be such that it is in the position to carry out ‘all or some of the public powers normally exercised by the government’ there.<sup>40</sup>

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<sup>35</sup> HRC, Report to the UN General Assembly, 10 October, UN Doc. A/46/40, para. 652.

<sup>36</sup> HRC, Concluding Observations: Israel, 18 August 1998, UN Doc. CCPR/C/79/Add.93, para. 10 (‘the Covenant must be held applicable to the occupied territories and those areas of southern Lebanon and West Bekaa where Israel exercises effective control’).

<sup>37</sup> ICJ, *Wall Opinion* (2004), *supra* note 9, paras. 112 (‘the territories occupied by Israel have for 37 years been subject to its territorial jurisdiction as occupying power’); ICJ, *Armed Activities case* (2005), *supra* note 9, para. 216 (‘international human rights instruments are applicable in respect of acts done by a State in the exercise of its jurisdiction outside its own territory, particularly in occupied territory’).

<sup>38</sup> ECtHR, *Loizidou v. Turkey*, Judgement on Preliminary Objections, 23 March 1995, Application no. 15318/89, para. 62, emphasis added.

<sup>39</sup> ECtHR, *Cyprus v. Turkey*, Judgement, Application No. 25781/94, 10 May 2001, para. 77, emphasis added.

<sup>40</sup> ECtHR, *Banković v. Belgium et al.* (2001), *supra* note 4023, para. 71.

As we concluded in the previous chapter, peace operations are in no way prevented from becoming an occupying power in the mission area, provided that all requirements of military occupation are met. A case in point is the situation in Iraq under US and British forces until the hand-over of sovereignty in June 2004. However, when the House of Lords heard the *Al-Skeini* case, involving the killing of six Iraqis by British forces in Basra in 2003, the law lords had doubts as to whether the United Kingdom was in effective control of southern Iraq, given the strength of the anti-coalition insurgency and the small number of British troops on the ground. Subsequently, it denied the existence of jurisdiction with regard to the deceased relatives of the first five applicants, who had been killed during patrols on the streets of Basrah.<sup>41</sup> By contrast, when the European Court heard the case it held that all applicants' relatives fell within the jurisdiction of the United Kingdom; it did not, however, rely on the spatial model ('effective control over territory') – but on the personal model, which will be discussed further below – for satisfying the jurisdiction test.<sup>42</sup> The Court thus avoided the question as to whether it was enough to be an occupying power for clearing the threshold or whether it takes more for a state to exercise effective control over an area. It seems the Court did so because it also had doubts as to whether the entire south of Iraq, for which the United Kingdom was in charge, could be considered under the effective control of British forces at the time the killings took place.

Another example for which the spatial model may be relevant is the case of buffer zones under the control of peace forces, such as on Cyprus or in the Golan Heights. The exclusive control of the UN Peacekeeping Force in Cyprus (UNFICYP) over the buffer zone has been recognised by the European Court in cases against Turkey concerning its presence in the north of the island,<sup>43</sup> without, however, drawing any conclusion as to UNFICYP's human rights obligations inside the zone, let alone the human rights treaty obligations of the respective troop-contributing states.<sup>44</sup>

So-called 'safe zones', which the United Nations declared in certain places during the war in Bosnia, are another example where the spatial model may prove relevant.<sup>45</sup> The most notorious

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<sup>41</sup> UKHL, *Al-Skeini et al. v. Secretary of State for Defence*, Opinions of the Lords of Appeal, 13 June 2007, para. 83 (per Lord Rodger). Only Baha Mousa, the sixth applicant's relative, was deemed within the jurisdiction of the United Kingdom, as he died inside a military prison, para. 97 (per Lord Carswell) and para. 132 (per Lord Brown).

<sup>42</sup> ECtHR, *Al-Skeini v. United Kingdom*, Judgement, 7 July 2011, Application no. 55721/07, paras. 143-150.

<sup>43</sup> See, for instance, ECtHR, *Isaak v. Turkey*, Decision, 28 September 2006, Application no. 44587/98; ECtHR, *Stephens v. Cyprus, Turkey and the UN*, Decision on Admissibility, 11 December 2008, Application no. 45267/06.

<sup>44</sup> For an excellent discussion: Mujezinović Larsen (2012), *supra* note 31, pp. 198-202.

<sup>45</sup> *Ibid.*, pp. 194-98 (distinguishing buffer zones from safe areas and other security zones, which usually do not entail any real and exclusive control of the area in question).

among them was the Srebrenica safe zone, infamous for the failure of the Dutch UNPROFOR battalion (Dutchbat) to prevent the mass-killing of Bosniak men by Bosnian-Serb soldiers in July 1995. In the *Mothers of Srebrenica* case (2014),<sup>46</sup> the Hague District Court found no support for the claim that Dutchbat had ‘physical power and control’ over the entire safe area in and around Srebrenica, or – after its fall – over the mini safe area, where more than 20,000 refugees had sought refuge.<sup>47</sup> It held, however, that the Netherlands had ‘effective control’ over their own compound:

The compound was a fenced-off area in which Dutchbat had the say and over which the UN after the fall of Srebrenica exercised almost no actual say any more. ... [T]he Bosnian Serbs respected this area and left it untroubled after the fall of Srebrenica. ... [T]he State was only able to supervise observance of the human rights anchored in the ECHR and ICCPR vis-à-vis those persons who as of the fall of Srebrenica were in the compound. The State was not able to do this for the populace of the safe area prior to the fall of Srebrenica and even less after that vis-à-vis the refugees in the mini safe area that lay beyond the compound or beyond the mini safe area.<sup>48</sup>

Hence, the Dutch peacekeepers in Srebrenica had only control over their compound and were thus only in a position and thus expected to protect the refugees present there. This included the 320 able-bodied men among them, who (with few exceptions) were executed following their forced evacuation from the compound.<sup>49</sup>

A closely related example is the case of international territorial administrations, such as in Kosovo or formerly in East Timor. In the case of *Behrami and Saramati v. France and Norway* (2007), the European Court avoided the question of whether the troop-contributing states were in effective control of territory in Kosovo, as it attributed the conduct of KFOR – albeit wrongly – to the United Nations alone. Only on the side-lines did the Court mention that:

Kosovo was ... under the effective control of the international presences [i.e. KFOR and UNMIK] which exercised the public powers normally exercised by the Government of the FRY.<sup>50</sup>

This passage has led Aurel Sari to claim that the Court was perhaps not so wrong when denying jurisdiction on the part of France and Norway,<sup>51</sup> suggesting that effective control over territory

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<sup>46</sup> Hague District Court, *Mothers of Srebrenica v. Netherlands*, Judgment, 16 July 2014, Case no. C/09/295247.

<sup>47</sup> *Ibid*, para. 4.159.

<sup>48</sup> *Ibid*, paras. 4.160-61.

<sup>49</sup> *Ibid*, para. 4.338.

<sup>50</sup> ECtHR, *Behrami and Saramati v. France and Norway*, Decision, Application no. 71412/01 and 78166/01, 2 May 2007, para. 70, references omitted.

<sup>51</sup> Sari, ‘Autonomy, Attribution and Accountability: Reflections on the “Behrami” Case’, in: Collins and

can only be exercised by one entity. By contrast, Milanović believes that control does not necessarily have to be exclusive and deems it possible that certain parts of Kosovo may also have been under the effective control of the respective troop-contributing states.<sup>52</sup> The Court's position on the matter is not entirely clear from its case-law. As mentioned above, the fact that in the *Al-Skeini* case (2011) it did not apply the spatial model seems to suggest that it defines effective control in rather exclusive terms.

A similar conclusion can be drawn from the case of *Issa v. Turkey* (2004), which involved the alleged killing of Iraqi nationals during Turkish military operations in northern Iraq over a six-week period in spring 1995. The Court disagreed with the applicants that Turkey had effective control over the entire area of northern Iraq and distinguished the facts of the case from the situation in northern Cyprus on the basis of the size of the area, the duration of the troops' presence and the degree of control exercised.<sup>53</sup> However, rather than disregarding the effective control model altogether, the Court went on to say that it did:

not exclude the possibility that, as a consequence of this military action, the respondent State could be considered to have exercised, temporarily, effective overall control of a particular portion of the territory of northern Iraq. Accordingly, if there is a sufficient factual basis for holding that, at the relevant time, the victims were within that specific area, it would follow logically that they were within the jurisdiction of Turkey.<sup>54</sup>

The Court was thus willing to apply the spatial model to a much more limited area where the necessary degree of control was exercised, even if only temporarily.<sup>55</sup> In other words, a state whose national contingent is involved in a peace operation may be considered to exercise jurisdiction towards the inhabitants of a small area under its control, such as a village, to the effect that it has to observe the full range of rights there. More interestingly, the European Court has applied the model to even smaller places, apparently driven by its quest for locations under virtually exclusive control.<sup>56</sup> For instance, the *Al-Saadoon and Mufdhi* case (2009) concerned the applicants' detention in a military prison run by British forces as part of the Multinational

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White (eds.), *International Organizations and the Idea of Autonomy: Institutional Independence in the International Legal Order* (Routledge, London 2011), 257-277, pp. 264-66.

<sup>52</sup> Milanović (2011), *supra* note 17, p. 150.

<sup>53</sup> ECtHR, *Issa v. Turkey*, Judgement, 16 November 2004, Application no. 31821/96, para 75.

<sup>54</sup> *Ibid.*, para. 74, emphasis added.

<sup>55</sup> In addition to this reading of the case, Louise Doswald-Beck offers an alternative interpretation, whereby the Court's examination on whether Turkish troops had been present in the area in question was merely to ascertain whether they were responsible for the killings. This plainly follows the functional approach suggested further below: Doswald-Beck, *Human Rights in Times of Conflict and Terrorism* (OUP 2011), p. 16.

<sup>56</sup> When discussing the spatial model of extra-territorial jurisdiction in the *Hirsi* case, the Court explicitly mentioned situations involving the exercise of 'full and exclusive control over a prison or a ship': ECtHR, *Hirsi Jamaa v. Italy*, Judgement, 23 February 2012, Application no. 27765/09, para. 73.

Force in Iraq following the hand-over of sovereignty at the end of June 2004. The Court held that:

given the total and exclusive de facto, and subsequently also de jure, control exercised by the United Kingdom authorities *over the premises in question*, the individuals detained there, including the applicants, were within the United Kingdom's jurisdiction.<sup>57</sup>

It would have been difficult to argue that during the post-occupation phase British forces had effective control over parts of Iraq. The Court thus applied the territorial jurisdiction concept solely to the building of the detention facility where the applicants were being held. The European Court also made use of the spatial model in a case involving the interception of a foreign ship on the high seas by the French navy. It held that France had:

exercised *full and exclusive control over the Winner* [i.e. vessel] and its crew, at least de facto, from the time of its interception.<sup>58</sup>

This finding may be relevant in any peace operation with a maritime component, especially during anti-piracy operations. To apply the spatial concept of extra-territorial jurisdiction to ever 'smaller areas' involves, however, a certain 'degree of artificiality'.<sup>59</sup> Moreover, despite its obvious advantage, this approach also clearly has its limits, especially in the course of a peace operation. First, even in the case of small areas or places an overlap of jurisdiction cannot always be ruled out, as they can be jointly controlled by two or more states and other entities, thus running counter to the implicit quest for exclusive control. A case in point is *Hess v. United Kingdom* (1975), involving the detention of Nazi war criminal Rudolf Hess in a detention facility in Berlin-Spandau, which was run jointly by all four Allied powers.<sup>60</sup> Second, while a considerable number of ground troops may be considered in control of a small area and thus bring persons present there within their jurisdiction, the same will hardly be the case for naval or aerial operations. Indeed, while NATO forces during the 1999 bombing campaign may have controlled the airspace over Yugoslavia – as alleged by the applicants in *Banković* – this was not enough to exercise control in spatial terms over those on the ground. Likewise, during mar-

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<sup>57</sup> ECtHR, *Al-Saadoon and Mufdhi v. United Kingdom*, Decision on Admissibility, 30 June 2009, Application no. 61498/08, para. 80, emphasis added. In the same passage, the Court added that this conclusion was 'consistent with the dicta of the House of Lords in *Al-Skeini*', which had held that the sixth applicant's relative, Baha Moussa, was under the jurisdiction of the United Kingdom while detained in a military prison inside a British base.

<sup>58</sup> ECtHR, *Medvedev v. France*, Judgement, 29 March 2010, Application no. 3394/03, para. 67.

<sup>59</sup> Milanović (2011), *supra* note 17, p. 134.

<sup>60</sup> ECmHR, *Hess v. the United Kingdom*, Decision as to the Admissibility, 28 May 1975, Application no. 6231/73, Reports 2 (1975), p. 73.

itime operations the concept would only apply from the moment naval forces board the intercepted vessel and bring it under their control. Hence, for both scenarios, one would have to rely on a different concept of extra-territorial jurisdiction. In addition, it is worth mentioning that in *Al-Skeini* (2011) the European Court explicitly recognised the limits of applying the spatial model to ever smaller places and objects:

The Court does not consider that jurisdiction in the above cases arose *solely* from the control exercised by the Contracting State over the buildings, aircraft or ship in which the individuals were held. What is decisive in such cases is the *exercise of physical power* and control over the person in question.<sup>61</sup>

This means that the spatial model is essentially complemented by a personal model, which seems more appropriate in such situations.

### **Personal Model**

Practice of human rights bodies has also recognised a model of extra-territorial jurisdiction based on authority and control over individuals, which may be better suited in the context of a peace operation. This personal model was first employed by the European Commission in the early inter-state case of *Cyprus v. Turkey* (1975). The Commission held that:

High Contracting Parties are bound to secure the said rights and freedoms to *all persons under their actual authority and responsibility*, whether that authority is exercised within their own territory or abroad ... It follows that these [Turkish] armed forces are authorised agents of Turkey and that they bring any person or property in Cyprus “within the jurisdiction” of Turkey, in the sense of Art. 1 of the Convention, to the extent that they *exercise control over such persons* or property. Therefore, insofar as these armed forces, by their acts or omissions, affect such persons’ rights or freedoms under the Convention, the responsibility of Turkey is engaged.<sup>62</sup>

Rather than relying on Turkey’s role as occupying power in northern Cyprus, the Commission focused on the exercise of authority and control over persons. Similar language has been used in the jurisprudence of the Human Rights Committee and the Inter-American Commission. There is ample support in the practice of all human rights treaty bodies that a person is within the authority and control of a state acting abroad when that person is in the state’s custody,

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<sup>61</sup> ECtHR, *Al-Skeini v. United Kingdom* (2011), *supra* note 42, para. 136, emphasis added.

<sup>62</sup> ECmHR, *Cyprus v. Turkey*, Decision as to the Admissibility, 26 May 1975, Application no. 6780/74 and 6950/75, paras. 8-10, emphasis added. The Commission maintained this view in its subsequent decision: ECmHR, *Cyprus v. Turkey*, Decision as to the Admissibility, 10 July 1978, Application no. 8007/77, paras. 24-25.

through arrest or detention.<sup>63</sup> This was also explicitly accepted by the NATO states before the European Court in the *Banković* case (2001).<sup>64</sup> What is of particular relevance for military operations is the fact that the Inter-American Commission applied the American Declaration to persons arrested and detained by US forces during the invasion of Grenada in 1983,<sup>65</sup> as well as to the detainees at Guantanamo Bay.<sup>66</sup> The European Court has likewise found the European Convention applicable to persons detained by British forces in Iraq<sup>67</sup> and it would have come to the same conclusion in the *Saramati* case (2007) had it found the applicant's detention by KFOR in Kosovo to be attributable to Norway rather than to the United Nations alone.<sup>68</sup>

However, unlike in the case of detention facilities or similar places to which the spatial model could arguably be applied,<sup>69</sup> jurisdiction in personal terms already exists once the person is in the custody of the state in question, regardless of that person's location at the time of the arrest. British courts disagreed on this point in *Al-Skeini* with regard to Baha Mousa, who had been arrested at a hotel and subsequently detained in a British military prison, where he eventually died. While the House of Lords confirmed the view of the District Court that the Convention only applied inside the prison, the Appeals Court held that he 'came within the control and authority of the UK from the time he was arrested at the hotel and thereby lost his freedom at the hands of British troops'.<sup>70</sup> However, it went on to distinguish Baha Mousa from the other five victims:

None of them were under the control and authority of British troops at the time when they were killed. This is one of the main points that was decided in *Bankovic*. The only case

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<sup>63</sup> ECtHR, *Öcalan v. Turkey*, Judgement, 12 May 2005, Application no. 46221/99, para. 91; ECmHR, *Illich Sanchez Ramirez v. France*, Decision, 24 June 1996, Application no. 28789/95; ECmHR, *Freda v. Italy*, Decision, 7 October 1980, Application no. 8916/80. HRC, *Lopez Burgos v. Uruguay*, View, 29 July 1981, Communication no. R.12/52, para. 12.3; HRC, *Celiberti de Casariego v. Uruguay*, View, 29 July 1981, Communication no. 56/1979, para. 10.2.

<sup>64</sup> ECtHR, *Banković v. Belgium et al.* (2001), *supra* note 23, para. 37 ('The *arrest and detention* of the applicants outside of the territory of the respondent State ... constituted, according to the Governments, a *classic exercise of such legal authority or jurisdiction over those persons* by military forces on foreign soil', emphasis added).

<sup>65</sup> IACmHR, *Coard et alia v. United States*, Decision, Case 10.951, 29 September 1999, para. 37.

<sup>66</sup> IACmHR, *Request for Precautionary Measures Concerning the Detainees at Guantanamo Bay, Cuba*, Decision, 12 March 2002 ('[M]ost of the detainees in Guantanamo Bay were apprehended in connection with this military operation [in Afghanistan] and remain wholly *within the authority and control* of the United States government', emphasis added).

<sup>67</sup> ECtHR, *Al-Saadoon and Mufdhi v. United Kingdom* (2009), *supra* note 57, para. 80.

<sup>68</sup> ECtHR, *Behrami and Saramati v. France and Norway* (2007), *supra* note 50. The same reasoning applies to: ECtHR, *Hussein v. Albania et alia*, Decision as to the Admissibility, 14 March 2006, Application no. 23276/04.

<sup>69</sup> See discussion above.

<sup>70</sup> UK EWCA, *Al-Skeini et al. v. Secretary of State for Defence*, Judgement, 21 December 2005, para. 108 (Lord Justice Brooke).

which might give rise to an argument to the contrary is that of Muhammed Salim (on the basis that British troops assumed control of the house when they burst in), but it would in my judgment be thoroughly undesirable for questions about the applicability of the ECHR to turn for their resolution on sophisticated arguments of this kind. The soldiers, for instance, might have found they were by no means in control of the house if they had all been shot dead by hostile gunfire after they had broken in. It is essential, in my judgment, to set rules which are readily intelligible. If troops deliberately and *effectively restrict someone's liberty* he is under their control. This did not happen in any of these five cases.<sup>71</sup>

Hence, in the view of the Appeals Court, the exercise of authority and control for the purpose of establishing jurisdiction under the Convention requires a custodial situation. This may lead to an absurd result: states could evade their responsibility for *prima facie* human rights violations abroad by simply killing rather than arresting a person, thus running counter to the objects and purposes of human rights law.<sup>72</sup> Even with regard to the use of potentially lethal force – the topic of the present study – there is a continuum of different scenarios that may be envisaged, ranging from close range shooting, for instance, to effect an arrest, to long-distance targeting with robust weaponry. The case-law of the human rights monitoring bodies is not entirely clear on this matter.

For a long time, *Banković* (2001) was the only relevant case under the European Convention that involved the extra-territorial use of force, namely the bombing of a Belgrade TV station by NATO air forces during the Kosovo war, which left sixteen persons dead and another sixteen seriously injured. The Court's Grand Chamber held unanimously that air strikes were not capable of bringing the victims within the jurisdiction of the respondent states.<sup>73</sup> Yet, the Court's subsequent case-law significantly departed from this restrictive control concept. In the case of *Isaak v. Turkey* (2006), the Court held that the victim, a Greek-Cypriot demonstrator who was beaten to death by Turkish security personnel and civilian counter-demonstrators in the neutral UN buffer zone in Cyprus, was 'under the authority and/or effective control' of Turkey due to the acts of its agents.<sup>74</sup> Moreover, in a closely related incident involving a rally in the vicinity of the UN buffer zone, Turkish armed forces fired into the crowd leading to serious injuries of a person standing on the Greek-Cypriot side. In its decision, the Court held that

even though the applicant sustained her injuries in territory over which Turkey exercised no control, the opening of fire on the crowd from close range, which was the direct and

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<sup>71</sup> Ibid, para. 110 (Lord Justice Brooke), emphasis added and references omitted.

<sup>72</sup> In a similar way: Hannum, 'Remarks, Bombing for Peace: Collateral Damage and Human Rights', 96 *American Society of International Law Proceedings* (2002), 96-99, p. 98.

<sup>73</sup> ECtHR, *Banković v. Belgium et alia* (2001), *supra* note 23. This finding was closely linked to the Court's assertion that the case fell outside the *espace juridique* of the Convention. See the discussion in the section below, p. 159.

<sup>74</sup> ECtHR, *Isaak v. Turkey*, Decision as to the Applicability, 28 September 2006, Application no. 44587/98.

immediate cause of those injuries, was such that the applicant must be regarded as “within the jurisdiction” of Turkey.<sup>75</sup>

Another case, which comes even closer to the situation in *Banković*, is *Pad v. Turkey* (2007), involving the killing of seven Iranians by Turkish helicopter fire along the Turkish-Iranian border. Although it was unclear whether the incident had occurred on the Iranian or Turkish side of the border, the Court held that

it is not required to determine the exact location of the impugned events, given that the Government had already admitted that the fire discharged from the helicopters had caused the killing of the applicants’ relatives ... Accordingly, the Court finds that the victims of the impugned events were within the jurisdiction of Turkey.<sup>76</sup>

This ruling seems to be at variance with the *Banković* decision with regard to the level of control required. It would indeed seem artificial to distinguish these cases from one another merely on the basis that the NATO bombing raid was conducted from a higher altitude than the helicopter machine-gun fire.

The practice of other bodies on this issue is also instructive. For instance, in *Congo v. Uganda* the International Court of Justice deemed the International Covenant applicable ‘in respect of acts done by a State in the exercise of its jurisdiction outside its own territory, particularly in occupied territory’.<sup>77</sup> The use of the word ‘particularly’ implies that the Covenant also applied in areas that were at that time not ‘occupied’ by Ugandan forces. The Court, however, did not specify whether the Covenant also applies to the use of lethal force where the victims had not yet been taken into custody. A clearer example is the Court’s advisory opinion on the *Legality of the Use of Nuclear Weapons* (1996). Even though the Court did not explicitly discuss the extra-territorial application of human rights treaties, it nevertheless implicitly recognised that the Covenant applies to the use of nuclear weapons abroad. Given the effects of such weapons, their deliberate use on a state’s own territory is highly unlikely. Moreover, the Court resorted to humanitarian law rules applicable in international armed conflicts, in other words between two or more states. Hence, the Court must have meant that the use of nuclear weapons amounts to the exercise of control and thus of jurisdiction in order to trigger the application of the Covenant.

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<sup>75</sup> ECtHR, *Andreou v Turkey*, Decision as to the Applicability, 3 June 2008, Application no. 45653/99.

<sup>76</sup> ECtHR, *Pad v. Turkey*, Decision, 28 June 2007, Application no. 60167/00, paras. 54-55.

<sup>77</sup> ICJ, *Armed Activities* (2005), *supra* note 37, paras. 216.

The Human Rights Committee has also acknowledged the extra-territorial application of the Covenant to non-custodial situations, such as in the case of a fatwa issued by the Iranian leadership calling for the killing of Salman Rushdie. The fact that he was based abroad did not pose an obstacle for the Committee.<sup>78</sup> Likewise, in a 1985 country report the Inter-American Commission found a violation of the right to life on the part of Chile for having carried out two car bomb attacks in Argentina (1974) and in the United States (1976) that killed four Chilean dissidents.<sup>79</sup> The Commission has also found human rights law applicable to combat situations taking place abroad, including a US air force bombing a mental health hospital during the invasion of Grenada in 1983<sup>80</sup> and rocket shelling like in the case of *Salas v. United States*, involving the US military intervention in Panama in 1989, in which it held:

Where it is asserted that a use of military force has resulted in noncombatant deaths, personal injury, and property loss, the human rights of the noncombatants are implicated. In the context of the present case, the guarantees set forth in the American Declaration are implicated.<sup>81</sup>

Moreover, in *Armando Alejandro v. Cuba* (1999), which concerned two civilian aircrafts shot down by a Cuban military jet in international airspace, the Commission found that by opening fire the Cuban pilots ‘placed the civilian pilots of the “Brothers to the Rescue” organization under their authority’, which led to their death.<sup>82</sup> Admittedly, because neither the United States nor Cuba were a party to the American Convention, all three cases had been brought under the American Declaration, which does not contain a jurisdiction clause, even though the Commission has read analogous limitations into it. A similar case arose, however, under the American Convention when Ecuador filed an interstate complaint against Colombia for a cross-border operation of the Colombian military against a FARC training camp on Ecuadorian soil in March 2008. The Colombian air force had bombed the camp from the air, killing twenty-five people and injuring three, after which troops entered the site from helicopters and removed some of

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<sup>78</sup> HRC, Concluding Observations: Iran (Islamic Republic of), 3 August 1993, CCPR/C/79/Add. 25, para. 9.

<sup>79</sup> HRC, Report on the Situation of Human Rights in Chile, 9 September 1985, OEA/Ser.L/V/II.66 Doc. 17, para. 29.

<sup>80</sup> IACmHR, *Disabled Peoples International v. United States*, Admissibility Decision, 22 September 1987, Application No. 9213, OEA/Ser.L/V/II.71 Doc. 9 rev.1. The Commission did not specifically discuss the issue of jurisdiction. The case was dropped following a friendly settlement between the parties: Report to Conclude the Case, 1 March 1996 Application No. 9213, Report No. 3/96, OEA/Ser.L/V/II.91 Doc. 7.

<sup>81</sup> IACmHR, *Salas v. United States*, Decision, Case No. 10.573, 14 October 1993, para. 6.

<sup>82</sup> IACmHR, *Armando Alejandro et al. v. Cuba*, Decision, 29 September 1999, Case 11.589, Report No. 86/99, para. 25.

the bodies, including the one of FARC leader Raúl Reyes. The Commission found that Colombia exercised jurisdiction over the camp during that operation.<sup>83</sup>

The case of *Al-Skeini v. United Kingdom* (2011) brought some important clarifications concerning the reach of the European Convention. The Grand Chamber of the European Court explicitly outlined different concepts of extra-territorial jurisdiction:

[T]he Court's case-law demonstrates that, in certain circumstances, the *use of force* by a State's agents operating outside its territory may bring the *individual thereby brought under the control* of the State's authorities into the State's Article 1 jurisdiction. This principle has been applied where an individual *is taken into the custody of State agents* abroad.<sup>84</sup>

This point was further specified in the recent case of *Chagos Islanders v. United Kingdom* (2012), in which the Court found that the Convention applies

where the State through its agents exercises control and authority over an individual outside its territory, such as *using force to take a person into custody* or exerting full physical control over a person through apprehension or detention.<sup>85</sup>

Hence, in addition to the arrest and detention of a person, the Court also recognised the exercise of jurisdiction by a state when its agents use force in order to take a person into custody – a scenario similar to that of the *Isaak* case, where the victim had been beaten to death by Turkish agents inside the UN buffer zone on Cyprus. It may, however, be difficult to clearly distinguish cases on the basis of whether an arrest was sought or even possible.<sup>86</sup>

## Public Powers Model

The Court in *Al-Skeini* also added another model based on the exercise of public powers:

[T]he Court has recognised the exercise of extra-territorial jurisdiction by a Contracting State when, through the consent, invitation or acquiescence of the Government of that territory, it exercises all or some of the public powers normally to be exercised by that Government (Banković, cited above, § 71). Thus where, in accordance with custom, treaty or other agreement, authorities of the Contracting State carry out executive or judicial functions on the territory of another State, the Contracting State may be responsible for breaches

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<sup>83</sup> IACmHR, *Ecuador v. Colombia* ('Franklin Guillermo Aisalla Molina'), Decision, 21 October 2010, Case IP-02, Report No. 112/10, OEA/Ser.L/V/II.140 Doc. 10, paras. 98-102.

<sup>84</sup> ECtHR, *Al-Skeini v. United Kingdom* (2011), *supra* note 42, para. 136, emphasis added.

<sup>85</sup> ECtHR, *Chagos Islanders v. United Kingdom*, Decision on Admissibility, 11 December 2012, Application no. 35622/04, para. 70 (v), emphasis added.

<sup>86</sup> Note that the UK has pledged to comply with its human rights obligations (esp. ICCPR and ECHR) in 'relation to *all persons detained* by its Armed Forces': HRC, Replies of the United Kingdom, 25 March 2015, CCPR-C-GBR-Q-7-Add.1, para. 6.

of the Convention thereby incurred, as long as the acts in question are attributable to it rather than to the territorial State.<sup>87</sup>

The Court thus repeated its controversial finding in *Banković*, whereby extra-territorial jurisdiction only exists in situations in which a state carries out public powers on the territory of another state in conformity with international law.<sup>88</sup> It was precisely this type of model that the Court finally chose in *Al-Skeini* when considering whether British forces exercised jurisdiction over the applicants' killed relatives, rather than the fact that the United Kingdom was an occupying power and thus in effective control of South Iraq. In doing so, it referred extensively to UN Security Council resolution 1483 and subsequent resolutions, which authorised the coalition forces to take measures to contribute to the maintenance of security and stability in Iraq. As stated above, however, the Court is wrong in subjecting the notion of jurisdiction and control over persons to the legality element. This approach runs the risk of relieving all those states that act unlawfully on the territory of another state from their obligations under the Convention – unless they exercise effective control over an area or take a person into custody.

Nonetheless, while the restriction may be criticised in general terms, it does not necessarily pose a serious obstacle for the application of the European Convention in the course of a peace operation.<sup>89</sup> Indeed, as has been shown above, such missions are usually deployed with the consent of the host state. The same seems to be the case where they take the shape of an anti-piracy mission; such operations typically have the agreement of the relevant coastal states to enter their territorial waters and have a legal basis under the Convention on the Law of the Sea (1982) to take measures against alleged pirates on the high seas.<sup>90</sup> In addition, all such operations have a sound UN mandate by the Security Council acting under Chapter VII of the UN Charter. Some difficult questions may arise in this regard: Do such resolutions compensate any possible lack of consent given by the host state, for instance, in the case of an enforcement operation? Also, what kind of powers and tasks qualify as 'public powers'? The passage in the

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<sup>87</sup> ECtHR, *Al-Skeini v. United Kingdom* (2011), *supra* note 42, para. 135, emphasis added.

<sup>88</sup> Marko Milanović claims that the Court purposefully misplaced the *Banković* reference to 'public powers', which according to him 'was *not* about jurisdiction as authority and control over individuals (personal model), but about jurisdiction as effective control over territory (spatial model)': Milanović, '*Al-Skeini* and *Al-Jedda* in Strasbourg' 23 (1) EJIL (2012), 121-139, p. 128. A close reading of the passage in *Banković*, however, reveals that the reference to public powers was not limited to cases of effective control of an area alone.

<sup>89</sup> This had already been seen by Lawson with regard to similar statements in the *Banković* case. Lawson (2004), *infra* note 97, p. 110 ('The passage quoted here arguably opens the way for complaints about, for instance, peace-keeping operations were the armed forces of a Contracting Party exercise all or some of the public powers in a specific region'). Likewise: Quéniwet (2011), *supra* note 31, 99-143, pp. 115-11; Frostad (2011), *supra* note 16, p. 143.

<sup>90</sup> Arts. 100-107 and 110 UNCLOS.

*Al-Skeini* judgment lists ‘consent, invitation or acquiescence’ alongside ‘in accordance with custom, treaty or other agreement’ without any indication as to a hierarchy between these different legal bases for the exercise of public powers. It could be argued that, since all states are members of the United Nations, they have accepted the powers of the Security Council under the UN Charter, including its right to adopt binding resolutions under Chapter VII and to authorise military operations against the will of the respective states. Still, it would be necessary that the actions of the peace operation qualify as public powers, including executive or judicial functions. In *Al-Skeini*, the Court referred to the ‘maintenance of security and stability’, which is common place in most Security Council resolutions authorising peace operations. It remains, however, unclear what other tasks may qualify as public powers or ‘executive functions’.<sup>91</sup> Finally, could not also the protection of civilians, which was essentially the mandate for the no-fly zone in Libya in 2011, fall under these categories?<sup>92</sup>

Moreover, unlike the spatial model, which requires virtually exclusive control over a defined area, the public powers model clearly recognises the possibility of an overlap of jurisdiction between different actors – most likely between the state exceptionally carrying out public powers abroad and the host state authorities. It merely requires that the acts in question be attributable to the intervening state rather than the territorial state.<sup>93</sup> Even though the interpretation proposed here may provide a convenient answer, it also has its limits. For instance, if a state party to the European Convention takes measures exceeding the mandate of the peace operation in which it is involved, the Convention no longer applies to its actions, which may even provide a dangerous incentive to take measures not covered by the mandate.<sup>94</sup> However, this concern seems unfounded after the Court’s recent judgement in *Jaloud v. Netherlands* (2014), involving the shooting of a civilian at a checkpoint manned by Dutch forces in Iraq:

The checkpoint had been set up in the execution of SFIR’s mission, under United Nations Security Council Resolution 1483, to restore conditions of stability and security conducive to the creation of an effective administration in the country. The Court is satisfied that the respondent Party exercised its “jurisdiction” within the limits of its SFIR mission and for

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<sup>91</sup> Even if a specific task falls under this rubric, the exercise of jurisdiction may – in the view of the Court – be limited to the performance of only that task, rather than any other actions in the mission area.

<sup>92</sup> Milanović (2012), *supra* note 88, p. 131 (‘For example, under *Al-Skeini* the current bombing of Libya by a number of European states could *not* fall under Article 1 ECHR’).

<sup>93</sup> ECtHR, *Al-Skeini v. United Kingdom* (2011), *supra* note 42, para. 135 (‘... Contracting State may be responsible for breaches of the Convention thereby incurred, *as long as the acts in question are attributable to it rather than to the territorial State*’, emphasis added).

<sup>94</sup> Hence, there may well be acts and situations that would not be covered under this model.

the purpose of *asserting authority and control over persons passing through the check-point*.<sup>95</sup>

This indicates a significant shift from legality considerations towards factual control over the enjoyment of the right itself.

## Gradual Model

In his concurring opinion on *Assanidze v. Georgia* (2004), Judge Loucaides defined jurisdiction as the ‘possibility of imposing the will of the State on any person’, which may also take the form of military operations abroad.<sup>96</sup> This position essentially mirrors the views expressed by a number of other commentators. According to Rick Lawson, jurisdiction should be based on the existence of a ‘direct and immediate link between the extraterritorial conduct of a state and the alleged violation of an individual’s rights’,<sup>97</sup> while the scope of positive obligations would depend on the degree of control exercised over the person abroad.<sup>98</sup> In the same vein, Martin Scheinin calls for a ‘contextual assessment of the state’s factual control in respect of facts and events’ allegedly amounting to human rights violations.<sup>99</sup> By contrast, Françoise Hampson rejects the control standards adopted by various human rights treaty bodies for being overly restrictive and defines jurisdiction instead as an ‘effective assertion of authority’. Accordingly, a state exercises jurisdiction *vis-à-vis* persons abroad whenever it ‘foreseeably affects’ the person’s rights, usually through the acts of its agents.<sup>100</sup> Despite the methodological differences, all of these approaches share a strong emphasis on negative human rights obligations.

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<sup>95</sup> ECtHR, *Jaloud v. Netherlands*, Judgement, 20 November 2014, Application no. 47708/08, para. 152, emphasis added and references omitted. For a similar case: ECtHR, *Pisari v. Moldova and Russia*, Judgement, 21 April 2015, Application no. 42139/12, para. 33 (involving a Russian-manned checkpoint at the cease-fire line between Moldova and Transnistria).

<sup>96</sup> ECtHR, *Assanidze v. Georgia*, Judgement, 8 April 2004, Application no. 71503/01, Concurring Opinion of Judge Loucaides.

<sup>97</sup> Lawson, ‘Life after Bankovic’, in: Coomans and Kamminga (eds.), *Extraterritorial Application of Human Rights Treaties* (2004), 83-125, pp. 103-105.

<sup>98</sup> *Ibid.*, p. 120. Similar views have been expressed by other scholars: Oberleitner, *Human Rights in Armed Conflict. Law, Practice, Policy* (CUP 2015), pp. 165-68; Mujezinović Larsen (2012), *supra* note 31, pp. 367-74 (calling for a clear distinction between negative and positive HRL obligations); Lubell (2010), *supra* note 8, pp. 227-31; 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* (Intersentia, 2010), pp. 566-67; Lorenz, *Der Territoriale Anwendungsbereich der Grund- und Menschenrechte* (Berliner Wissenschaftsverlag 2005), pp. 105-18.

<sup>99</sup> Scheinin (2004), *supra* note 25, p. 76.

<sup>100</sup> Hampson, ‘The Scope of the Extra-Territorial Applicability of International Human Rights Law’, in: Gilbert et al. (eds.), *The Delivery of Human Rights: Essays in Honour of Professor Sir Nigel Rodley* (2011), 157-82, pp. 166-71.

John Cerone and Marko Milanović follow a very similar approach of distinguishing between negative and positive obligations. However, rather than reading down the terms ‘jurisdiction’ and ‘control’ for that purpose, they show that this conceptual distinction is reflected in the wording of the jurisdiction clauses themselves.<sup>101</sup> In fact, the European Convention uses the term ‘secure’,<sup>102</sup> which implies a positive obligation, rather than ‘respect’. This distinction is even more apparent in the American Convention:

The States Parties to this Convention undertake to *respect the rights and freedoms* recognized herein and to *ensure to all persons subject to their jurisdiction* the free and full exercise of those rights and freedoms.<sup>103</sup>

Moreover, a memorandum prepared by Harold Koh in October 2010 in his capacity as Legal Adviser of the Department of State draws the same conclusion for the Covenant.<sup>104</sup> It shows that the duty to *respect* is free-standing and not tied to the ‘within its territory and subject to its jurisdiction’ requirement as opposed to the duty to *ensure*.<sup>105</sup> This is also consistent with the *travaux préparatoires* of the Covenant.<sup>106</sup> Accordingly, states are not expected to do the sheer impossible of guaranteeing the full range of human rights all over the world. The scope of their human rights obligations rather depends on the degree of control exercised in the situation at hand. The full range of rights, including positive obligations, will therefore only apply when the state exercises effective control over territory abroad enabling it to exercise public powers. Where a person is in the hands of a state due to arrest or detention which does not exercise control over the territory, only the right to liberty and related rights will be triggered. By contrast, where the state merely interferes with a specific right, for instance, the right to life by using potentially lethal force, the state only has to observe the negative element of the said right,

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<sup>101</sup> Cerone, ‘Human Dignity in the Line of Fire : the Application of International Human Rights Law during Armed Conflict, Occupation, and Peace Operations’, 39 (5) *Vanderbilt Journal of Transnational Law* (2006), 1447-510, pp. 1505-507; Milanović (2011), *supra* note 17, pp. 209-27.

<sup>102</sup> Art. 1 ECHR. The same applies to Art. 1 CIS Convention (‘shall secure to everyone within their jurisdiction’) and Art. 3 (1) Arab Charter (‘undertakes to ensure to all individuals subject to its jurisdiction’).

<sup>103</sup> Art. 1 (1) ACHR, emphasis added. The same conclusion can be drawn for the Arab Charter and the CIS Convention, *supra* note 3.

<sup>104</sup> US DoS, Memorandum Opinion on the Geographical Scope of the International Covenant on Civil and Political Rights, prepared by Harold Koh, 19 October 2010, pp. 10-11.

<sup>105</sup> To be precise, the memorandum convincingly shows that it is grammatically incorrect to say ‘to respect ... to all individuals within its territory and subject to its jurisdiction’, both in English and in the other authentic languages of the ICCPR, *ibid*.

<sup>106</sup> It was essentially the scope of positive obligations abroad which made the US call for the inclusion of the term ‘territory’ into Article 2 during the drafting process of the ICCPR: UN HR Commission, Summary Record of the 138<sup>th</sup> Meeting, UN Doc E/CN.4/SR.194 (1950), paras. 33-34.

that is to say not to deprive anyone of his or her life unless justified under the relevant permissible limitations.<sup>107</sup>

The practice of the Inter-American Commission and the Human Rights Committee seems to implicitly follow the gradual approach, having applied the relevant human rights instruments to a variety of different circumstances, including combat operations and extra-territorial killings. Both bodies have, however, also used more explicit language to that effect. In the *Celiberti* case, for instance, the Human Rights Committee clarified that the term ‘subject to its jurisdiction’ does not refer:

to the place where the violation occurred, but rather to *the relationship* between the individual and the State *in relation to a violation of any of the rights* set forth in the Covenant, wherever they occurred.<sup>108</sup>

Likewise, in the above-mentioned case of *Ecuador v. Colombia* (2010), concerning a Colombian attack on a FARC camp in Ecuador, the Inter-American Commission made a lengthy statement on the issue of jurisdiction, essentially embracing the gradual approach suggested above:

[T]he exercise of authority over persons by agents of a State even if not acting within their territory, *without* necessarily requiring the existence of a *formal, structured and prolonged legal relation in terms of time* to raise the responsibility of a State for acts committed by its agents abroad. At the time of examining the scope of the American Convention’s jurisdiction, it is necessary to determine whether there is a *causal nexus between the extraterritorial conduct of the State and the alleged violation* of the rights and freedoms of an individual.

What has been stated above does not necessarily mean that a duty to guarantee the catalogue of substantive rights established in the American Convention may necessarily be derived from a State’s territorial activities, including all the range of obligations with respect to persons who are under its jurisdiction for the (entire) time the control by its agents lasted. Instead, the obligation *does arise in the period of time that agents of a State interfere in the lives* of persons who are on the territory of the other State, for those agents to respect their rights, in particular, their right to life and humane treatment.<sup>109</sup>

The applicants in *Banković* (2001) relied on this gradual approach in their submissions before the European Court. They claimed that they had been brought directly within the jurisdiction of the respondent states by the air strikes; but, unlike in the Cyprus cases, the respondent states were:

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<sup>107</sup> What is, however, often forgotten in the literature, is that an interference with the negative prong of the right to life may also trigger positive obligations such as the duty to conduct an effective investigation into the killing, while the duty to protect the person’s life against third persons will not be triggered in this scenario.

<sup>108</sup> HRC, *Lilian Celiberti de Casariego v. Uruguay* (1982), *supra* note 63, para. 10.2.

<sup>109</sup> IACmHR, *Ecuador v. Colombia* (2010), *supra* note 83, paras. 99-100, emphasis added.

not obliged to do the impossible (secure the *full range* of Convention rights) but rather are held accountable for those Convention *rights within their control in the situation in question* (emphasis added).<sup>110</sup>

The Court, however, rejected this argument by stating that the concept of Article 1 could not be ‘divided and tailored in accordance with the particular circumstances of the extra-territorial act in question’, which would otherwise render the term state’s jurisdiction ‘superfluous and devoid of any purpose’.<sup>111</sup> Yet, in the *Al-Skeini* case (2011) the Court explicitly departed from this all-or-nothing approach for applying the Convention extra-territorially:

It is clear that, whenever the State through its agents exercises control and authority over an individual, and thus jurisdiction, the State is under an obligation under Article 1 to secure to that individual the *rights and freedoms under Section 1 of the Convention that are relevant to the situation* of that individual. In this sense, therefore, the *Convention rights can be “divided and tailored”* (compare *Banković*, cited above, § 75).<sup>112</sup>

This verdict was upheld by the Grand Chamber in the subsequent *Hirsi* case (2012).<sup>113</sup> But the Court also stated *orbiter dictum* that the Convention was not applicable to an ‘*instantaneous extra-territorial act*’.<sup>114</sup> Consequently, the new dividing-and-tailoring approach to the rights under the Convention appears to be only of very limited relevance, such as with regard to persons in the custody of a state acting abroad. Nevertheless, some of the post-*Banković* cases discussed above seem to follow at least implicitly the gradual approach.<sup>115</sup> Moreover, the European Court has repeatedly stated that Article 1 of the European Convention:

cannot be interpreted so as to allow a State party to *perpetrate violations* of the Convention on the territory of another State, which it could not perpetrate on its own territory’.<sup>116</sup>

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<sup>110</sup> ECtHR, *Banković v. Belgium* (2001), *supra* note 23, para. 46.

<sup>111</sup> *Ibid*, para. 75.

<sup>112</sup> ECtHR, *Al-Skeini v. United Kingdom* (2011), *supra* note 42, para. 137.

<sup>113</sup> ECtHR, *Hirsi Jamaa v. Italy* (2012), *supra* note 56, para. 74.

<sup>114</sup> *Ibid*, para. 73, emphasis added (‘which is however ruled out when, as in *Banković*, only an instantaneous extra-territorial act is at issue, since the wording of Article 1 does not accommodate such an approach to “jurisdiction”’). It thus repeated an earlier statement made in *Medvedyev v. France*, (2010), *supra* note 58, para. 64 (‘where – as in the *Banković* case – what was at issue was an instantaneous extraterritorial act, as the provisions of Article 1 did not admit of a “cause-and-effect” notion of “jurisdiction”’).

<sup>115</sup> There is also increasing support from British courts for the gradual approach: EWHC, *Al-Saadoon v. Secretary of State for Defence*, Judgment, 17 March 2015, EWHC 715 (Admin), paras. 112-30 (which confirms in relation to a number of test cases arising from British military operations in Iraq that, in addition to the public powers model, ‘jurisdiction also arose through the exercise of physical power and control over the individual who was shot and killed’, which only excludes death and injury caused by (traffic) accidents). This broad concept was in principle confirmed in a related case: UK EWCA, *Serdar Mohammed et al. v. Ministry of Defence*, Judgment, 30 July 2015, EWCA Civ 843, paras. 95-106.

<sup>116</sup> For instance: ECtHR, *Solomou v Turkey*, Judgment, 24 June 2008, Application no. 36832/97, para. 45; *Issa v. Turkey* (2004), *supra* note 53, para. 71; *Isaak v. Turkey* (2006), *supra* note 74; *Andreou v. Turkey* (2008), *supra* note 75. This wording was borrowed from the case of *Lopez Burgos v. Uruguay*, para. 10.3.

The word ‘perpetrate’ seems to refer to violations of negative obligations, which would support the gradual approach. Where the personnel of a peace operation do not exercise control over territory,<sup>117</sup> their use of force would be governed by human rights law to the extent that they interfere with the negative rights of individuals. This is most probably the case in situations when lethal force is used. However, it is equally conceivable that other rights may be negatively affected. While the use of (potentially) lethal force is likely to fall within the scope of the right to life, injuries or suffering below this threshold may potentially qualify as inhuman treatment. Unlike torture – which requires a quasi-custodial situation – inhuman treatment can also be inflicted on the victim from a distance, for instance, in riot-control situations with batons, water cannons, tear gas and rubber bullets, all of which are capable of causing severe pain or injuries. Moreover, the breaking up of rallies by force would also interfere with the freedom of assembly. The same may be said for measures taken at checkpoints with regard to the freedom of movement. Furthermore, house-searches would certainly fall within the scope of the right to privacy and family life, and the confiscation or destruction of property would clearly interfere with the right to property.

While the spatial and the personal models are premised on the virtually exclusive control over the territory or person in question, the gradual approach lends itself more easily to situations where there is an overlap of competences between different troop-contributing states, an international organisation and the host state authorities. The concept is primarily based on negative human rights obligations, the observance of which does not pose a problem where there are other actors involved.

## REMAINING CHALLENGES

### **Military and Combat Operations**

Even among those in favour of a broad geographical reach of human rights law, the inclusion of military or combat operations is not always absolutely clear. In his concurring opinion on *Al-Skeini*, for instance, Judge Bonello criticised the European Court for shying away from fully rethinking the concept of extra-territorial jurisdiction. The approach he suggests is essentially the same as the gradual model presented above, whereby the rights would apply depending on

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<sup>117</sup> Due to the fact that forces are on the ground, the level of control is certainly higher than in a case of air-bombing.

whether their observance is within the authority and control of the state in question.<sup>118</sup> He makes, however, the following statement:

[Jurisdiction] also hangs from the *mouth of a firearm*. In *non-combat situations*, everyone in the line of fire of a gun is within the authority and control of whoever is wielding it.<sup>119</sup>

This leaves open the question of whether combat operations should also be covered by the European Convention and human rights law in general. Likewise, Harold Koh held in his laudable memorandum that US actions abroad would only be governed by the International Covenant in the case of significant levels of control, which he considers unlikely to be exercised:

(1) over the *conduct of active hostilities*; (2) in situations where another state took the action in question; or (3) where a nation's *military forces* participated in U.N.-controlled peace-keeping or other operations.<sup>120</sup>

This is somewhat surprising because the duty to 'respect' does not necessarily require an exercise of control. The possible extension of human rights law to state armed forces acting abroad, during armed conflicts and occupations, has also been criticised by others.<sup>121</sup> Likewise, in *Hassan v. the United Kingdom* (2014), involving the detention of an Iraqi during the invasion of Iraq in 2003, the British government had claimed that:

where State agents operating extra-territorially take an individual *into custody*, this is a ground of extra-territorial jurisdiction which has been recognised by the Court. However, they submitted that this basis of jurisdiction should *not apply in the active hostilities phase* of an international armed conflict, where the agents of the Contracting State are operating in territory of which they are not the occupying power, and where the conduct of the State will instead be *subject to the requirements of international humanitarian law*.<sup>122</sup>

The European Court, however, rejected this assertion and found that the detainee had been, for the duration of his internment within the jurisdiction of the United Kingdom.<sup>123</sup> Certainly, the fact that jurisdiction exists does not exclude the possibility of taking humanitarian law into account when determining whether there has been a violation of specific rights.<sup>124</sup>

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<sup>118</sup> ECtHR, *Al-Skeini v. United Kingdom* (2011), *supra* note 42, Concurring Opinion of Judge Bonello, paras. 4-20.

<sup>119</sup> *Ibid*, para. 28, emphasis added.

<sup>120</sup> US DoS, Memorandum Opinion (2010), *supra* note 104, p. 50.

<sup>121</sup> Dennis and Surena, 'Application of the International Covenant on Civil and Political Rights in Times of Armed Conflict and Military Occupation', 6 *European Human Rights Law Review* (2008), 714-31 (mainly focusing on the spatially restricted scope of the ICCPR); Modirzadeh, 'The Dark Sides of Convergence: A Pro-Civilian Critique of the Extraterritorial Application of Human Rights Law in Armed Conflict', 86 *International Law Studies* (2010), 349-410.

<sup>122</sup> ECtHR, *Hassan v. United Kingdom*, Judgement, 16 September, Application no. 29750/09, para. 76.

<sup>123</sup> *Ibid*, paras. 77-78.

<sup>124</sup> This question will be considered in the last chapter on the interplay between both legal regimes, see below

The Court will have to consider similar legal challenges when it has to decide on the merits of the up-coming *Georgia v. Russia II* case<sup>125</sup> and a great number of applications lodged by individuals in relation to the war between Georgia and Russia in 2008.<sup>126</sup> It will be the first time since the intervention in Cyprus in 1974 that the Court has to decide on alleged human rights violations stemming from an armed conflict between two contracting states of the European Convention. As the hostilities between Georgia and Russia took place solely on Georgian territory, the extra-territoriality issue is limited to the Russian actions. So it would be rather unreasonable if this should prevent the Court from applying the same human rights standards to both parties.

It would also be artificial to accept that the Convention protected Georgian property that was looted inside territory under the full control of Russian forces (spatial test), but not the lives of Georgians that were killed or severely injured by bombings, artillery shelling or sniper fire in places that – at the time of the alleged violation – were not under the control of the Russian armed forces, e.g. during the Russian advance on the town of Gori or bombing raids against targets in Tbilisi. This will be an opportunity for the Court to fully embrace the gradual approach to extra-territorial jurisdiction, whereby negative rights are always applicable *vis-à-vis* everyone, regardless of the location and circumstances (including combat), while the scope of positive obligations under the Convention would depend on the exact situation at hand.

## Regionality

Forces involved in peace operations do not necessarily come from neighbouring countries of the state where the mission takes place. In fact, in many cases sending states are from different continents than the host states. This begs the question as to what extent the regional nature of (at least some) human rights treaties may be considered an obstacle to their application in the mission area. This was the main argument of the Grand Chamber in the case of *Banković*:

The Court's obligation, in this respect, is to have regard to the special character of the Convention as a constitutional instrument of the *European* public order ... It is therefore

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from p. 208.

<sup>125</sup> ECtHR, *Georgia v. Russia II*, Decision, 13 December 2011, Application no. 38263/08, paras. 63-68 (deciding to join the issue of incompatibility *ratione loci* with the merits of the case).

<sup>126</sup> Report of the Secretary-General of the Council of Europe, 25 March 2009, *The Council of Europe and the conflict in Georgia – Activities for the promotion of Council of Europe values and standards*, SG/Inf(2009)5, p. 11 ('Almost 3 300 individual applications against Georgia have been lodged by persons affected by the hostilities in South Ossetia at the beginning of August 2008. Seven of these applications were communicated to the Georgian Government on 6 January 2009').

difficult to contend that a failure to accept the extra-territorial jurisdiction of the respondent States would fall foul of the Convention's *ordre public* objective, which itself underlines the essentially regional vocation of the Convention system ... [T]he Convention is a multi-lateral treaty operating ... in an *essentially* regional context and *notably* in the legal space (*espace juridique*) of the Contracting States. The FRY clearly does not fall within this legal space. The Convention was not designed to be applied throughout the world, even in respect of the conduct of Contracting States.<sup>127</sup>

The *legal space* doctrine has been strongly rejected by many scholars. They stress that the Convention does not contain any reference to such a regionally limited scope of application. Altıparmak states that the 'ECHR is not a *citizen's rights treaty*, but a human rights treaty'; thus human rights have to be observed universally *vis-à-vis* all persons falling within the jurisdiction of contracting state.<sup>128</sup> The universality of human rights protection seems strongly required by the object and purpose of the Convention, so that 'it would be equally unconscionable to prohibit deliberate violations of the Convention on the territories of other States Parties, while allowing to commit them at will on the territories of other states, which are not parties to the human rights treaty in question'.<sup>129</sup>

The only case in which the legal space doctrine has been explicitly relied upon in the Court's post-*Banković* jurisprudence is *Andreou v. Turkey* (2008), where the applicant had sustained severe injuries when Turkish security forces fired shots across the cease-fire line in Cyprus:

The Court further notes that, when she was hit by the bullet, the applicant was standing outside the neutral UN buffer zone and in close vicinity to the Greek-Cypriot National Guard checkpoint. Unlike the applicants in the *Bankovic* and *Others* case (cited above) she was accordingly *within territory covered by the Convention*.<sup>130</sup>

In the remainder of its subsequent case-law the European Court has, however, significantly departed from its legal space doctrine. It has applied the Convention to a number of different situations outside the territory of the Council of Europe, such as the arrest of Abdullah Öcalan in Kenya,<sup>131</sup> the killing of a Cypriot citizen inside the UN buffer zone<sup>132</sup> and the interception of foreign ships on the high seas,<sup>133</sup> without discussing the legal space doctrine. Moreover, in *Issa v. Turkey* (2004) the Court applied a different reading of the term 'legal space':

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<sup>127</sup> ECtHR, *Banković v. Belgium* (2001), *supra* note 23, para. 80.

<sup>128</sup> Altıparmak, 'Bankovic: an obstacle to the application of the European Convention on Human Rights in Iraq?', 9 (2) *Journal of Conflict & Security Law* (2004), 213-51, p. 243.

<sup>129</sup> Gondek, 'Extraterritorial Application of the European Convention on Human Rights: Territorial Focus in the Age of Globalization?', 52 (3) *NIHR* (2005), 349-87, p. 377.

<sup>130</sup> ECtHR, *Andreou v. Turkey* (2008), *supra* note 75, emphasis added. para. 71.

<sup>131</sup> ECtHR, *Öcalan v. Turkey* (2005), *supra* note 63.

<sup>132</sup> ECtHR, *Isaak v. Turkey* (2006), *supra* note 74.

<sup>133</sup> ECtHR, *Medvedev v. France* (2010), *supra* note 58; ECtHR, *Hirsi Jamaa v. Italy* (2012), *supra* note 56.

Accordingly, if there is a sufficient factual basis for holding that, at the relevant time, the victims were within that specific area, it would follow logically that they were *within the jurisdiction* of Turkey (and not that of Iraq, which is not a Contracting State and *clearly does not fall within the legal space (espace juridique)* of the Contracting States (see the above-cited *Banković* decision, § 80).<sup>134</sup>

The Court thus equated it with the term ‘jurisdiction’ of a contracting party, thus rendering the entire doctrine redundant and superfluous. In *Pad v. Turkey* (2007), the Court even went so far as to claim that:

a State may be held accountable for violations of the Convention rights and freedoms of persons who are in the territory of another State which *does not necessarily fall within the legal space* of the Contracting States, but who are found to be under the former State’s authority and control through its agents operating – whether lawfully or unlawfully – in the latter State.<sup>135</sup>

Possible exceptions to the doctrine had already been recognised in the case of *Quark Fishing Ltd. v. United Kingdom* (2006), in which the Court held that *Banković* merely stressed the ‘exceptional nature of extensions beyond that legal space’.<sup>136</sup> This finding coincides with a similar argument made by Ralph Wilde that the use of the terms ‘essentially’ and ‘notably’ in the legal space passage of the *Banković* decision implies that the doctrine itself allows for exceptions and thus for extra-territorial jurisdiction outside the Convention’s legal space.<sup>137</sup> This reasoning has been confirmed by the Court’s Grand Chamber in *Al-Skeini* (2011). In response to the legal space argument advanced by the British Government,<sup>138</sup> it held as follows:

[T]he importance of establishing the occupying State’s jurisdiction in such cases *does not imply*, a contrario, that jurisdiction under Article 1 of the Convention *can never exist outside* the territory covered by the Council of Europe Member States. The Court has not in its case-law applied any such restriction.<sup>139</sup>

This statement renders the legal space doctrine virtually obsolete.<sup>140</sup> What remains to be seen is whether there exists any similar restriction under other human rights treaties, especially of a

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<sup>134</sup> ECtHR, *Issa v. Turkey* (2004), *supra* note 53, para. 74, emphasis added.

<sup>135</sup> ECtHR, *Pad v. Turkey* (2007), *supra* note 76, para. 53, emphasis added.

<sup>136</sup> ECtHR, *Quark Fishing Ltd. v. United Kingdom*, Decision as to Admissibility, 19 September 2006, Application no. 15305/06, emphasis added.

<sup>137</sup> Wilde, ‘The “Legal Space” or “Espace Juridique” of the European Convention on Human Rights: Is It Relevant to Extra-Territorial State Action?’, 10 *European Human Rights Law Review* (2005), 115-124, pp. 116-17.

<sup>138</sup> ECtHR, *Al-Skeini v. United Kingdom* (2011), *supra* note 42, para. 112.

<sup>139</sup> *Ibid*, para. 142, emphasis added.

<sup>140</sup> In support: Milanović (2012), *supra* note 88, p. 129 (‘After this ‘*espace juridique*’ is now rightly nothing more than a fishy French phrase, which is all that it was in *Bankovic* anyway’). For a more nuanced view: Mujezinović Larsen (2012), *supra* note 31, pp. 224-33.

regional nature. According to Louise Doswald-Beck, no such limitation features in the jurisprudence of the African Commission on Human and People's Rights and the Inter-American Commission.<sup>141</sup> For instance, in the above-mentioned case *Alejandro v. Cuba* (2001), the Inter-American Commission applied the American Declaration to acts taking place in international airspace above the high seas. By contrast, for Robert Goldman the jurisprudence of the Commission – whose member he was from 1996 to 2004 – suggests that it considers the Inter-American human rights system as applying solely within the Americas or that it protects solely nationals of member states of the Organisation of American States (OAS). He sees this as a possible reason why the Commission has never dealt with complaints it has received regarding persons in US custody in Iraq and Afghanistan.<sup>142</sup> However, this interpretation seems to be at odds with the Commission's verdict in the *Franklin Guillermo* case (2010), in which it held that:

[A]lthough jurisdiction usually refers to authority over persons who are within the territory of a State, *human rights are inherent in all human beings* and are *not based on their citizenship or location*. Under Inter-American human rights law, each American State is obligated therefore to respect the rights of all persons within its territory and of those present in the territory of another state but subject to the control of its agents.<sup>143</sup>

On the basis of this statement it would appear that the reach of the Inter-American human rights instruments is not limited to the territory or nationals of OAS member states. In the same vein, it is highly unlikely that the application of any other (regional) human rights treaties is subject to any similar restriction.<sup>144</sup>

## CONCLUSION

The foregoing shows that human rights law clearly governs the actions of states and international organisations involved in a peace operation. Neither the spatial or personal models, nor the public powers model provide a sufficient justification for limiting the geographical scope of human rights law. There is indeed strong evidence for a convergence in the practice of human

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<sup>141</sup> Doswald-Beck (2011), *supra* note 55, p. 22.

<sup>142</sup> Goldman, 'Extraterritorial Application of the Human Rights to Life and Personal Liberty, Including *Habeas Corpus*, during Situations of Armed Conflict', in: Kolb and Gaggioli (eds.), *Handbook of Human Rights and Humanitarian Law* (Elgar Publishing 2013), 104-24, p. 111.

<sup>143</sup> IACmHR, *Ecuador v. Colombia* (2010), *supra* note 83, para. 91.

<sup>144</sup> For instance, Martin Scheinin notes 'that the correct approach under the ICCPR is based on the universal nature of human rights, irrespective of whether the country where the alleged extraterritorial violations occur is a party to the ICCPR': Scheinin (2004), *supra* note 25, p. 77.

rights institutions towards a gradual model for the extra-territorial application of human rights law. Accordingly, negative obligations (i.e. the duty to respect) apply everywhere at all times, while the scope of positive obligations (i.e. the duty to protect or fulfil) is highly context-specific. This proposition also has a strong basis in the text of the different jurisdiction clauses and is fully consistent with the intentions of the drafters. For the same universalist objectives, the reach of human rights treaties cannot be limited to a specific region. Likewise, there is nothing in the concept of jurisdiction and human rights law as a whole that excludes its application *in toto* in case of combat or other military operations.<sup>145</sup>

While the spatial and the personal models are premised on the virtually exclusive control over the territory or person in question, the gradual approach lends itself more easily to situations where there is an overlap of competences between different states and other entities. Indeed, applied to the context of peace operations, this model allows for the application of human rights law in relation to the acts – as opposed to omissions – of all actors involved. In other words, any act directly attributable to a sending state or organisation triggers its *own* human rights obligations (under treaty or general international law) in relation to the affected right. Hence, the act's lawfulness depends on the permissible limitations applicable to interferences with *that* specific right.<sup>146</sup>

The most obvious case involves the use of (lethal) force. The very fact of targeting prompts the victim's negative right to life and thus the state's or organisation's responsibility to abstain from it, unless the interference is justified by the circumstances. Human rights law provides not only for detailed restrictions for the deprivation of life, but also precautionary duties that need to be observed – including adequate training, planning and equipment – to avoid the resort to lethal force as far as possible.<sup>147</sup> While *positive* in character, these precautionary duties are closely linked to the *negative* aspect of the right to life and thus equally applicable to any situation involving the resort to (lethal) force. There is a broad continuum of different scenarios that may

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<sup>145</sup> Such circumstances raise the issue of derogations from HRL and the interplay between HRL and IHL, which will be addressed in the second part of this chapter (from p. 170) and the next chapter (from p. 208), respectively.

<sup>146</sup> The complex issue of permissible limitations and possible challenges in the course of peace operations will be discussed in the following section, pp. 166-169.

<sup>147</sup> Art. 2 ECHR; Art. 6 ICCPR; Art. 4 ACHR; Art. 5 Arab Charter; Art. 2 CIS Convention; Art. 4 ACHPR; Art. I ADRDM. For a detailed discussion on the circumstances under which (potentially) lethal force may be used under human rights law and the relevant precautionary duties that have to be observed, see the specific section in Chapter 5, from p. 220.

be envisaged, ranging from close range shooting (e.g. to effect an arrest) to long-distance targeting with robust weaponry. It should be recalled that this includes also any form of force application in active combat and other military operations.

The use of force against individuals triggers also additional duties. This includes both the duty to investigate the incident and assess its lawfulness as well as to provide medical assistance and protection to possible survivors. The exact scope of these positive obligations is, however, highly context-specific.<sup>148</sup> On 20 October 2011, for instance, at the end of the Libyan Civil War, NATO air strikes targeted the convoy in which Muammar Gaddafi and his entourage tried to flee the beleaguered city of Sirte. Gaddafi survived and tried to hide in a storm pipe before being captured by rebels and killed shortly afterwards.<sup>149</sup> If NATO forces had been on the ground and managed to capture him, they would have had to treat his injuries and protect him against lynch attacks by rebels.

Also other important rights may be relevant. The use of non-lethal weapons in riot-control situations – e.g. batons, water cannons, tear gas and rubber bullets – is capable of causing severe pain or injuries, and thus triggers the prohibition of inhuman treatment, which means that the personnel of peace operation have to abstain from using such weapons or other forms of physical force in an excessive or disproportionate manner.<sup>150</sup>

Moreover, breaking up rallies by force would also interfere with the freedom of assembly.<sup>151</sup> The same conclusion can be drawn for measures taken at checkpoints with regard to the freedom of movement.<sup>152</sup> In addition, house-searches would interfere with the right to privacy and family life,<sup>153</sup> and the confiscation or destruction of property would certainly fall within the scope of the right to property.<sup>154</sup> Hence, the negative aspect of these rights – to refrain from any undue interference with them – binds the personnel of the peace operation in all possible mission scenarios, irrespective of circumstances.

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<sup>148</sup> For a detailed analysis on the scope investigative duties under Art. 2 ECHR in overseas military operations: ECtHR, *Al-Skeini v. United Kingdom* (2011), *supra* note 42, paras. 1451-77; ECtHR, *Jaloud v. Netherlands* (2014), *supra* note 95, paras. 157-228.

<sup>149</sup> Financial Times, 'Confusion over NATO Role in Gaddafi Death', 20 October 2011, [www.ft.com/cms/s/0/af362fc0-fb2e-11e0-8756-00144feab49a.html](http://www.ft.com/cms/s/0/af362fc0-fb2e-11e0-8756-00144feab49a.html).

<sup>150</sup> See, in particular, p. 220, and *infra* note 156.

<sup>151</sup> Art. 11 ECHR; Art. 21 ICCPR; Art. 15 ACHR; Art. 24 (f) Arab Charter; Art. 12 CIS Convention; Art. 11 ACHPR; Art. XXI ADRDM.

<sup>152</sup> Art. 2 Protocol 4, ECHR; Art. 12 ICCPR; Art. 22 ACHR; Art. 26 (a) Arab Charter; Art. 22 CIS Convention; Art. 12 ACHPR; Art. VIII ADRDM.

<sup>153</sup> Art. 8 ECHR; Art. 17 ICCPR; Art. 11 ACHR; Art. 21 Arab Charter; Art. 9 CIS Convention; Art. V ADRDM.

<sup>154</sup> Art. 1 Protocol 1, ECHR; Art. 17 UDHR; Art. 21 ACHR; Art. 31 Arab Charter; Art. 26 CIS Convention; Art. 14 ACHPR; Art. XXIII ADRDM.

While the gradual model is essentially based on negative human rights obligations and those duties that are inherently linked to them, the other models discussed above provide important additional grounds for positive obligations. Indeed, detaining a person does not only trigger the freedom from arbitrary deprivation of liberty,<sup>155</sup> but also a number of positive responsibilities under a variety of different rights. This includes, among others, important safeguards on detention conditions and treatment, *habeas corpus* and fair trial rights, as well as the non-refoulement principle, which prohibits troop-contributing states from transferring detainees to the host state authorities or other contingents, if there is a risk that they may be facing torture or cruel, inhuman and degrading treatment or punishment.<sup>156</sup> This is the crux of the *personal model* in its more limited form, covering only situations in which the person is in custody as a result of arrest or detention.

If the control exercised by the state or organisation acting abroad extends even to territory, the full set of rights with all its positive obligations may become applicable. This so-called *spatial model* requires a high level of control, usually to the exclusion of other actors. But it can also be applied to very small areas, including the military compound of the relevant contingents, thus triggering the duty to take proactive measures to protect vulnerable groups that may have sought refuge there.<sup>157</sup> The spatial model may also be of relevance for international territorial administrations, such as in Kosovo or formerly in East Timor.<sup>158</sup> It may be complemented by the *public powers models* as an additional source of positive human rights obligations, triggered by delegation of far-reaching powers under the mandate or other explicit authorisations.

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<sup>155</sup> Art. 5 ECHR; Art. 9 ICCPR; Art. 7 ACHR; Art. 14 Arab Charter; Art. 5 CIS Convention; Art. 6 ACHPR; Art. I ADRDM.

<sup>156</sup> Art. 3 ECHR; Art. 7 ICCPR; Art. 5 ACHR; Art. 8 (a) Arab Charter; Art. 3 CIS Convention; Art. 5 ACHPR; Art. I ADRDM.

<sup>157</sup> See, for instance: Hague District Court, *Mothers of Srebrenica v. Netherlands* (2014), *supra* note 46, paras. 4.160-61.

<sup>158</sup> See also: Stahn, *The Law and Practice of International Territorial Administration. Versailles to Iraq and Beyond* (CUP 2008); Knoll, *The Legal Status of Territories Subject to Administration by International Organisations* (CUP 2008); Wilde, *International Territorial Administration. How Trusteeship and the Civilizing Mission Never Went Away* (OUP 2008); Kolb et al. (2005), *infra* note 333, pp. 233-315.

## 4.3 LIMITATIONS AND DEROGATIONS

### OVERVIEW

Human rights law is a careful balance between the freedoms of the individual and the legitimate interests of the state and the society as a whole, including the rights of others. This means that even though human rights law applies in the course of a peace operation, the rights are usually not absolute but subject to possible limitations. That is why this section will examine possible challenges in applying limitations – especially derogations – in an extra-territorial setting. We will therefore consider a number of possible approaches for overcoming these difficulties.

### PERMISSIBLE LIMITATIONS AND POSSIBLE CHALLENGES

The Universal Declaration (1948) states clearly that:

In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are *determined by law* solely for the *purpose* of securing due recognition and respect for the *rights and freedoms of others* and of meeting the just requirements of *morality, public order* and the *general welfare* in a democratic society.<sup>159</sup>

Similar provisions can be found in a number of other human rights instruments.<sup>160</sup> However, many specific rights contain built-in limitation clauses, according to which the said rights may only be restricted to the extent necessary to attain a certain legitimate aim. For instance, Article 21 of the International Covenant clearly states under which circumstances the right of assembly can be limited:

No restrictions may be placed on the exercise of this right other than those imposed in conformity with the law and which are necessary in a democratic society in the interests of national security or public safety, public order (*ordre public*), the protection of public health or morals or the protection of the rights and freedoms of others.

A less explicit form of limitations can be found in those provisions that prohibit any ‘arbitrary’ interference with the right in question. Clear examples are the right to life and the right to liberty

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<sup>159</sup> Art. 29 (2) UDHR, emphasis added.

<sup>160</sup> Art. 27 (2) ACHPR (‘The rights and freedoms of each individual shall be exercised with due regard to the rights of others, collective security, morality and common interest’); Art. 32 (2) ACHR, (‘The rights of each person are limited by the rights of others, by the security of all, and by the just demands of the general welfare, in a democratic society’); Art. XXVIII ADRDM.

under the Covenant,<sup>161</sup> as opposed to their counterparts under the European Convention, which contain an exhaustive list of exceptions under which deprivations of life and liberty would not be a violation.<sup>162</sup> The arbitrariness standard also seems to be the basis for human rights under customary law. The advantage of using the term ‘arbitrary’ is that it is more flexible and thus more open for a harmonious interpretation with other legal regimes, such as humanitarian law. In peacetime, however, the exact content of the rights has largely converged, despite the structural differences of the provisions. Overall, permissible limitations of rights share the following common features,<sup>163</sup> stemming from the provisions themselves and the practice of human rights bodies:

1. Legal basis: the restriction needs to be provided by law (adequately accessible for the general public) to make them foreseeable for anyone that could possibly be affected and to maintain the rule of law.<sup>164</sup>
2. Legitimate aim: the restriction needs to be taken in pursuance of a legitimate aim, such as national security, public safety, public order, public health or morals and the protection of the rights and freedoms of others.<sup>165</sup>
3. Necessity and proportionality: the restriction must be the least intrusive measure and proportionate in relation to the legitimate aim pursued and to the democratic society as a whole.<sup>166</sup>

The application of these requirements to the actions of states abroad and the challenges that this may cause has so far received relatively little scholarly attention. Naz Modirzadeh, for instance, points at the absence of the normal ‘two-way exchange’ between the rights-holder and the duty-bearer – on which human rights is premised – during military operations abroad; but her criticism is mainly focused on cases of military occupations.<sup>167</sup> Others have instead highlighted that terms like ‘national security’ or ‘riot or insurrection’ are restricted to a state’s own territory and

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<sup>161</sup> Arts. 6 (1) and 9 (1) ICCPR.

<sup>162</sup> Arts. 2 (2) (a-c) and 5 (1) (a-f) ECHR.

<sup>163</sup> See also: Scheinin, ‘Core Rights and Obligations’, in: Shelton (ed.), *The Oxford Handbook of International Human Rights Law* (OUP, 2013), 527-40, p. 534 (providing a longer list of common features, which are in essence also reflected in the 3-prong list provided here).

<sup>164</sup> In a similar way: Kiss, ‘Permissible Limitations on Rights’, in: Henkin (ed.), *The International Bill of Rights: The Covenant on Civil and Political Rights* (Columbia University Press 1981), 290-310, pp. 304-305; Doswald-Beck (2011), *supra* note 55, pp. 72-75.

<sup>165</sup> Kiss (1981), *ibid*, pp. 295-304 (providing detailed definitions for each of these terms); Doswald-Beck (2011), *supra* note 55, pp. 75-76.

<sup>166</sup> Kiss (1981), *ibid*, pp. 305-308; Doswald-Beck (2011), *supra* note 55, pp. 76-78.

<sup>167</sup> Modirzadeh (2010), *supra* note 121, 349-410, pp. 371 and 375 (‘I do not want an occupying power that has invaded my State to be recognized by the international community as having a “rights-based” relationship with my population’).

are therefore not available abroad.<sup>168</sup> Such an overly narrow interpretation is, however, not supported by the human rights case-law. There is indeed no reason why circumstances abroad should not enter the equation. The European Court and the Human Rights Committee have, for instance, interpreted the term ‘national security’ broadly so as to also cover threats to international peace and security<sup>169</sup> and even acknowledged its existence as a self-standing purpose.<sup>170</sup> This issue is closely linked to the legal basis requirement. This refers primarily to the legal basis for overseas military actions under the sending states’ own internal law, including executive decisions or acts of parliament authorising the deployment of troops abroad and outlining the specific mandate.<sup>171</sup> This should normally not pose any problems, as it is essentially in the hands of the states themselves, but legal difficulties may nevertheless arise.<sup>172</sup> What complicates the matter even further is the fact that actions performed outside a state’s own territory require also a legal basis under international law.<sup>173</sup> The mandate of the UN Security Council provides generally a good starting point, but may be complemented by other legal bases, including the host state’s consent to a number of measures.

This is perhaps best reflected by the recent case of *Hassan v. France* (2014), in which the European Court had to decide on the lawfulness of the arrest and detention of suspected pirates by French navy forces acting as part of the NATO-led anti-piracy operation off the coast of Somalia. The Court found a sufficient legal basis in the mandate under Resolution 1816 (2008),<sup>174</sup> in combination with Somalia’s explicit consent to operations in its coastal waters and the general

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<sup>168</sup> Dennis, ‘Non-Application of Civil and Political Rights Treaties Extraterritorially During Times of International Armed Conflict’, 40 (2) *Israel Law Review* (2007), 453-502, p. 489 (footnote text); Goldman (2013), *supra* note 142, pp. 115-16.

<sup>169</sup> ECtHR, *Nada v. Switzerland*, Judgement, 12 September 2012, Application no. 10593/08, para. 174. HRC, *Sayadi and Vinck v. Belgium* (2008), *infra* note 298, para. 10.7 (‘the obligation to comply with the Security Council decisions adopted under Chapter VII of the Charter may constitute a “restriction” covered by article 12, paragraph 3, which is necessary to protect national security or public order’).

<sup>170</sup> ECtHR, *Al-Dulimi and Montana Management Inc. v. Switzerland*, Judgement, 26 November 2013, Application no. 5809/08, para. 127 (‘la restriction ... poursuit un but légitime, à savoir le maintien de la paix et de la sécurité internationales. La Cour est prête à accepter cette conclusion’).

<sup>171</sup> The same can be said to be the case for international organisations under their internal law in relation to their actions.

<sup>172</sup> See, for instance: EWHC, *Serdar Mohammed v. Ministry of Defence*, 2 May 2014, 1369 (QB), in which the court concluded that the policy practiced by British ISAF forces of detaining suspects for more than 96 hours without transfer to the Afghan authorities violated Art. 5 (1) ECHR, because it had no legal basis under Afghan law or under international law (UN mandate or IHL), and failed to meet one of the listed purposes.

<sup>173</sup> This seems to be precisely the reason why the European Court has shown considerable reluctance in the past to extend the reach of the Convention beyond state borders, unless the exercise of extra-territorial jurisdiction was permitted under international law.

<sup>174</sup> ECtHR, *Hassan v. France*, Judgement, 4 December 2014, Application nos. 46695/10 and 54588/10, paras. 61-68.

anti-piracy regime under the Convention on the Laws of the Sea (1982).<sup>175</sup> By contrast, the Court considered the domestic legal framework in France inadequate to justify the pre-trial detention of the suspected Somali pirates. It also criticised France's delay in bringing them promptly before a judge once they had arrived on French soil, but fully accepted the earlier delay caused by the arrest and detention on the high seas and the difficult mission conditions.<sup>176</sup> The flexibility applied by the Court shows that human rights law is generally capable of taking the circumstances, including the special geographic and operational conditions, under which most peace missions operate duly into account.<sup>177</sup> However, in many of the operations the security situation and other conditions on the ground may be such that it is no longer possible to operate under the ordinary legal framework and that emergency powers may be required.

## DEROGATIONS FROM HUMAN RIGHTS OBLIGATIONS

Nearly all human rights treaties examined here contain derogation clauses, which allow for far-reaching measures in response to emergency situations. As emphasised by the Human Rights Committee in its General Comment 29 (2001), derogations are a specific – albeit more extensive – form of limitations from certain rights, subject to additional requirements and specific safeguards.<sup>178</sup> While using different wording, the derogation clauses follow largely the same pattern and share a number of common features.<sup>179</sup> All of them require the existence of an emergency situation which poses a serious threat that cannot be addressed any longer with ordinary measures.<sup>180</sup> Only some of them explicitly mention 'war',<sup>181</sup> the meaning and relevance

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<sup>175</sup> Arts. 100-107 and 110 UNCLOS.

<sup>176</sup> Ibid, paras. 99-104 (in line with previous case-law), but criticised the undue delay (2 days) once the suspects had finally arrived in France).

<sup>177</sup> By contrast, the ECtHR – and arguably other human rights courts – is not willing to show the same level of flexibility when it comes to the state's failure to provide for an adequate domestic legal framework for its actions abroad, which is entirely in the hands of the state itself.

<sup>178</sup> HRC, General Comment 29, 'States of Emergency (Article 4)', 31 August 2001, UN Doc. CCPR/C/21/Rev.1/Add.11, para. 4. The HRC does not use the term 'suspension', which is often (wrongly) associated with derogation measures, because it implies a wholesale displacement of HRL. Assuming such a sweeping effect does, however, overlook the set of additional restrictions and safeguards under the derogation procedure.

<sup>179</sup> For an excellent outline of the main features: HRC, General Comment 29 (2001), *ibid*; Oraá, *Human Rights in States of Emergency in International Law* (Clarendon Press 1992), p. 11-206. See also: Ergec, *Les Droits de l'Homme à l'Épreuve des Circonstances Exceptionnelles : Étude sur l'Article 15 de la Convention Européenne des Droits de l'Homme* (Bruylant 1987).

<sup>180</sup> Art. 15 (1) ECHR; Art. 4 (1) ICCPR; Art. 27 (1) ACHR; Art. 35 (1) CIS Convention; Art. 4 (1) Arab Charter. The exact wording of this element will be considered in the following section.

<sup>181</sup> Art. 15 (1) ECHR; Art. 27 (1) ACHR; Art. 35 (1) CIS Convention.

of which will be discussed in the following section. It suffices here to stress that there is a wide consensus that armed conflicts, terrorist activities, disturbances and riots (including sectarian violence) as well as natural disasters and epidemics are all situations that may possibly qualify as emergencies within the meaning of human rights law.<sup>182</sup> It has also been suggested that emergencies have to affect the whole population and the entire territory of the state in question;<sup>183</sup> but this has been widely rejected, as it would gravely disadvantage larger states in comparison to smaller ones.<sup>184</sup> In other words, localised emergencies of sufficient gravity can also qualify as public emergencies within the meaning of the derogation clauses.

Yet, derogation does not provide states with a *carte blanche* when facing an emergency. Rather, specific derogation measures must not exceed what is ‘strictly required by the exigencies of the situation’,<sup>185</sup> which reflects a strict necessity and proportionality requirement. In addition, these measures must be consistent with the state’s other obligations under international law. This refers, for instance, to humanitarian law but also to other human rights treaties to which it is bound as well as similar obligations under general international law (including *jus cogens*).<sup>186</sup> That is why there has in practice been a significant convergence of the applicable safeguards. This is true both for the principle of non-discrimination as well as the list of non-derogable rights, which differs from treaty to treaty.<sup>187</sup> Nevertheless, all of them share a common core of non-derogable rights: the right to life, the prohibition of torture or to cruel, inhuman or degrading treatment or punishment, the prohibition of slavery and servitude, and certain fair trial standards (e.g. the *nullem crimen* principle). The European Convention and the CIS Convention contain, however, an exception to the non-derogable right to life for ‘deaths resulting from lawful

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<sup>182</sup> Joseph and Castan, *The International Covenant on Civil and Political Rights. Cases, Materials, and Commentary* (3<sup>rd</sup> edn., OUP 2013), para. 26.53, p. 911.

<sup>183</sup> ECtHR, *Lawless v. Ireland (No. 3)*, Judgement, 1 July 1961, Application no 332/57, para. 28 (‘exceptional situation of crisis or emergency which affects the whole population and constitutes a threat to the organised life of the community of which the State is composed’).

<sup>184</sup> Joseph and Castan (2013), *supra* note 182, para. 26.53, p. 911; Buergenthal, ‘To Respect and to Ensure: State Obligations and Permissible Derogations’, in: Henkin (ed.), *The International Bill of Rights: The Covenant on Civil and Political Rights* (Columbia University Press 1981), 72-91, p. 80; ILA, *Minimum Standards of Human Rights Norms in a State of Exception*, Principle 1 (b).

<sup>185</sup> Art. 15 (1) ECHR; Art. 4 (1) ICCPR; Art. 27 (1) ACHR; Art. 4 (1) Arab Charter; Art. 35 (1) CIS Convention (‘extent strictly required by the gravity of the situation’).

<sup>186</sup> HRC, General Comment 29 (2001), *supra* note 178, paras. 11-16.

<sup>187</sup> Art. 15 (2) ECHR; Art. 4 (2) ICCPR; Art. 27 (2) ACHR; Art. 4 (2) Arab Charter; Art. 35 (2) CIS Convention.

acts of war'.<sup>188</sup> In addition, the derogation clauses include procedural requirements: while all include the duty to issue a notification,<sup>189</sup> some also require an official proclamation.<sup>190</sup>

The issue of derogation poses a particular challenge in relation to other human rights instruments without derogation clauses, such as the Universal Declaration (1948), the American Declaration (1948) and the African Charter (1981). Does the absence of a specific clause imply that there is an unlimited right to derogate or does it mean that there is no such right at all? Also, what is the answer for human rights obligations under general international law, such as customary law and general principles?<sup>191</sup> The only tenable solution leads to the same option as under the treaty-based derogation regime. To be precise, states and international organisations can deviate from their human rights obligations under other instruments and general international law, subject to largely the same requirements and safeguards outlined above.<sup>192</sup> What supports this claim is the fact that derogation clauses are considered a concretisation of the state of necessity,<sup>193</sup> which has been explicitly recognised as a circumstance precluding the wrongfulness of states and international organisations.<sup>194</sup> The case of the African Charter is, however, more challenging, since the African Commission has repeatedly excluded the possibility of derogations.<sup>195</sup> This has led to a rich debate among scholars.<sup>196</sup> But it is fair to say that the

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<sup>188</sup> Art. 15 (2) ECHR; Art. 35 (2) CIS Convention.

<sup>189</sup> Art. 15 (3) ECHR; Art. 4 (3) ICCPR; Art. 27 (3) ACHR; Art. 4 (3) Arab Charter; Art. 35 (3) CIS Convention.

<sup>190</sup> Art. 4 (1) ICCPR; Art. 4 (1) Arab Charter.

<sup>191</sup> For an overly cautious view: Sari, 'Derogations from the European Convention on Human Rights in Deployed Operations', written evidence provided to the UK Commons Select Committee on Defence, November 2013, [www.publications.parliament.uk/pa/cm201314/cmselect/cmdfence/931/931we13.htm](http://www.publications.parliament.uk/pa/cm201314/cmselect/cmdfence/931/931we13.htm), para. 23 ('the UK also remains bound by any human rights norms forming part of customary international law; the effect of a derogation on these customary norms is unclear').

<sup>192</sup> Oraá, 'The Protection of Human Rights in Emergency Situations under Customary International Law', in: Goodwill-Gill and Talmon (eds.), *The Reality of International Law: Essays in Honour of Ian Brownlie* (Clarendon Press 1999), 413-38; Oraá (1992), *supra* note 179, pp. 209-59.

<sup>193</sup> Cassella, *La Nécessité en Droit International. De l'État de Nécessité aux Situations de Nécessité* (Martinus Nijhoff 2011), pp. 180-95; Ergec (1987), *supra* note 179, p. 56-102; Hartmann, 'Derogation from Human Rights Treaties in Public Emergencies', 22 *Harvard International Law Journal* (1981), 1-52, pp. 12-13.

<sup>194</sup> Art. 25 ASR and Art. 25 ARIO. For a more detailed discussion of the operation of the state of necessity, see the section below on essential and legitimate interests, p. 180.

<sup>195</sup> ACmHPR, *Commission Nationale des Droits de l'Homme et des Libertés v. Chad*, Decision on the Merits, 11 October 1995, Communication no. 74/92, para. 21 ('The African Charter, unlike other human rights instruments, does not allow for State parties to derogate from their treaty obligations during emergency situations. Thus, even a civil war in Chad cannot be used as an excuse by the State violating or permitting violations of rights'). This position was most recently confirmed in: ACmHPR, *Sudan Human Rights Organisation and Centre on Housing Rights and Evictions v. Sudan*, Decision on the Merits, 27 May 2009, Communication nos. 279/03 - 296/05, paras. 165-67.

<sup>196</sup> Critical of the ACmHPR's position on the non-availability of derogations: Heyns, 'The African Regional Human Rights System: In Need of Reform?', 1 *African Human Rights Law Journal* (2001), 155-74, pp. 161-62; Sermet, 'The Absence of a Derogation Clause from the African Charter on Human and Peoples'

derogation option is perhaps less crucial in the African context, because the Charter leaves states already much more room for limitations than under any other human rights treaty, so that the final outcome may indeed be very similar to that under the regular derogation regime.

## MODELS FOR EXTRA-TERRITORIAL DEROGATIONS

### Introduction

A major challenge for states to invoke derogations for their participation in peace operations abroad is the derogation clauses' restrictive wording. Indeed, the European Convention, as well as the Covenant and the Arab Charter, require the existence of an emergency threatening the 'life of the nation'.<sup>197</sup> The American Convention and the CIS Convention use similar but less restrictive language.<sup>198</sup> It is difficult to see how the *life of the nation* of a state can be said to be threatened by that state's involvement in military operations abroad. On this point, Lord Bingham held in the *Al-Jedda* case (2007) that the power to derogate:

may only be exercised in time of war or other public emergency threatening the life of the nation *seeking to derogate* ... It is hard to think that these *conditions could ever* be met when a state had chosen to conduct an overseas peacekeeping operation, however dangerous the conditions, from which it could *withdraw*.<sup>199</sup>

This sceptical position on extra-territorial derogations was more recently upheld by the British Supreme Court.<sup>200</sup> Likewise, a great number of international lawyers and military law experts are sceptical as to whether derogations could ever be available to states for measures taken in

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Rights: A Critical Discussion', 7 African Human Rights Law journal (2007), 142-61. For the opposite view: Jibril Ali, 'Derogation from Constitutional Rights and Its Implication under the African Charter on Human and Peoples' Rights', 17 Law, Democracy and Development (2013), 78-110.

<sup>197</sup> Art. 15 (1) ECHR ('In time of war or other public emergency threatening the life of the nation'); Art. 4 (1) ICCPR ('In time of public emergency which threatens the life of the nation'); Art. 4 (1) Arab Charter ('In exceptional situations of emergency which threatens the life of the nation').

<sup>198</sup> Art. 27 (1) ACHR ('In time of war, public danger, or other emergency that threatens the independence or security of a State Party, it may take measures'); 35 (1) CIS Convention ('In time of war or other emergency situation threatening the higher interests of any Contracting Party').

<sup>199</sup> UKHL, *Al-Jedda v. Secretary of State for Defence* (2007), *supra* note 65, para. 38, emphasis added; supported by Lord Carswell (para. 132) and Lord Brown (para. 150).

<sup>200</sup> UKSC, *Smith v. Ministry of Defence*, Judgement, 19 June 2013, UKSC 41, para. 60 ('The circumstances in which that power can properly be exercised are far removed from those where operations are undertaken overseas').

an exclusively extra-territorial context.<sup>201</sup> These concerns may also have been the reason why the so-called *Copenhagen Process Principles and Guidelines* (2012), which deal specifically with the handling of detainees in international military operations, do not even mention derogations at all.<sup>202</sup> What drives this scepticism is the lack of practice on the part of states, but also the failure of human rights bodies to provide sufficient clarity on the matter. In its more recent case-law on British actions in Iraq, the European Court simply noted that no derogation had been made, which could certainly be interpreted as an acknowledgment that the power of derogation had indeed been available to the state in question.<sup>203</sup> In the *Al-Skeini* case (2011), it also observed that the International Court of Justice appeared to accept that:

even in respect of *extra-territorial acts*, it would in principle be possible for a State to derogate from its obligations under the International Covenant ...<sup>204</sup>

But it failed to express its own views on the issue and to outline necessary preconditions. Interestingly, the respondent states in the *Banković* case (2001) had warned the European Court that an extension of the Convention's extra-territorial reach would ultimately lead to 'more protective derogations under Article 15' in relation to international military operations abroad.<sup>205</sup> In the same case, the Court stated that:

Article 15 itself is to be read subject to the "jurisdiction" limitation enumerated in Article 1 of the Convention.<sup>206</sup>

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<sup>201</sup> Pejic, 'The European Court of Human Rights' *Al-Jedda* Judgement: The Oversight of International Humanitarian Law', 93 *IRRC* (2011), 837-51, p. 250 (raising doubts as to whether extra-territorial derogations could be available in overseas missions); Goldman (2013), *supra* note 142, p. 114; Hong Ip, 'PSOs: Establishing the Rule of Law Through Security and Law Enforcement Operations', in: Arnold and Knoops (eds.), *Practice and Policies of Modern Peace Support Operations under International Law* (Transnational Publishers 2006), 3-34, p. 15; Garraway, 'The Relevance of Jus post bellum : a Practitioner's Perspective', in: Stahn and Kleffner (eds.), *Jus Post Bellum: Towards a Law of Transition from Conflict to Peace* (T.M.C. Asser Press 2008), 153-62, p. 157; ICRC, Expert Meeting on Multinational Peace Operations (2003), *supra* note, p. 19 (raised by one expert); Roxstrom et al., 'The NATO Bombing Case (*Bankovic et al. v. Belgium et al.*) and the Limits of Western Human Rights Protection', 23 *Boston University International Law Journal* (2005), 55-134, p. 118.

<sup>202</sup> Copenhagen Process on the Handling of Detainees in International Military Operations – Principles and Guidelines, 19 October 2012.

<sup>203</sup> ECtHR, *Al-Jedda v. United Kingdom* (2011), *supra* note 66, para. 100; ECtHR, *Hassan v. United Kingdom* (2014), *supra* note 122, para. 98.

<sup>204</sup> ECtHR, *Al-Skeini v. United Kingdom* (2011), *supra* note 42, para. 90, emphasis.

<sup>205</sup> ECtHR, *Banković v. Belgium* (2001), *supra* note 23, para. 43.

<sup>206</sup> *Ibid.*, para. 62.

This has led some to claim that the right to derogate goes hand in hand with any extension of the Convention's reach abroad,<sup>207</sup> even though this passage was rather about the issue of jurisdiction. There is, however, support for this contention in the earlier *Cyprus* case (1976) before the European Commission, which held that:

Turkish armed forces in Cyprus brought any other persons or property there "within the jurisdiction" of Turkey, in the sense of Art. 1 of the Convention, "to the extent that they exercise control over such persons or property". It follows that, to the same extent, Turkey was the High Contracting Party competent *ratione loci* for any measures of derogation under Art. 15 of the Convention affecting persons or property in the north of Cyprus.<sup>208</sup>

Hence, the Commission drew a clear link between a state's exercise of extra-territorial jurisdiction and its power to derogate abroad. In the same vein, Marco Sassòli dismissed the possible double-standard of holding states accountable for their actions abroad, while at the same time denying them the right to derogate because their own nation is not directly affected by the events abroad.<sup>209</sup>

The Human Rights Committee has so far largely avoided the issue. In fact, it did not address the question of extra-territorial derogations in its statements on derogations and on the extra-territorial application of the Covenant, including its General Comments 29 and 31.<sup>210</sup> In its most recent General Comment 35 on detentions, the Committee briefly mentions the possibility of derogations during peacekeeping missions abroad,<sup>211</sup> but without giving any guidance on the preconditions that need to be met and on how this solution could possibly square with the restrictive wording of the derogation clauses. That is why the following parts of this section will consider four different models for overcoming the conceptual difficulties inherent in extra-territorial derogations.

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<sup>207</sup> Mujezinović Larsen (2012), *supra* note 31, p. 308; ECtHR, *Hassan v. United Kingdom* (2014), *supra* note 122, Party Dissenting Opinion of Judge Spano, para. 8 ('the extra-jurisdictional reach of the Convention under Article 1 must necessarily go hand in hand with the scope of Article 15').

<sup>208</sup> ECmHR, *Cyprus v. Turkey*, Report, 10 July 1976, Application no. 6780/74 and 6950/75, para. 525.

<sup>209</sup> Sassòli, 'The Role of Human Rights and International Humanitarian Law in New Types of Armed Conflicts', in: Ben-Naftali (ed.), *International Humanitarian Law and International Human Rights Law: Pas de Deux* (OUP 2011), 34-94, p. 66. Similarly: Frostad (2011), *supra* note 16, pp. 156-57; Mujezinović Larsen (2012), *supra* note 31, p. 308; Ekins et al., 'Clearing the Fog of Law. Saving our Armed Forces From Defeat by Judicial Diktat', 30 March 2015, Policy Exchange, [www.policyexchange.org.uk/publications/category/item/clearing-the-fog-of-law-saving-our-armed-forces-from-defeat-by-judicial-diktat](http://www.policyexchange.org.uk/publications/category/item/clearing-the-fog-of-law-saving-our-armed-forces-from-defeat-by-judicial-diktat).

<sup>210</sup> Note that the issue of extra-territorial derogations has also remained entirely unaddressed in some publications dealing both with the extra-territorial reach of human rights law and the problem of derogations: Buergethal (1981), *supra* note 184; Doswald-Beck (2011), *supra* note 55.

<sup>211</sup> HRC, General Comment 35, 16 December 2014, CCPR/C/GC/35, para. 65, p. 19, footnote text.

## War and Armed Conflict

As noted above, some of the regional human rights treaties do indeed mention the term ‘war’ in their derogation clauses. For instance, the European Convention provides for the possibility to derogate in ‘time of war or other public emergency threatening the life of the nation’.<sup>212</sup> This raises the question as to whether the requirement of a threat to the life of the nation refers to ‘other public emergency’ as well as to ‘war’. This seems to be the generally accepted interpretation among commentators, mainly because of the word ‘other’.<sup>213</sup> But is there really no room for an alternative reading of Article 15? To be precise, could it not be argued that times of war constitute a self-standing ground for derogations,<sup>214</sup> without having to amount to a threat to the life of the nation as required for *other* public emergencies? In fact, in earlier drafts ‘war’ was quite separate from the ‘life of the nation’ formula.<sup>215</sup>

However, while convenient for the present purposes, this interpretation of Article 15 may be inconsistent with the state’s other international obligations for going against the clear wording of the Covenant,<sup>216</sup> which in Article 4 only speaks of a ‘public emergency which threatens the life of the nation’, without mentioning the term ‘war’. During the drafting process of the Covenant, the reference to war was dropped for symbolic reasons due to the United Nations’ aim to prevent war. Nevertheless, the drafters considered war to be the clearest example of a public emergency justifying a resort to derogation measures.<sup>217</sup> Indeed, war was believed to imply a

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<sup>212</sup> Art. 15 (1) ECHR. Similar wording in 27 (1) ACHR and 35 CIS (1) Convention.

<sup>213</sup> EWHC, *Serdar Mohammed v. Ministry of Defence* (2014), *supra* note 172, para. 155 (‘This wording, however, (in particular the word “other”) tends to suggest that Article 15 was not intended to apply to a war overseas which does not threaten the life of the nation’); Sari (2013), *supra* note 191, para. 15; Krieger, ‘Die Verantwortlichkeit Deutschlands nach der EMRK für seine Streitkräfte im Auslandseinsatz’, 62 *Zeitschrift für Ausländisches Öffentliches Recht und Völkerrecht* (2002), 669-702, p. 690; Frowein and Peukert, *Europäische Menschenrechtskonvention. EMRK-Kommentar* (Engel Verlag 1996), para. 7, p. 482. For the same conclusion in relation to Art. 27 (1) ACHR: Norris and Reiton, ‘The Suspension of Guarantees: A Comparative Analysis of the American Convention on Human Rights and the Constitutions of the States Parties’, 30 *American University Law Review* (1980-1981), 189-223, pp. 194-96 (linking war to the ‘danger to the independence or security of the state’ requirement).

<sup>214</sup> Marko Milanović raises the same question, but leaves it unanswered: Milanović, ‘Extraterritorial Derogations from Human Rights Treaties in Armed Conflict’, in: Bhuta (ed.), *Human Rights as Cosmopolitan Law? Extraterritorial Human Rights Obligations in International Law* (OUP forthcoming, [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2447183](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2447183)), p. 15. Ekins et al. (2015), *supra* note 209, pp. 34-35 (discussing it only briefly in a few lines, but using it as a main argument for derogations from the ECHR in relation to overseas military operations).

<sup>215</sup> Indeed, delegates held that the derogation clause ‘had the advantage of excluding, even in the case of war or threat to the life of the nation, any derogation of certain fundamental rights’ (emphasis added). Council of Europe, *Collected Edition of the ‘Travaux Préparatoires’ of the European Convention on Human Rights, Vol. IV* (Martinus Nijhoff 1978), p. 30.

<sup>216</sup> Strictly speaking, the problem only arises in case the derogation under the first human rights treaty involves measures for which there also needs to be a derogation under the second treaty.

<sup>217</sup> A/2929 (1955), para. 37 (‘While it was recognized that one of the most important public emergencies was

level of seriousness that *other* emergency situations still had to reach in order to allow for derogations. That is indeed the main reason why the ‘life of the nation’ formula was added to the derogation clauses of the European Convention and the Covenant.<sup>218</sup> Hence in the view of the drafters of both instruments, situations of war would invariably pose a threat to the life of the nation. With this in mind, it is difficult to accept the opposite conclusion by the Human Rights Committee in its General Comment 29:

The Covenant requires that *even during an armed conflict* measures derogating from the Covenant are allowed *only if* and to the extent that the situation *constitutes a threat to the life of the nation*.<sup>219</sup>

What the Committee is implying here is that there may well be armed conflict situations that do not cross the ‘threat to the life of the nation’ threshold.<sup>220</sup> This brings us to the ultimate question: the meaning of the term ‘war’ according to the drafters of the treaties.

Unfortunately, the *travaux préparatoires* do not provide a clear definition of the term and its link to humanitarian law. There is indeed a whole spectrum of possible interpretations, ranging from one extreme to the other. For instance, it is conceivable that the drafters adhered to the traditional definition of ‘war’, as a situation of comprehensive use of force between states.<sup>221</sup> This was indeed the view of Adolf Süsterhenn in the *Lawless* case before the European Commission,<sup>222</sup> but the majority of commissioners saw no basis for such an overly restrictive interpretation of the term ‘war’.<sup>223</sup> Conversely, the drafters may have been influenced by analogous terminology in their own national constitutional laws authorising governments to declare a state

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the outbreak of war, it was felt that the covenant should not envisage, even by implication, the possibility of war, as the United Nations was established with the object of preventing war’). This is well documented in the discussion on the matter involving the delegates of Chile, Venezuela, the USA, the Soviet Union, France, Egypt and the UK, E/CN.4/SR.330, 1 July 1952, p. 4-10. Also afterwards the term ‘war’ was used during the discussions of the derogation clause: A/5655, 10 December 1963, paras. 51-53. See also: Buerenthal (1981), *supra* note 184; p. 79.

<sup>218</sup> ECmHR, *Lawless v. Ireland*, Report of the Commission, Application no. 332/57, 19 December 1959, Opinions of Commission Members Constantin Eustathiades (para. 92, p. 95) and Adolf Süsterhenn (para. 93, p. 98).

<sup>219</sup> HRC, General Comment 29 (2001), *supra* note 178, para. 3, emphasis added.

<sup>220</sup> This is also the view of the following authors: Provost, *International Human Rights and Humanitarian Law* (CUP 2002), pp. 274-75; Montealegre, ‘The Compatibility of a State Party’s Derogation under Human Rights Conventions with its Obligations under Protocol II and Common Article 3’, 33 *American University Law Review* (1983-84), 41-51, p. 43; Debuf (2013), *infra* note 292, p. 95; Ergec (1987), *supra* note 179, pp. 126-29; and those authorities cited above, *supra* note 213.

<sup>221</sup> Dinstein, *War, Aggression and Self-Defence* (5<sup>th</sup> edn., CUP 2011), pp. 3-15 (criticising Oppenheim’s traditional definition).

<sup>222</sup> ECmHR, *Lawless v. Ireland* (1959), *supra* note 218, Opinion of Commission Member Adolf Süsterhenn, para. 93, p. 98.

<sup>223</sup> *Ibid*, majority opinion, para. 90, p. 84.

of war or to impose martial law. In some cases, such declarations may even be issued for insurgencies or without there being any armed hostilities at all, rendering the term ‘war’ void of any meaning and prone to abuse. This risk was explicitly raised throughout the expert discussion on earlier drafts of the Covenant.<sup>224</sup>

The drafting of the major human rights treaties coincided with the revision of humanitarian law – namely the adoption of the Geneva Conventions of 1949 and the Additional Protocols of 1977 – which substituted the term ‘armed conflict’ for the notion of ‘war’. It is unclear to what extent these developments had an influence on the actual drafting of the human rights treaties.<sup>225</sup> The *travaux préparatoires* show, however, that the drafters often referred to humanitarian law terminology and associated concepts when discussing the precise wording of the individual rights<sup>226</sup> and their inclusion into the list of non-derogable rights.<sup>227</sup> In other words, when using the term ‘war’, the drafters must have meant a situation giving rise to the application of humanitarian law,<sup>228</sup> including its modern threshold requirements.<sup>229</sup>

It is widely acknowledged that the term ‘war’ used in the derogation clauses covers international armed conflicts.<sup>230</sup> It thus covers any form of inter-state use of force, even cases of low-level and incidental violence that would hardly qualify as war under the traditional concept.<sup>231</sup> But

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<sup>224</sup> HR Commission, 95<sup>th</sup> meeting, 29 May 1950, E/CN.4/SR.195, paras. 34-37 (with the delegate of the Board of Jewish Organizations inquiring about ‘the exact meaning of certain phrases in the article, such as “in time of war”. Theoretically, the Allies were still at war with Germany’).

<sup>225</sup> Marko Milanović believes there was no direct influence: Milanović (2014), *supra* note 214, p. 14.

<sup>226</sup> Amendment suggested by Australia, E/CN.4/201, 19 May 1949, most likely withdrawn due to the subsequent inclusion of a derogation clause (‘After “arrest or detention” in clause 4 of article 9 the following words should be added: “except an enemy alien lawfully detained as a prisoner of war”’).

<sup>227</sup> See in general: Art. 15 (2) ECHR, which excludes ‘deaths resulting from lawful acts of war’; or Art. 35 (2) CIS Convention, using very similar wording. For the ICCPR, see A/5655, 10 December 1963, para. 53 (‘One representative pointed out that, since “public emergency” as defined in article 4 must be understood to include a state of war, lawful acts of war could not be regarded as being barred even though the article dealing with the right to life (art. 6) was not subject to derogation in times of emergency’).

<sup>228</sup> This is without prejudice to the use of terms such as ‘time of war or of imminent threat of war’ or ‘wartime’ used in the exception clauses of protocols that abolish the death penalty in peacetime, namely Art. 2 of Protocol 6 (1982) to the ECHR. See also: Doswald-Beck (2011), *supra* note 55, p. 192.

<sup>229</sup> In a similar way: ECmHR, *Cyprus v. Turkey* (1976), *supra* note 208, Separate Opinion of Commission Member Felix Ermacora, para. 6 (‘The term “war” is to be understood in the meaning of modern international legislation ... in particular the attempts to modify the provisions of the Geneva Conventions, avoid the expression “war” and use the expression “armed conflict”’).

<sup>230</sup> Joseph and Castan (2013), *supra* note 182, para. 26.53, p. 911; Doswald-Beck (2011), *supra* note 55, pp. 192-93; Lubell (2010), *supra* note, p. 188; Van Dijk et al., *Theory and Practice of the European Convention on Human Rights* (4<sup>th</sup> edn., Intersentia 2006), p. 1059-60; Buergenthal (1981), *supra* note 184, p. 80; Ergéc (1987), *supra* note 179, pp. 123-29 (requiring, however, higher intensity).

<sup>231</sup> Skirmishes and detention of enemy forces is enough for an IAC but would not qualify as war in the traditional sense.

does the same hold true for occupations or non-international armed conflicts?<sup>232</sup> Military occupations constitute a special case when they are not accompanied by hostilities. They are, however, governed by the law of international armed conflicts and structurally have many features of ordinary emergency situations. Hence, even *calm* occupations should be considered a ground for derogations, irrespective of the threat that the situation poses to the ‘life of the nation’ of the occupying power.<sup>233</sup> By contrast, the vast majority of commentators believe that the term ‘war’ as used by the drafters of the human rights treaties during their discussions does not extend to non-international armed conflicts.<sup>234</sup> What supports the claim that they should also be covered, however, is the general intention of the drafters to provide for a derogation option in situations governed by humanitarian law. Most importantly, however, non-international armed conflicts have a much higher intensity threshold than international ones, which makes them by default much more akin to ordinary emergency situations.

Extending the war-based ground for derogations to non-international armed conflicts would make a considerable difference for peace operations, as they are usually involved in fighting with non-state armed groups and only rarely become a party to an international armed conflict or an occupying power. Nevertheless, this would still leave open the question for a peace operation to which humanitarian law does not apply at all.

### Essential and Legitimate Interests

Another possible approach – in support of derogations for overseas operations – is to interpret the term ‘life of the nation’ as referring to the essential and legitimate interests of the state, also covering its actions abroad. Similar language can be found in earlier drafts of the Covenant and the European Convention, primarily in the form of ‘the interests of the people’. Indeed, in June 1949 the Human Rights Commission made this addition to its initial derogation clause of the draft covenant.<sup>235</sup> The passage found its way into the draft of the European Convention in

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<sup>232</sup> Similarly: Milanović (2014), *supra* note 214, pp. 14-15 (but not providing a definite answer).

<sup>233</sup> Ergec (1987), *supra* note 179, pp. 128-29.

<sup>234</sup> Doswald-Beck (2011), *supra* note 55, pp. 192-93 (claiming that NIACs are already covered by the term ‘insurrection’ mentioned under Art. 2 (2) (c) ECHR, which is, however, highly doubtful); UCIHL, Expert Meeting on the Right to Life in Armed Conflicts and Situations of Occupation (2005), pp. 12-13 (a number of experts doubting the terms ‘war’ or ‘lawful acts of war’ cover NIACs); Van Dijk et al. (2006), *supra* note 230, pp. 1059-60 (considering it irrelevant, as NIACs may qualify as ‘other public emergencies’). For the opposite view: Ergec (1987), *supra* note 179, pp. 125-28.

<sup>235</sup> Art. 4, Draft Covenant on Human Rights, 23 June 1949, E/1371 and E/CN. 4/350, Annex I, p. 29 (‘In time of war or other public emergency threatening the interests of the people’). For the previous draft: HR Commission, Report to the ECOSOC, 17 December 1947, E/600 Annex B 1, p. 30 (Art. 4 ‘In time of war or other public emergency’), which had been proposed by the United Kingdom.

February 1950.<sup>236</sup> In the following months, however, it got incrementally replaced by the ‘life of the nation’ formula.<sup>237</sup> What had apparently started as an accidental mistranslation in the French records<sup>238</sup> became by June 1950 the uniform wording in both the English and French versions of the draft convention.<sup>239</sup> Unfortunately, there is nothing in the discussion records that could explain the reasoning behind this shift towards the ‘life of the nation’ phraseology in the final version of the European Convention. By contrast, its inclusion into the derogation clause of the Covenant caused considerable debate. There was a wide consensus among the delegates that the wording of the clause should provide a high degree of clarity and guard against possible abuse by states. But there was considerable disagreement as to which text was better suited to attain that goal, leading to numerous changes of the draft article.<sup>240</sup> When the United Kingdom suggested an amendment featuring the ‘life of the nation’ formula, the Soviet Union sought to reinstate the earlier wording restricted to emergencies that ‘threaten the interests of the people’. Nevertheless, both delegations showed support for the proposal of one another.<sup>241</sup> There was, however, some resistance against the British amendment, especially from Chile, India and Uruguay, which argued that the term ‘life of the nation’ was legally unclear and instead favoured the ‘interest of the people’ wording in the previous drafts.<sup>242</sup> What played probably a significant role for the majority of delegations to eventually adopt the ‘life of the nation’ formula was their concern for consistency with Article 15 of the European Convention – a crucial point at least for the states in Western Europe.

The interests-based approach experienced, however, a revival with the adoption of CIS Convention (1995), whose derogation clause reads as follows:

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<sup>236</sup> See, for instance: British proposal: UK Doc. A 782, Meeting of the Committee of Experts, 4 February 1950, Council of Europe, *Collected Edition of the ‘Travaux Préparatoires’ of the European Convention on Human Rights, Vol. III* (Martinus Nijhoff 1976), p. 190.

<sup>237</sup> First appearing in the drafts of the meeting of the Committee of Experts, 6-10 March 1950, *ibid.*, pp. 306-07 (Art. 7 bis).

<sup>238</sup> *Ibid.*, pp. 312-13 (Art. 2, only in the French version) and pp. 324-25 (Art. 8, only in the French version); Report to the Committee of Ministers, 17 March 1950, Council of Europe, *Collected Edition of the ‘Travaux Préparatoires’ of the European Convention on Human Rights, IV* (Martinus Nijhoff 1978), pp. 30-31 (Art. 8); Conference of Senior Officials, 8-17 June 1950, *ibid.*, pp. 56-57 (only in the French version), pp. 182-83 (only in the French version) and pp. 226-27 (French text speaks of ‘menaçant (les intérêts du pays) la vie de la nation’).

<sup>239</sup> Draft Convention, Annex to the Report of the Conference of Senior Officials, *ibid.*, pp. 280-81.

<sup>240</sup> A number of delegates considered the ‘interests of the people’ wording unclear and open to abuse. Quite surprisingly, however, they favoured a French proposal without any gravity threshold (‘state of emergency officially proclaimed by the authorities or in the case of public disaster’), which was then adopted as the new draft text: Commission on Human Rights, 195<sup>th</sup> meeting on 16 May 1950, E/CN.4/SR.195, 29 May 1950, paras. 34-43 and 55-67, finally adopting provisionally the French proposal, para. 97.

<sup>241</sup> E/CN. 4/SR. 330, 1 July 1952, pp. 3-6.

<sup>242</sup> *Ibid.*, pp. 4-5 and 11-14.

In time of war or other emergency *situation threatening the higher interests* of any Contracting Party, that Party may take measures derogating from its obligations under this Convention ...<sup>243</sup>

The requirement of a threat to the state's higher interests certainly implies an exceptional situation, without, however, ruling out derogations in an exclusively extra-territorial setting.<sup>244</sup> The focus on interests for the purpose of derogation is also consistent with the definition of *necessity* as a circumstance precluding the wrongfulness of states. Article 25 (1) (a) of the Articles on State Responsibility states that necessity can only be invoked for an act that:

is the only way for the State to safeguard an essential interest against a grave and imminent peril.<sup>245</sup>

The notion 'essential interests' does not necessarily denote a legal concept and is therefore difficult to define with sufficient precision, but it appears to go far beyond the survival of the state alone and may encompass matters of global concern.<sup>246</sup> This follows clearly from the Commentaries:

It extends to particular interests of the State and its people, as well as of the *international community as a whole*.<sup>247</sup>

Chief among the interests of the international community as a whole is certainly the maintenance of international peace and security. Indeed, if states are allowed to invoke threats to their own security as a serious peril to their essential interests, it seems equally appropriate to support the same for measures directed against a serious threat to international peace and security. Moreover, this approach seems also consistent with the additional requirement that the state did not contribute to the threat itself.<sup>248</sup> Even though a state may put itself at greater risk by deploying its own troops to a crisis region, the overall threat to the interests of the international community as a whole would remain the same, even if the state withdrew its forces.

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<sup>243</sup> Art. 35 (1) CIS Convention.

<sup>244</sup> Lena Svenson-McCarthy rejects the strong emphasis on the state. Yet, even she does implicitly recognise the possibility that an emergency situation may arise from a threat to the legitimate interests of a nation as such: Svensson-McCarthy (1998), *infra* note 299, p. 196 ('The terms "higher interests of any Contracting Party" convey the impression that derogations may be justified by reasons of state rather than by the legitimate interests of the nation as such').

<sup>245</sup> ASR, A/RES/56/83, 28 January 2002, Annex. For the equivalent provision: Art. 25 ARIO, A/RES/66/100, 27 February 2012, Annex.

<sup>246</sup> Cassella (2011), *supra* note 193, pp. 180-95.

<sup>247</sup> Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries, Yearbook of the International Law Commission (2001), Vol. II, Part 2, A/CN.4/SER.A/2001/Add.1, Art. 25, p. 83, para. 15. See also para. 14, emphasis added ('It has been invoked to protect a wide variety of interests, including safeguarding the environment, preserving the very existence of the State and its people in time of public emergency, or ensuring the safety of a civilian population').

<sup>248</sup> Art. 25 (2) (b) ASR.

To conclude, the interests-based approach suggested here may be a reasonable basis for extra-territorial derogations under the CIS Convention and in relation to human rights obligations under general international law. It is, however, unclear whether the same holds true for the European Convention and the Covenant. As we have seen above, there is certainly some support for this approach in the drafting history of both instruments. But it is highly questionable whether this is indeed enough for the European Court or the Human Rights Committee to read the ‘life of the nation’ formula as referring to the essential and legitimate interests of the state in order to allow for extra-territorial derogations.<sup>249</sup>

### **Threat to International Peace and Security**

Another approach goes yet a step further, by looking directly at the mandate of the peace operations in question and the language used therein. As we have seen before, the resolutions of the Security Council usually include the following statement before the reference to Chapter VII of the UN Charter:

*Determining* that the situation in [the mission area] constitutes a threat to international peace and security,<sup>250</sup>

One could possibly argue that if the situation in the mission area is sufficiently grave to constitute a threat to international peace and security, then it must also amount to a threat to the life of *all other nations* for the purpose of the relevant derogation clauses. This argument has received only little scholarly attention. Martin Scheinin, for instance, found it regrettable that the Human Rights Committee did not consider this line of reasoning in *Sayadi and Vinck* (2008) in relation to the terror-listing regime.<sup>251</sup> Anne Peters, by contrast, rejects this solution vehemently. According to her, labelling a crisis situation as a ‘threat to international peace and security’ has nothing to do with a public emergency within the meaning of human rights law and should therefore allow for no flexibility in relation to the derogation requirements.<sup>252</sup> Her reservation may be explained by the sweeping use of the terminology and its inherent risk to abuse.

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<sup>249</sup> Note, however, that Martin Scheinin, who as a member of the HRC played a leading role in the drafting of General Comment 29, considers this a viable interpretation of Art. 4 ICCPR.

<sup>250</sup> Usually in the penultimate preambular paragraph; see for instance S/RES/2100 (Mali), 25 April 2013.

<sup>251</sup> Scheinin, ‘Is the ECJ Ruling in *Kadi* Incompatible with International Law?’, 28 (1) Yearbook of European Law (2009), 637-53, p. 640. Only Sir Nigel Rodley had pointed at the issue of derogations, but without going into detail: HRC, *Sayadi and Vinck v. Belgium*, View, 29 December 2008, Communication no. 1472/2006, Appendix B, individual opinion of Committee member Sir Nigel Rodley (concurring), p. 37. Also sympathetic to the idea, albeit less technical: De Wet, *The Chapter VII Powers of the United Nations Security Council* (Hart Publishing 2004), pp. 202 and 321-22.

<sup>252</sup> Peters, ‘Article 25’ in: Simma et al. (eds.), *The Charter of the United Nations: A Commentary Vol I* (3<sup>rd</sup>

This is certainly a concern with regard to counter-terrorism.<sup>253</sup> Nevertheless, any measure taken would still have to satisfy the necessity and proportionality requirement, which serves as an ultimate safeguard against abuse.

At least in the case of peace operations, the determination of the crisis situations seems entirely appropriate. With the potential of spreading across international borders and affecting other member states, these situations do indeed amount to threats to international peace and security, and thus an emergency threatening the life of *all* nations. What is more, the mandate is usually subject to renewal (usually after twelve months) and thus allows for a periodical reassessment of the whole situation. Hence, a significant improvement of the situation or other changes can lead to a phasing-out of the operation.<sup>254</sup>

What complicates the picture even more is the Security Council's own inconsistency when adopting resolutions for establishing peace operations or extending their mandates – even in consecutive resolutions on the same country. Indeed, some of them do *not* at all refer to a threat to international peace and security, even though they may provide for a robust mandate.<sup>255</sup> By contrast, other resolutions do include a finding of a threat to international peace and security, but were not adopted under Chapter VII of the UN Charter.<sup>256</sup> In some other cases, the preamble includes only the following statement before the Chapter VII reference:

Mindful of its primary responsibility for the maintenance of international peace and security under the Charter of the United Nations<sup>257</sup>

Moreover, even where the existence of a threat to international peace and security is acknowledged, it may come with different appreciations. Indeed, a great number of resolutions use a more restrictive phraseology: 'threat to international peace and security *in the region*'.<sup>258</sup> The

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edn, OUP 2012), 787-854, p. 825, para. 124.

<sup>253</sup> S/RES/1368 (on the 9/11 attacks), 12 September 2001, para. 1; most recently, S/RES/2178 (on terrorism, especially ISIS and Al-Nusrah Front), 24 September 2014. For other situations in which the UNSC has been using its 'threat to international peace and security' formula: S/RES/2141, 5 March 2014 (on the proliferation of weapons of mass destruction); S/RES/2177, 18 September 2014 (on the recent Ebola crisis in West Africa).

<sup>254</sup> Nevertheless, some resolutions did provide a *permanent* mandate, for instance, in the case of Kosovo and East Timor: S/RES/1244 (Kosovo), 10 June 1999; S/RES/1272 (East Timor), 25 October 1999.

<sup>255</sup> S/RES/1981 (Côte d'Ivoire), 13 May 2011; S/RES/2124 (Somalia), 12 November 2013. Note that the last resolution adopted in relation to ISAF in Afghanistan that used the standard formula and referred to Chapter VII was S/RES/2069, 9 October 2012.

<sup>256</sup> S/RES/1884 (Lebanon), 27 August 2009.

<sup>257</sup> S/RES/2174 (Libya), 27 August 2014; S/RES/2180 (Haiti), 14 October 2014.

<sup>258</sup> Emphasis added, see among others: S/RES/2147 (DRC), 28 March 2014; S/RES/2012 (Haiti), 14 October 2011; S/RES/2162 (Côte d'Ivoire), 25 June 2014; S/RES/2187 (South Sudan), 25 November 2014; S/RES/2184 (Piracy off the coast of Somalia), 12 November 2014; and those resolutions cited below, *infra* notes 260-263.

problem with this addition is that it may effectively restrict the availability of derogations to those contributing states that are *from the same region*,<sup>259</sup> thus undermining the attempt to find a sufficiently broad solution to the ‘life of the nation’ conundrum. In view of this, it seems surprising that the use of this *regional* restriction is not necessarily driven by facts on the ground but rather casual, even for consecutive resolutions in relation to the same country, as in the case of Bosnia and Herzegovina,<sup>260</sup> Central African Republic,<sup>261</sup> Somalia<sup>262</sup> and Sudan.<sup>263</sup> Also, the most recent Repertoire of the Practice of the Security Council fails to explain this inconsistent use of its standard terminology.<sup>264</sup>

It is for these reasons that the mandate-based approach does not offer the ultimate solution to the ‘life of the nation’ conundrum. This is not surprising, given that it has not been the primary intention of the Security Council members to remove the derogation obstacle that troop-contributing nations may be facing. However, it does not have to remain like that. In fact, the Council could overcome its own inconsistency by streamlining the use of its standard terminology and by clearly stating that the situation in the mission area in question constitutes a ‘threat to international peace and security, i.e. a threat to the life of all nations’. In addition, Security Council resolutions may also prove useful for the proclamation and notification requirement, as we will see further below.

## Host Nation Model

The most prominent approach among commentators in support of derogations in the course of peace operations is to base the assessment entirely on the situation prevailing inside the mission area. Hence, rather than reading the ‘life of the nation’ formula as a reference to the sending states, the focus is instead put on the situation of the *host nation*. This interpretation seems quite

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<sup>259</sup> Of course, the resolutions in no way define the geographical limits of the term ‘region’, but it goes without saying that they are not meant to include all states around the globe, let alone all international and regional organisations.

<sup>260</sup> S/RES/2123, 12 November 2013 (‘... in the region’); S/RES/2183, 11 November 2014 (using the standard formula).

<sup>261</sup> S/RES/2149, 10 April 2014, and S/RES/2196, 22 January 2015 (both using ‘... in the region’); S/RES/2127, 5 December 2013 and S/RES/2181, 21 October 2014 (both using the standard formula).

<sup>262</sup> S/RES/2182, 24 October 2014 (‘... in the region’); S/RES/2142, 5 March 2014 (using the standard formula).

<sup>263</sup> S/RES/2035, 17 February 2012 (‘... in the region’); S/RES/2179, 14 October 2014 (using the standard formula to describe the situation in Abyei and along the border between Sudan and South Sudan).

<sup>264</sup> Repertoire of the Practice of the Security Council, 2010-2011, Part VII – Actions with Respect to Threats to the Peace, Breaches of the Peace, and Acts of Aggression (Chapter VII of the Charter), 17<sup>th</sup> Supplement, Department of Political Affairs – Security Council Affairs Division, [www.un.org/en/sc/repertoire/2010-2011/Part%20VII/2010-2011\\_Part%20VII.pdf](http://www.un.org/en/sc/repertoire/2010-2011/Part%20VII/2010-2011_Part%20VII.pdf), pp. 8-30.

appropriate, given that the primary purpose of the presence of international forces is to alleviate the security situation in the mission area.

The main argument for this approach is that the competence to derogate from some human rights obligations should go hand in hand with the geographical reach of the obligations, in some cases even stretching across state borders. Most of the proponents of this approach see little difficulty in simply interpreting the term ‘nation’ as a reference to the *local* nation in the mission area,<sup>265</sup> especially where international forces exercise a sufficient level of control.<sup>266</sup> Such a wide interpretation has, however, also met with criticism from other scholars.<sup>267</sup> Also, the Venice Commission has made it clear that the emergency in question has to threaten the life of the nation of the state taking these derogation measures, even though this statement was mainly concerned with secret detention and rendition activities.<sup>268</sup>

Nevertheless, even some of those who generally support this host nation model are sceptical as to whether such a far-reaching interpretation is appropriate without sufficient practice to that effect.<sup>269</sup> Indeed, no state has so far made active use of this approach for their participation in international military missions abroad. The only practice worth mentioning are the *EU Draft Guidelines for Criminal Procedure in Crisis Management Operations* (2002), which explicitly state that:

In case of public exceptional danger which threatens the life of the nation and the existence of which is officially proclaimed, or in case of a *threat to the security of the local population*

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<sup>265</sup> EWHC, *Serdar Mohammed v. Ministry of Defence* (2014), *supra* note 213, para. 156 (‘in the context of an international peacekeeping operation, a war or other emergency threatening the life of the *nation on whose territory* the relevant acts take place’, emphasis added); Ekins et al. (2015), *supra* note 209, pp. 34-35; Sari (2013), *supra* note 213, para. 19 (‘the term ‘nation’ in Article 15 should be construed as extending to any third States in which the armed forces of the contracting parties operate’); Milanović (2014), *supra* note 214, pp. 16-20.

<sup>266</sup> Sassòli (2011), *supra* note 209, p. 66 (‘An emergency on an occupied territory or a territory where the state has a certain limited control must be sufficient’); Naert (2010), *supra* note 98, p. 578 (‘the local “nation” is under the jurisdiction of the “occupying” State. In that case, it is logical that a threat to the life of *this* nation can justify a derogation’, emphasis added).

<sup>267</sup> See, for instance: Rooney, ‘Hassan v United Kingdom and Extraterritorial Derogations’, Human Rights in Ireland Blog, 8 January 2014, <http://humanrights.ie/civil-liberties/rooney-on-hassan-v-united-kingdom-and-extraterritorial-Derogations> (‘If one thinks that the ‘life of the nation’ could refer to Iraq or Afghanistan, then why should the UK be able to derogate from its obligations when it is the life of another nation that is in jeopardy?’).

<sup>268</sup> European Commission for Democracy through Law (Venice Commission), Opinion on the International Legal Obligations of Council of Europe Member States in Respect of Secret Detention Facilities and Interstate Transport of Prisoners, 17 March 2006, CDL-AD(2006)009, para. 72 (‘State may apply Article 15 only if and to the extent that a war or other public emergency threatening the *life of the nation presents itself in that very same State*’).

<sup>269</sup> Mujezinović Larsen (2012), *supra* note 31, pp. 310-11; Krieger, ‘After Al-Jedda: Detention, Derogation, and an Enduring Dilemma’, 50 *Military Law and Law of War Review* (2011), 419-45, p. 436; Frostad (2011), *supra* note 16, pp. 156-57.

or to the maintenance of the law and order in the *mission area*, competent international authorities may take, as provided in their mandate under UN auspices, measures derogating from these guidelines ...<sup>270</sup>

However, this juxtaposition is also somewhat self-defeating, as it implies that a similar outcome could perhaps not be obtained from the ordinary ‘life of the nation’ formula itself. Kjetil Mujezinović Larsen also considered to what extent the flexibility that the European Court has shown in cases of localised emergencies within the territories of states may imply a similar approach for the host nation in overseas military operations.<sup>271</sup> This approach is, however, inherently inward-bound and thus might not be lightly applied across state borders.

As a matter of methodology, it is apt to look into the derogation practice of states in their colonial possessions, where the application *ratione loci* of human rights treaties was uncontested.<sup>272</sup> Indeed, the United Kingdom formally derogated from certain rights under the European Convention for some of its overseas territories in which it was facing uprisings against its rule, namely: Aden and South Arabia, Cyprus, Guiana, Kenya, the Federation of Malaya and Singapore, Mauritius, Northern Rhodesia, Nyasaland, Uganda, and Zanzibar.<sup>273</sup> The derogations provided for far-reaching detention powers, far beyond the strict safeguards under Article 5 of the Convention.<sup>274</sup>

Jaime Oraá finds it hard to accept that a crisis in a remote territory could have affected ‘the whole of the UK population’.<sup>275</sup> This is, however, a misreading of the full complexity of this practice, in view of the way in which the British Empire was structured. British colonies differed greatly in their status, ranging from crown colonies to protectorates or protected states.

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<sup>270</sup> EU Committee for Civilian Aspects of Crisis Management, Draft Guidelines for Criminal Procedure in Crisis Management Operations, 30 May 2002, EU Doc. 9465/02, para. 1(6), emphasis added; also cited by Naert (2010), *supra* note 98, p. 578, footnote text.

<sup>271</sup> Mujezinović Larsen (2012), *supra* note 31, pp. 310-11. But he himself remains sceptical in the absence of any state practice or case-law to that effect.

<sup>272</sup> Subject, of course, to Art. 56 ECHR.

<sup>273</sup> Notes Verbales of 24 May 1954, 13 April 1956 and 7 October 1955, 1 YECHR (1955-57), pp. 48-51; Notes Verbales of 21 January 1959 (Cyprus) and 25 May 1959 (Nyasaland), 2 YECHR (1958-59), pp. 78-86; Notes Verbales of 5 January 1960 (Aden), 11 May 1960 (Singapore) and 21 September 1960 (Kenya), 3 YECHR (1960), pp. 68-90; Note Verbale of 5 December 1961 (Zansibar), 4 YECHR (1961), p. 38-54; Note Verbale of 16 November 1962 (Uganda), 5 YECHR (1962), pp. 8-10; Note Verbale of 27 November 1964 (Guiana), 7 YECHR (1964), pp. 28-30; Notes Verbales of 1 March and 12 July 1965 (Guiana and Mauritius), 8 YECHR (1965), pp. 10-17; Note Verbale (Aden and South Arabia) of 30 August 1966, 9 YECHR (1966), pp. 16-18.

<sup>274</sup> None of the derogation notices (*ibid*) mentioned the right to life (Art. 2), nor was there any reference to ‘war’, ‘insurgencies’ or IHL terminology, despite the fact that some of the crises – i.e. the Malayan Emergency (1948-60), the Kenyan Emergency (1952-60), and the Aden Emergency (1963-67) – involved large-scale battles and arguably amounted to NIACs.

<sup>275</sup> Oraá (1992), *supra* note 179, p. 29 (‘No state contested the lawfulness of this practice, even if it is hard to accept that, for example, the emergency in Guiana ... affected the whole of the UK population’).

While this could merely have been a euphemism, it is clear that none of these territories was legally part of the United Kingdom. Rather, they were characterised as ‘territories for the international relations of which the United Kingdom is responsible’ in line with the *colonial* clause under Article 63 of the European Convention.<sup>276</sup> In other words, when declaring emergencies for these territories, it was the *local nation* – clearly separate and distinguishable from the nation of the United Kingdom – that was believed to be at threat. The derogation notice issued for Singapore, for instance, clearly speaks of a ‘threat to the life of the nation in Singapore’.<sup>277</sup>

This position became even more apparent in the case of *Greece v. United Kingdom* before the European Commission in relation to emergency powers used in Cyprus. During the proceedings, Greece inquired about the meaning of the ‘life of the nation’ and expressed its doubts that the United Kingdom could have meant that the situation in Cyprus threatened the ‘whole British nation’.<sup>278</sup> Greece was, however, ready to accept that the term ‘nation’ did not necessarily refer to the ‘entire British Commonwealth’, but could instead be limited to Cyprus.<sup>279</sup> This was also the position of the United Kingdom, which contended that the term ‘nation’:

in the Convention is clearly something distinct from ‘Party’ ... It is common ground that the nation there referred to is for this purpose the nation in Cyprus, the ‘collectivité en place’.<sup>280</sup>

The Commission agreed with Greece and the United Kingdom that the term ‘nation’ meant the island of Cyprus and ‘not the United Kingdom or Commonwealth’,<sup>281</sup> and provided a compelling reason for this contention:

[T]he term "nation" means the *people and its institutions*, even in a non-self-governing territory, or in other words, the organised society, including the *authorities responsible* both under *domestic and international law* for the *maintenance of law and order*. Otherwise, a High Contracting Party, which extended the operation of the Convention to a territory for whose external relations that Party was responsible under Article 63, *would not be entitled* to invoke the right of derogation under Article 15 in any case of an attempt to overthrow by force the established Government of the territory. It seems *inconceivable* that

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<sup>276</sup> Even the Crown Dependencies (Isle of Man, Guernsey and Jersey) and the remaining British overseas territories (including Gibraltar and the Falkland Islands) are not part of the United Kingdom. HRC, 7<sup>th</sup> Report of the United Kingdom, the British Overseas Territories, the Crown Dependencies, CCPR/C/GBR/7, 29 April 2013, para. 108 (‘The Crown Dependencies are not part of the UK but are self-governing dependencies of the Crown’).

<sup>277</sup> Note verbale of 11 May 1960, 3 YECHR (1960), p. 75.

<sup>278</sup> ECmHR, *Greece v. United Kingdom*, Report, Vol. I, 26 September 1958, Application no. 176/56, p. 120, para. 113.

<sup>279</sup> *Ibid.*, p. 120, para. 115.

<sup>280</sup> *Ibid.*, p. 120-21, paras. 114-15.

<sup>281</sup> *Ibid.*, p. 133, para. 130.

the High Contracting Parties can have intended such a result or that any one of them would agree to extend the Convention to such territories on that basis.<sup>282</sup>

The Commission thus acknowledged that non-self-governing territories had a special status *de-tached* from the metropolitan states. Hence, any extension of the Convention to a territory for which a state assumes the responsibility (under domestic and international law) to maintain law and order should also entail the right for the same state to derogate during emergencies, based exclusively on the situation prevailing inside the territory in question in relation to the ‘collectivité en place’.<sup>283</sup> Only the Greek member of the Commission, Constantin Eustathiades, disagreed with this interpretation due to his strong anti-colonial stance.<sup>284</sup> Apart from him, however, there was a wide consensus within the Commission and among the parties (Greece and the United Kingdom) on this central issue in an otherwise extremely controversial case. Taken together with the fact that this has so far been the only detailed pronouncement by a Strasbourg organ on derogations in an exclusively extra-territorial context, the case is of enormous relevance for emergency situations that states may face abroad.<sup>285</sup>

Applied to the context of peace operations, international forces can derogate on the basis of an emergency situation inside the area of deployment, provided that they are indeed responsible for the maintenance of law and order there. This would require both a sufficiently broad mandate and the host state consent, which is typically the case in most missions.<sup>286</sup> As a result, it is not only the plight of the local people that is relevant for the assessment but also the security threat faced by the international forces themselves, as they are functionally part of the *host*

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<sup>282</sup> Ibid. By ten votes to one, the Commission subsequently found that in the instant case the derogation met the requirements of Article 15 of the Convention (p. 138, para. 136).

<sup>283</sup> This reasoning is also consistent with colonial clause in Art. 56 (3) ECHR (previously Art. 63 ECHR), requiring that the provisions of the Convention – including Article 15 – be applied in such territories ‘with due regard, however, to local requirements’.

<sup>284</sup> ECmHR, *Greece v. United Kingdom* (1958), *supra* note 278, Dissenting Opinion of Constantin Eustathiades, pp. 140-150, para. 139. He strongly rejected the possibility that the colonial authorities could be part of the nation in Cyprus, considering the lack of proper democratic participation. Instead, he suggested an all-or-nothing approach, whereby state parties that extend the ECHR to their colonies would not have any power of derogation. This is, however, a short-sided and disingenuous approach, as it would leave the states with no other option but to withdraw their extension under the colonial clause, which would result in the wholesale loss of protection under the ECHR for those living in those overseas territories.

<sup>285</sup> It is surprising that this sensible legal construction managed to escape the institutional memory of the ECtHR and states party to the ECHR, especially in the UK, where the issue of derogations for overseas military operations has been explicitly discussed, both in parliament and in courts, with both the British government and most judges being sceptical as to the possibility of derogating from human rights treaties for overseas operations. Note, however, that the report was not reported and only made public in 1997, upon the request by the UK itself: Committee of Ministers, *Greece v. United Kingdom*, Resolution, 17 September 1997, Application no. 176/56.

<sup>286</sup> The fact that the mandate is based on a Security Council resolution also helps to remove the colonial bias that dominated the above-mentioned case.

*nation* – alongside the national authorities and local population – for the purpose of the derogation clauses.

An additional layer of authorisation or responsibility may also come from other sources of international law. As we have seen above, the Convention on the Law of the Sea (1982) provides for an explicit authorisation for measures against piracy on the high seas.<sup>287</sup> The same is true for international forces that assume the role as an occupying power in a certain area,<sup>288</sup> because occupying powers have an *explicit duty* under humanitarian law to maintain law and order in the territory they occupy.<sup>289</sup> The picture becomes more complex in case of armed hostilities: Non-international armed conflicts in which the peace operation fights on the side of the host state against non-state armed groups would fall squarely within the host nation model. The situation is, however, different where measures are taken against state armed forces, even if the mandate provides an authorisation to protect the civilian population – as in the case of NATO’s air campaign against Gaddafi forces in Libya in 2011. Nevertheless, these cases of international armed conflicts would clearly fall under the war-based ground, which we discussed above.<sup>290</sup>

## Conclusion

In sum, extra-territorial derogations have a clear basis under all derogation regimes. The interests- and mandate-based models considered above have a lot of merit, especially in relation to human rights obligations stemming from general international law and treaties without derogation clauses. But they fail to offer a fully comprehensive framework for extra-territorial derogations. Nevertheless, they may certainly work in tandem and reinforce the operation of the other two models. The host nation model is perhaps best suited to offer a robust basis for derogations in response to an emergency situation. Under this model, international forces are part of the *host nation* and threats against them are crucial for the assessment. Derogations and similar acts by the host state authorities are not necessarily required, nor are they enough to cover the actions of military forces from different sending states. But they may support the claim that there is indeed an emergency under way and that ordinary measures are no longer adequate.

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<sup>287</sup> Arts. 100-107 and 110 UNCLOS.

<sup>288</sup> As we concluded above, however, they would already be covered by the war-based model: see p. 179.

<sup>289</sup> Art. 43 HRLW (‘The authority of the legitimate power having in fact passed into the hands of the occupant, the latter shall take all the measures in his power to restore, and ensure, as far as possible, public order and safety ...’). Blatant disregard for the wishes of the local population may be indeed a complicating factor, but emergency measures taken under such circumstances would likely fail the necessity and proportionality test, which serves as an additional safeguard against abuse. Moreover, since (at least the core of) the principle of self-determination qualifies as *jus cogens*, derogation measures taken with blatant disregard for the wishes of the local population would be equally unlawful on this ground: see from p. 202.

<sup>290</sup> See above, p. 176.

Only if the peace operation becomes involved in an international armed conflict with state armed forces would the derogation basis shift towards the war-based model. To be precise, international armed conflicts constitute a self-standing ground for derogations, regardless of the threat felt back home, even under those human rights treaties whose derogation clauses do not even mention war.

## NOTIFICATION AND DECLARATION REQUIREMENT

### Introduction

As noted above, all derogation clauses include a notification requirement, whereas the Covenant and the Arab Charter entail also the duty to officially proclaim the derogation. However, apart from the British practice of emergency powers in its colonial possessions, no state has ever submitted a derogation notice in relation to measures it had taken outside its own territory.<sup>291</sup> This dilemma is even more apparent in the context of peace operations, even though the issue has received increasing attention in recent years. The reluctance of states to derogate in extra-territorial settings is mainly due to their flawed litigation strategies. In other words, lodging a formal derogation would gravely undermine the claim that the relevant treaty was not applicable in the place in question. As this strategy is proving increasingly unsuccessful, states may well decide to drop it altogether. In addition, states may also have been under the impression that extra-territorial derogations were simply not available to them due to the rigid wording of the derogation clauses. However, as we have seen above, such concerns are rather unfounded and the text of the provisions should not be seen as an obstacle by states that encounter genuine emergency situations while acting abroad.

Both aspects may also explain why hardly any state has ever derogated for the measures it has taken in the context of an international armed conflict, including military occupations.<sup>292</sup> This weakens the claim that the absence of derogations in armed conflict situations is mainly driven by the belief among states that humanitarian law renders the relevant human rights rules inapplicable. If that was the case, states would also refrain from derogations in situations of non-

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<sup>291</sup> Indeed, not even the derogation notice of Israel mentions the Palestinian territories, as it continues to reject the extra-territorial reach of the ICCPR (of course, with the exception of the Golan Heights and East Jerusalem, which Israel has officially annexed).

<sup>292</sup> See the detailed outline of the derogation practice in this regard: Debuf, *Captured in War: Lawful Internment in Armed Conflict* (Hart Publishing 2013), p. 164 (text of footnote 521).

international armed conflict. Practice, however, shows that states have indeed derogated in some cases.<sup>293</sup> Where they did not, the authorities may have been worried about the negative political repercussions that such public statements might have.

Policy rather than legal considerations may also be responsible for the absence of derogations in some of the countries that contribute troops to peace operations. In fact, emergency legislation and derogation notifications are rather unpopular and run the risk of eroding public support for the country's participation in such missions, which may already spark enough controversy.<sup>294</sup> What is also remarkable is that also the host nation governments only rarely issue formal derogations, which makes it even more difficult for states involved in a peace operation to invoke derogations on their behalf. This pervasive failure to notify in relation to peace operations begs the question as to whether derogations are simply unavailable under such circumstances or whether they could still be invoked to justify actions that would otherwise be at odds with the ordinary human rights standards. That is why this section will consider the legal consequences that the failure to comply with the procedural requirements may have and two possible alternative models under which derogations may still be available.

### **Duty to Notify or to Declare**

When the International Court of Justice rendered its advisory opinion in the *Wall* case in 2004, it considered possible violations of the Covenant as a result of Israel's construction of a security barrier inside the West Bank. The Court observed that the derogation notice submitted only mentioned Article 9 (right to liberty and security) and concluded that the other articles of the Covenant remained fully applicable both in Israel and inside the West Bank.<sup>295</sup> It is, however, questionable whether this overly formalistic approach was really warranted by the facts and whether it was in line with the Human Rights Committee's previous practice.<sup>296</sup> Indeed, the failure of states to formally notify their derogations had never in itself been enough for the Committee to deny states the right to invoke derogations throughout the proceedings before

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<sup>293</sup> Ibid.

<sup>294</sup> Krieger (2011), *supra* note 269, p. 438 (referring to constitutional and political constraints in states party to the ECHR like Germany).

<sup>295</sup> ICJ, *Wall Opinion* (2004), *supra* note 9, paras. 127-29.

<sup>296</sup> Indeed, focusing on the necessity and proportionality test under Art. 4 (1) ICCPR would probably have led to the same findings.

it.<sup>297</sup> Moreover, the Committee as a whole remained silent on this issue in its General Comment 29, issued in 2001. However, one of its members, Sir Nigel Rodley, stressed this point in his concurring opinion in *Sayadi and Vinck v. Belgium* (2008):

[T]he absence of compliance with such procedural rules by a State party to an international human rights agreement cannot be taken as evidence that derogation has not happened or cannot be effected.<sup>298</sup>

This position is also widely supported in the legal literature.<sup>299</sup> What supports this view is the fact that the notification requirement is only part of the third paragraph of the derogation clauses and that it uses the wording ‘availing itself of the right of derogation’, which implies the existence of an unconditional power to derogate. Moreover, notifications do not benefit the affected individuals, but are to be sent to third states or the relevant international body in order to ensure international control.

This stands in clear contrast to the duty to officially proclaim the existence of the emergency, which is part of the first paragraph of Article 4 of the Covenant. Its primary purpose is to keep individuals affected by the derogation measure duly informed and thus to prevent *de-facto* derogations.<sup>300</sup> This important distinction between the notification requirement and the duty to publicity is also reflected in the practice and doctrinal writings related to the European Convention.<sup>301</sup> A case in point is *Cyprus v. Turkey* (1976), decided by the European Commission. Noting that Turkey had made no communication in relation to the invasion and occupation of northern Cyprus, the Commission emphasised the important function of formal notifications but

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<sup>297</sup> HRC, *Landinelli Silva v. Uruguay*, Views, 8 April 1981, Communication No. R.8/34, UN Doc. Supp. No. 40 (A/36/40), para. 8.3.

<sup>298</sup> HRC, *Sayadi and Vinck v. Belgium*, Views, 29 December 2008, Communication no. 1472/2006, Appendix B, individual opinion of Committee member Sir Nigel Rodley (concurring), p. 37.

<sup>299</sup> Joseph and Castan (2013), *supra* note 182, p. 921 (but noting that states failing to notify may have great difficulty in proving the existence of a public emergency during legal proceedings); Nowak, *U.N. Covenant on Civil and Political Rights: CCPR Commentary* (2<sup>nd</sup> edn., Engel Verlag 2005), p. 107; Oraá (1992), *supra* note 179, p. 58-86 (also for ECHR and ACHR); Schmahl, ‘Derogation von Menschenrechtsverpflichtungen in Notstandslagen’, in: Fleck (ed.), *Rechtsfragen der Terrorismusbekämpfung durch Streitkräfte* (Nomos 2004), 125-46, pp. 143-44. For the opposite view: Svensson-McCarthy, *The International Law of Human Rights and States of Exception* (Martinus Nijhoff 1998), pp. 683-718 (who sees the notification as a material part of the derogation procedure and thus a constitutive requirement for exercising the right to derogate).

<sup>300</sup> Nowak (2005), *ibid.*, p. 92; Oraá (1992), *supra* note 179, p. 35.

<sup>301</sup> Harris et al., *Law of the European Convention on Human Rights* (3<sup>rd</sup> edn., OUP 2014), p. 847 (calling a sanction of nullity unnecessarily draconian); White and Ovey, *The European Convention on Human Rights* (5<sup>th</sup> edn., OUP 2010), pp. 121-122 (but noting that states failing to notify may have great difficulty in proving the existence of a public emergency during legal proceedings); Oraá (1992), *supra* note 179, pp. 34-86 (confirming this distinction for all three major treaties: ICCPR, ECHR and ACHR). For the opposite view: Svensson-McCarthy (1998), *supra* note 299, p. 683-718.

found it unnecessary to clarify the consequences of a failure to comply with the procedural requirements of Article 15 (3).<sup>302</sup> However, it went on to say that:

[I]n any case, Art. 15 requires *some formal and public act of derogation, such as a declaration of martial law or state of emergency*, and that, where no such act has been *proclaimed* by the High Contracting Party concerned, although it was not in the circumstances prevented from doing so, Art. 15 cannot apply.<sup>303</sup>

Unlike Article 4 (1) of the Covenant, the European Convention does not explicitly mention the publicity requirement. It does, however, apply indirectly as measures under Article 15 need to be consistent with other obligations under international law, including the Covenant.<sup>304</sup> Commission member Giuseppe Sperduti clarified in his dissenting opinion the purpose and scope of the publicity requirement to which the majority had referred:

[I]t does not seem compatible with the spirit of the European Convention that it should envisage a right of derogation which would be exercised without even the citizens of the state, the inhabitants of a territory or other persons subject for some other reason to the jurisdiction of the High Contracting Party being warned in what circumstances and under what conditions they might be subjected to restrictions, constraints or sanctions contrary to the rights and freedoms which the Convention normally assures them.<sup>305</sup>

He drew a clear distinction, however, between specific measures and the general acts authorising and regulating them.<sup>306</sup> Turkey had only declared martial law in some provinces on the Turkish mainland, but not for Cyprus.<sup>307</sup> This led the Commission's majority to conclude that in the absence of 'some formal and public act of derogation' Article 15 was inapplicable to Turkey's actions on the island.<sup>308</sup> This is, however, hardly convincing. Even without a declaration of martial law extending to Cyprus, everyone present on the island could witness the armed invasion and subsequent occupation by Turkish armed forces. They could thus easily anticipate what these exceptional events meant for the enjoyment of their rights and freedoms under the Convention.

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<sup>302</sup> ECmHR, *Cyprus v. Turkey* (1976), *supra* note 208, paras. 526-27. For a clearer position on this issue: dissenting opinion of Mr Sperduti, joined by Mr Trechsel, on art. 15 of the Convention, para. 3 ('In brief, the obligation in question should, in principle at least, be seen as an *autonomous obligation* in the sense that its violation *does not affect* the valid exercise of the right of derogation flowing from the same article').

<sup>303</sup> *Ibid.*, para. 527.

<sup>304</sup> ECtHR, *Brannigan and McBride v. United Kingdom*, Judgement, 26 May 1993, Application nos. 14553/89 and 14554/89, paras. 68-73. However, at the time of the *Cyprus* case, most European states, including Turkey, had not yet become a party to the ICCPR.

<sup>305</sup> ECmHR, *Cyprus v. Turkey* (1976), *supra* note 208, dissenting opinion of Sperduti, para. 4.

<sup>306</sup> *Ibid.*, dissenting opinion of Sperduti, para. 4.

<sup>307</sup> *Ibid.*, *Cyprus v. Turkey* (1976), *supra* note 208, paras. 520-23.

<sup>308</sup> *Ibid.*, para. 528.

## Effect of Humanitarian Law

What is most striking about the European Commission's verdict in *Cyprus v. Turkey* is its findings on the detention of Cypriot prisoners of war. Despite its conclusion that Turkey was barred from invoking its derogation powers, the Commission nonetheless held that it:

has not found it necessary to examine the question of a breach of Art. 5 with regard to persons accorded the status of prisoners of war.<sup>309</sup>

While the reasoning behind this finding remains vague, Sperduti provided a convincing explanation for this conclusion:

[Certain] situations which, from the *moment* when they arise, *render applicable* rules – of domestic or international law as the case may be – under which *exceptional measures* can be taken in the conditions envisaged by them. One cannot see how one could deduce from Art. 15 that it was necessary to resort to further forms of publicity in relation to these rules. ... [M]easures which are in themselves contrary to a provision of the European Convention but which are taken legitimately under the international law applicable to an armed conflict, are to be considered as *legitimate measures of derogation* from the obligations flowing from the Convention.<sup>310</sup>

Hence, the application of humanitarian law – which is a matter of facts alone – entails an *implicit* derogation from human rights law without further notice. This automatic effect is consistent with the traditional laws of war,<sup>311</sup> but has also found support in recent scholarly writing. Rusen Ergec, for instance, sees no need for additional formalism in situations of armed conflict.<sup>312</sup> Els Debuf, however, confirms the implicit derogation effect of humanitarian law only for international armed conflicts, for which Geneva Conventions III and IV provide detailed internment regimes for prisoners of war and civilians, respectively.<sup>313</sup> Marko Milanović, by contrast, calls the automaticity argument 'seriously flawed', because in his view derogation measures are and should remain the 'choice of the state'.<sup>314</sup> This largely reflects the position of Felix Ermacora, who in his separate opinion on the above-mentioned *Cyprus* case cautioned

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<sup>309</sup> Ibid, para. 313.

<sup>310</sup> Ibid, dissenting opinion of Sperduti, paras. 5 and 7, emphasis added.

<sup>311</sup> See, for instance: Instructions for the Government of Armies of the United States in the Field, Prepared by Francis Lieber, promulgated as General Orders No. 100 by President Lincoln, 24 April 1863, Art. 1 ('A place, district, or country occupied by an enemy stands, in consequence of the occupation, under the Martial Law of the invading or occupying army, whether any *proclamation* declaring Martial Law, or any *public warning* to the inhabitants, has been *issued or not*', emphasis added).

<sup>312</sup> Ergec (1987), *supra* note 179, pp. 304-305.

<sup>313</sup> Debuf (2013), *supra* note 292, pp. 166-70.

<sup>314</sup> Milanović (2014), *supra* note 214, pp. 20-22 (who is, however, unclear on the distinction between the notification and declaration requirement).

the Commission against assuming this role *ex officio* and substituting ‘the sovereign will of a State’.<sup>315</sup>

The European Court was confronted with a similar legal problem in *Hassan v. United Kingdom* (2014). The case involved the short internment of a young Iraqi in April 2003, during the final phase of the coalition-led invasion of Iraq. He was initially interned at Camp Bucca under suspicion of being a combatant or a civilian otherwise posing a threat to Allied forces, but soon cleared by a review panel and promptly released, in full compliance with Article 78 of Geneva Convention IV.<sup>316</sup> Although the United Kingdom had not formally derogated from the European Convention for its military actions in Iraq, it invoked its powers to intern under humanitarian law. The Court largely followed this argument in relation to Article 5 of the Convention:

[T]he grounds of permitted deprivation of liberty set out in subparagraphs (a) to (f) of that provision *should be accommodated*, as far as possible, with the taking of prisoners of war and the detention of civilians who pose a risk to security under the Third and Fourth Geneva Conventions. ... It can only be in *cases of international armed conflict*, where the taking of prisoners of war and the detention of civilians who pose a threat to security are accepted features of international humanitarian law, that Article 5 could be *interpreted* as permitting the exercise of such broad powers.<sup>317</sup>

The Court applied the same reasoning to the procedural safeguards, especially the judicial review of detentions,<sup>318</sup> and ultimately found no violation of Article 5.<sup>319</sup> This novel approach seems, however, to push the concept of interpretation to a breaking point. It has been rightly criticised by Judge Spano in his laudable dissenting opinion, joined by three other judges. According to them, it remains unclear what the majority means by ‘accommodation’ and to what extent it still qualifies as interpretation rather than treaty modification, considering that Article 5 (1) – unlike some other human rights treaties – contains an exhaustive list of grounds for detention. This unprincipled use of methodology is particularly worrying when it concerns the restriction of existing rights rather than their expansion.<sup>320</sup> This criticism is especially warranted in relation to subsequent practice. According to the majority, there is consistent practice among states not to derogate from human rights treaties in relation to internment of prisoners of war

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<sup>315</sup> ECmHR, *Cyprus v. Turkey* (1976), *supra* note 208, Separate Opinion of Commission Member Felix Ermacora, para. 7.

<sup>316</sup> Art. 78 (1) GC IV (‘If the Occupying Power considers it necessary, for *imperative reasons of security*, to take safety measures concerning protected persons, it may, at the most, subject them to assigned residence or to *internment*’, emphasis added).

<sup>317</sup> ECtHR, *Hassan v. United Kingdom* (2014), *supra* note 122, para. 104.

<sup>318</sup> *Ibid*, par. 106.

<sup>319</sup> *Ibid*, paras. 109-110.

<sup>320</sup> *Ibid*, Partly Dissenting Opinion of Judge Spano, joined by Judges Nicolaou, Bianku and Kalaydjewa, paras. 11-19.

and civilians during international armed conflicts.<sup>321</sup> However, this common pattern is rather inconclusive and does not necessarily mean that states intended to modify the content of Article 5. Indeed, as mentioned above, there are a number of different reasons that may contribute to the absence of derogations, including political considerations and the misbelief among certain states that human rights treaties do not apply abroad.

Nevertheless, despite the legitimate criticism by Judge Spano, which is widely shared among commentators,<sup>322</sup> the approach taken by the European Court is perhaps best understood as a subtle confirmation of the concept of *implicit derogations* rather than a permanent treaty modification. What supports this conclusion is the fact that the Court still requires the respondent states to explicitly invoke humanitarian law in their pleadings.<sup>323</sup> What is more, the Court made clear that this *ad hoc* option is only available in *cases of international armed conflict*, where measures of internment are ‘accepted features’ of humanitarian law.<sup>324</sup> It would therefore seem only of limited relevance in peace operations, as they are more likely to become involved in a non-international armed conflict with non-state armed groups. Moreover, it still remains unclear whether this approach would also apply to measures other than detentions – a question to be considered in the next chapter, focused on the interplay between both legal regimes.<sup>325</sup>

### Effect of the Mandate

Even if armed conflicts and occupations may give rise to *implicit derogations*, this still leaves the question open in relation to specific measures or situations not covered by humanitarian law. There may be indeed other legal regimes of a similar emergency nature.<sup>326</sup> It may be argued that the specific mandate of the peace operation could have such a character.<sup>327</sup> Indeed, the

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<sup>321</sup> Ibid, para. 101. To support this finding, the majority quotes extensively (para. 42) from the Debuf (2013), *supra* note 292, p. 164, who (as we have just seen) supports the concept of implicit derogations.

<sup>322</sup> See, for instance: Fatima, ‘Reflections on Hassan v UK: A Mixed Bag on the Right to Liberty (Part 2)’, 14 October 2014, <http://justsecurity.org/15942/reflections-hassan-uk-mixed-bag-liberty>; Hill-Cawthorne, ‘The Grand Chamber Judgement in Hassan v UK’, 16 September, [www.ejiltalk.org/the-grand-chamber-judgement-in-hassan-v-uk](http://www.ejiltalk.org/the-grand-chamber-judgement-in-hassan-v-uk).

<sup>323</sup> ECtHR, *Hassan v. United Kingdom* (2014), *supra* note 122, para. 107.

<sup>324</sup> Ibid, para. 104.

<sup>325</sup> For war-related detentions under the Art. 9 ICCPR, see the following, excellent post on the HRC’s newly adopted General Comment 35 (2014), *supra* note 211: Fatima, ‘UN HRC’s General Comment on the Right to Liberty and Security: A Missed Opportunity? (Part Two)’, 20 November 2014, <http://justsecurity.org/17596/human-rights-committees-general-comment-no-35-security-detention>.

<sup>326</sup> Indeed, Sperduti only referred to IHL as one among many: ECmHR, *Cyprus v. Turkey* (1976), *supra* note 208, dissenting opinion of Sperduti, para. 5.

<sup>327</sup> De Wet (2004), *supra* note 251, pp. 202 and 321-22 (arguing that the determination of a threat to international peace is sufficient for finding that a state of emergency exists and that neither the Council nor the participating states should be bound by further requirements for declaration). Naert (2010), *supra* note 98, pp. 579-80 (only briefly entertaining the idea, but considering the resolutions’ content too vague).

relevant Security Council resolutions usually contain a detailed description of the emergency situation in the mission area and entrust a number of tasks to the peace operation in order to mitigate that situation. Moreover, they are published upon adoption, which makes them easily accessible for the general public in line with the publicity requirement. In addition, nearly all resolutions provide a mandate that is restricted to a limited period of time, with the possibility of renewal after periodic review – another common feature of emergency acts. The fact that they are almost all adopted under Chapter VII of the Charter does not necessarily matter, but certainly adds a level of importance and authority.

The difficulty, however, is that the resolutions are usually rather vague and do not clearly spell out the specific measures that may be taken by the personnel of the peace operation. And while there are a number of internal operational regulations and directives, they are usually classified and not shared with the general public affected by the relevant exceptional measures. An exception is perhaps Colin Powell's letter attached to Resolution 1546 (2004), which had explicitly mentioned internment among the measures to be carried out by coalition forces in post-occupation Iraq.<sup>328</sup> As shown above in relation to the *Al-Jedda* case (2011), the British government only based its arguments on Article 103 of the Charter and the overriding effect of Security Council resolutions.<sup>329</sup> The verdict of the European Court should therefore not be seen as a wholesale rejection of the derogation option based on the mandate, which is structurally different from the effects of Article 103.

The case may be different where the peace operation is part of an international territorial administration, which sets its own comprehensive legal framework in the territory similar to the domestic legal order of states. Cases in point are the early years of the international missions in Kosovo and East Timor, both established in 1999. In Kosovo, for instance, UNMIK referred to an emergency situation to justify its far-reaching detention powers.<sup>330</sup> But this was not reflected in other public acts<sup>331</sup> or during the reporting procedure before the Human Rights Committee.<sup>332</sup>

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<sup>328</sup> S/RES/1546, 5 June 2004, annex.

<sup>329</sup> ECtHR, *Al-Jedda v. United Kingdom* (2011), *supra* note 59, paras. 105-106, emphasis added.

<sup>330</sup> UNMIK Statement on the Ombudsperson Special Report No. 3 ('The situation in Kosovo is analogous to emergency situations envisioned in the human rights conventions'); Ombudsperson Institution, *Special Report No. 3 on the Conforming of Deprivations of Liberty under 'Executive Orders' with Recognized International Standards* of 29 June 2001, [www.ombudspersonkosovo.org/repository/docs/E4010912a\\_633702.pdf](http://www.ombudspersonkosovo.org/repository/docs/E4010912a_633702.pdf).

<sup>331</sup> UNMIK/REG/1999/24, On the Law Applicable in Kosovo, 12 December 1999, para. 1 (3), which refers to the full application of the relevant human rights treaties.

<sup>332</sup> HRC, Report Submitted by UNMIK to the HRC on the Human Rights Situation in Kosovo since June 1999, 13 March 2006, CCPR/C/UNK/1; HRC, Concluding Observations, Kosovo, 14 August 2006, CCPR/C/UNK/CO/1.

Views are therefore divided as to whether there was indeed a duly declared public emergency in Kosovo.<sup>333</sup>

## Conclusion

The fact alone that no derogation notice has been issued is not enough to deny states the right to invoke their derogation powers during legal proceedings. What is essential is that those affected by the emergency measures are duly informed. The factual circumstances of armed conflicts or military occupations and the special rules of humanitarian law whose application they trigger should be seen as sufficiently clear, so that no further notice would be required.

It should be emphasised that the need to derogate may vary from state to state. That is to say, troop-contributing states that have ratified the European Convention – whose rights set generally stricter standards than those found in other human rights treaties – may feel a greater urgency to lodge a derogation than states from other regions,<sup>334</sup> including the majority of the host states. The same holds true for the relevant international organisations (e.g. UN, NATO, AU), who are usually bound by less rigid human rights standards under general international law.<sup>335</sup> Nevertheless, it seems more appropriate to adopt a common approach to derogations among all states and organisations involved in the mission.

The specific mandates of the peace operations have so far not been used. However, as shown above, this approach has much merit. Indeed, using Security Council resolutions and mission-related documents proactively for specifying emergency measures would have the advantage of combining the mandate authorisations with the notification and public announcement of the emergency. Most importantly, it would allow dealing with the derogation issue in one package, which would be of relevance for the United Nations, relevant regional organisations and sending states as well as the host states.

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<sup>333</sup> In support: Kolb et al., *L'Application du Droit International Humanitaire et des Droits de l'Homme aux Organisations Internationales. Forces de Paix et Administrations Civiles Transitoires* (Bruylant 2005), p. 313. For the opposite view: Stahn, *The Law and Practice of International Territorial Administration: Versailles to Iraq and Beyond* (CUP 2008), pp. 506-508. Note also that the question of emergency powers in Kosovo remained entirely unaddressed in any of the cases before the ECtHR, due to its finding in *Behrami and Saramati v. France and Norway* (2007), *supra* note 50.

<sup>334</sup> Some national contingents may also be deployed to more peaceful regions and tasked with much fewer functions (e.g. no arrests and detentions) than others, making the derogation issue a less pressing question for their respective sending states.

<sup>335</sup> See again the discussion above, from p. 38.

## NECESSITY AND PROPORTIONALITY, AND OTHER SAFEGUARDS

As we noted above, emergency situations do not allow for a whole-sale suspension of all human rights that are not specifically listed as non-derogable. In fact, all clauses state that the specific derogation measures must not exceed what is ‘strictly required by the exigencies of the situation’.<sup>336</sup> This constitutes a necessity and proportionality requirement in a material sense, as it needs to be shown that the usual limitations available under the rights themselves are not sufficient to address the emergency situation.<sup>337</sup> The requirement has, however, also an impact on the geographical and temporal scope of the emergency measure in question.<sup>338</sup> The Human Rights Committee is therefore correct in stressing in its recently adopted General Comment 35 on detentions that:

When the emergency justifying measures of derogation arises from the participation of State party’s armed forces in a peacekeeping mission abroad, the geographic and material scope of the derogating measures must be limited to the exigencies of the peacekeeping mission.<sup>339</sup>

In other words, only in those parts of the mission area *directly affected* by the emergency and only *to the extent* that the ordinary legal framework proves inadequate can international forces involved in a peace operation take measures that derogate from the relevant rights. As previ-

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<sup>336</sup> Art. 15 (1) ECHR; Art. 4 (1) ICCPR; Art. 27 (1) ACHR; Art. 4 (1) Arab Charter; Art. 35 (1) CIS Convention (‘extent strictly required by the gravity of the situation’). See also more generally: Oraá (1992), *supra* note 179, pp. 140-70.

<sup>337</sup> HRC, General Comment 29 (2001), *supra* note 178, paras. 4-5.

<sup>338</sup> ECtHR, *Sakik v. Turkey*, Judgement, 26 November, Application nos. 23878/94 et al., paras. 37-39 (requiring the limitation of the measures to the effected provinces); HRC, Concluding Observations on Israel, 18 August 1998, CCPR/C/79/Add.93, para. 11 (criticising the long-term state of emergency in Israel since 1948 and calling for a review of its continued need and the material and territorial scope of the measures).

<sup>339</sup> HRC, General Comment 35 (2014), *supra* note 211, para. 65, p. 19, footnote text.

ously noted, this is further restricted by the set of rights deemed non-derogable and other obligations under international law (including *jus cogens*),<sup>340</sup> which are a clear corollary of the necessity and proportionality requirement.<sup>341</sup> That is why there needs to be a comprehensive approach to derogations from the same rights across different human rights treaties and general international law.<sup>342</sup>

Nonetheless, this does not mean that derogations will ultimately be the same for all human rights treaties, because they do not all use similarly strict language in relation to their rights as the European Convention. This is especially apparent in relation to the right to life and the right to liberty, where the European Convention uses an exhaustive list of exceptions rather than an arbitrariness standard like the Covenant and some other human rights treaties. That is also why there is indeed a greater need to derogate from the European Convention in times of armed conflict. Having said that, this does not mean that humanitarian law will fully displace the rights to life and liberty in case of derogations in times of armed conflict, as some scholars seem to suggest.<sup>343</sup> Indeed, the extent to which humanitarian law becomes the only determinant is still subject to the necessity and proportionality requirement under the derogation clause itself. Giuseppe Sperduti, in his laudable dissenting opinion in *Cyprus v. Turkey*, stated on this issue:

It is to be noted that the rules of international law concerning the treatment of the population in occupied territories ... are undeniably capable of *assisting the resolution* of the question whether the measures taken ... are or are not justified according to the criterion that only measures of derogation strictly required by the circumstances are authorised. In fact these rules duly take account of the *necessities* of the occupying power ... [and] will *in principle* assure that that High Contracting Party will not go *beyond the limits* of the right of derogation conferred on it by Art. 15 of the Convention.<sup>344</sup>

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<sup>340</sup> For a list of the most frequently cited examples of *jus cogens* norms: ILC, Report of the Study Group of the International Law Commission, Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law, finalized by Martti Koskenniemi, 13 April 2006, UN Doc. A/CN.4/L.682, para. 33 ('the prohibition of aggression, slavery and the slave trade, genocide, racial discrimination apartheid and torture, as well as basic rules of international humanitarian law applicable in armed conflict, and the right to self-determination'). More generally: Orakhelashvili, *Peremptory Norms in International Law* (OUP 2006).

<sup>341</sup> HRC, General Comment 29 (2001), *supra* note 178, para. 11-16 (finding that more rights than those listed in Art. 4 (2) ICCPR may indeed have a non-derogable character, at least the essential core of these rights). On this issue, see also: Scheinin (2013), *supra* note 163, pp. 532-35.

<sup>342</sup> Given our earlier findings that the requirements for derogations from general international law are indeed largely the same as (albeit less restrictive than) those under the derogation clauses, there is little support for the concerns expressed by some: Sari (2013), *supra* note 213, para. 23 ('the UK also remains bound by any human rights norms forming part of customary international law; the effect of a derogation on these customary norms is unclear').

<sup>343</sup> Ekins et al. (2015), *supra* note 209, p. 34-35.

<sup>344</sup> ECmHR, *Cyprus v. Turkey* (1976), *supra* note 208, dissenting opinion of Sperduti, para. 6, emphasis added.

In general, this is certainly a correct assessment, but the statement refers foremost to military occupations, where many provisions have also built-in necessity clauses. Moreover his careful formulation (‘in principle’) implies that there may indeed be situations where the full application of humanitarian law might go beyond the acceptable limits of Article 15. It appears that this is the correct reading of the Human Rights Committee’s slightly vague statement:

that even during an armed conflict measures derogating from the Covenant are allowed only if and *to the extent* that the situation constitutes a threat to the life of the nation.<sup>345</sup>

This issue is closely related to the relationship between human rights law and humanitarian law, which will be considered in great detail in the following chapter. The reference to other obligations under international law not only covers humanitarian law but also the *jus ad bellum*. Indeed, during the drafting of the International Covenant – which partly coincided with that of the European Convention – there was consensus among all delegates that derogations had to be consistent with the UN Charter, including cases of self-defence or measures authorised by the Security Council under Chapter VII.<sup>346</sup> Nevertheless, human rights bodies have so far refrained from denying the power to derogate in cases of *jus ad bellum* violations.<sup>347</sup> It is also highly unlikely that this question would ever play any role in the context of peace operations, given that they have usually a sufficiently broad mandate.<sup>348</sup>

## 4.4 CONCLUSION

This chapter shows that human rights law is clearly applicable to the actions of states and international organisations during peace operations. Neither the spatial or personal models, nor the public powers model provide sufficient justification for limiting the geographical scope of human rights law. Rather, there is strong evidence for a convergence in the practice of human rights institutions towards a gradual model for the extra-territorial application of human rights law. Accordingly, negative obligations apply at all times, while the scope of positive obligations

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<sup>345</sup> HRC, General Comment 29 (2001), *supra* note 178, para. 3, emphasis added.

<sup>346</sup> See, for instance: E/CN.4/SR.330, 1 July 1952, pp. 4-10 (featuring the comments made by Chile, Venezuela, the USA, the Soviet Union, France, Egypt and the UK).

<sup>347</sup> ECmHR, *Cyprus v. Turkey* (1976), *supra* note 208 (not discussing the legality of the Turkish invasion, although this had been explicitly pleaded by Cyprus, para. 510); HRC, General Comment 29 (2001), *supra* note 178 (mentioning nowhere the UN Charter); ECtHR, *Hassan v. United Kingdom* (2014), *supra* note 122 (not discussing the legality of the invasion); ECtHR, *Georgia v. Russia II* (2011), *supra* note 125 (not discussing the legality of the Russian invasion).

<sup>348</sup> Moreover, even in case of transgressions of the mandate, these are usually rather marginal.

is context-specific and depends on certain levels of control and possibly explicit authorisations.<sup>349</sup>

Even though human rights law applies directly to the actions of states and international organisations involved in a peace operation, it shows a high degree of flexibility to address security concerns. In fact, in addition to the broad range of permissible limitations already available, most human rights treaties provide for the possibility of derogations from a large number of rights, subject to certain requirements and additional safeguards. In order to overcome the apparent strictures of the derogation clauses (usually requiring a threat to the life of the nation) in extra-territorial settings, this chapter suggest the ‘host nation’ model as the best solution for derogations in response to emergency situations in the mission area. Under this model, international forces are part of the *host nation* and threats against them are crucial for the assessment. Derogations and similar acts by the host state authorities are not necessarily required, nor are they enough to cover the actions of military forces from different sending states. But they may support the claim that there is indeed a public emergency in motion and that ordinary measures are no longer adequate. Only if the peace operation becomes involved in an international armed conflict with state armed forces would the derogation basis shift towards the war-based model, which provides a self-standing ground for derogations.

The fact alone that no derogation notice has been issued is not enough to deny states the right to invoke their derogation powers during legal proceedings. What is essential is that those affected by the emergency measures are duly informed. The factual circumstances of armed conflicts or military occupations and the special rules of humanitarian law, whose application they trigger, should be seen as sufficiently clear, so that no further notice would be required. Moreover, Security Council resolutions and related documents could be used proactively for specifying emergency measures. This would allow the derogation issue to be dealt with in one package, relevant for the United Nations, the regional organisations and sending states involved as well as the host states. Yet, even in case of a genuine emergency, the scope of permissible measures is clearly restricted by the set of non-derogable rights, other international legal obligations (including humanitarian law and the mandate) and the necessity and proportionality requirement.

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<sup>349</sup> See the detailed outline of different mission scenarios giving rise to human rights obligations of states and IOs involves in a peace operations (including negative and positive obligations), from p. 162.

# 5 REGIME INTERPLAY IN PEACE OPERATIONS

## 5.1 GENERAL OVERVIEW

The two previous chapters considered the grounds for the application of humanitarian and human rights law in the course of peace operations and concluded that both legal regimes are likely to apply and to govern the conduct of such operations in the field. Given the volatile security situation in the mission areas, it is indeed not unlikely that the peace operation will become – at least for some period of its deployment – a party to an armed conflict.<sup>1</sup> Such confrontations will usually take the form of a non-international armed conflict, as they almost always involve members of non-state armed groups on the other side.<sup>2</sup>

Human rights law applies virtually everywhere, including in overseas military missions, as there is no convincing reason nor any textual support for limiting its operation. The application of human rights law is subject to a gradual test: negative obligations need to be observed at all times, while the application of positive human rights obligations is context-specific. Moreover, individual human rights are subject to permissible limitations and to derogations – which are equally available in peace operations – subject to certain requirements and restrictions, including the non-derogability of certain rights, and the necessity and proportionality requirement.

Hence there will often be cases during peace operations in which both legal regimes apply to the same situation – both in space and time. This may lead to a clash between opposing rules in relation to certain actions, especially on the question as to when and how (lethal) force may be used, a question on which both legal regimes differ greatly. Certainly, this potential conflict cannot be avoided by exclusively relying on humanitarian law under an absolute *lex specialis*

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<sup>1</sup> Cases where this is certainly the case: MINUSMA in Mali (10,000 troops), MONUSCO in the DRC (20,000 troops), AMISOM in Somalia (21,000 troops) and previously, ISAF in Afghanistan (with more than 100,000 troops) and the Multinational Force in Iraq (with more than 100,000 troops).

<sup>2</sup> In very exceptional situations, peace operations may also assume the role of an occupying power, which will also trigger the application of humanitarian law, even in the absence of armed hostilities with local armed forces.

concept, making it the only applicable law in times of armed conflict. Nor does it seem appropriate to disregard humanitarian law altogether and give exclusive preference to human rights law.

That is why this chapter will consider the interplay between human rights and humanitarian law in relation to the different use-of-force rules. We will first consider the general features of norm interaction and the norm conflict tools, which we will then apply to the concurrent application of human rights and humanitarian law. This will be followed by a detailed examination of the substantive rules on the use of (lethal) force under both regimes to identify differences between them as a possible source of norm conflicts. Thereafter, we will consider different models in order to identify the best solution for overcoming these possible conflicts.

## 5.2 INTERACTION AND CONFLICT BETWEEN NORMS AND LEGAL REGIMES

Much has been written in recent years about the conflict between human rights law and humanitarian law as well as the discontents of the *lex specialis* doctrine.<sup>3</sup> However, some of the scholarly writings fail to address what appears to be the primary and most central question: what is a norm conflict?<sup>4</sup> This section will therefore briefly examine how norms interact for the purpose of defining conflicts between legal norms, followed by a discussion on the available tools to overcome them in the fragmented international legal order. We will then consider what these general considerations on norm interaction may mean for navigating the interplay between human rights law and humanitarian law.

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<sup>3</sup> For three major compilations on the relationship between IHL and human rights law: Kolb and Gaggioli (eds.), *Handbook of Human Rights and Humanitarian Law* (Elgar Publishing 2013); Ben-Naftali (ed.), *International Humanitarian Law and International Human Rights Law: Pas de Deux* (OUP 2011); Arnold and Quéniwet (eds.), *International Humanitarian Law and Human Rights Law. Towards a New Merger in International Law* (Martinus Nijhoff 2008).

<sup>4</sup> Krieger, 'A Conflict of Norms: The Relationship Between Humanitarian Law and Human Rights Law in the ICRC Customary Law Study', 11 JCSL (2006), 265-91; Prud'homme, 'Lex Specialis: Oversimplifying a More Complex and Multifaceted Relationship?', 40 (2) Israel Law Review (2007), 356-95; Lindroos, 'Addressing Norm Conflicts in a Fragmented Legal System: The Doctrine of Lex Specialis', 74 (1) Nordic Journal of International Law (2005), 27-66.

## GENERAL FEATURES

Before addressing the issue of norm conflicts, one has to consider the different functions that international norms may have. We can generally distinguish between *obligations* and *rights*.<sup>5</sup> Obligations can take the form of *prohibitions* (prohibitive norms or negative obligations) or *commands* (prescriptive norms or positive obligations), while *rights* may qualify either as *exemptions* or *permissions*.<sup>6</sup> Permissive norms have to be explicit and thus do not include so-called ‘negative permissions’, which are premised on the general understanding of international law that everything that is not prohibited is allowed. What makes the picture more complicated is the fact that many rights are conditional; in other words, they also contain prescriptive or prohibitive elements which need to be observed so as to render the exempting or permissive elements applicable.<sup>7</sup> The relationship between two norms can either take the form of *conflict* or *accumulation*. According to Joost Pauwelyn, two norms *accumulate* when they do not contradict each other, either by having distinctive scopes of application or by confirming one another.<sup>8</sup> By contrast, *norm conflicts* arise when two norms overlap in relation to their scopes of application and do not accumulate, for instance, because the relationship is not sufficiently explicit in the text of at least one of these two norms.<sup>9</sup>

The precise definition of norm conflict has been a matter of debate, with doctrinal scholars traditionally favouring a narrow definition. For them, only a case of direct incompatibility – ruling out simultaneous compliance – entails a conflict between two norms.<sup>10</sup> There are, however, a number of shortcomings with this narrow concept of norm conflict: First, it rules out any conflict between obligations and rights, and thus risks undermining the object and purpose of such permissive rules. Second, this approach is meant to avoid conflicts through the very

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<sup>5</sup> This taxonomy is based on: Pauwelyn, *Conflict of Norms in Public International Law* (CUP 2003), pp. 158-62; Pauwelyn’s analysis draws largely from: Kelsen, *Théorie Générale des Normes* (Presses Universitaires de France 1996).

<sup>6</sup> While often falling into one of the above types, secondary norms regulate other (primary or substantive) norms.

<sup>7</sup> Pauwelyn (2003), *supra* note 5, pp. 160-61.

<sup>8</sup> For instance: (1) one norm explicitly terminates the application of the other norm, (2) one norm functions as an explicit exception to another, more general rule, or (3) two norms provide for different, but not mutually exclusive, solutions for the same matter and (at least) one norm explicitly refers to or incorporates the other one. *Ibid.*, pp. 161-63.

<sup>9</sup> *Ibid.*, pp. 161-66.

<sup>10</sup> See, for instance: Jenks, ‘Conflict of Law-Making Treaties’, 30 *BYIL* (1953), 401-53, pp. 426 and 451; Karl, ‘Conflicts Between Treaties’, in: Bernhardt (ed.), *Encyclopedia of Public International Law* (North-Holland 1984), 468-73, p. 468; Caplinski and Danilenko, ‘Conflicts of Norms in International Law’, 21 *Netherlands Yearbook of the International Law* (1990), 3-42, pp. 12-13.

definition of conflict, thus rendering the accepted tools to overcome norm conflicts largely useless.<sup>11</sup> It seems therefore more apt to follow a broader definition of norm conflict, as suggested by the ILC Study Group on Fragmentation of International Law<sup>12</sup> and a number of international legal scholars.<sup>13</sup> Most helpful for our purposes is the definition provided by Erich Vranes:

There is a conflict between norms, one of which may be permissive, if in obeying or applying one norm, the other norm is necessarily or potentially violated.<sup>14</sup>

This is clearly the case when there are two opposite commands, but the definition covers also clashes between a prohibition and a permission or even between two different prohibitions (one being simply stricter than the other one).<sup>15</sup> Nonetheless, this broad definition only denotes an *apparent* norm conflict. To be precise, it may still be possible to avoid the conflict by resort to conflict avoidance tools.<sup>16</sup> There is indeed a strong presumption against conflict in international law: where the wording of one of the norms is open-ended and (partly) ambiguous, it allows for an interpretation in light of the other norm, within the meaning of Article 31 (3) (c) of the Vienna Convention on the Laws of Treaties. Where such a harmonious interpretation succeeds, there will no longer be a conflict between the norms in question.<sup>17</sup>

Only where all attempts to overcome the inconsistency between the two norms by means of interpretation fail, can there be a *genuine* norm conflict, which then requires conflict resolution.<sup>18</sup> The most widely acknowledged conflict resolution techniques are the *lex posterior* and the *lex specialis* doctrines. The former decides the conflict in favour of the more recent norm, while the latter gives priority to the more specific one, because it addresses the particular subject

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<sup>11</sup> Pauwelyn (2003), *supra* note 5, pp. 184-88; Milanović, 'Norm Conflict in International Law: Whither Human Rights?', 20 *Duke Journal of Comparative and International Law* (2009), 69-132, p. 73.

<sup>12</sup> ILC, Report of the Study Group of the International Law Commission, Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law, finalized by Martti Koskenniemi, 13 April 2006, UN Doc. A/CN.4/L.682 (hereinafter: ILC Fragmentation Report), para. 25, p. 19 ('This Report adopts a wide notion of conflict as a situation where two rules or principles suggest different ways of dealing with a problem') and para. 254, p. 130.

<sup>13</sup> Pauwelyn (2003), *supra* note 5, pp. 175-76 ('two norms are, therefore, in a relationship of conflict if one constitutes, has led to, or may lead to, a breach of the other'); Milanović, 'Norm Conflicts, International Humanitarian Law and Human Rights Law', in: Ben-Naftali (2011), *supra* note 3, 95-125, p. 102 ('whenever the application of the two norms leads to two opposite results'); D'Aspremont and Tranchez, 'The Quest for a Non-Conflictual Coexistence of International Human Rights Law and Humanitarian Law: Which Role for the "lex specialis" Principle?', in: Kolb and Gaggioli (2013), *supra* note 3, 223-50, p. 233 (using the term 'competition' instead of 'conflict').

<sup>14</sup> Vranes, 'The Definition of 'Norm Conflict' in International Law and Legal Theory', 17 (2) *EJIL* (2006), 395-418, p. 395.

<sup>15</sup> As we will see below, this is perhaps the best way to describe most conflicts arising between IHL and HRL.

<sup>16</sup> Pauwelyn (2003), *supra* note 5, p. 178.

<sup>17</sup> *Ibid.*, pp. 240-44; ILC Fragmentation Report (2006), *supra* note 12, paras. 410-80, pp. 206-44.

<sup>18</sup> Milanović (2009), *supra* note 11, p. 73; Pauwelyn (2003), *supra* note 5, p. 178.

matter ‘more directly or precisely’. Both doctrines are aimed at identifying the ‘current expression of state consent’ and therefore often work in tandem.<sup>19</sup> However, it needs to be stressed that the *lex specialis* doctrine also plays a key role in the field of interpretation for the purpose of conflict avoidance.<sup>20</sup> In other words, the more specific rule should be:

read and understood within the confines or against the background of the general standard, typically as an elaboration, updating or a technical specification of the latter.<sup>21</sup>

It may, however, sometimes be difficult to clearly distinguish the general norm from the special one.<sup>22</sup>

Even though the *lex specialis* doctrine was already used by most early legal scholars in their treatises on international law,<sup>23</sup> some authors emphasise that it has its origin in domestic legal systems and question whether it can be applied to the increasingly fragmented international legal order.<sup>24</sup> These concerns have been echoed by Pauwelyn himself, who has become increasingly sceptical in his recent writings that international law can be equated to a coherent legal system similar to the domestic legal order of states and that the established conflict-of-norms rules can be applied to all international legal conflicts: where we deal with one treaty and perhaps one legal regime, reliance on such rules (including *lex specialis*) seems appropriate, but their use becomes more problematic for conflicts between rules from different specialised regimes.<sup>25</sup> With this in mind, we should be particularly cautious when using *lex specialis* doctrine as a conflict-resolution rather than as a conflict-avoidance technique to overcome potential conflicts between human rights and humanitarian law.

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<sup>19</sup> Pauwelyn (2003), *supra* note 5, pp. 385-96.

<sup>20</sup> ILC Fragmentation Report (2006), *supra* note 12, paras. 56-57 and 88-107; Pauwelyn (2003), *supra* note 5, p. 414; Mus, ‘Conflicts between Treaties in International Law’, 45 (2) Netherlands International Law Review (1998), 208-32, p. 218; Akehurst, ‘The Hierarchy of Sources of International Law’, 47 BYIL (1974-75), 273-85; Fitzmaurice, ‘The Law and Procedure of the International Court of Justice 1951-1954: Treaty Interpretation and Other Treaty Points’, 33 BYIL (1957), 203-93, p. 236.

<sup>21</sup> ILC Fragmentation Report (2006), *supra* note 12, para. 56.

<sup>22</sup> *Ibid*, para. 58.

<sup>23</sup> See, for instance: De Vattel, *The Law of Nations; Or, Principles of the Law of Nature Applied to the Conduct of Nations and Sovereigns* (London 1793), Livre II, Ch. XVII, p. 511, para. 316; Pufendorf, *De Jure Naturae et Gentium* (1672), Libri V, Ch. XII; Grotius (1625), *infra* note 27, Livre II, Ch. 16, Sect. XXIX.

<sup>24</sup> Prud’homme (2007), *supra* note 4; Lindroos (2005), *supra* note 4.

<sup>25</sup> Michaels and Pauwelyn, ‘Conflict of Norms or Conflict of Laws: Different Techniques in the Fragmentation of Public International Law’, 22 (3) Duke Journal of Comparative and International Law (2012), 349-76. For the latter case, they suggest the use of conflict-of-law rules, i.e. those deriving from private international law. For a very similar approach: Pulkowski, *The Law and Politics of International Regime Conflict* (OUP 2014), p. 329-35.

## CONCURRENT APPLICATION OF HUMAN RIGHTS AND HUMANITARIAN LAW

Human rights law and international humanitarian law are two distinct bodies of law with different histories and structural features. Indeed, modern human rights law has its origin in domestic constitutional law – before becoming part of international law – and is essentially premised on the vertical relationship between the state and the individual (i.e. the rights-holder). By contrast, humanitarian law has been part of international law since its inception, set out to regulate the conduct of states based on reciprocity, which was later extended to include also certain types of non-state actors. Ultimately, however, the most striking difference is that humanitarian law is meant to regulate warfare, while human rights law is essentially made for peacetime.<sup>26</sup>

At the time of Hugo Grotius, it was relatively easy to avoid greater systemic conflicts, as one could simply distinguish between two mutually exclusive sets of rules: the laws of peace versus the laws of war.<sup>27</sup> However, while some states have at times argued for a wholesale displacement of human rights law along similar lines,<sup>28</sup> this is hardly a viable solution for the relationship between both bodies of law in times of armed conflict. When codifying one regime, cross-references to the other one were built into the relevant treaty text. Indeed, the so-called Martens Clause – contained in the Hague Rules (1907) and Additional Protocol I (1977) alike – can clearly be read in that way,<sup>29</sup> alongside other, more explicit references to human rights law applicable in times of armed conflict.<sup>30</sup> Moreover, most human rights treaties include derogation clauses. As we have seen in the previous chapter, one of the main reasons for their inclusion

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<sup>26</sup> See more generally: Quénivet, ‘The History of the Relationship Between International Humanitarian Law and Human Rights Law’, in: Arnold and Quénivet (2008), *supra* note 3, 1-12; Kolb, ‘Human Rights Law and International Humanitarian Law between 1945 and the Aftermath of the Teheran Conference of 1968’, in: Kolb and Gaggioli (2013), *supra* note 3, 35-52.

<sup>27</sup> Grotius, *De Jure Belli ac Pacis, Libri Tres* (Paris 1625).

<sup>28</sup> HRC, Comments by the Government of the United States of America on the Concluding Observations, 10 October 2007, UN Doc. CCPR/C/USA/CO/3/Rev.1/Add.112 (‘The law of war, and not the Covenant, is the applicable legal framework governing these detentions’); HRC, Second Period Report of Israel, 4 December 2001, UN Doc. CCPR/C/ISR/2001/2, para. 8; ECtHR, *Georgia v. Russia (II)*, Decision on Admissibility, 13 December 2011, Application no. 38263/08, para. 69 (Russia’s arguments: ‘the Convention did not apply to a situation of international armed conflict ... In such circumstances the conduct of the State Party’s forces was governed exclusively by international humanitarian law’).

<sup>29</sup> The Martens Clause was first mentioned in the preamble of the Hague Rules of 1899 and those of 1907. It was included with minor alterations in the text of Art. 1 (2) AP I (‘In cases not covered ..., civilians and combatants remain under the protection and authority of the principles of international law derived from established custom, from the principles of humanity and from dictates of public conscience’).

<sup>30</sup> Art. 72 AP I (‘The provisions of this Section are additional to ... other applicable rules of international law relating to the protection of fundamental human rights during international armed conflict’); preamble of AP II (‘Recalling furthermore that international instruments relating to human rights offer a basic protection to the human person’).

was to provide for flexibility in times of war, while ensuring that at least a core set of rights continues to apply fully. This shows that at the meta-level, both legal regimes clearly accumulate rather than being in conflict with one another. The continued application of human rights law during armed conflicts has also been confirmed in the practice of the major UN bodies, including the General Assembly, the Security Council and the Secretary-General.<sup>31</sup>

It is therefore hardly surprising that the International Court of Justice has consistently confirmed the continued application of human rights law in situations of armed conflict or military occupation.<sup>32</sup> It has repeatedly held that:

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.<sup>33</sup>

The complementary approach suggested by the Court is relatively straight-forward in situations that are only governed by one field of law, for instance, the right to assembly under human rights law or specific rules on the provision of medical assistance governed by humanitarian law. The same is true for cases when the two legal regimes provide the same standard of protection or even complement each other, for instance, with regard to the prohibition of torture and inhuman treatment of detainees.

Over the past few decades, legal scholars have developed a number of different theories to explain the exact relationship between human rights and humanitarian law.<sup>34</sup> However, as a common denominator in the academic debate it seems nowadays widely accepted<sup>35</sup> that both

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<sup>31</sup> Tehran Conference, General Resolution XXIII, 'Respect for Human Rights in Armed Conflicts', 13 May 1968, UN Doc A/Conf.32/41; A/RES/2444, 19 December 1968; UNSG, Reports on the Respect for Human Rights in Armed Conflicts, 20 November 1969, A/7720, paras. 23-30, and 18 September 1970, A/8052, paras. 24-27; S/RES/1674, 28 April 2006, para. 26; S/RES/1882, 11 November 2009, para. 3.

<sup>32</sup> ICJ, *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 8 July 1996, ICJ Reports 1996, pp. 226-67, para. 25; and the two cases cited *infra*.

<sup>33</sup> ICJ, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 9 July 2004, ICJ Reports 2004, pp. 136-203, para. 106; ICJ, *Democratic Republic of the Congo v. Uganda*, Judgement, 19 December 2005, ICJ Reports 2005, pp. 168-283, para. 216.

<sup>34</sup> See, for instance: Heintze, 'Theories on the Relationship between International Humanitarian Law and Human Rights Law', in: Kolb and Gaggioli (2013), *supra* note 3, 53-64, who distinguishes the following three theories: separation theory, complementary theory, and integration theory (mainly drawing from recent development in the field of children's rights); Gowlland-Debbas and Gaggioli, 'The Relationship between International Human Rights and Humanitarian Law: An Overview', in: Kolb and Gaggioli (2013), *supra* note 3, 77-103, who distinguishes the following three theories: separation theory, complementary theory, and harmonisation theory.

<sup>35</sup> For the minority view, i.e. that IHL and HRL are not (or should not be) complementary to each other: Modirzadeh, 'The Dark Sides of Convergence: A Pro-Civilian Critique of the Extraterritorial Application of Human Rights Law in Armed Conflict', 86 *International Law Studies* (2010), 349-410 (mainly criticising

regimes are largely complementary,<sup>36</sup> including for the specific case of peace operations and other overseas military operations.<sup>37</sup> In fact, US Colonel and military lawyer G.I.A.D. Draper said already in 1972 that:

The two systems are essentially complementary, and that is an end of the old dichotomy between the Law of War and the Law of Peace into which International Law was traditionally divided. We have moved a long way.<sup>38</sup>

The US government has also acknowledged this fact in its most recent state report (2011) to the Human Rights Committee:

In this context, it is important to bear in mind that international human rights law and the law of armed conflict are in many respects *complementary and mutually reinforcing*. These two bodies of law contain many similar protections.<sup>39</sup>

The picture becomes, however, more complex where the specific rules of human rights and humanitarian law provide different solutions that are incompatible with one another: for instance, in relation to the killing or detention of enemy forces. Such cases fall squarely into the broad concept of norm conflict adopted above and thus call for an effort to interpret the norms

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the negative effect of what she calls ‘convergence’ on the integrity of IHL); Dennis and Surena, ‘Application of the International Covenant on Civil and Political Rights in Times of Armed Conflict and Military Occupation’, 6 *European Human Rights Law Review* (2008), 714-31 (but mainly focused on the spatially restricted scope of the ICCPR).

<sup>36</sup> Oberleitner, *Human Rights in Armed Conflict. Law, Practice, Policy* (CUP 2015), pp. 81-128 (on concurrent application); Hampson, ‘The Relationship between International Humanitarian Law and International Human Rights Law’, in: Sheeran and Rodley (eds.), *The Routledge Handbook of International Human Rights Law* (Routledge 2013), 185-213; Doswald-Beck, *Human Rights in Times of Conflict and Terrorism* (OUP 2011), pp. 106-26; Lubell, *Extraterritorial Use of Force Against Non-State Actors* (OUP 2010), pp. 236-47; Henckaerts, ‘Concurrent Application of International Humanitarian Law and Human Rights Law: A Victim Perspective’, in: Arnold and Quéniévet (2008), *supra* note 3, 237-67, pp. 262-67; Orakhelashvili, ‘The Interaction Between Human Rights and Humanitarian Law: Fragmentation, Conflict, Parallelism, or Convergence?’, 19 (1) *EJIL* (2008), 161-82; Prud’homme (2007), *supra* note 4; Krieger (2006), *supra* note 4; Gillard, ‘International Humanitarian Law and Extraterritorial State Conduct’, in: Coomans and Kamminga (eds.), *Extraterritorial Application of Human Rights Treaties* (Intersentia 2004), 25-39, pp. 35-36; Dinstein (2004), *infra* note 130, pp. 20-25; Provost, *International Human Rights and Humanitarian Law* (CUP 2002).

<sup>37</sup> Mujezinović Larsen, *The Human Rights Treaty Obligations of Peacekeepers* (CUP 2012), pp. 243-97; Odello and Piotrowicz, ‘Legal Regimes Governing International Military Missions’, in: Odello and Piotrowicz (eds.), *International Military Missions and International Law* (Martinus Nijhoff 2011), 25-44; Kleffner, ‘Human Rights and International Humanitarian Law: General Issues’, in: Gill and Fleck (eds.), *Handbook of the International Law of Military Operations* (OUP 2010), 51-77, pp. 72-75; 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* (Intersentia, 2010), pp. 589-617.

<sup>38</sup> Draper, ‘Human Rights and the Law of War’, 12 *Virginia Journal of International Law* (1972), 326-42, p. 338.

<sup>39</sup> HRC, Fourth Periodic Report, USA, 30 December 2011, CCPR/C/USA/4, para. 507. Even the most recent Israeli report is more sympathetic towards the idea of convergence between both legal regimes, while at the same time maintaining the traditional separatist view: HRC, Fourth Periodic Report, Israel, CCPR/C/ISR/4, 12 December 2013, para. 47.

in light of the other so as to possibly overcome the inconsistency. This is precisely what the International Court of Justice was doing in its *Nuclear Weapons* advisory opinion (1996). Since the Covenant's right to life is non-derogable, the Court proceeded as follows:

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. Thus whether a particular loss of life, through the use of a certain weapon in warfare, is to be considered an arbitrary deprivation of life contrary to Article 6 of the Covenant, can only be decided by *reference to the law* applicable in armed conflict and not deduced from the terms of the Covenant itself.<sup>40</sup>

To be clear, it was the indeterminacy of the term 'arbitrary deprivation of life' that allowed the Court to read the humanitarian law solution (*lex specialis*) into the right-to-life provision of the Covenant, without having to resort to any form of conflict resolution.<sup>41</sup> A general reference to the *lex specialis* nature of humanitarian law was also made by the Court in its *Wall* advisory opinion (2004), but was eventually dropped in the subsequent judgment of *Congo v. Uganda* (2005), prompting doubts as to whether this doctrine is to be maintained.<sup>42</sup>

In one of his most recent writings, Marko Milanović shows meticulously that the *lex specialis* doctrine only entered the debate on the interplay between both regimes once it had been specifically pleaded by the United Kingdom during the proceedings before the Court in the above-mentioned *Nuclear Weapons* case and then only as a tool to avoid a possible conflict with human rights law by means of harmonious interpretation.<sup>43</sup> So 'despite the Latin veneer of antiquity',<sup>44</sup> the notion of *lex specialis* has only been in active use in academic discussions on the relationship between human rights and humanitarian law since the mid-1990s. It is therefore unclear whether the doctrine can really serve as a resolution tool for conflicts between rules of both regimes that cannot be avoided. What makes its use especially difficult is the fact that the substantive content of human rights and humanitarian law is spread across multiple instruments

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<sup>40</sup> ICJ, *Nuclear Weapons* (1996), *supra* note 32, para. 25.

<sup>41</sup> Surprisingly, this is what Sandesh Sivakumaran claims the ICJ was doing in the case: Sivakumaran, 'International Humanitarian Law', in: Moeckli et al. (eds.), *International Human Rights Law* (2<sup>nd</sup> edn., OUP 2013), 479-95, pp. 489-90 ('In this instance, the relevant rules of international humanitarian law constituted the *leges specialis* and so trumped, to the extent of the inconsistency, the equivalent rule found in international human rights law', emphasis added).

<sup>42</sup> ICJ, *Wall Opinion* (2004), *supra* note 33, para. 106 (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). ICJ, *DRC v. Uganda* (2005), *supra* note 33, para. 216.

<sup>43</sup> Milanović, 'The Lost Origins of Lex Specialis: Rethinking the Relationship between Human Rights and International Humanitarian Law', in: Ohlin (ed.), *Theoretical Boundaries of Armed Conflicts and Human Rights* (CUP forthcoming 2015, [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2463957](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2463957)), pp. 8-24.

<sup>44</sup> *Ibid*, p. 12.

adopted at different times and that it relies heavily on custom as well as the practice and case-law of international judicial bodies. This makes the quest for the most recent expression of state consent – the ultimate purpose of the tandem of *lex specialis* and *lex posterior* – an almost impossible endeavour.

Even for many of those using the *lex specialis* notion, including for cases of conflict resolution, it is by no means an inherent character of humanitarian law. Rather, both human rights law and humanitarian law constitute special regimes compared to international law as a whole. The answer as to which constitutes the special rule may therefore differ from situation to situation.<sup>45</sup> Marco Sassòli and Laura Olson define *lex specialis* as the law with the ‘larger common contact surface area’ with the situation. A major factor for the assessment is therefore whether one of the norms addresses the problem at hand more explicitly.<sup>46</sup> Moreover, besides speciality it is also essential to consider whether the solution is consistent with the systemic objectives of the law. This is arguably an element which allows for broader interpretation, taking into account aspects of the general law.<sup>47</sup> This seems to be also the approach of the Human Rights Committee, which has previously referred to the ‘more specific rules’ of humanitarian law and their relevance for interpreting the Covenant, while explicitly stressing the complementary nature of that relationship.<sup>48</sup> Likewise, the most recent US report mentions the *lex specialis* doctrine, but adds that:

Determining the international law rule that applies to a particular action taken by a government in the context of an armed conflict is a *fact-specific determination*, which cannot be easily generalized, and raises especially complex issues in the context of non-international armed conflicts ...<sup>49</sup>

The determination is thus highly context-specific and depends on the issue at stake. While a number of different aspects may deserve consideration, including detention or the protection of

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<sup>45</sup> D’Aspremont and Tranchez (2013), *supra* note 13, pp. 40-41; Orakhelashvili (2011), *supra* note 36, p. 182; ILC Fragmentation Report (2006), *supra* note 12, paras. 111-22; Lindroos (2005), *supra* note 4, p. 42.

<sup>46</sup> Sassòli and Olson, ‘The Relationship between International Humanitarian and Human Rights Law Where It Matters: Admissible Killing and Internment of Fighters in Non-International Armed Conflicts’, 90 IRRC (2008), 599-627, pp. 604-05. According to the authors, the same reasoning also applies to conflicts involving one or more customary rules, as they are most likely to be codified in a treaty, an authoritative study or a doctrinal text.

<sup>47</sup> ILC Fragmentation Report (2006), *supra* note 12, para. 107.

<sup>48</sup> HRC, General Comment 31, ‘Nature of the General Legal Obligation Imposed on States Parties to the Covenant’, 29 March 2004, CCPR/C/21/Rev 1/Add 13, para. 11.

<sup>49</sup> HRC, Fourth Periodic Report, USA (2011), *supra* note 39, para. 507, emphasis added. The last point is restricted to NIACs ‘occurring within a State’s own territory’, but seems mainly motivated by the USA’s continuous opposition to the ICCPR’s extra-territorial reach.

private property, this thesis is focused on the overall question as to when and how physical force may be used in peace operations.

## 5.3 USE OF FORCE UNDER BOTH REGIMES

In order to locate potential areas of conflict between human rights law and humanitarian law, this section will consider the relevant rules on the use of force. The emphasis here is on the standards governing the actions of international forces in the field rather than their possible duties.<sup>50</sup> The present discussion on the relevant use-of-force standards will be followed by the main section of this chapter, aimed at identifying the most appropriate model for the interaction of these different sets of rules.

### HUMAN RIGHTS LAW

#### Introduction

In non-custodial situations, the deliberate use of physical force by state agents may affect a number of different rights, including the freedom of assembly,<sup>51</sup> the freedom of movement,<sup>52</sup> and property rights.<sup>53</sup> However, we will consider here only the right to life and the prohibition

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<sup>50</sup> In other words, this section is not concerned with the measures that peacekeepers may be required to take in order to protect the local population from attacks. Such a duty (i.e. *positive* obligation) may indeed arise under HRL, but it is highly unlikely to produce any norm conflict between HRL and HRL. For an excellent discussion on this issue: Mujezinović Larsen (2012), *supra* note 37, pp. 386-93 (calling for flexibility to avoid a disproportionate burden on the mission and concluding that such HRL duties correspond largely with the terms of their mandate already binding on them). HRL provides also for investigative duties in response to possible violations, which are also beyond the scope of this section. While the equivalent duty under IHL is not (necessarily) the same, this difference is also unlikely to produce any norm conflict between HRL and HRL and thus less relevant for the present chapter. For an excellent contribution on the duty to investigate: Todeschini, 'Emerging Voices: The Right to a Remedy in Armed Conflict – International Humanitarian Law, Human Rights Law and the Principle of Systemic Integration', *Opinio Juris*, 5 August 2015, <http://opiniojuris.org/2015/08/05/emerging-voices-the-right-to-a-remedy-in-armed-conflict-international-humanitarian-law-human-rights-law-and-the-principle-of-systemic-integration>.

<sup>51</sup> Art. 11 ECHR; Art. 21 ICCPR; Art. 15 ACHR; Art. 24 (f) Arab Charter; Art. 12 CIS Convention; Art. 11 ACHPR; Art. XXI ADRDM.

<sup>52</sup> Art. 2 Protocol 4, ECHR; Art. 12 ICCPR; Art. 22 ACHR; Art. 26 (a) Arab Charter; Art. 22 CIS Convention; Art. 12 ACHPR; Art. VIII ADRDM.

<sup>53</sup> Art. 1 Protocol 1, ECHR; Art. 17 UDHR; Art. 21 ACHR; Art. 31 Arab Charter; Art. 26 CIS Convention; Art. 14 ACHPR; Art. XXIII ADRDM.

of cruel, inhuman and degrading treatment, as they are the rights most directly affected.<sup>54</sup> They also allow for fewer limitations and enjoy a much greater universal recognition than other rights.

While the prohibition of cruel, inhuman and degrading treatment is generally considered to be an absolute right, it is nevertheless subject to inherent limitations as part of its definition. In other words, whether a certain act is to be seen as cruel or inhuman treatment is highly context-specific and subject to a severity and proportionality test. As rightly put by the Manfred Nowak and Elizabeth McArthur:

Since the police, of course, are *entitled to use physical force* and arms for *lawful purposes*, the *principle of proportionality* must be applied in order to determine whether the use of force is excessive or not. Only such use of force which results in severe pain or suffering and which, in the particular circumstances of a given case, is considered to be *excessive* and *non-proportional* in relation to the purpose to be achieved amounts to inhuman or cruel treatment or punishment.<sup>55</sup>

This shows a close similarity with the limitations under the right to life, which is usually engaged whenever lethal force has been used. However, even where the targeted person survived the use of life-threatening force, the European Court has usually examined its lawfulness under the right to life rather than under the prohibition of cruel and inhuman treatment.<sup>56</sup> A similar approach has been employed by other human rights bodies.<sup>57</sup> The following considerations on the right to life are therefore equally relevant for the use of non-lethal force.<sup>58</sup>

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<sup>54</sup> On the prohibition of cruel, inhuman and degrading treatment: Art. 3 ECHR; Art. 7 ICCPR; Art. 5 ACHR; Art. 8 (a) Arab Charter; Art. 3 CIS Convention; Art. 5 ACHPR; Art. I ADRDM. The listed articles also include the ban on torture, which is not specifically considered here, as it usually requires quasi custodial situations; the same reason motivated the exclusion of ‘punishment’.

<sup>55</sup> Nowak and McArthur, *The United Nations Convention against Torture. A Commentary* (OUP 2008), p. 568, emphasis added (with regard to Art. 16 CAT, dealing with cruel, inhuman or degrading treatment or punishment).

<sup>56</sup> ECtHR, *Andreou v. Turkey*, Judgement, 27 October 2009, Application no. 45653/99, para. 41 (‘physical ill-treatment by State agents which does not result in death may disclose a violation of that provision. In particular, the Court must determine whether the force used against the applicant was potentially lethal and what kind of impact the conduct of the officials concerned had not only on her physical integrity but also on the interest the right to life is intended to protect. In relation to this, the degree and type of force used and the intention or aim behind the use of force may, among other factors, be relevant’) and para. 63 (finding it unnecessary to the same facts under Art. 3 ECHR). Also, ECtHR, *Makaratzis v. Greece* (2004), *infra* note 70, para. 49.

<sup>57</sup> IACmHR, *Santo Domingo Massacre v. Colombia*, Merits, 24 March 2011, Report No. 31/11, Case 12.416, para. 118 (quoting the ECtHR and previous IACtHR case-law). See, however: IACtHR, *Santo Domingo Massacre v. Colombia*, Judgement, 30 November 2012, Series No. 259, para. 230 (following a different approach, i.e. assessing the use of force *vis-à-vis* the survivors only under Art. 5 (1) ACHR). ACmHPR, *Kazeem Aminu v. Nigeria*, Decision, 11 May 2000, Communication no. 205/97, para. 18 (‘The Commission notes that the Complainant’s client (victim) is still alive but in hiding for fear of his life. It would be a narrow interpretation to this right to think that it can only be violated when one is deprived of it’).

<sup>58</sup> In other words, the same considerations on the use of force with respect to the right to life apply *a fortiori*

The formulation of the right to life varies across the different human rights treaties.<sup>59</sup> For instance, Article 6 (1) of the International Covenant states that:

Every human being has the inherent right to life. This right shall be protected by law.  
No one shall be arbitrarily deprived of his life.

The same approach of prohibiting arbitrary deprivation of life has been followed by the drafters of some of the regional human rights instruments, namely the American Convention, the African Charter and the Arab Charter.<sup>60</sup> By contrast, the European Convention prohibits the *intentional deprivation of life* unless ‘it results from the use of force which is no more than absolutely necessary’ for achieving one of the following three legitimate aims:

- (a) in defence of any person from unlawful violence;
- (b) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained;
- (c) in action lawfully taken for the purpose of quelling a riot or insurrection.<sup>61</sup>

The equivalent provision under the CIS Convention seems to be inspired by the European Convention, but is somewhat opaque as to its permissible exceptions.<sup>62</sup>

As already highlighted in the previous chapters, the right to life also exists outside of treaty law. Indeed, it is widely seen as part of customary law and general principles of international law<sup>63</sup> and is also generally considered a rule of *jus cogens*.<sup>64</sup> The contours of this non-treaty right

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to the use of non-lethal force in relation to the prohibition of cruel, inhuman and degrading treatment. For instance, applying the principle of proportionality (outlined below) means that the pain and injury caused by physical force (e.g. truncheons, water cannons, tear gas) must be balanced with (i.e. not exceed) the purpose of that use of force (e.g. to break up an illegal rally).

<sup>59</sup> The original texts of most general HRL treaties include the death penalty as an explicit exception from the right to life, subject to certain procedural requirements under the provision itself and further limitations or complete abolition under subsequent protocols: Art. 2 ECHR, Art. 6 ICCPR, Art. 4 ACHR, Arts. 6-7 Arab Charter and Art. 2 CIS Convention. See more generally: Hood and Hoyle, *The Death Penalty: A Worldwide Perspective* (5<sup>th</sup> edn., OUP 2015).

<sup>60</sup> Art. 4 (1) ACHR (‘Every person has the right to have his life respected. This right shall be protected by law and, in general, from the moment of conception. No one shall be arbitrarily deprived of his life’); Art. 4 ACHPR and Art. 5 Arab Charter.

<sup>61</sup> Art. 2 (2) ECHR.

<sup>62</sup> Art. 2 (4) CIS Convention (‘Deprivation of life shall not be regarded as inflicted in contravention of the provisions of this Article when it results from the use of force solely in such *cases of extreme necessity and necessary defence* as are provided for in national legislation’, emphasis added). Due to the lack of relevant case-law, the exact meaning of these terms has remained vague and will not be further considered here.

<sup>63</sup> Art. 3 UDHR; Hague Appeals Court, *Mustafić-Mujić v. Netherlands & Nuhanović v. Netherlands*, Judgement, 5 July 2011, Case no. 200.020.174/01, para. 6.3; Joseph, *The International Covenant on Civil and Political Rights* (OUP 2004), p. 154 (highlighting that Art. 6 (1) ICCPR speaks of ‘inherent right to life’, which suggests an independent existence of the right prior to the adoption of the ICCPR).

<sup>64</sup> HRC, General Comment no. 24, 2 November 1994, UN Doc. CCPR/C/21/Rev.1/Add.6, para. 8; ECO-WAS Community Court of Justice, *Serap v. Nigeria*, Judgement, 27 October 2009, ECW/CCJ/APP/0808,

have been incrementally shaped within the framework of the United Nations. Most relevant in that context are the statements of special rapporteurs and international standard-setting instruments, in particular, the *Basic Principles on the Use of Force and Firearms by Law Enforcement Officials*, adopted in 1990.<sup>65</sup> While not formally binding, these statements and instruments have been used as an authoritative interpretation on the use of force by the European Court<sup>66</sup> and the Human Rights Committee<sup>67</sup> as well as the Inter-American<sup>68</sup> and African human rights systems.<sup>69</sup> In addition, most of these bodies also regularly refer to the relevant provision of other human rights treaties and their related jurisprudence.<sup>70</sup> This has led to a significant convergence regarding the content of the right to life,<sup>71</sup> which prompted the European Court to conclude that:

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para. 18 ('Some of the fundamental human rights, such as the right to life, have even been elevated to the status of "Jus Cogens", peremptory norms of international law from which no derogation is permitted').

<sup>65</sup> Basic Principles on the Use of Force and Firearms by Law Enforcement Officials, adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana (Cuba), 27 August to 7 September 1990, hereinafter: Use of Force and Firearms Principles (1990). See also the *Code of Conduct for Law Enforcement Officials*, annexed to UN GA Res. 34/169, adopted by the UN General Assembly on 17 December 1979.

<sup>66</sup> ECtHR, *Erdogan v. Turkey*, Judgement, 25 April 2006, Application no. 19807/92, paras. 56-57; ECtHR, *Kakoulli v. Turkey*, Judgement, 22 November 2005, Application no. 38595/97, paras. 77-79 and 109; ECtHR, *Nachova v. Bulgaria*, Judgement, 6 July 2005, Applications nos. 43577/98 and 43579/98, paras. 71-74 and 96; ECtHR, *Makaratzis v. Greece*, Judgement, 20 December 2004, Application no. 50385/99, paras. 30-31 and 59; ECtHR, *McCann v. United Kingdom*, Judgement, 5 September 1995, Application no. 18984/91, paras. 138-39.

<sup>67</sup> HRC, Concluding Observations on the Fourth Periodic Report of the United States of America, 23 April 2014, CCPR/C/USA/CO/4, para. 11.

<sup>68</sup> IACtHR, *Nadège Dorzema v. Dominican Republic*, Judgement, 24 October 2012, Case no. 251, paras. 78-84 and footnote text; IACtHR, *Zambrano Vélez v. Ecuador*, Judgement, 4 July 2007, Case no. 166, paras. 84-86 and footnote text; IACtHR, *Montero-Aranguran v. Venezuela*, Judgement, 5 July 2006, Case no. 150, paras. 69 and 75; IACmHR, *Report on Terrorism and Human Rights*, 22 October 2002, OEA/Ser.L/V/II.116, para. 87.

<sup>69</sup> ACmHPR, *Noah Kazingachire v. Zimbabwe*, Decision on the Merits, 2 May 2012, Communication no. 295/04, paras. 107-22; ACmHPR, Working Group on Death Penalty and Extra-Judicial, Summary or Arbitrary Killings in Africa, Intersession Activity Report (November 2013 - April 2014), 12 May 2014, [www.achpr.org/sessions/55th/intersession-activity-reports/death-penalty](http://www.achpr.org/sessions/55th/intersession-activity-reports/death-penalty), hereinafter: ACmHPR, Arbitrary Killings Working Group Report (2014), para. 50.

<sup>70</sup> For instance: IACmHR, *Wallace de Almeida v. Brazil*, Report No. 26/09, 20 March 2009, Case no. 12.440, para. 103; IACtHR, *Dorzema v. Dominican Republic* (2012), *supra* note 68, paras. 85-87 and footnote text; IACtHR, *Zambrano Vélez v. Ecuador* (2007), *supra* note 68, paras. 84-89 and footnote text (all three cases referring to ECtHR jurisprudence with regard to Art. 2 ECHR). ECtHR, *Makaratzis v. Greece* (2004), *supra* note 66, paras. 29 and 58 (referring to the General Comment 6 of the HRC with regard to Art. 6 ICCPR). ACmHPR, *Noah Kazingachire v. Zimbabwe* (2012), *supra* note 69, para. 133 (referring to the IACtHR case-law).

<sup>71</sup> In a similar way: Melzer, *Targeted Killing in International Law* (OUP 2008), pp. 118-120; Tavernier, 'Le Recours à la Force par la Police', in: Tomuschat et al. (eds.), *The Right to Life* (Neihoff Publishers 2010), 41-64, pp. 58-63.

The convergence of the above-mentioned instruments [UDHR, ICCPR and ECHR] is significant: it indicates that the right to life is an inalienable attribute of human beings and forms the supreme value in the hierarchy of human rights.<sup>72</sup>

Hence, despite the textual differences of the relevant treaty provisions outlined above, there are a number of common features of the right to life, which will be examined in the following sections.

## Legal Basis

Any deprivation of life requires a sufficient legal basis. This follows from the duty to protect life, specifically mentioned in nearly all right-to-life provisions. The Human Rights Committee held that:

The protection against arbitrary deprivation of life, which is explicitly required by the third sentence of article 6 (1), is of paramount importance. ... The deprivation of life by the authorities of the State is a matter of the utmost gravity. Therefore, the law must *strictly control and limit* the circumstances in which a person may be deprived of his life by such authorities.<sup>73</sup>

This requirement has been confirmed and refined in the subsequent practice of the Committee<sup>74</sup> and the jurisprudence of other human rights bodies.<sup>75</sup> It is also explicitly mentioned in the *Use of Force and Firearms Principles*.<sup>76</sup>

As for peace operations, their specific mandate – often accompanied by the host state’s explicit consent – usually provides a sufficient international legal basis for their actions in the field and possible interferences with the rights of individuals. These mandates are, however, worded in rather general terms. Commanders draw up specific rules of engagement or tactical directives, similar to domestic rules for police and other security forces, to regulate the use of force by

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<sup>72</sup> ECtHR, *Streletz et al. v. Germany*, Judgement, Applications nos. 34044/96, 35532/97 and 44801/98, 22 March 2001, paras. 93-94.

<sup>73</sup> HRC, General Comment no. 6, Article 6 (Right to Life), 30 April 1982, UN Doc. HRI/GEN/1/Rev.1, para. 3.

<sup>74</sup> HRC, *Guerrero v. Colombia*, Views, 31 March 1982, Communication no. 11/45, paras. 13.1-13.3; HRC, *Baboeram v. Suriname*, Merits, 10 April 1984, Communication nos. 146/1983 and 148-154/1983, para. 14.3.

<sup>75</sup> IACtHR, *Nadege Dorzema v. Dominican Republic* (2012), *supra* note 68, paras. 79-82 and 85; ECtHR, *Nachova v. Bulgaria* (2005), *supra* note 66, paras. 96-97; ECtHR, *Makaratzis v. Greece* (2004), *supra* note 66, para. 66; ECtHR, *Kakoulli v. Turkey* (2005), *supra* note 66, para. 109.

<sup>76</sup> Use of Force and Firearms Principles (1990), *supra* note 65, Principles 1 (‘Governments and law enforcement agencies shall adopt and implement rules and regulations on the use of force and firearms against persons by law enforcement officials. In developing such rules and regulations, Governments and law enforcement agencies shall keep the ethical issues associated with the use of force and firearms constantly under review’) and Principle 11 (listing specific aspects such rules and regulations should entail).

their troops in the field. These may vary greatly from contingent to contingent, depending on the national caveats entered by their respective troop-contributing states.

Moreover, these rules are usually classified for the purpose of force protection.<sup>77</sup> Nevertheless, some parts of them are occasionally made available in order to ensure broader awareness, especially among those possibly affected by their actions.<sup>78</sup> Certainly, the rules of engagement and tactical directives do not necessarily cover all possible mission scenarios. However, human rights bodies have shown their willingness to distinguish between routine police operations and unique cases, such as large-scale hostage-taking situations, that require more tailor-made responses.<sup>79</sup> Given the high level of unpredictability in the mission area, the legal basis requirement applies with a great level of flexibility to the reality of peace operations.

### **Necessity and Proportionality**

The meaning of the term ‘arbitrary’ is not only restricted to unlawfulness.<sup>80</sup> During the drafting process of the Covenant, the delegates suggested spelling out the circumstances in which killings would be considered lawful. Most of the suggested exceptions were modelled on the three grounds listed under the Article 2 (2) of the European Convention.<sup>81</sup> Of particular relevance for peace operations, however, was one of the proposals which included: ‘killing in the case of enforcement measures authorized by the Charter’.<sup>82</sup> Nevertheless, any list of exceptions was

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<sup>77</sup> On this issue: Rowe, ‘The Rules of Engagement in Occupied Territory: Should they be Published?’, 8 *Melbourne Journal of International Law* (2007), 327-39.

<sup>78</sup> See, for instance, parts of the ISAF Tactical Directive, issued by HQ ISAF, 6 July 2009, [www.nato.int/isaf/docu/official\\_texts/Tactical\\_Directive\\_090706.pdf](http://www.nato.int/isaf/docu/official_texts/Tactical_Directive_090706.pdf). See also: IIHL, Sanremo Handbook on Rules of Engagement, November 2009.

<sup>79</sup> ECtHR, *Finogenov v. Russia* (2011), *infra* note 115, para. 230 (involving the 2002 hostage crisis at Moscow’s Dubrowka musical theatre).

<sup>80</sup> Joseph and Castan, *The International Covenant on Civil and Political Rights, Cases, Materials, and Commentary* (3<sup>rd</sup> edn., OUP 2013), para. 8.04, p. 168.

<sup>81</sup> UNGA, ‘Annotations on the Text of the Draft International Covenants on Human Rights’, 1 July 1955, UN Doc. A/2929, p. 29. Interestingly, Art. 2 (2) ECHR is modelled on an earlier draft of Art. 6 ICCPR, proposed by Australia, Denmark, France, Lebanon and the United Kingdom, E/1371 and E/CN. 4/350, 23 June 1949, p. 53.

<sup>82</sup> UN Doc. A/2929, *ibid*, p. 29 (‘Among the exceptions proposed were : (a) execution of death sentence imposed in accordance with law; (b) killing in self-defence or defence of another; (c) death resulting from action lawfully taken to suppress insurrection, rebellion or riots; (d) killing in attempting to effect lawful arrest or preventing the escape of a person in lawful custody; (e) killing in the case of enforcement measures authorized by the Charter; (f) killing in defence of persons, property or State or in circumstances of grave civil commotion; (g) killing for violation of honour’). There is no indication that the the proposal ‘killing in the case of enforcement measures authorized by the Charter’ was specifically discussed during any of the sessions, but it seems most likely that it referred to a case like the military campaign in Korea at that time, to which IHL of IACs was clearly applicable. Its inclusion in the list was thus rather uncontroversial.

seen as necessarily incomplete and the use of the term ‘arbitrary’ was favoured,<sup>83</sup> despite the lack of clarity as to its exact meaning.<sup>84</sup>

Similar considerations may have motivated the drafters of the regional instruments that included the same ‘arbitrariness’ wording. It is generally acknowledged that security forces may use force to defend themselves or others, to effect an arrest or to otherwise maintain law and order,<sup>85</sup> in line with the exceptions listed in Article 2 (2) of the European Convention.<sup>86</sup>

The exact level of force that can be used and whether it may include lethal force, however, depends entirely on the necessity and proportionality test.<sup>87</sup> While both principles are often used interchangeably, they do denote quite different legal concepts. Indeed, as we know from the previous chapter, the principle of necessity requires that there be a no less drastic alternative to the measure in question. Hence, for a concrete use of force to be considered necessary, it must be the only means to achieve one of the above-mentioned objectives.<sup>88</sup>

By contrast, the principle of proportionality requires that a balance be ‘struck between the aim pursued and the means employed to achieve it’.<sup>89</sup> In other words, a deprivation of life can only be justified in order to protect life.<sup>90</sup> Hence, not every use of force that is necessary can be

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<sup>83</sup> Ibid, p. 29-30 (‘it was maintained that any enumeration of limitations would necessarily be incomplete and would, moreover, tend to convey the impression that greater importance was being given to the exceptions than to the right. An article drafted in such terms would seem to authorize killing rather than safeguard the right to life. ... The article should simply but categorically affirm that “no one shall be arbitrarily deprived of his life”’).

<sup>84</sup> Ibid, p. 30 (‘It was explained that a clause providing that no one should be deprived of his life “arbitrarily” would indicate that the right was not absolute and obviate the necessity of setting out the possible exceptions in detail. The use of the term “arbitrarily” was criticized, however, on the ground that it did not express a generally recognized idea and that it was ambiguous and open to several interpretations’).

<sup>85</sup> HRC, *Guerrero v. Colombia* (1982), *supra* note 74, para. 13.2; IACmHR, Report on Terrorism and Human Rights (2002), *supra* note 68, para. 87; IACmHR, *Alejandro v. Cuba*, Decision, 29 September 1999, Case 11.589, Report No. 86/99, para. 43 (‘the civilian light aircraft posed no danger to Cuba’s national security, to the Cuban people, or to the military pilots’); Use of Force and Firearms Principles (1990), *supra* note 65, para. 9 and paras. 12-13 (on the use of force to disperse non-violent and non-violent assemblies).

<sup>86</sup> See above, p. 222.

<sup>87</sup> IACmHR, *Alejandro v. Cuba* (1999), *supra* note 85, paras. 42-45 (with regard to the right to life under the ADRDM); IACmHR, Report on Terrorism and Human Rights (2002), *supra* note 68, paras. 87 and 91-92; IACmHR, *Wallace de Almeida v. Brazil* (2009), *supra* note 70, paras. 105-106; IACtHR, *Uzcátegui v. Venezuela*, Judgement, 3 September 2012, Case no. 249, paras. 141-43; IACtHR, *Nadege Dorzema v. Dominican Republic* (2012), *supra* note 68, paras. 85-87; IACtHR, *Montero-Aranguran v. Venezuela* (2006), *supra* note 68, paras. 67-68; ACmHPR, *Noah Kazingachire v. Zimbabwe* (2012), *supra* note 69, para. 111-16; ECtHR, *Nachova v. Bulgaria* (2005), *supra* note 66, paras. 94-95 and 106-08; ECtHR, *Makaratzis v. Greece* (2004), *supra* note 66, paras. 64-66; HRC, *Guerrero v. Colombia* (1982), *supra* note 74, paras. 13.2-13.3.

<sup>88</sup> Melzer further distinguishes between qualitative, quantitative and temporal necessity: Melzer (2008), *supra* note, p. 101.

<sup>89</sup> ECtHR, *Güleç v. Turkey*, Judgement, 27 July 1998, Application no. 21593/93, para. 71.

<sup>90</sup> See, in particular: ACmHPR, *Noah Kazingachire v. Zimbabwe* (2012), *supra* note 69, para. 116.

considered proportionate and thus lawful. The interaction of the principle of necessity and proportionality is well reflected in the *Use of Force and Firearms Principles*, which state that firearms can only be used:

in self-defence or defence of others against the imminent threat of death or serious injury, to prevent the perpetration of a particularly serious crime involving grave threat to life, to arrest a person presenting such a danger and resisting their authority, or to prevent his or her escape, and *only when less extreme means are insufficient* to achieve these objectives. In any event, *intentional lethal use* of firearms may only be made when strictly *unavoidable in order to protect life*.<sup>91</sup>

On the basis of that, we can examine different scenarios that peace operations may be facing. The most obvious case are genuine self-defence situations, in which a person poses an imminent threat to the life or limb of others. A case in point is an attack by armed individuals on the personnel of peace operations or other people in their vicinity.<sup>92</sup> For as long as that threat persists and if there are no other means to contain it, lethal force may be used.<sup>93</sup> An even more pertinent case is the threat by suicide bombers or by armed hostage-takers determined to kill the hostages or members of the rescue teams. The use of lethal force in such scenarios is not only permissible, but even required to comply with the duty to protect the life of those threatened.

Attempts to arrest or to prevent an escape are more complex. While force may generally be used, it has to be proportionate to the situation and the threat the person poses. Indeed, practice shows that direct lethal force is only available as a last resort against persons who pose a threat that is analogous to classic self-defence situations considered above. This is well reflected in the case of *Nachova v. Bulgaria* (2006), in which the European Court held that the use of firearms was disproportionate and thus unlawful:

where it is known that the person to be arrested poses no threat to *life or limb* and is not suspected of having committed a *violent offence*, even if a failure to use lethal force may result in the opportunity to arrest the *fugitive being lost*.<sup>94</sup>

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<sup>91</sup> Use of Force and Firearms Principles (1990), *supra* note 65, para. 9.

<sup>92</sup> Mujezinović Larsen (2012), *supra* note 37, pp. 378-79.

<sup>93</sup> The option of lethal targeting disappears once the assailants no longer pose an immediate threat, most evidently once they have surrendered.

<sup>94</sup> ECtHR, *Nachova v. Bulgaria* (2005), *supra* note 66, para. 95, emphasis added; also followed by: ECtHR, *Kakoulli v. Turkey* (2005), *supra* note 66, para. 108; IACtHR, *Nadege Dorzema v. Dominican Republic* (2012), *supra* note 68, para. 85.

This shows clearly also the complex interplay between the necessity and the proportionality requirements.<sup>95</sup> The same is true for the use of force in other law-and-order scenarios, such as riot and crowd control,<sup>96</sup> or at checkpoints when approaching vehicles fail to stop.<sup>97</sup>

The perhaps most controversial use-of-force cases are those in defence of property. Some have suggested that such cases in peace operations would indeed be compatible with the Covenant and perhaps even with the European Convention.<sup>98</sup> This is, however, hardly the case under any human rights regime.<sup>99</sup> While it is true that mob violence against dwelling houses of certain ethnic groups or against their cultural property poses a serious threat to inter-communal peace and reconciliation, this does not warrant the use of (potentially) lethal force unless there is a threat to life and limb. The same applies to the theft and pillage of the peace operation's equipment. An important exception exists, however, with regard to weapons and other dangerous objects, whose unauthorised removal may easily pose a direct threat to the safety of the personnel or others in the vicinity, and thus allow for the use of force in a same way as in other self-defence situation outlined above.<sup>100</sup>

### Precautionary Duties

In addition to the necessity and proportionality test, human rights law requires states and international organisations to take all feasible precautions so as to minimise the recourse to potentially lethal force. As with other positive obligations, this is of course not meant to impose an unrealistic or impossible burden on the relevant authorities. For instance, the *Use of Force and*

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<sup>95</sup> Consider also the illustrative example provided by Noam Lubell, where the use of firearms is a necessary but grossly disproportionate means to prevent a driver from speeding away to evade a parking ticket that a police officer tries to issue. Lubell, *Extraterritorial Use of Force against Non-State Actors* (OUP 2010), p. 173.

<sup>96</sup> ACmHPR, Arbitrary Killings Working Group Report (2014), *supra* note 69, para. 50 ('the use of lethal force to clear even an unauthorised public gathering is unlawful unless lives are threatened').

<sup>97</sup> ECtHR, *Kakoulli v. Turkey* (2005), *supra* note 66, para. 108; IACtHR, *Nadege Dorzema v. Dominican Republic* (2012), *supra* note 68, para. 85.

<sup>98</sup> Hong Ip, 'PSOs: Establishing the Rule of Law Through Security and Law Enforcement Operations', in: Arnold and Knoops (eds.), *Practice and Policies of Modern Peace Support Operations under International Law* (Transnational Publishers 2006), 3-34, pp. 28-30.

<sup>99</sup> ACmHPR, Arbitrary Killings Working Group Report (2014), *supra* note 69, para. 51 (criticising the authorisation in national police codes to use lethal force in defence of property).

<sup>100</sup> Penny, '“Drop That or I’ll Shoot ... Maybe”: International Law and the Use of Deadly Force to Defend Property in UN Peace Operations', 14 (3) *International Peacekeeping* (2007), 353-67, p. 364. See also: Mujezinović Larsen (2012), *supra* note 37, pp. 379-81 (who seems generally more willing to accept the use of lethal force in defence of property or defence of the mission).

*Firearms Principles* require law-enforcement agents to give a clear warning of their intent to use firearms:

*unless* to do so would unduly place the law enforcement officials at risk or would create a risk of death or serious harm to other persons, or would be clearly inappropriate or pointless in the circumstances of the incident.<sup>101</sup>

Police operations should be planned and implemented in a manner to minimise, as far as possible, the risk of having to resort to lethal force.<sup>102</sup> This is perhaps best reflected in the case of *McCann v. United Kingdom*, involving the fatal shooting of three suspected members of the Irish Republic Army (IRA) by British special forces in Gibraltar. The European Court accepted that the soldiers genuinely believed that they had to use lethal force against the suspects to prevent them from detonating a car bomb.<sup>103</sup> Nevertheless, the Court criticised the failure to prevent the entry of the suspects and to arrest them already at the border with Spain, which made the fatal shooting a ‘foreseeable possibility if not a likelihood’.<sup>104</sup> The Court also criticised the handling of intelligence information and the failure to make provision for a margin of error.<sup>105</sup> The need for exceptional care and cross-checking in handling decisive intelligence has also been stressed with regard to other terror-related scenarios, such as suicide bombings.<sup>106</sup>

Appropriate training of law-enforcement officers is a vital component for the planning and implementation of operations. This may include teaching alternatives to the use of lethal force and

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<sup>101</sup> Para. 10. See also, HRC, *Guerrero v. Colombia* (1982), *supra* note 74, paras. 13.2; IACmHR, *Alejandro v. Cuba* (1999), *supra* note 85, para. 42 (denouncing the lack of prior warning by Cuban military pilots shooting down a civilian light plane); Heyns, Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, ‘The Protection of Life in the Context of Arrest’, 30 August 2011, A/66/330, para. 38.

<sup>102</sup> ECtHR, *Andronicou and Constantinou v. Cyprus*, Judgement, 9 October 1997, Application no. 25052/94, paras. 181-86 (on the planning and execution of a hostage-rescue operation); ECtHR, *Makaratzis v. Greece*, *supra* note 66, paras. 66-71; ECtHR, *Giuliani and Gaggio v. Italy*, Judgement, 24 March 2011, Application no. 23458/02, paras. 244-62 (on the planning and on-site implementation of crowd control measures during violent protests). IACmHR, *Neira Alegria v. Peru*, Judgement, 19 January 1995, Case no. 21, para. 62 (criticising the lack of precautionary measures to reduce the cost of lives when raiding a prison affected by rioting).

<sup>103</sup> ECtHR, *McCann v. United Kingdom* (1995), *supra* note 66, paras. 195-201.

<sup>104</sup> *Ibid*, para. 205.

<sup>105</sup> *Ibid*, paras. 206-11.

<sup>106</sup> Philip Alston, Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, 8 March 2006, E/CN.4/2006/53, paras. 50-51.

firearms,<sup>107</sup> or training for different operational scenarios, including hostage-takings, checkpoint situations, access denial or crowd control.<sup>108</sup> According to the Inter-American Court, internal disturbances should, as a matter of principle, be dealt with by the police rather than the military:

States must restrict to the maximum extent the use of armed forces to control domestic disturbances, since they are trained to fight against enemies and not to protect and control civilians, a task that is typical of police forces.<sup>109</sup>

While this is generally true, the use of armed forces personnel for law-enforcement tasks is explicitly envisaged by the *Use of Force and Firearms Principles*.<sup>110</sup> Moreover, the use of soldiers for policing and related tasks is an operational reality in contemporary peace operations, which makes it even more necessary to provide troops with relevant training across the full operational spectrum.

In addition, police and security forces also have to be equipped with protective gear and armoured vehicles and with a variety of different weapons, including non-lethal incapacitating weapons, to allow for a differentiated use of force.<sup>111</sup> A case in point is *Güleç v. Turkey*, involving an illegal and violent pro-Kurdish demonstration.<sup>112</sup> Turkish forces started firing into the crowd from a vehicle-mounted machine gun, resulting in the deaths of several demonstrators. The European Court criticised that:

The gendarmes used a very powerful weapon because they apparently did not have *truncheons, riot shields, water cannon, rubber bullets or tear gas*. The lack of such equipment is all the more incomprehensible and unacceptable ... in a region in which a state of emergency has been declared, where at the material time disorder could have been expected.<sup>113</sup>

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<sup>107</sup> Principles 19 and 20.

<sup>108</sup> IACtHR, *Nadege Dorzema v. Dominican Republic* (2012), *supra* note 68, paras. 87-90 (criticising the lack of planning and training for dealing with unauthorised border crossings); ECmHR, *Aytekin v. Turkey*, Report, 18 September 1997, Application no. 22880/93, para. 97 (criticising the lack of planning and training for road checkpoints).

<sup>109</sup> IACtHR, *Montero-Aranguran v. Venezuela* (2006), *supra* note 68, para. 78.

<sup>110</sup> Footnote 1 to the preamble ('In countries where police powers are exercised by military authorities, whether uniformed or not, or by State security forces, the definition of law enforcement officials shall be regarded as including officers of such services').

<sup>111</sup> Use of Force and Firearms Principles (1990), *supra* note 65, para. 2.

<sup>112</sup> ECtHR, *Güleç v. Turkey* (1998), *supra* note 89.

<sup>113</sup> *Ibid.*, para. 71-72. See also, ECtHR, *Erdogan v. Turkey*, Judgement, 25 April 2006, Application no. 19807/92, para. 74 (on the failure to equip with tear gas and stun grenades). ACmHPR, *Movement Burkinabé des Droits de l'Homme et des Peuples v. Burkina Faso*, Decision on the Merits, 7 May 2001, Communication no. 204/97, para. 43.

In the same vein, human rights bodies have criticised the lack of appropriate traffic control equipment for checkpoints, including barricades, speed bumps or tire puncturing devices.<sup>114</sup> Finally, authorities must also ensure speedy rescue and evacuation operations and provide adequate medical treatment to injured persons.<sup>115</sup>

## HUMANITARIAN LAW

### Introduction

Humanitarian law is generally referred to as a careful balance between military necessity and humanity, which constitute the cardinal principles of humanitarian law, alongside the principle of distinction and proportionality. However, the function of these principles differs greatly from their counterparts in the field of human rights law, where necessity and proportionality play a constant role in assessing the lawfulness of state conduct. In humanitarian law, they constitute overarching principles, which have already been taken account of in the formation of the detailed rules that have evolved as a matter of positive law. Hence, unless there is an explicit reference in the norm text itself, they play no role in the actual operation of these rules.

As we have seen in the previous chapters, there is a large body of customary humanitarian law, which mirrors many of the detailed rules that can be found in the most relevant humanitarian law conventions. It is particularly relevant in relation to non-international armed conflict, which is the more likely type of armed conflict for peace operations and for which treaty law remains fairly limited. This is why the following analysis will be primarily based on the rules contained in the *Customary IHL Study*, with some cross-references to the *Sanremo NIAC Manual*, the *Secretary-General's Bulletin* and relevant practice as well as more specific treaty provisions.

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<sup>114</sup> IACtHR, *Nadege Dorzema v. Dominican Republic* (2012), *supra* note 68, para. 88. See also: ECtHR, *Pisari v. Moldova and Russia*, Judgement, 21 April 2015, Application no. 42139/12, para. 57 (on the lack of appropriate equipment for immobilising vehicles at Russian military checkpoints in Moldova).

<sup>115</sup> Use of Force and Firearms Principles (1990), *supra* note 65, para. 5 (c); ECtHR, *Finogenov v. Russia*, Judgement, 20 December 2011, Applications nos. 18299/03 and 27311/03, paras. 237-266 ('information exchange between various services, the belated start of the evacuation, limited on-the-field coordination of various services, lack of appropriate medical treatment and equipment on the spot, and inadequate logistics'); IACmHR, *Neira Alegria v. Peru* (1995), *supra* note 102, para. 74 (failure to search for survivors).

## Distinction, Proportionality and Feasible Precautions

Humanitarian law is premised on the existence of fighting. That is why the principle of distinction is of utmost importance and has led to the development of rules setting out clear categories of persons and objects that can be targeted and those that have to be spared. Rule 1 of the *Customary IHL Study* states clearly that:

The parties to the conflict must at all times distinguish between civilians and combatants. Attacks may only be directed against combatants. Attacks must not be directed against civilians.<sup>116</sup>

For that purpose, civilians are negatively defined as all those who are not members of the armed forces.<sup>117</sup> They are protected against attack ‘unless and for such time as they take a direct part in hostilities’.<sup>118</sup> The armed forces consist of combatants and medical and religious personnel.<sup>119</sup> While combatants have a right to participate in hostilities and may be attacked at any time, unless they are placed *hors de combat*,<sup>120</sup> medical and religious personnel are protected against attacks, provided they abstain from hostile acts.<sup>121</sup> As we have seen above, there is no combatant status in non-international armed conflicts. In other words, members of armed groups are civilians who no longer enjoy protection against attack due to their direct participation in hostilities.<sup>122</sup> Their special status and the general concept of direct participation in hostilities is examined in greater detail in the following subsection.

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<sup>116</sup> See also: Sect. 1.2.2 (Distinction) and 2.1.1.1 (Attacking Civilians and Civilian Objects), Sanremo NIAC Manual; Sect. 5.1, SG Bulletin.

<sup>117</sup> Rule 5, CIHL Study.

<sup>118</sup> Rule 6, *ibid.* See also Sect. 5.2, SG Bulletin.

<sup>119</sup> Rule 3, CIHL Study.

<sup>120</sup> Rule 47, *ibid.* (‘Attacking persons who are recognized as *hors de combat* is prohibited. A person *hors de combat* is: (a) anyone who is in the power of an adverse party; (b) anyone who is defenceless because of unconsciousness, shipwreck, wounds or sickness; or (c) anyone who clearly expresses an intention to surrender; provided he or she abstains from any hostile act and does not attempt to escape’). See also: Art. 41 AP I and Sect. 2.3.2 (Surrender), Sanremo NIAC Manual; Sect. 7.1, SG Bulletin.

<sup>121</sup> Rules 25 and 27, CIHL Study. See also: Sect. 3.2 (Medical and Religious Personnel), Sanremo NIAC Manual; Sect. 9.4, SG Bulletin.

<sup>122</sup> Similar, but differently structured: Sect. 1.1.2 (Fighters) and 1.1.3 (Civilians), Sanremo NIAC Manual; Sect. 5.2, SG Bulletin.

The civilian-military distinction is replicated in relation to objects.<sup>123</sup> To be precise, civilian objects are protected against direct attack, unless and for such time as they are military objectives.<sup>124</sup> As far as objects are concerned, Rule 8 of the *Customary IHL Study* defines military objectives as all those:

which by their *nature, location, purpose or use make an effective contribution* to military action and whose partial or total *destruction, capture or neutralization*, in the circumstances ruling at the time, offers a definite *military advantage*.<sup>125</sup>

This certainly includes any military equipment, such as weapons, ammunition or vehicles, as well as fixed military installations and barracks. The reach of the definition is, however, much broader: Also dual-use objects (e.g. landing strips, railways, ports, roads and bridges), which may be used both for military and civilian purposes, can easily qualify as a military objective. The same applies to genuine civilian objects and sites (e.g. schools, hospitals and places of worship), if they are *used* for military purposes by enemy forces.

Since military objectives may be subjected to direct attack, this qualification may have serious consequences for civilians and civilian objects in the vicinity. For that reason, Rule 14 of the *Customary IHL Study* encapsulates a proportionality test by prohibiting attacks that:

may be *expected to cause incidental loss* of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be *excessive* in relation to the concrete and direct *military advantage anticipated* ...<sup>126</sup>

The rule is thus aimed at preventing attacks where the expected collateral damage to civilians and civilian objects would outweigh ('*excessive* in relation to') the expected military advantage, while acknowledging that incidental harm and damage may occur as a result of attacks on legitimate targets.<sup>127</sup> Hence, the underlying rationale of proportionality under humanitarian law greatly differs from its counterpart in human rights law, which does not distinguish between different categories of people, but instead treats all human lives the same.

What is more, unlike human rights law – which appears to be relatively clear on what amounts to a proportionate or disproportionate outcome – the answer under humanitarian law is rather vague. Apart from very extreme cases, there is indeed little guidance as to whether the collateral

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<sup>123</sup> Rule 7, CIHL Study ('... distinguish between civilian objects and military objectives. Attacks may only be directed against military objectives. Attacks must not be directed against civilian objects'). See also, Sect. 1.2.2 (Distinction) and Sect. 2.1.1.1, Sanremo NIAC Manual.

<sup>124</sup> Rules 9-10, CIHL Study. See also, Sect. 1.1.5 (Civilian Objects), Sanremo NIAC Manual.

<sup>125</sup> Emphasis added. See also: Sect. 1.1.4 (Military Objectives), Sanremo NIAC Manual.

<sup>126</sup> Emphasis added. See also: Sect. 2.1.1.4 (Proportionality), Sanremo NIAC Manual; Sect. 5.5, SG Bulletin.

<sup>127</sup> For the ICRC view that also medical personnel are covered by the rules on proportionality and precaution: Gisel, 'Can the Incidental Killing of Military Doctors Never be Excessive?', 95 IRRC (2013), 215-30.

damage is *excessive*. The *ICRC Commentary on the Additional Protocols* suggests that ‘extensive civilian losses’ are by default disproportionate, regardless of the importance of the military advantage at stake.<sup>128</sup> This is, however, a misreading of the term ‘*excessive* in relation to’, which clearly entails a balancing test.<sup>129</sup> Overall, it seems widely accepted that no rule of thumb exists for assessing how many dead civilians are acceptable for specific targeting scenarios,<sup>130</sup> such as disabling a tank of the enemy or destroying their main command centre attended by their military commanders. Rather, it appears that views on these questions differ greatly, even among key allies.<sup>131</sup>

Moreover, even if there was a bright-line test based on numbers that commanders and targeting officers could rely on, it would still remain unclear how it should be applied to the wide range of different mission scenarios of contemporary peace operations. Is the notion of ‘military advantage’ *static* or does its meaning depend on the objectives and exact mandate of the operation in question? According to Michael Bothe, where an operation is specifically tasked with protecting civilians, this should inform the meaning of the term ‘military advantage’ for identifying military objectives and for assessing whether or not the attack would result in excessive incidental harm to civilians.<sup>132</sup> This would, however, create a difficult imbalance between the parties to the conflict. Indeed, enemy forces – which are primarily interested in the total defeat of the adversary – would be free to cause much greater levels of collateral damage than the peace operation. Moreover, where international forces act in support of the host government (for instance, against local rebel groups), there would also be an imbalance, creating possible challenges for joint operations.

However, in genuine air campaigns – which need to be less concerned about force protection than peace operations with ground troops – this concept may prove workable and may indeed help reduce the number of civilian casualties deemed proportionate and thus acceptable. A case in point is Operation Unified Protector in 2011, the NATO-led operation carrying out air strikes in Libya to protect civilians. According to NATO statements:

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<sup>128</sup> Sandoz et al., *Commentary on the Additional Protocols* (ICRC 1987), para. 1980, p. 626.

<sup>129</sup> This may explain why the CIHL Study refrains from making any detailed comments.

<sup>130</sup> Sanremo NIAC Manual, Commentary, p. 23, para. 5 (‘Proportionality is not an exact science and it is impossible to draw in advance hard and fast rules as to what outcome is proportionate to military advantage’). Dinstein, *The Conduct of Hostilities under the Law of International Armed Conflict* (CUP 2004), p. 121.

<sup>131</sup> For an excellent outline of this dilemma: Noll, ‘Analogy at War: Proportionality, Equality and the Law of Targeting’, 43 *Netherlands Yearbook of International Law* (2012), 205-30.

<sup>132</sup> Bothe, ‘The Responsibility to Protect and International Humanitarian Law’, in: Beruto (ed.), *International Humanitarian Law, Human Rights and Peace Operations. XXXIst Sanremo Round Table 2008* (IIHL 2009), 224-26, p. 225.

The OUP targeting policy was designed and implemented with the Security Council mandate to “protect civilians and civilian-populated areas under threat of attack” firmly at its core. The overriding objective throughout the campaign was to avoid any harm to civilians. Not one of the targets struck, involving over 7,700 weapons, was approved for attack, or in fact attacked, if either those designating and approving the target or the pilot executing it *had any evidence or other reason to believe that civilians would be injured or killed by a strike*.<sup>133</sup>

This zero-expectation standard goes far beyond what the proportionality rule would normally require. It is, however, unclear whether this standard was merely adopted for policy reasons or whether it reflects a mission-dependent adaption of the proportionality test as a matter of binding law. Moreover, as we have seen, the proportionality rule is based on collateral damage *expectations prior* to the attack itself. In order to fill the protection gap that may arise, humanitarian law also comprises far-reaching precautionary duties that the parties to the conflict have to fulfil. As a general rule:

[C]onstant care must be taken to spare the civilian population, civilians and civilian objects. All *feasible precautions* must be taken to avoid, and in any event to minimize, incidental loss of civilian life, injury to civilians and damage to civilian objects.<sup>134</sup>

This may include measures, such as target verification, damage assessment and advance warnings prior to an attack.<sup>135</sup> Parties to the armed conflict are also required to take all feasible precautions against the effects of possible enemy attacks, for instance, by removing military objectives from civilian areas.<sup>136</sup>

In sum, humanitarian law contains a tightly-woven net of rules aimed at limiting the possible effects of warfare on the civilian population, as well as other specifically protected persons and objects, while acknowledging that incidental harm and damage may occur as a result of attacks against legitimate military targets.<sup>137</sup>

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<sup>133</sup> HR Council, Report of the International Commission of Inquiry on Libya, 2 March 2012, A/HRC/19/68, Annex II, Correspondence from NATO, p. 30, emphasis added.

<sup>134</sup> Rule 15, CIHL Study. See also: Sect. 5.3, SG Bulletin.

<sup>135</sup> CIHL Study: Rule 16 (Target Verification), Rule 17 (Choice of Means and Methods of Warfare), Rule 18 (Assessment of the Effects of Attacks), Rule 19 (Control during the Execution of Attacks), Rule 20 (Advance Warning) and Rule 21 (Target Selection). See also: Sect. 2.1.2 (Precautions in Planning and Carrying out Attacks), Sanremo NIAC Manual.

<sup>136</sup> Ibid, Rules 22-24. See also: Sect. 4.1 (General Protection) and 2.3.7 (Location of Military Objectives), Sanremo NIAC Manual; Sect. 5.4, SG Bulletin.

<sup>137</sup> IHL also contains a number of rules on specifically protected persons and objects, including hospitals, cultural property, installations containing dangerous forces and the natural environment. See for a full list: Rules 25-45, CIHL Study. See also: Sect. 6.6-6.8, SG Bulletin.

## Direct Participation in Hostilities

As we have seen above, the lack of a combatant status is a particular feature of the law of non-international armed conflict. To be precise, members of armed groups are *prima facie* civilians who forfeit their protection against attack due to their role as fighters. Moreover, both in international and non-international armed conflicts civilians also join the fighting on a more spontaneous or incidental basis. As a general rule:

Civilians are protected against attack, *unless and for such time* as they take a direct part in hostilities.<sup>138</sup>

In order to explore the concept of direct participation in hostilities and the modalities governing the loss of civilian protection, the ICRC and the T.M.C. Asser Institute convened five expert meetings between 2003 and 2008.<sup>139</sup> The discussions among the experts proved highly contentious, which meant that the final outcome – the *Interpretative Guidance on the Notion of Direct Participation in Hostilities*, issued in May 2009 – solely reflects the views of the ICRC.<sup>140</sup> The document has attracted strong criticism from a number of military lawyers.<sup>141</sup> But most parts of the *Interpretative Guidance* are fairly uncontroversial, including the status of fighters in non-international armed conflicts and the constitutive elements of acts amounting to direct participation in hostilities.

As noted above, civilians only lose their protection ‘for such time’ as they take a direct part in hostilities. This implies a *revolving door* between protection and loss of protection, which can be easily exploited by members of armed groups: they can be farmers by day and fighters by night. This would, however, shield them from direct attack for most of the time and would thus create an imbalance by unfairly favouring such fighters over members of state armed forces, who can be targeted at any time. In order to solve the *revolving door dilemma* many experts advocated a membership approach, making fighters liable to attack along the same lines as

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<sup>138</sup> Rule 6, CIHL Study, emphasis added. This rule is based on an identical formulation contained in Art. 50 (3) AP I and Art. 13 (3) AP II. See also CA3 (1) (‘Persons taking *no active part* in the hostilities ... shall in all circumstances be treated humanely’, emphasis added).

<sup>139</sup> See, for instance, the summary reports of all five expert meetings, between 2003 and 2008: [www.icrc.org/eng/resources/documents/article/other/direct-participation-article-020709.htm](http://www.icrc.org/eng/resources/documents/article/other/direct-participation-article-020709.htm).

<sup>140</sup> ICRC, *Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law*, prepared and edited by Nils Melzer, May 2009, hereinafter: ICRC, *Interpretive Guidance* (2009).

<sup>141</sup> See, in particular, Nils Melzer’s detailed response to the individual points raised by Kenneth Watkin, Michael Schmitt, William Boothby and Hays Parks, who had all participated in the expert meetings: Melzer, ‘Keeping the Balance Between Military Necessity and Humanity: A Response to Four Critiques of the ICRC’s Interpretive Guidance on the Notion of Direct Participation in Hostilities’, 42 (3) *NYU Journal of International Law and Politics* (2010), 831-916.

regular soldiers.<sup>142</sup> In the end, the ICRC chose to focus on the person's exact function within the group rather than their mere membership.<sup>143</sup> According to the *Interpretative Guidance*, persons that are continuously involved in:

the preparation, execution, or command of acts or operations amounting to direct participation in hostilities are assuming a *continuous combat function*.<sup>144</sup>

Hence, they lose their protection and can be targeted (in the same way as government soldiers, unless *hors de combat*) for as long as they assume that *continuous combat function* within the armed group.<sup>145</sup> While some human rights experts have expressed their concern at this novel concept,<sup>146</sup> there seems to be an increasing appreciation for the fact that it does at least provide useful guidance on a matter virtually unaddressed in treaty law.<sup>147</sup> Whether a person has a continuous combat function needs to be assessed based on the circumstances. Carrying combat weapons openly or wearing uniforms or other distinctive emblems of the group are relatively clear signs. But also conclusive behaviour – involving repeated rather than sporadic acts of direct participation in hostilities – may indicate the role as a fighter.<sup>148</sup>

Where the continuous combat function cannot be established beyond doubt, the general test of direct participation in hostilities for civilians in relation to the commission of *specific acts* applies.<sup>149</sup> As noted above, their loss of protection is limited to the duration of such acts amounting to direct participation in hostilities, which results in a much more limited targetability. The *Interpretative Guidance* makes clear, however, that preparatory measures as well as prior deployment and return from the scene constitute an integral part of the specific act in question and

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<sup>142</sup> Summary Report of the Third Expert Meeting on the Notion of Direct Participation in Hostilities co-organised by the ICRC and the TMC Asser Institute, Geneva, 23-25 October 2005, pp. 59-64. See also: Kleffner, 'From "Belligerents" to "Fighters" and Civilians Directly Participating in Hostilities' 54 (2) *Netherlands International Law Review* (2007), 315-36 (discussing the different approaches in detail).

<sup>143</sup> ICRC, *Interpretive Guidance* (2009), pp. 31-35.

<sup>144</sup> *Ibid.*, p. 34, emphasis added. Unlike the pure membership approach, the 'continuous combat function' concept does not automatically cover members of the political and religious leadership of the armed group, despite the important role they may play inside the group. However, they do squarely fall into that category if they have command over the military wing, similar to supreme command powers over regular state forces, which usually lies with the head of the executive branch of government.

<sup>145</sup> *Ibid.*, pp. 71-73.

<sup>146</sup> HR Council, Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, Philip Alston, Study on targeted killings, 28 May 2010, A/HRC/14/24/Add.6, para. 65 (deploring mainly the lacking legal basis of this far-reaching concept in existing treaty-based IHL).

<sup>147</sup> HR Council, Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, Christof Heyns, 13 September 2013, A/68/382, para. 70.

<sup>148</sup> ICRC, *Interpretive Guidance* (2009), p. 35.

<sup>149</sup> In case of doubt, e.g. in relation to the performance of a continuous combat function or to the commission of acts amounting to DPH, the retention of the protected status is to be presumed (*ibid.*, pp. 74-76).

thus have a direct impact on the duration of the loss of protection.<sup>150</sup> In order to qualify as direct participation in hostilities, the specific act must meet the three following cumulative criteria:

1. The act must be likely to *adversely affect* the military operations or military capacity of a party to an armed conflict or, alternatively, to *inflict* death, injury, or destruction on persons or objects protected against direct attack (threshold of harm), *and*
2. There must be a *direct causal link* between the act and the harm likely to result either from that act, or from a coordinated military operation of which that act constitutes an integral part (direct causation), *and*
3. The act must be *specifically designed* to directly cause the required threshold of harm in support of a party to the conflict and to the detriment of another (belligerent nexus).<sup>151</sup>

The first requirement (threshold of harm) goes beyond mere harm to military operations and covers also attacks against protected persons (e.g. civilians or persons *hors de combat*) and protected objects, provided such attacks have a belligerent nexus. The second requirement (direct causation) makes sure that the contribution to the general war effort – which may involve significant parts of the civilian population – does not amount to direct participation in hostilities. Moreover, the third requirement (belligerent nexus) entails an *objective test*, focusing on whether the act in question can ‘reasonably be perceived’ as being specifically designed to help one party by directly causing harm to the other.<sup>152</sup>

This allows us to consider a number of different mission scenarios that international forces participating in a peace operation may be facing in the field: Guerrilla-style ambushes and similar violent attacks against ground troops are perhaps the clearest case. But also sabotage acts and other unarmed activities aimed at disturbing deployments, logistics and communication of the international forces or their local allies qualify as direct participation in hostilities. The same is the case for the removal of mines to allow the deployment of enemy forces or providing them with tactical targeting information on troop movements.<sup>153</sup> All these acts will lead to the loss of civilian protection for the persons involved. In other words, they can be targeted with lethal force during the commission of these acts, regardless of whether they do pose any threat to life and limb of peace-keepers or any third persons.

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<sup>150</sup> Ibid, pp. 65-68.

<sup>151</sup> Ibid, p. 46.

<sup>152</sup> Ibid, p. 64.

<sup>153</sup> Ibid, pp. 48-49.

Civilians who act as voluntary human shields constitute a particular challenge for peace operations, especially when conducting air strikes, since they place themselves around military objectives to render them immune from attack. Their presence does indeed have a negative effect on the attacking side, by upsetting the outcome of the proportionality assessment. This creates, however, only a legal obstacle, but does in no way physically impede air strikes against the target.<sup>154</sup> Hence, civilians who act as human shields in this scenario do not cross the threshold to direct participation in hostilities and remain protected against attack.<sup>155</sup> This may, however, create an incentive to use ground troops, which would allow for an entirely different legal conclusion.<sup>156</sup> Indeed, if civilians try to block roads or bridges to obstruct the movement of ground troops or try to shield enemy fighters from sniper fire, their actions do amount to direct participation in hostilities. The same conclusion can be drawn for cases of riots or large-scale inter-communal violence, provided the acts are specifically designed to support enemy forces, while causing direct harm to the peace operation or their allies.<sup>157</sup>

Direct participation in hostilities does not require a *minimum age*. In fact, international forces involved in peace operations are on many occasions confronted with children that are used by armed groups, such as in Sierra Leone or in the Democratic Republic of Congo. Despite their young age, they may be attacked when they perform genuine fighting tasks, either on a continuous basis or more sporadically.<sup>158</sup> But also non-violent assignments in support of the group (e.g. as scouts for gathering tactical intelligence) may lead to a loss of protection and make them targetable. In the recent *Lubanga* case (2012), the International Criminal Court held that also other roles – including as porters, cooks or sex slaves for armed groups – may qualify as ‘active participation’ in hostilities.<sup>159</sup> This interpretation was, however, concerned with the meaning of the war crime of:

Conscripting or enlisting children under the age of fifteen years into armed forces or groups or using them to *participate actively in hostilities*;<sup>160</sup>

In view of the Court, active participation had to be interpreted as referring to the act of exposing the child to ‘real danger as a potential target’.<sup>161</sup> In other words, the broad interpretation was

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<sup>154</sup> Ibid, p. 57.

<sup>155</sup> For the opposite view: Schmitt, ‘Deconstructing Direct Participation in Hostilities: The Constitutive Elements’, 42 (3) NYU Journal of International Law and Politics (2010), 697-739, p. 732.

<sup>156</sup> ICRC, Interpretive Guidance (2009), p. 56

<sup>157</sup> Ibid, p. 63.

<sup>158</sup> This presupposes of course that the armed group they support is indeed involved in an armed conflict with the international forces involved in the peace operation in question.

<sup>159</sup> ICC, *Prosecutor v. Lubanga Dyilo*, Trial Chamber, Judgement, 14 March 2012, Case no. ICC-01/04-01/06, para. 628.

<sup>160</sup> Art. 8 (2) (e) (vii), ICC Statute, emphasis added.

<sup>161</sup> ICC, *Prosecutor v. Lubanga Dyilo* (2012), *supra* note 159, para. 628.

only meant to expand the protective scope of the war crime – so as to cover any child *placed in harm's way* – and does in no way affect the notion of direct participation in hostilities in relation to the civilian protection from direct attack.

### **Less-Harmful Means Approach**

As we have seen in the two previous subsections, humanitarian law is mainly concerned with limiting the effects of warfare on the civilian population as well as other specifically protected persons and objects. It accepts the deliberate lethal targeting of persons on the basis of status and conduct, even when they are far from posing any direct threat to life or limb as required under human rights law.

Section IX of the *Interpretive Guidance* is devoted to limiting these far-reaching effects of the targeting under humanitarian law. It specifically states that:

[T]he *kind and degree of force* which is permissible against persons not entitled to protection against direct attack *must not exceed* what is actually *necessary* to accomplish a legitimate military purpose in the prevailing circumstances.<sup>162</sup>

Even though this does not necessarily imply an absolute capture-rather-than-kill requirement, Section IX stresses that there is no *licence to kill* combatants and civilians that have forfeited their right to protection.<sup>163</sup> In large-scale confrontations with well-armed forces or rebel fighters, the suggested restriction is unlikely to have any effect.<sup>164</sup> The outcome is, however, different where operating forces have firm control over an area and encounter an unarmed fighter, a person who transmits viable targeting information or a crowd of villagers that deliberately blocks a bridge to shield enemy forces. What is essential is the ability to control the circumstances on the ground rather than the lack or loss of protection from attack. According to Section IX, less harmful means must be employed before lethal force can be used, provided they do not pose additional risks to the forces on the ground.<sup>165</sup> This approach greatly reflects the position previously taken by Nils Melzer,<sup>166</sup> the main author of the *Interpretive Guidance*, but also echoes the long-held view of Jean Pictet:

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<sup>162</sup> ICRC, *Interpretive Guidance* (2009), p. 77.

<sup>163</sup> *Ibid*, p. 78.

<sup>164</sup> *Ibid*, p. 81.

<sup>165</sup> *Ibid*, pp. 81-82.

<sup>166</sup> Melzer (2008), *supra* note 71, pp. 278-96.

[I]f a combatant can be put out of action by taking him prisoner, he should not be injured; if he can be put out of action by injury, he should not be killed; and if he can be put out of action by light injury, grave injury should be avoided.<sup>167</sup>

Section IX is undoubtedly the most controversial part of the *Interpretive Guidance* and has attracted strong criticisms from military lawyers<sup>168</sup> and general international lawyers alike.<sup>169</sup> Its inclusion proved already controversial during the expert meetings, with many experts questioning the legal basis of this duty under humanitarian law, while being more open to the idea that such limitations may derive from applicable human rights law or policy considerations.<sup>170</sup> According to the *Interpretive Guidance*, the ‘less-harmful means’ approach advocated in Section IX has its grounding in the restrictive function of the principle of military necessity in harmony with the principle of humanity.<sup>171</sup> It is also reflected in the preamble of the St. Petersburg Declaration (1868), which states:

That the only legitimate object which States should endeavour to accomplish during war is to weaken the military forces of the enemy;

That for this purpose it is sufficient to disable the greatest possible number of men;

That this object would be exceeded by the employment of arms which uselessly aggravate the sufferings of disabled men, or render their death inevitable;<sup>172</sup>

The difficulty with this argument lies in the fact that the principles of military necessity and humanity are not self-standing rules. As noted above, they rather constitute overarching principles that have already been taken into account in the formation of the individual rules of positive humanitarian law and have thus no bearing on the operation of these rules absent an explicit reference.

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<sup>167</sup> Pictet, *Development and Principles of International Humanitarian Law* (Martinus Nijhoff 1985), p. 75.

<sup>168</sup> Parks, ‘Part IX of the ICRC “Direct Participation in Hostilities” Study: No Mandate, No Expertise, and Legally Incorrect’, 42 (3) *NYU Journal of International Law and Politics* (2010), 794-830; Taylor, ‘The Capture Versus Kill Debate: Is the Principle of Humanity Now Part of the Targeting Analysis When Attacking Civilians Who Are Directly Participating in Hostilities?’, *The Army Lawyer* (2011), 103-11; Boothby, *The Law of Targeting* (OUP 2012), p. 526.

<sup>169</sup> Akande, ‘Clearing the Fog of War? The ICRC’s Interpretive Guidance on Direct Participation in Hostilities’, 59 (1) *ICLR* (2010), 180-192, p. 192; Ohlin, ‘The Duty to Capture’, 97 *Minnesota Law Review* (2013), 1268-1342; Kleffner, ‘Section IX of the ICRC Interpretive Guidance on Direct Participation in Hostilities: The End of Jus in Bello Proportionality as We Know It?’, 45 (1) *Israel Law Review* (2012), 35-52; Blum, ‘The Dispensable Lives of Soldiers’, 2 (1) *Journal of Legal Analysis* (2010), 69-124.

<sup>170</sup> Summary Report of the Fifth Expert Meeting on the Notion of Direct Participation in Hostilities, co-organised by the ICRC and the TMC Asser Institute, Geneva, 5-6 February 2008, pp. 7-32.

<sup>171</sup> ICRC, *Interpretive Guidance* (2009), p. 78-80. See also, Melzer (2008), *supra* note 166, pp. 286-91.

<sup>172</sup> Declaration Renouncing the Use, in Time of War, of Explosive Projectiles under 400 Grammes Weights, St. Petersburg, 11 December 1868, emphasis added.

Ryan Goodman has more recently come out in support of the ‘less-harmful means’ approach adopted by the ICRC in the *Interpretive Guidance*.<sup>173</sup> He argues that this approach is supported by the text and the negotiating history of Additional Protocol I,<sup>174</sup> especially Article 35 (2), which reads as follows:

It is prohibited to employ weapons, projectiles and material and methods of warfare of a nature to cause *superfluous* injury or *unnecessary* suffering.<sup>175</sup>

Michael Schmitt is, however, not convinced that *ordinary* killing was ever meant to be covered by the term ‘method of warfare’, while certain ways of killing would undoubtedly fall into that category.<sup>176</sup> Hence, he considers it unlikely that Article 35 (2) prohibits killings that are militarily unnecessary. Schmitt agrees, however, with Goodman<sup>177</sup> that some relevant scenarios fall under the *hors de combat* protection, because the persons are ‘in the power’ of the enemy (even prior to capture),<sup>178</sup> unless they show the ability or willingness to resist.<sup>179</sup>

In view of these considerations, it remains debatable whether humanitarian law really contains a ‘less-harmful means’ requirement that goes any further than the *hors de combat* exception.<sup>180</sup> We shall therefore proceed on the assumption that no such requirement exists and that targeting based on status or conduct is fully consistent with humanitarian law, as opposed to human rights law, which requires threats to life or limb prior to the use of lethal force.

## Means and Methods of Warfare

Despite its liberal targeting rules, humanitarian law restricts the choice of means and methods that the belligerents can employ.<sup>181</sup> As we have seen above, it bans the use of weapons and

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<sup>173</sup> Goodman, ‘The Power to Kill or Capture Enemy Combatants’, 24 (3) EJIL (2013), 819-53. He remains less clear as to whether the term ‘military advantage’ should be interpreted narrowly, thereby excluding what can be considered military convenience; and whether that military advantage has to be additionally balanced with the suffering of the person in question, i.e. a genuine proportionality test (p. 823).

<sup>174</sup> Ibid, pp. 836-52.

<sup>175</sup> Emphasis added. See also Rule 70, CIHL Study; Sect. 1.2.3 (Unnecessary Suffering), CIHL Study; Sect. 6.3, SG Bulletin.

<sup>176</sup> Schmitt, ‘Wound, Capture, or Kill: A Reply to Ryan Goodman’s ‘The Power to Kill or Capture Enemy Combatants’’, 24 (3) EJIL (2013), 855-61, p. 857.

<sup>177</sup> Goodman (2013), *supra* note 173, p. 830-36. For a similar approach: Römer, *Killing in a Gray Area Between Humanitarian Law and Human Rights* (Springer 2010), pp. 78-83.

<sup>178</sup> Art. 41 (2) AP I (‘A person is ‘hors de combat’ if: (a) he is in the power of an adverse Party’). See also: Rule 47, CIHL Study.

<sup>179</sup> Schmitt (2013), *supra* note 176, pp. 860-61.

<sup>180</sup> Similarly cautious: HR Council, Report of the Special Rapporteur, Christof Heyns, 13 September 2013, A/68/382, paras. 77-79.

<sup>181</sup> Art. 35 (1) AP I. See also: Sect. 6.1, SG Bulletin.

methods that are of a nature to ‘cause superfluous injury or unnecessary suffering’.<sup>182</sup> In addition to this general rule, humanitarian law contains a number of bans and restrictions on the use of specific methods and weapons.<sup>183</sup> There have been attempts in the field of human rights law to apply these rules also to peacetime situations. A case in point is the *Turku Declaration of Minimum Humanitarian Standards* (1990), which states that:

Weapons or other material or methods prohibited in international armed conflicts must not be employed in any circumstances.<sup>184</sup>

There is, however, little that such specific bans could add to human rights law, considering that it already contains far stricter rules on the use of (lethal) force. Quite the opposite, adopting the same prohibitions and limitations may sometimes even prove counterproductive in peacetime situations.

Tear gas and other chemical substances used as riot control agents provide an illustrative example: As shown above, human rights law strongly recommends their use alongside other less-lethal equipment for crowd control and gradual force application. By contrast, the use of riot-control agents in warfare is explicitly prohibited, alongside other substances falling under the Chemical Weapons Convention (1993).<sup>185</sup> These prohibitions are widely regarded as rules of customary law applicable both in international and non-international armed conflicts.<sup>186</sup> Also the *Secretary-General’s Bulletin* contains an explicit ban on the use of asphyxiating, poisonous or other gases.<sup>187</sup> There are a number of reasons why the ban on chemical weapons has been extended to cover riot control agents and other less-toxic substances. As a general rule, many

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<sup>182</sup> Rule 70, CIHL Study; Sect. 2.2.1.3 (Unnecessary Suffering), Sanremo NIAC Manual; Sect. 6.3, SG Bulletin.

<sup>183</sup> Rules 46-69 (on methods) and 71-86 (on weapons), CIHL Study. See also, Sects. 2.2.2.-2.2.3 (on weapons) and Sect. 2.3 (on methods), Sanremo NIAC Manual; Sects. 6.1-6.9, SG Bulletin.

<sup>184</sup> Art. 5 (3), Declaration of Minimum Humanitarian Standards (Declaration of Turku), Turku/Abo, 2 December 1990, reprinted in Report of the Sub-Commission on Prevention of Discrimination and Protection of Minorities Commission on Human Rights, UN Doc. E/CN.4/1995/116, p. 4.

<sup>185</sup> Chemical Weapons Convention, 13 January 1993, hereinafter: CWC. See, particular, Art. I (5) CWC (‘Each State Party undertakes not to use riot control agents as a method of warfare’) and Arts. I (b) and II (1) CWC (on the general ban of chemical weapons and their definition).

<sup>186</sup> Rules 74-75, CIHL Study; Sect. 2.2.2 (c), Sanremo NIAC Manual. See also: Hains, ‘Weapons, Means and Methods of Warfare’, in: Wilmshurst and Breau (eds.), *Perspectives on the ICRC Study on Customary International Humanitarian Law* (CUP 2007), 258-81, pp. 269-70; Boothby, *Weapons and the Law of Armed Conflict* (OUP, 2009), p. 135. Oleoresin Capsicum (i.e. pepper spray) is biological in origin and thus falls rather under the biological weapons ban: Rule 73, CIHL Study; Sect. 2.2.2 (b), Sanremo NIAC Manual.

<sup>187</sup> Sect. 6.2, SG Bulletin (‘The United Nations force shall respect the rules prohibiting or restricting the use of certain weapons and methods of combat under the relevant instruments of international humanitarian law. These include, in particular, the prohibition on the use of *asphyxiating, poisonous or other gases* and biological methods of warfare’, emphasis added).

chemical agents can prove lethal or lead to grave injuries, depending on the quantity and concentration, the location and duration of exposure as well as the age and health condition of the person affected. Moreover, riot control agents were notoriously used as the first chemical weapons in modern warfare and carry the danger of escalation, including the use of more dangerous substances.<sup>188</sup> Furthermore, the effects of chemical agents cannot be easily limited to a specific area and may thus strike combatants and civilians without distinction. The ban on the use of such substances as a method of warfare is thus a concretisation of the general prohibition on indiscriminate weapons.<sup>189</sup> Likewise, other forms of non-lethal or less-than-lethal weapons may pose a problem under humanitarian law – even if they are not explicitly prohibited – to the extent that they have indiscriminate effects, for instance: acoustic weapons, heat rays, sticky or slippery foam and malodorants.<sup>190</sup>

Bullets that ‘expand or flatten easily in the human body’ are another example of weapons subject to different rules in peace and wartime. Their use in international armed conflicts has been explicitly outlawed since 1899.<sup>191</sup> What makes them especially reprehensible is their high degree of lethality: Unlike regular ammunition, these projectiles (also known as hollow-point, soft-nose or dum-dum bullets) mushroom upon entering the target’s body, causing excessive tissue damage and leaving little chance of survival. However, despite this age-old ban in warfare, expanding bullets are commonly used by national police forces in many different countries. They are an effective tool in confrontations with armed, recalcitrant hostage-takers and suicide bombers, as these projectiles are more likely to kill the targeted person instantly, without the risk of over-penetration, thus avoiding the dangerous ricochet effect that ordinary bullets may have for bystanders. From a human rights perspective, the use of expanding bullets is thus not only justified but might even be mandatory for being the only viable way to protect the lives of innocent people in such situations.

The *Customary IHL Study* claims that the ban on expanding bullets also extends to non-international armed conflicts.<sup>192</sup> This view is supported by the *Secretary-General’s Bulletin*, which

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<sup>188</sup> They were used in the trenches of World War I and made affected soldiers an easy target for enemy firearms, regardless of their being *hors de combat*. See also Rule 75, CIHL Study, commentary, p. 265.

<sup>189</sup> Rule 71, CIHL Study; Sect. 2.2.1.1 (Indiscriminate Weapons), Sanremo NIAC Manual.

<sup>190</sup> Koplow, *Non-Lethal Weapons* (CUP 2006), 46-47; Casey-Maslen, ‘Non-Kinetic-Energy Weapons Termed “Non-Lethal”’, Geneva Academy of International Humanitarian Law and Human Rights, October 2010, pp. 69-73. See also: NATO Research and Technology Organisation, ‘Non-Lethal Weapons and Future Peace Enforcement Operations’, RTO-TR-SAS-040, December 2004, Annex .

<sup>191</sup> Declaration Concerning Expanding Bullets, The Hague, 29 July 1899.

<sup>192</sup> Rule 77, CIHL Study.

explicitly mentions expanding bullets in a list of prohibited weapons.<sup>193</sup> By contrast, the drafters of the *Sanremo NIAC Manual* considered it doubtful whether the prohibition equally applies to non-international armed conflicts, considering the above-mentioned common use of expanding bullets in domestic law-enforcement.<sup>194</sup> The *Customary IHL Study* tries to distinguish these projectiles from the banned military version, by claiming that the former are commonly fired from pistols rather than rifles and thus deposit much less energy, which may result in less severe injuries.<sup>195</sup> Practice shows, however, that expanding bullets used by police are often fired from rifles to ensure better long-distance targeting.<sup>196</sup> At the Kampala Review Conference in 2010, the state parties to the ICC Statute adopted an amendment to Article 8 of the Statute, which makes it a war crime to employ certain weapons in non-international armed conflicts whose use had until then only been a crime in international armed conflicts. Besides poison and gases, it also lists expanding bullets, which finally confirms the customary law prohibition of these projectiles in any type of armed conflict.<sup>197</sup>

Another area where human rights law and humanitarian law come to different solutions involves the use of deceptive methods by operating forces. Ruses are commonly used in wartime to gain a tactical advantage by confusing or surprising the enemy, for instance, by using decoy weapons or by launching mock attacks or ambushes. As a general rule, parties to the conflict are free to use ruses and deceptive tactics as long as they are not specifically prohibited.<sup>198</sup> Examples of such bans include: the improper use of the Red Cross emblem or other protected signs,<sup>199</sup> the misuse of the white flag<sup>200</sup> and the use of flags, insignia and uniforms of neutrals and other states not party to the conflict.<sup>201</sup> These cases are closely connected to perfidy, which involves:

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<sup>193</sup> Sect. 6.2, SG Bulletin.

<sup>194</sup> Sect. 2.2.2, *Sanremo NIAC Manual*, para. 12, p. 35. See also: Haines (2007), *supra* note, p. 272 (criticising the ICRC's CIHL Study for its *unqualified* ban of expanding bullets in NIAC).

<sup>195</sup> Rule 77, CIHL Study, p. 270.

<sup>196</sup> See, for instance, the very elaborate outline of recent practice highlighting the police use of rifles: Vanheusden, Parks and Boothby (2011), *infra* note 335, pp. 541-42, text of footnote 17.

<sup>197</sup> Amendments to Article 8 of the Rome Statute, RC/Res.5, adopted at the 12<sup>th</sup> plenary meeting, 10 June 2010, [www.icc-cpi.int/icedocs/aspdocs/Resolutions/RC-Res.5-ENG.pdf](http://www.icc-cpi.int/icedocs/aspdocs/Resolutions/RC-Res.5-ENG.pdf). For a more detailed discussion on this amendment and the role of Resolution 5, see the section further below, p. 45.

<sup>198</sup> Rule 57, CIHL Study ('Ruses of war are not prohibited as long as they do not infringe a rule of international humanitarian law').

<sup>199</sup> Rules 59-61, CIHL Study (including the UN emblems and uniforms); Sect. 2.3.4, *Sanremo NIAC Manual*.

<sup>200</sup> Rule 58, CIHL Study.

<sup>201</sup> Rule 63, CIHL Study; Sect. 2.3.4, *Sanremo NIAC Manual*. Moreover, it is also prohibited to use the flags or emblems, insignia or uniforms of the adversary in combat: Rule 62, CIHL Study; Sect. 2.3.5, *Sanremo NIAC Manual*.

Acts *inviting the confidence* of an adversary to lead him to believe that he is *entitled to, or is obliged to accord, protection* under the rules of international law applicable in armed conflict, with intent to *betray that confidence* ... The following acts are examples of perfidy:

- (a) the feigning of an intent to negotiate under a flag of truce or of a surrender;
- (b) the feigning of an incapacitation by wounds or sickness;
- (c) the feigning of civilian, non-combatant status; and
- (d) the feigning of protected status by the use of signs, emblems or uniforms of the United Nations or of neutral or other States not Parties to the conflict.<sup>202</sup>

The essence of perfidy is thus the abuse of good faith among the parties to the conflict. Suicide bombings against international forces in Afghanistan, Mali and Somalia by fighters dressed as civilians are a more recent form of perfidious attacks,<sup>203</sup> which may seriously undermine the respect for the protection of civilians and other protected persons and objects. Article 37 of Additional Protocol I explicitly bans the resort to perfidy to ‘kill, injure or capture the adversary’.<sup>204</sup> The *Customary IHL Study* uses the same wording in its customary rule on perfidy, applicable in both types of armed conflict.<sup>205</sup> State practice is, however, not fully consistent as to the inclusion of *capture* by resort to perfidy in addition to the acts of killing and injuring.<sup>206</sup> For instance, under the original ban contained in the Hague Regulations (1907) it is only prohibited ‘to kill or wound treacherously’.<sup>207</sup> This is why the *Sanremo NIAC Manual* uses a more narrow definition limited to only these two acts and questions whether customary law covers also *capture*.<sup>208</sup> It appears, however, more reasonable to include capture, as any attempt to seize

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<sup>202</sup> Art. 37 (1) AP I, emphasis added. This definition is also used by the commentary to Rule 65, CIHL Study, p. 223.

<sup>203</sup> Munir, ‘Suicide Attacks: Martyrdom Operations or Acts of Perfidy?’, in: Frick and Müller (eds.), *Islam and International Law: Engaging Self-Centrism from a Plurality of Perspectives* (Martinus Nijhoff 2013), 99-123.

<sup>204</sup> Art. 37 (1) AP I.

<sup>205</sup> Rule 65, CIHL Study. See also: Jackson, ‘Perfidy in Non-International Armed Conflicts’, 88 *International Law Studies* (2012), 237-259, pp. 246-47 (but unclear in distinguishing the prohibition of perfidy from the crime of treacherous killing or wounding); Dehn, ‘Permissible Perfidy?’, 6 (4) *Journal of International Criminal Justice* (2008), 627-53.

<sup>206</sup> Rule 65, CIHL Study, commentary, p. 225.

<sup>207</sup> Article 23 (b), Hague Regulations (1907).

<sup>208</sup> Sect. 2.3.6, *Sanremo NIAC Manual* (‘if the intent in doing so is to kill or wound an adversary’). See also the relevant commentary, p. 43, para. 2. See also: Rule 111, *HPCR Manual on International Law Applicable to Air and Missile Warfare, With Commentary*, March 2010, pp. 244-45, paras. 5-6 (divided on the question whether capture is covered as a matter of customary IHL, with only the minority of experts in favour of its inclusion).

a person usually involves ‘a threat to kill or injure’ and may even result in the death or injury of the person in question.<sup>209</sup>

The *Secretary-General’s Bulletin* does not specifically mention perfidy or other forms of unlawful deceptions, but these acts are arguably covered by the general obligation to respect the rules ‘prohibiting or restricting the use of certain weapons and methods of combat’ under humanitarian law.<sup>210</sup> In 1997, a group of SFOR peacekeepers in post-Dayton Bosnia reportedly misused a Red Cross sign to facilitate the arrest of a suspected war criminal.<sup>211</sup> If that action had taken place during an armed conflict (to which the peace operation was a party) it would have been a clear violation of the rule banning the misuse of the emblem and arguably an act of perfidy, broadly defined to include attempts to capture. For the same reason, military planners in peace operations have to be especially careful when using special forces commandos in plain clothes or non-conventional uniforms during armed conflict situations.<sup>212</sup>

By contrast, no such restrictions exist in peacetime as an obligation under human rights law. While law-enforcement agents are usually required to identify themselves as such, especially before using firearms, this does not prevent them from using plain clothes to gain a tactical advantage.<sup>213</sup> Indeed, the use of undercover commandos, as in the above-mentioned *McCann* case, may often be the best way to confront and arrest dangerous suspects. Using plain-clothed agents for such specific tasks is therefore fully consistent with human rights law, especially where other alternatives carry a greater risk to the lives of those involved (i.e. suspects, police and bystanders).

## APPRAISAL AND CONCLUSION

Human rights law contains strict limitations on the use of force in peacetime. To be precise, lethal force can only be employed to protect life and limb against unlawful attacks. Moreover, security forces have to take the appropriate measures (e.g. continuous training and adequate equipment) to minimise the resort to force in all possible scenarios. These standards apply as the default framework in all peace operations. By contrast, humanitarian law accepts the existence of warfare as a fact and sets out clear categories of persons and objects that can be targeted

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<sup>209</sup> Rule 65, CIHL Study, commentary, p. 225

<sup>210</sup> Sect. 6.2, SG Bulletin.

<sup>211</sup> Rule 59, CIHL Study, practice part, para. 458, p. 1316.

<sup>212</sup> Cathcart, ‘Legal Dimensions of Special Forces and Information Operations’ in: Fleck and Gill (eds.), *supra* note, 395-414, p. 401; Parks, ‘Special Forces’ Wear of Non-Standard Uniforms’, 4 (2) *Chicago Journal of International Law* (2003), 493-560; Lubell (2010), *supra* note, pp. 160-61.

<sup>213</sup> Use of Force and Firearms Principles (1990), *supra* note 65, para. 10.

and those that have to be spared in times of armed conflict. It accepts the use of deliberate deadly force against combatants and other persons with a continuous combat function (i.e. status-based) and persons who commit specific acts amounting to direct participation in hostilities (i.e. conduct-based), even without there being any threat to the life and limb of others. Moreover, on many occasions the fighting causes incidental harm to the civilian population and other protected persons and objects. For this reason, humanitarian law provides strict rules on how such effects must be limited: for instance, by abstaining from disproportionate attacks and taking all feasible precautions, including target verification and damage assessment. When it comes to the use of specific means and methods of warfare, humanitarian law contains very specific prohibitions and limitations. In particular, it bans the use of tear gas and other non-lethal chemical agents, as well as expanding bullets and offensive operations with plain-clothed personnel – all of which are lawful under human rights law and widely used in domestic law-enforcement situations.

Despite the fact that we rejected the less-harmful-means approach advocated by the ICRC's *Interpretive Guidance*, this does not necessarily mean that humanitarian law provides peace forces involved in an armed conflict with a right-vouched *licence to kill* combatants or fighters belonging to the enemy. Most parts of humanitarian law use prohibitive rather than permissive terminology.<sup>214</sup> While there is an explicit authorisation allowing combatants 'to participate directly in hostilities', it is only applicable in international armed conflicts.<sup>215</sup> Moreover, how combatants (or the states on behalf of which they fight) conduct their operations is then subject to further prohibitions rather than authorisations. The same reasoning applies *a fortiori* to non-international armed conflicts, where there exists no formal combatant status. Indeed, the principle of equality would have meant that such combatant status could be invoked both by members of state forces and anti-government fighters, effectively shielding the latter from any criminal prosecution for taking up arms illegally. Admittedly, the ICRC's *Customary IHL Study* uses language that sounds rather permissive when it states in Rule 1 that attacks 'may only be directed against combatants'.<sup>216</sup> This wording, however, has its origin in some military manuals, where the language is not meant to be as legalistic as in international conventions.<sup>217</sup>

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<sup>214</sup> Similarly: Jinks, 'International Human Rights Law in Time of Armed Conflict', in: Clapham and Gaeta (eds.), *The Oxford Handbook of International Law in Armed Conflict* (OUP 2014), 656-74, pp 666-68.

<sup>215</sup> Art. 43 (2) AP I.

<sup>216</sup> See also: Rule 7, CIHL Study ('...Attacks *may* only be directed against military objectives ...', emphasis added)

<sup>217</sup> See the practice parts of the CIHL Study, [www.icrc.org/customary-ihl/eng/docs/v2\\_rul\\_rule7](http://www.icrc.org/customary-ihl/eng/docs/v2_rul_rule7). The same caveat must be made in relation to the *Interpretive Guidance*'s wording, when it says that 'civilians may be directly attacked' for the duration of their direct participation in hostilities, in view of the less-harmful-means approach, which follows in Section IX. *Interpretive Guidance*, p. 12. See also: ICRC Commentary to the Additional Protocols, *supra* note 128, Art. 13 AP II, para. 4789 ('Those who belong to armed forces or armed groups *may be* attacked at any time', emphasis added).

In sum, rather than authorising killings, the targeting rules of humanitarian law are better understood as a set of more *lenient* prohibitions, which simply allow for broader exceptions for using force against individuals than human rights law.

It goes without saying that status- and conduct-based targeting is only available in times of armed conflict. This may sound like a truism, but is aimed at cases of military occupations without hostilities. As we have seen in Chapter 3, such occupations are governed by the law of international armed conflicts. But in the absence of armed hostilities, the far-reaching targeting rules cannot be invoked. To be precise, if there is *no* armed conflict, then there are *no* enemy forces or military objectives either, *nor* civilians that participate directly in hostilities. Hence, every individual in territories under this form of military occupation is a protected person; as a result, the use of force against them is subject to the same restraints as against civilians or persons *hors de combat* in times of armed conflict.

However, apart from the general protection against attack, treaty-based humanitarian law is rather silent as to when and how (lethal) force can be used against civilians and other protected persons. A notable exception is Article 42 of Geneva Convention III, which deems the use of weapons against prisoners of war an ‘extreme measure’ and requires prior warnings. However, this rule is mainly concerned with (attempted) escapes, which is one of the clearest cases of hostile acts that result in the loss of protection for persons *hors de combat*. While other provisions prohibit certain violent acts, including ‘attempts upon their lives’, ‘murder’ and ‘causing death’,<sup>218</sup> they fail to give clear guidance as to when and how (lethal) force may be used against protected persons. In fact, in order to give meaning to the customary rules on fundamental guarantees, the commentary part of the *Customary IHL Study* refers extensively to human rights treaty law and related practice,<sup>219</sup> especially on the right to life.<sup>220</sup> This shows clearly the need for considering the interplay between humanitarian law and human rights law, which is the focus of the next section.

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<sup>218</sup> Common Arts. 12, 13 and 32, GC I-IV. See also: Sect. 7.2, SG Bulletin (e.g. violence to life and murder); Sect. 1.2.4, Sanremo NIAC Manual (‘they must be treated humanely’).

<sup>219</sup> Chapter 23, Rules 87 (Human Treatment), 89 (Murder) and 90 (Torture and CIDT), CIHL Study, commentary, pp. 299-319.

<sup>220</sup> *Ibid*, pp. 313-14.

## 5.4 MODELS OF INTERACTION

### OVERVIEW

The review of the relevant substantive rules in the foregoing sections revealed that there are considerable differences between human rights law and humanitarian law as to when and how (lethal) force can be used. This has also direct repercussions for peace operations. Admittedly, the case is rather simple when there is no armed conflict, because then any use of force is subject to the strict peacetime rules provided by human rights law. However, given the volatile security situation in the mission areas, it is far more likely that the peace operation will become – at least for some period of its deployment – a party to an armed conflict. Such confrontations will usually take the form of a non-international armed conflict, as they almost always involve members of non-state armed groups on the other side. As we have seen above, human rights and humanitarian law apply concurrently in such cases and will potentially conflict as to when and how force may be used.

That is why this section examines how human rights courts and similar (quasi) judicial bodies have dealt with the interaction of these two legal regimes and which approaches they have used to overcome the underlying norm conflicts, both in international and non-international armed conflicts.<sup>221</sup> Much has been written about the question as to whether and how such bodies – whose mandate, unlike that of the International Court of Justice and domestic courts, is usually limited to the relevant human rights treaty – may employ humanitarian law. Nowadays, however, it seems relatively clear that they can and should take the relevant humanitarian law provisions into account.<sup>222</sup> Throughout the following examination, some weight is also given to

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<sup>221</sup> Note that the majority of the cases considered are related to NIAC situations. Nevertheless, some of those cases involving IACs and military occupations have gained more prominence for the question at issue, especially the more recent ECtHR case-law in relation to coalition actions during the invasion and occupation of Iraq (2003/04).

<sup>222</sup> See, for instance: Kälin, 'Universal Human Rights Bodies and International Humanitarian Law', in: Kolb and Gaggioli (2013), *supra* note 3, 441-65; Tigroudja, 'The Inter-American Court of Human Rights and International Humanitarian Law', in: *ibid*, 466-79; Moir, 'The European Court of Human Rights and International Humanitarian Law', in: *ibid*, 480-502; Pinzauti, 'Good Time for a Change: Recognizing Individuals' Rights under the Rules of International Humanitarian Law on the Conduct of Hostilities', in: Cassese (ed.), *Realizing Utopia: The Future of International Law* (OUP 2012), 571-82; Byron, 'A Blurring of the Boundaries: The Application of International Humanitarian Law by Human Rights Bodies', 47 *Virginia Journal of International Law* (2007), 839-96.

the case-law of national courts to the extent that their decisions refer directly to the relationship between humanitarian law and human rights law.<sup>223</sup>

Our analysis of these different interaction models aims at clarifying how the possible norm conflict in relation to the use of force can be resolved or otherwise overcome. As a word of caution, it should be noted that detention cases feature prominently in the jurisprudence of certain courts and have played a significant role in shaping the way these courts have been looking at the interplay between human rights and humanitarian law. This is why some of these more important cases will also be considered. Having said that, however, this section does not attempt to provide a conclusion for the interplay between the different standards of detention and internment under both regimes.<sup>224</sup>

### TRADITIONAL *LEX SPECIALIS* MODEL

The best-known approach is the *lex specialis* model in its most traditional form, according to which humanitarian law provides always the more specific norm, which invariably trumps any conflicting human rights norm. This was arguably the position of the International Court of Justice when it handed down its *Nuclear Weapons* case (1996), in which it referred to humanitarian law as the *lex specialis* for the purpose of interpreting the term ‘arbitrary deprivation of life’. The Court’s advisory opinion was, however, merely a general and abstract assessment in order to examine the overall lawfulness of the use of nuclear weapons under international law. It is therefore necessary to see how this traditional *lex specialis* model has proven viable in the practice of human rights bodies when dealing with right-to-life cases.

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<sup>223</sup> The most prominent group of cases have been decided by British courts on the basis of the UK Human Rights Act, which incorporates the ECHR (as interpreted by the ECtHR).

<sup>224</sup> For a number of excellent contributions on this issue, with a special focus on peace operations and similar overseas military operations: Direk, *Security Detention in International Territorial Administrations: Kosovo, East Timor, and Iraq* (Brill 2015), pp. 58-216; Debuf, *Captured in War: Lawful Internment in Armed Conflict* (Hart Publishing 2013); Mujezinović Larsen (2012), *supra* note 37, pp. 393-418; Sassòli (2011), *infra* note 315, pp. 616-27; Naert (2010), *supra* note 37, pp. 624-33. See also: Copenhagen Process on the Handling of Detainees in International Military Operations – Principles and Guidelines, 19 October 2012.

## Inter-American Human Rights System

In its seminal *Report on Human Rights and Terrorism* (2002), the Inter-American Commission on Human Rights held that:

[I]n situations of armed conflict, international humanitarian law may serve as *lex specialis* in interpreting and applying international human rights instruments. ... [The American] Convention is devoid of rules that ... specify the circumstances under which it is not illegal, in the context of an armed conflict, to attack a combatant or civilian or when civilian casualties as a consequence of military operations do not imply a violation of international law. Consequently, in such circumstances, one must necessarily look to and apply definitional standards and relevant rules of international humanitarian law as sources of *authoritative guidance* in the assessment of the respect of the inter-American Instruments in combat situations.<sup>225</sup>

It reproduced almost verbatim the position it had previously taken in the case of *Abella v. Argentina* (1997), roughly a year after the International Court of Justice had delivered its opinion on *Nuclear Weapons*.<sup>226</sup> The case involved a thirty-hour battle over the control of an Argentinian military base seized by forty members of a left-wing rebel group. The Commission held that the confrontation was a non-international armed conflict, despite its short duration,<sup>227</sup> and referred explicitly to humanitarian law when considering whether the battle-related killing of twenty fighters was an arbitrary deprivation of life:

Specifically, when civilians, such as those who attacked the Tablada base, assume the role of combatants by directly taking part in fighting, whether singly or as a member of a group, they thereby become legitimate military targets. *As such, they are subject to direct individualized attack to the same extent as combatants.* Thus, by virtue of their hostile acts, the Tablada attackers lost the benefits of the above mentioned precautions in attack and against the effects of indiscriminate or disproportionate attacks pertaining to peaceable civilians.<sup>228</sup>

Hence, it did not question the legality of the shoot-to-kill policy pursued by the Argentinian forces against the rebels.<sup>229</sup> The same interpretive approach to clarify the meaning of ‘arbitrary’

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<sup>225</sup> IACmHR, *Report on Human Rights and Terrorism*, 22 October 2002, OEA/Ser.L/V/II.116, para. 61.

<sup>226</sup> IACmHR, *Juan Carlos Abella v. Argentina*, Decision of the Merits, 18 November 1997, Report No 55/97, Case No. 11.137, paras. 158-61.

<sup>227</sup> *Ibid*, paras. 154-56. This finding was necessary because the seizure of the military base was the first and last action of that group. The confrontation thus amounted to an extremely short-lived NIAC.

<sup>228</sup> *Ibid*, para. 178.

<sup>229</sup> *Ibid*, para. 188. See also: IACmHR, *Third Report on the Human Rights Situation in Colombia*, 26 February 1999, OEA/Ser.L/V/II.102, Ch. IV, para. 61 (‘The Commission notes that when they assume the role of combatants, members of paramilitary groups clearly lose their protection against direct attack until such time as they cease all their hostile acts against the adversary. However, when the direct participation of such persons in hostilities becomes their principal daily activity, the question arises as to whether they may have thereby divested themselves of their civilian status and effectively become combatants subject to direct attack to the same extent as members of regular armed forces’).

in times of armed conflict has been used by the Commission in relation to cases of detention, e.g. during the US-led invasion of Grenada and in Guantanamo.<sup>230</sup> The Inter-American Court confirmed this practice of interpreting the meaning of certain human rights in times of armed conflict by resort to humanitarian law.<sup>231</sup> However, all cases involving the right to life were only concerned with the unlawful killing of civilians and the facts were such that the outcome of the assessment would have been the same if *pure* human rights standards had been applied.<sup>232</sup> The assessment would probably have been different in the case of *Ecuador v. Colombia*, previously pending before the American Commission.<sup>233</sup> As already mentioned above, this case involved the cross-border operation of the Colombian military against a FARC training camp in Ecuador in March 2008, during which FARC commander Raúl Reyes and twenty-four others were killed. In its decision on admissibility, the Commission confirmed the role of humanitarian law as a source of interpretation:

[A]s the existence of an armed conflict has been established, it is indispensable [sic] to refer to IHL as a source of authorized interpretation which permits the American Convention's application – with *due consideration* to the particular set of circumstances in this situation.<sup>234</sup>

It remains an open question of whether the Commission would have fully applied the humanitarian law targeting rules (including status-based targeting), if the case had not been terminated by friendly settlement between Ecuador and Colombia before reaching the merits stage.<sup>235</sup>

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<sup>230</sup> IACmHR, *Coard v. United States*, Decision, Case 10.951, Report No. 109/99, 29 September 1999, paras. 45-61. IACmHR, *Precautionary Measures in Guantanamo Bay*, Cuba, 13 March 2002.

<sup>231</sup> IACtHR, *Las Palmeras v. Colombia*, Judgement on Preliminary Objections, 4 February 2000, Case No. 67, paras. 33-34. Most recently: IACtHR, *Santo Domingo Massacre v. Colombia* (2012), *infra* note 232, paras. 21-26 and 187-241.

<sup>232</sup> For instance: IACtHR, *Santo Domingo Massacre v. Colombia*, Judgement, 30 November 2012, Series No. 259, paras. 187-241 (involving a disproportionate aerial attack on a village believed to harbour FARC fighters).

<sup>233</sup> IACmHR, *Ecuador v. Colombia* ('Franklin Guillermo Aisalla Molina'), Decision, Case IP-02, Report No. 112/10, OEA/Ser.L/V/II.140 Doc. 10, 21 October 2010.

<sup>234</sup> *Ibid.*, para. 118. See also paras. 113-25, including para. 122 (featuring the term 'lex specialis').

<sup>235</sup> As reported by: Radio Equinoccio, 'Colombia Indemniza a Familia de Franklin Aisalla', 23 September 2013, <http://radioequinoccio.com/inicio/item/4161-colombia-indemniza-a-familia-de-franklin-aisalla.html>.

## African Human Rights System

The African Commission has so far only dealt with armed conflict situations on the sidelines.<sup>236</sup> For instance, in the inter-state case of *DRC v. Burundi, Rwanda and Uganda* (2003), the Commission highlighted the importance of humanitarian law treaties for the case,<sup>237</sup> but as it was mainly concerned with the inhumane treatment of civilians the outcome was no different from an assessment exclusively based on human rights law.<sup>238</sup> However, one of the Commission's working groups has recently held that:

International law permits States to take life in the context of armed conflict *only with the limits of safeguards for the right to life*. It is important that International Humanitarian Law be seen as a *complement*, rather than a replacement of Human Rights Law.<sup>239</sup>

It remains to be seen whether this is meant as a limitation to status- and conduct-based targeting in times of armed conflict and to what extent it will influence the future case-law of the African Commission and the Court in relation to combat-related killings.

## European Human Rights System

Unlike most other human rights treaties, the text of the European Convention does not lend itself so easily to an interpretation based on humanitarian law. To be precise, its right-to-life provision does not use the term 'arbitrary', but instead prohibits the intentional deprivation of life unless it is absolutely necessary in pursuit of one of the three legitimate aims.<sup>240</sup> The last of the aims listed refers to 'quelling a riot or insurrection', which may potentially also cover non-international armed conflicts. But any deprivation of life would still have to meet the strict requirements of necessity and proportionality (inherent in 'absolutely necessary'), which is unlikely in combat-based targeting absent a direct threat to life and limb. Article 5 (1) of the European Convention follows the same concept in relation to detention: It prohibits any deprivation of liberty, unless it falls into one of the six listed exceptions and is based on a procedure

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<sup>236</sup> No case involving an armed conflict situation has so far reached the more recently established African Court on Human and Peoples' Rights (ACtHPR).

<sup>237</sup> ACmHPR, *Democratic Republic of Congo v. Burundi, Rwanda, Uganda*, Decision on the Merits, 29 May 2003, Communication no. 227/99, para. 70 ('the Commission holds that the Four Geneva Conventions and the two Additional Protocols covering armed conflicts constitute part of the general principles of law recognized by African States, and take same into consideration in the determination of this case').

<sup>238</sup> *Ibid*, paras. 71-89.

<sup>239</sup> ACmHPR, Arbitrary Killings Working Group Report (2014), *supra* note 69, para. 46.

<sup>240</sup> Art. 2 (2) (a) - (c) ECHR.

prescribed by law.<sup>241</sup> In addition, Article 5 (4) entitles those detained to have the lawfulness of their detention reviewed by a court.

Due to the strict language used in the respective provisions, the derogation clause in Article 15 plays a much greater role than in other human rights instruments. Indeed, the drafters of the European Convention expected states to derogate in wartime, allowing them to engage in acts of war – including the targeting of enemy forces or the internment of prisoners of war or civilians considered a security threat – without falling afoul of their obligations under the Convention. The Strasbourg organs, therefore, had to work around the failure of states to derogate in relation to their acts in armed conflict. As we have seen in the previous chapter, the legal reasoning in *Cyprus v. Turkey* (1976) and *Hassan v. United Kingdom* (2014) leaves many questions unanswered. In both cases, however, the European Commission and the Court tried to do the sheer impossible, to bridge the normative gap between the state’s failure to lodge a formal derogation and war-related internment under humanitarian law.

The *Hassan* case involved the internment of a young Iraqi during the invasion of Iraq in April 2003. He was initially believed to be a combatant or a civilian otherwise posing a threat to Allied forces, but was eventually cleared by a review panel and promptly released, in full compliance with Article 78 of Geneva Convention IV.<sup>242</sup> In deciding the case, the European Court heeded the call of the British government as well as the third-party interveners from the Essex Human Rights Centre. In their *amicus curiae* brief, they had cautioned against disregarding humanitarian law entirely, as this ‘might run the risk of appearing disconnected from reality’, but they equally rejected the *lex specialis* doctrine for being of little practicable help.<sup>243</sup> As we concluded already in the previous chapter, the Court’s approach – of accommodating the constraints of Article 5 as far as possible with internment under Geneva Convention III and IV – is best understood as an *implicit derogation*. What supports this conclusion is the fact that the Court still requires the respondent states to explicitly invoke humanitarian law in their pleadings.<sup>244</sup> This differs from the operation of the traditional *lex specialis* model. Also, on substance the outcome is not a full-hearted adoption of the *lex specialis* concept, which the Court does not mention at all. This is most noticeable in relation to the review procedure required:

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<sup>241</sup> Art. 5 (1) (a) - (f) ECHR.

<sup>242</sup> Art. 78 (1) GC IV (‘If the Occupying Power considers it necessary, for *imperative reasons of security*, to take safety measures concerning protected persons, it may, at the most, subject them to assigned residence or to *internment*’, emphasis added).

<sup>243</sup> Hampson and Lubell, *Amicus Curiae Brief, Hassan v. United Kingdom*, 29750/09, University of Essex, Human Rights Centre, 30 October 2013, <http://repository.essex.ac.uk/9690/1/hampson-lubell-amicus-ec-thr-oct-2013.pdf>, referred to in: ECtHR, *Hassan v. United Kingdom* (2014), *supra* note, paras. 91-95.

<sup>244</sup> ECtHR, *Hassan v. United Kingdom*, Judgement, 16 September, Application no. 29750/09, para. 107.

Whilst it might not be practicable, in the course of an international armed conflict, for the legality of detention to be determined by an *independent* “court” in the sense generally required by Article 5 § 4, ... the “competent body” should provide sufficient guarantees of *impartiality* and *fair procedure* to protect against arbitrariness.<sup>245</sup>

What the Court is trying to do here is to *beef up* the review procedure under Geneva Convention IV, which only requires a ‘competent body’, by adding the additional requirements of ‘impartiality’ and ‘fair procedure’ in order to bring it more in line with the general safeguards in peacetime. Indeed, very similar to the effects of the necessity and proportionality requirement under the regular derogation procedure, the application of humanitarian law in this case is not unlimited.

The Court’s novel approach is, however, restricted to international armed conflicts, where the internment of prisoners of war and enemy civilians are ‘accepted features of international humanitarian law’.<sup>246</sup> By excluding non-international armed conflicts, *Hassan* is fully consistent with the Judgment rendered by Justice George Leggatt in *Serdar Mohammed* (2014) on behalf of the High Court of England and Wales. The case involved the long-term internment of an Afghan citizen by British forces in Afghanistan, which Justice Leggatt deemed a breach of Article 5 of the European Convention, because he saw no explicit power for internment under the law of non-international armed conflict.<sup>247</sup> This has led to a heated debate as to whether such a power does indeed exist, both for internment as well as lethal targeting.<sup>248</sup> As we concluded already in the previous section, there is certainly no *licence to kill* under the law of non-international armed conflict.<sup>249</sup> In the most recent Al-Saadoon case (2015), Justice Leggatt used the opportunity to express his support for the European Court’s novel approach to humanitarian law:

It seems to me that the same approach [as in *Hassan*] must in principle apply to article 2. Thus, where the armed forces of a state kill someone in the course of an armed conflict the killing will be lawful *provided it is consistent with IHL* even if it results from use of force

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<sup>245</sup> Ibid, para. 106, emphasis added and references omitted.

<sup>246</sup> Ibid, para. 104.

<sup>247</sup> EWHC, *Serdar Mohammed v. Ministry of Defence*, Judgment, 2 May 2014, 1369 (QB), paras. 239-94. This view was upheld on appeal: UK EWCA, *Serdar Mohammed et al. v. Ministry of Defence*, Judgment, 30 July 2015, EWCA Civ 843, paras. 164-253 (conducting a remarkably detailed analysis on the alleged authority to detain under the law of NIAC).

<sup>248</sup> For those in support in support of the argument that no such (explicit) powers exist under the law of NIAC: Hill-Cawthorne and Akande, ‘Locating the Legal Basis for Detention in Non-International Armed Conflicts: A Rejoinder to Aurel Sari’, EJIL talk blog, 2 June 2014, [www.ejiltalk.org/locating-the-legal-basis-for-detention-in-non-international-armed-conflicts-a-rejoinder-to-aurel-sari](http://www.ejiltalk.org/locating-the-legal-basis-for-detention-in-non-international-armed-conflicts-a-rejoinder-to-aurel-sari). For the opposite view: Aughey and Sari, ‘Targeting and Detention in Non-International Armed Conflict: Serdar Mohammed and the Limits of Human Rights Convergence’, 91 International Law Studies (2015), 60-118.

<sup>249</sup> For a largely similar view, see: Hill-Cawthorne and Akande (2014), *ibid*.

which is not absolutely necessary to achieve any of the purposes set out in sub-paragraphs (a) to (c) of article 2.<sup>250</sup>

Interestingly, he does not explicitly limit this approach to only international armed conflicts. Maintaining a strict distinction between international and non-international armed conflicts may also be difficult, as some recent wars involved elements of both, like in Georgia (2008) and currently in Ukraine. Nevertheless, in its admissibility decision on *Georgia v. Russia (II)*, currently pending in Strasbourg, the European Court had already held that:

Article 2 must be interpreted in so far as possible in the light of the general principles of international law, including the *rules of international humanitarian law* which play an indispensable and universally accepted role in mitigating the savagery and inhumanity of armed conflict. In a zone of international conflict Contracting States are under an obligation to protect the lives of those not, or no longer, engaged in hostilities. Generally speaking, the Convention should so far as possible be *interpreted in harmony with other rules of international law* of which it forms part.<sup>251</sup>

It therefore remains to be seen whether the Court will take humanitarian law fully into account in future cases involving war-related deaths and to what extent it will insert some additional constraints as it did in *Hassan* (2014). In the two most relevant cases that involved killings during multinational overseas operations – *Al-Skeini* (2011) and *Jaloud* (2014) – the Court could elegantly avoid the substantive issue, as the applicants had limited their complaints to the inadequacy of the investigation into the deaths.<sup>252</sup>

The European Court has so far only dealt with war-related deaths resulting from Turkey's armed conflict with Kurdish separatists (PKK) and the so-called Second Chechen War in Russia.<sup>253</sup> For instance, in *Ergi v. Turkey* (1998) it tacitly applied the humanitarian law standard of feasible precautions with a view to 'avoiding and, in any event, to minimising, incidental loss of civilian life' to an armed clash between PKK and Turkish forces in 1993.<sup>254</sup> The Court followed a sim-

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<sup>250</sup> EWHC, *Al-Saadoon v. Secretary of State for Defence*, Judgement, 17 March 2015, EWHC 715 (Admin), para. 111 (also cautioning that 'courts should recognise their lack of institutional competence to judge actions or decisions taken on the battlefield or when seeking to maintain security in dangerous and hostile conditions').

<sup>251</sup> ECtHR, *Georgia v. Russia II*, Decision on Admissibility, 13 December 2011, Application no. 38263/08, para. 72.

<sup>252</sup> ECtHR, *Al-Skeini v. United Kingdom*, Judgement, 7 July 2011, Application no. 55721/07; ECtHR, *Jaloud v. Netherlands*, Judgement, 20 November 2014, Application no. 47708/08.

<sup>253</sup> The vast majority of Art. 2 cases from Chechnya involve enforced disappearances, which are not considered here, as they strictly prohibited, both the ECHR and IHL.

<sup>254</sup> ECtHR, *Ergi v. Turkey*, Judgement, 28 July 1998, Application no. 66/1997/850/1057, para. 79. In another case, the Court found no violation of Art. 2 ECHR as the Turkish forces had previously come under attack and acted in proper self-defence: ECtHR, *Ahmet Özkan v. Turkey*, Judgement, 6 April 2004, Application no. 21689/93, para. 305 ('there were serious disturbances in south-east Turkey involving armed conflict

ilar approach in the two *Isayeva* cases (2005), the two most prominent judgments on Chechnya.<sup>255</sup> Both cases involved the killing of civilians after their vehicles had been hit by Russian air strikes in autumn 1999. The Court generally accepted the Russian claim that the strikes had been aimed at heavily-armed Chechen fighters, but concluded that the operations were not ‘planned and executed with the requisite care for the lives of the civilian population’.<sup>256</sup> What is, however, most astonishing is the zigzag course in the Court’s reasoning. Even though Russia had not explicitly invoked humanitarian law during the proceedings, the Court accepted that:

[T]he situation that existed in Chechnya at the relevant time called for *exceptional measures* by the State in order to regain control over the Republic and to suppress the *illegal armed insurgency*. ... [T]hose measures could presumably include the deployment of army units equipped with *combat weapons*, including military aviation and artillery. The presence of a very large group of armed fighters ... may have *justified use of lethal force* by the agents of the State, thus bringing the situation within paragraph 2 of Article 2.<sup>257</sup>

Nevertheless, and in a rather surprising move, it then went on to criticise the use of heavy bombs and missiles:

[U]sing this kind of weapon in a populated area, *outside wartime* and without prior evacuation of the civilians, is impossible to reconcile with the degree of caution expected from a *law-enforcement body* in a democratic society. *No martial law* and *no state of emergency* has been declared in Chechnya, and *no derogation* has been made under Article 15 of the Convention. The operation in question therefore has to be judged against a *normal legal background*.<sup>258</sup>

This finding has led to much debate as to whether the Court had indeed used the usual peacetime standards under human rights law or whether its reasoning is rather inspired by humanitarian law.<sup>259</sup> What is obvious, however, is that the use of the term ‘civilian’ does indeed reflect a

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between the security forces and members of the PKK ... the Court accepts, taking due account of all these circumstances, that the security forces’ tactical reaction to the initial shots fired at them from the village on 20 February 1993 cannot be regarded as entailing a *disproportionate degree of force*’, emphasis added).

<sup>255</sup> ECtHR, *Isayeva v. Russia*, Judgement, Application no. 57950/00, 24 February 2005; ECtHR, *Isayeva, Yusupova and Bazayeva v. Russia*, Judgement, Application nos. 57947/00 et al., 24 February 2005, para. 175.

<sup>256</sup> ECtHR, *Isayeva v. Russia*, *ibid*, para. 200; ECtHR, *Isayeva et al v. Russia*, *ibid*, para. 199.

<sup>257</sup> ECtHR, *Isayeva v. Russia*, *ibid*, para. 180, emphasis added; similar wording in *Isayeva et al v. Russia*, *ibid*, para. 178 (but the facts, including the attack by fighters from within the convoy, were more disputed here).

<sup>258</sup> ECtHR, *Isayeva v. Russia*, *ibid*, para. 191, emphasis added and references omitted. Surprisingly, this passage is not included in *Isayeva et al v. Russia*, *ibid*.

<sup>259</sup> In support of the view that the Court implicitly applied humanitarian law in the two Chechen cases: Droege, ‘Elective Affinities? Human Rights and Humanitarian Law’, 90 IRRC (2008), 501-48, p. 532; Quéniwet, ‘The Rights to Life in Humanitarian Law and Human Rights Law’, in: Quéniwet and Arnold (2008), *supra* note 3, 331-353, pp. 335-52. For the opposite view: Abresch, ‘A Human Rights Law of Internal Armed Conflict: The European Court of Human Rights in Chechnya’, 16 EJIL (2005), 741-67; Bowering, ‘Fragmentation, Lex Specialis and the Tensions in the Jurisprudence of the European Court of Human Rights’, 14 (3) *Journal of Conflict & Security Law* (2010), 485-98, pp. 494-97.

distinction from legitimate targets. To be precise, nowhere in these two judgments does the Court question the possibility to target enemy fighters belonging to the Chechen resistance. What is more, due to the gross disregard for civilian life, an assessment based purely on humanitarian law would arguably have come to the same results.<sup>260</sup> This seems to be also the underlying rationale in the more recent judgments on killings related to the war in Chechnya.<sup>261</sup> The European Court became even more explicit in *Benzer v. Turkey* (2013), concerning Turkish air strikes on two Kurdish villages in the South-East of Turkey in 1994, resulting in the death of thirty-eight civilian villagers.<sup>262</sup> The Court held that:

[A]n indiscriminate aerial bombardment of civilians and their villages cannot be acceptable in a democratic society, and cannot be *reconcilable* with any of the grounds regulating the use of force which are set out in Article 2 § 2 of the Convention or, indeed, with the *customary rules of international humanitarian law* or any of the international treaties regulating the use of force in armed conflicts.<sup>263</sup>

This was indeed the first time that the Court referred explicitly to humanitarian law standards when assessing Article 2 cases involving armed conflicts.<sup>264</sup> However, neither this statement nor the novel approach adopted in *Hassan v. United Kingdom* can be read as a full-hearted adoption of the traditional *lex specialis* model. Quite the contrary, there are indeed a number of cases in which the European Court or other human rights bodies have provided reasoning that seems to be at odds with humanitarian law, which will be considered in the following section.

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<sup>260</sup> This is so because of the failure to take all feasible precautions, but perhaps also under the proportionality test, had the pilots and planners indeed expected an excessive number of civilian deaths.

<sup>261</sup> ECtHR, *Abdulkhanov v. Russia*, Judgement, Application no. 22782/06, 3 October 2013 (artillery and air attack on village in Chechnya in 2000, resulting in the death of 18 civilian villagers); *Damayev v. Russia*, Judgement, Application no. 36150/04, 29 May 2012 (aerial bombing of Chechen village in April 2004); *Khamzatov v. Russia*, Judgement, Application no. 31682/07, 28 February 2012 (shooting of civilian car); *Khashuyeva v. Russia*, Judgement, Application no. 25553/07, 19 July 2011 (Special forces operation on village by ground troops, leading to the wounding and subsequent death of a village boy); *Suleymanova v. Russia*, Judgement, Application no. 9191/06, 12 May 2010 (shooting of civilian vehicle by Russian forces in Chechnya in 2000); *Abdurashidova v. Russia*, Judgement, Application no. 32968/05, 8 April 2010 (killing of child in cross-fire during raid against suspected fighters in Dagestan in 2005); *Akhamdoc v. Russia*, Judgement, Application no. 21586/02, 14 November 2008 (interception and shooting of civilian vehicle by Russian forces in Chechnya in 2001); *Umayeva v. Russia*, Judgement, Application no. 1200/03, 4 December 2008 (Russian attack on a civilian vehicle in Chechnya in 2000).

<sup>262</sup> ECtHR, *Benzer v. Turkey*, Judgement, 12 November 2013, Application no. 23502/06.

<sup>263</sup> *Ibid.*, para. 184, emphasis added and references omitted.

<sup>264</sup> For a similar statement made by a number of individual judges in their joint concurring opinion: ECtHR, *Abuyeva v. Russia*, Judgement, 2 December 2010, Application no. 27065/05, concurring opinion of Judge Malinervni, joined by Judges Rozakis and Spielmann.

## MOST FAVOURABLE PROTECTION MODEL

Another approach that may help to moderate the interplay between human rights law and humanitarian law is the most-favourable-protection principle. It is an established tool to overcome norm conflicts,<sup>265</sup> especially in human rights law, where it can be found in the text of most relevant conventions.<sup>266</sup> In a nutshell, this principle gives priority to any norm that provides for a higher level of protection. It is also reflected in the reference to ‘other obligations under international law’, which can be found in the derogations clauses. The same is true for the above-mentioned Martens Clause and other provisions in humanitarian law treaties that explicitly refer to other legal rules or regimes offering better protection. What is less clear, however, is whether it is appropriate to use the most-favourable-protection principle to overcome potential conflicts between the different use-of-force rules under both legal regimes.<sup>267</sup> There is certainly a significant overlap between this principle and the *lex specialis* doctrine, since the level of protection may indeed reflect the speciality of the norm. Moreover, the more protective rule does not necessarily come from human rights law, but may also belong to humanitarian law (e.g. on the use of certain means and methods of warfare), depending on the exact circumstances. On this important point, the most-favourable-protection model differs from the so-called human rights model, with which it shares some similarities and which is at times also considered by some scholars.<sup>268</sup> However, by disregarding entirely the rules of humanitarian law – which provides certainly more freedom for lethal targeting than human rights law but contains also stricter

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<sup>265</sup> Sadat-Akhavi, *Methods of Resolving Conflicts Between Treaties* (Brill 2003), pp. 213-31 (among the few authors considering the principle at great length for conflicts between treaties).

<sup>266</sup> They operate first and foremost as saving clauses: Art. 53 ECHR (‘Nothing in this Convention shall be construed as limiting or derogating from any of the human rights and fundamental freedoms which may be ensured ... under any *other agreement*’); Art. 5 (2) ICCPR (‘There shall be no restriction upon or derogation from any of the fundamental human rights recognized or existing ... pursuant to law, conventions, regulations or custom’); Art. 29 (b) ACHR; Art. 43 Arab Charter; Art. 33 CIS Convention.

<sup>267</sup> See, for instance: Graf-Brugère, ‘A *Lex Favorabilis*? Resolving Norm Conflicts between Human Rights Law and Humanitarian Law’, in: Kolb and Gaggioli (2013), *supra* note 3, 251-70, pp. 262-63 (cautioning against reliance on the approach where the difference was intended or relates to the conduct of hostilities); ICRC, Expert Meeting on the Use of Force in Armed Conflicts (2013), *infra* note 308, pp. 21-22 (model supported by only one expert); Mujezinović Larsen (2012), *supra* note 37, pp. 260-61; Cassimatis, ‘International Humanitarian Law, International Human Rights Law, and Fragmentation of International Law’, 56 (3) ICLQ (2007), 623-39, p. 633 (but somewhat unclear whether he means indeed the most-favourable-protection model or the so-called human rights model considered *infra*). Prud’homme (2007), *supra* note 4, p. 358 (calling it detached from reality).

<sup>268</sup> Mujezinović Larsen (2012), *supra* note 37, pp. 261-63; Schabas, ‘*Lex specialis*? Belt and Suspenders?: The Parallel Operation of Human Rights Law and the Law of Armed Conflict, and the Conundrum of *Jus ad Bellum*’, 40 (2) Israel Law Review (2007), 592-613, p. 612 (suggesting a pure HR approach for HR courts in cases of *jus ad bellum* violations, but unclear on the general interplay between HRL and IHL, especially in NIACs); Martin (2001), *infra* note 306 (suggesting a unified force rule drawing from both IHL and HRL as a new *de lege ferenda* approach).

rules, including on the use of certain weapons and methods – the human rights model fails to offer any guidance on overcoming the potential norm conflict between human rights and humanitarian law in a principled and comprehensive manner.

### **Inter-American Human Rights System**

In the above-mentioned *Abella* case (1997), the Inter-American Commission referred explicitly to the most-favourable-protection principle:

where there are differences between legal standards governing the same or comparable rights in the American Convention and a humanitarian law instrument, the Commission is duty bound to give legal effort to the provision(s) of that treaty *with the higher standard(s) applicable to the right(s) or freedom(s) in question*. If that higher standard is a rule of humanitarian law, the Commission should apply it.<sup>269</sup>

Nevertheless, the Commission had seemingly no problem with finding that the insurgents had lost their civilian protection, making them liable to attack for the duration of their engagement as quasi combatants. The Commission did, however, examine specific weapons prohibitions under humanitarian law and concluded that the incendiary weapons allegedly used by the Argentinian forces did not fall under a sufficiently comprehensive ban at the time of the events.<sup>270</sup>

Another case of relevance is *Cruz Sánchez v. Peru* (2011), which concerned the so-called Japanese Embassy hostage crisis.<sup>271</sup> In December 1996, a group of fourteen heavily armed members of the Túpac Amaru Revolutionary Movement (MRTA), a left-wing armed group that was fighting the Peruvian government at that time, seized the Japanese Embassy in Lima (Peru) during an official reception and took hundreds of hostages, including many foreign diplomats, high-level state and military officials, and business executives. While most of them were soon released, the MRTA fighters kept over seventy of the most valuable hostages. They were eventually freed four months later after a successful rescue operation, which resulted in the killing of one hostage and two commandos, as well as all of the MRTA hostage-takers. Some of their families lodged a case with the Inter-American Commission. In its verdict, the Commission

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<sup>269</sup> IACmHR, *Abella v. Argentina* (1997), *supra* note 226, para. 165. See also: IACmHR, *Report on Human Rights and Terrorism* (2002), *supra* note 225, para. 45 ('Under this interconnected regime of treaty obligations, one instrument may not be used as a basis for *denying or limiting other favorable or more extensive* human rights that individuals might otherwise be entitled to under international or domestic law or practice').

<sup>270</sup> IACmHR, *Abella v. Argentina* (1997), *supra* note 226, paras. 180-88. Even today, there is no absolute ban on the use of incendiary weapons under IHL: Rule 85, CIHL Study. See, however: Sect. 6.2, SG Bulletin, which explicitly mentions incendiary weapons in the list of prohibited weapons during UN peace operations involved in armed conflicts.

<sup>271</sup> IACmHR, *Cruz Sánchez v. Peru*, Merits, 31 March 2011, Report No. 66/10, Case No. 12.444.

included only one *meagre* reference to humanitarian law, in which it denounced the hostage-taking by the MRTA as a violation of humanitarian law.<sup>272</sup> By contrast, the assessment of the core question – whether or not the use of lethal force against the MRTA militants was lawful – is entirely based on human rights law.<sup>273</sup> However, the outcome would hardly have been any different under humanitarian law, given that even human rights law authorises the direct use of lethal force in order to save the lives of hostages and security forces when confronting well-armed hostage-takers.<sup>274</sup>

Obviously, the case would have been different, had the commandos used expanding bullets to kill the MRTA militants; but it is up to speculation whether this would have led the Commission to find a violation of the right to life, having recourse to the special weapons rules under humanitarian law. In sum, despite being explicitly mentioned in some early practice, the most-favourable-protection approach appears to have never played a role in moderating the interplay between both legal regimes within the Inter-American human rights system.

## European Human Rights System

The previous section has already considered a number of cases decided by the European Court in relation to the conflict in Chechnya. Some of the most recent cases from the northern Caucasus even go a step further and entail conclusions that seem to be at odds with humanitarian law. A case in point is *Khatsiyeva v. Russia* (2008), which involved a helicopter attack on villagers in Ingushetia who were believed to be armed insurgents involved in a previous attack on Russian aircraft.<sup>275</sup> It appears that the pilots had wrongly identified the villagers, which allowed the Court to find a violation of their right to life. The Court added, however, an interesting *orbiter dictum*:

[T]he Court is not persuaded that the killing of Khalid Khatsiyev and Kazbek Akiyev, *even assuming that they were armed* [as claimed by Russia], constituted a use of force which was no more than absolutely necessary in pursuit of the aims provided for in Article 2 § 2 (a) and (b) of the Convention.<sup>276</sup>

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<sup>272</sup> Ibid, para. 132.

<sup>273</sup> Ibid, paras. 118-61.

<sup>274</sup> Likewise, both humanitarian law and human rights law prohibit the killing of militants once they have surrendered or been taken into custody, which the Commission deemed to be the case for three of the MRTA militants and thus found a violation of their right to life (ibid, para. 161).

<sup>275</sup> ECtHR, *Khatsiyeva v. Russia*, Judgement, 17 January 2008, Application no. 5108/02.

<sup>276</sup> Ibid, para. 138, emphasis added.

This could be read as suggesting that the Convention did not allow for status- or conduct-based targeting in contrast to what humanitarian law was providing for. This seems to be supported by more recent case-law. For instance, in *Kerimova v. Russia* (2012) the Court examined the lawfulness of several air strikes on the Chechen town of Urus-Martan in October 1999, at the very beginning of the Second Chechen War. The town had long been under the control of a large number of well-armed fighters, who had turned it into a ‘fortress’, which prevented the use of ground troops.<sup>277</sup> The Court was therefore prepared to:

accept that the Russian authorities had no choice other than to *carry out aerial strikes* in order to be able to take over Urus-Martan, and that their actions were in pursuit of one or more of the aims set out in paragraph 2 (a) and (c) of Article 2 of the Convention. It is, however, *not convinced*, having regard to the materials at its disposal, that the necessary degree of care was exercised in preparing the operations of 2 and 19 October 1999 in such a way as to *avoid or minimise*, to the greatest extent possible, the risk of a loss of life, both *for persons at whom the measures were directed* [i.e. the rebels] and for civilians.<sup>278</sup>

While generally allowing the use of heavy combat weapons, the Court still applied the usual peacetime standard of precaution to avoid or minimise the risks to life, *including* that of the rebel fighters. In other words, the Court simply disregarded the more liberal targeting rules available under humanitarian law. This is perhaps the most controversial finding of a human rights court on the use of force in a conflict situation. It was also entirely unnecessary, since the applicants’ complaint was concerned with the killing of their civilian relatives and not the death of the Chechen fighters.<sup>279</sup>

Another relevant case was brought by the widow of former Chechen rebel leader Aslan Maskhadov and decided by the European Court in 2013.<sup>280</sup> Maskhadov died in March 2005 when Russian security forces entered the bunker in which he was hiding. The Court confirmed the official Russian version that Maskhadov had been killed by one of his own men to evade capture during the raid; it thus found no violation of the right to life on the part of Russia.<sup>281</sup> The facts of the case allowed the Court to elegantly avoid the difficult question of whether it would have been

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<sup>277</sup> ECtHR, *Kerimova v. Russia*, Judgement, 3 May 2011, Applications nos. 17170/04 et al., paras. 241-47.

<sup>278</sup> Ibid, para. 248, emphasis added and references omitted. For exactly the same approach and wording: ECtHR, *Khamzayev v. Russia*, Judgement, 3 May 2011, Application no. 1503/02, para. 180 (involving the very same attack on Urus-Martan); ECtHR, *Eshmukhambetov v. Russia*, Judgement, 29 March 2011, Application no. 23445/03, para. 146 (involving a similar aerial attack on Chechen village in September 1999).

<sup>279</sup> Moreover, it is highly doubtful whether there were indeed any others means available to limit the risks to the life of the rebel fighters, considering that they had turned the town into a ‘fortress’, which made the use of ground troops impossible and the use of air strikes the only viable option (as explicitly acknowledged by the Court itself).

<sup>280</sup> ECtHR, *Maskhadova v. Russia*, Judgement, 6 June 2013, Application no. 18071/05.

<sup>281</sup> Ibid, paras. 187-91.

acceptable to kill Maskhadov on sight, for instance, through an air strike on his hideout. As the chief commander of the Chechen armed resistance, he undoubtedly had a continuous combat function, which made him a military target under humanitarian law at any time.<sup>282</sup>

Another case where humanitarian law had a role to play is *Finogenov v. Russia* (2011).<sup>283</sup> Similar to *Cruz Sánchez v. Peru* (2011), the case involved a major hostage crisis but with a much more fatal ending. In October 2002, a group of forty to fifty Chechen rebel fighters (armed with assault rifles and explosive vests) seized a Moscow musical theatre, taking 850 hostages and demanding the immediate withdrawal of Russian forces from Chechnya. In order to render the hostage-takers unconscious, Russian special forces pumped an unknown chemical agent (probably fentanyl) into the building's ventilation system. While all militants were killed by gunshots during the subsequent raid, about 130 hostages died due to adverse reactions to the gas. In response to a complaint lodged by the victims' relatives, the European Court found only a violation of the right to life due to the poor planning and implementation of the rescue and evacuation operations after the raid by Russian forces.<sup>284</sup> The Court did discuss extensively the use of the chemical agent as such,<sup>285</sup> but eventually concluded that:

[T]he gas used by the Russian security forces, while dangerous, was not supposed to kill, in contrast, for example, to bombs or air missiles. The general principle stated in the *Isayeva* case, condemning the indiscriminate use of heavy weapons in anti-terrorist operations, can be reaffirmed, but it was formulated in a different factual context, where the Russian authorities used airborne bombs to destroy a rebel group which was hiding in a village full of civilians. Although the gas in the present case was used against a group consisting of hostages and hostage-takers, and although the gas was dangerous and even potentially lethal, it was not used "indiscriminately" as it left the hostages a high chance of survival, which depended on the efficiency of the authorities' rescue effort.<sup>286</sup>

Nowhere in the judgment did the Court discuss the legality of using such chemical agents under humanitarian law when confronting fighters belonging to an armed group. It is unclear whether the judges considered human rights law to take precedence due to the law-enforcement nature of the situation or whether they deemed humanitarian law to be entirely inapplicable, despite the obvious nexus to the war in Chechnya.<sup>287</sup>

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<sup>282</sup> However, the fact that the Court made an effort to meticulously validate the official Russian account that Maskhadov was indeed killed by one of his comrades, seems to imply that the judges did perhaps not feel comfortable enough with simply concluding that he was targetable under humanitarian law and thus not protected by the stricter human rights rules at the moment of his killing.

<sup>283</sup> ECtHR, *Finogenov v. Russia*, Judgement, 20 December 2011, Applications nos. 18299/03 and 27311/03.

<sup>284</sup> *Ibid*, paras. 237-263.

<sup>285</sup> *Ibid*, paras. 227-236

<sup>286</sup> *Ibid*, para. 232, emphasis added.

<sup>287</sup> Unlike the Inter-American Commission in *Cruz Sánchez v. Peru* (2011), *supra* note 271 (which rightly

The European Court had taken a similarly liberal approach on the use of chemical agents against direct military targets in *Kaplan v. Turkey* (2005).<sup>288</sup> The case involved a police raid against suspected PKK members, who were meeting in an apartment, which led to a heavy exchange of gunfire resulting in the killing of a policeman, the believed fighters and two children. Even though the Court was convinced by the facts that the suspects were indeed PKK fighters, it criticised the police's handling of the raid for unduly putting the lives of the militants at risk, especially by relying exclusively on the use of firearms rather than 'tear gas or stun grenades'.<sup>289</sup> To be precise, the Court applied the ordinary human rights test to the use of force against fighters and even went as far as suggesting (as a more preferable option) the use of tear gas against them, despite the ban on using riot control agents as a method of warfare.

### Human Rights Committee

Similar conclusions can be drawn from the practice of the Human Rights Committee in relation to the deprivation of life in times of armed conflict. For instance, in an early case involving the killing of seven individuals, believed to be members of a guerrilla group and behind the abduction of a senior state official, the Committee found a violation of the right to life under the Covenant. They were shot and killed when they returned to their house, without prior warning or giving them the opportunity to surrender:

There is no evidence that the action of the police was necessary in their own defence or that of others, or that it was necessary to effect the arrest or prevent the escape of the persons concerned. Moreover, the victims were *no more than suspects* of the kidnapping which had occurred some days earlier and their killing by the police deprived them of all the protections of *due process of law* laid down by the Covenant.<sup>290</sup>

Hence, the Committee applied a *pure* human rights test without showing deference to the targeting rules under humanitarian law, which would arguably have allowed for the killing of guerrilla fighters under such circumstances.<sup>291</sup> The Committee also criticised Israel in 2003, at

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called the hostage-taking an IHL violation by the MRTA rebel group).

<sup>288</sup> ECtHR, *Hamiyet Kaplan v. Turkey*, Judgement, 13 September 2005, Application no. 36749/97.

<sup>289</sup> Ibid, para. 51 ('la maîtrise probablement insuffisante par les agents de police des méthodes permettant l'arrestation des personnes recherchées et dangereuses sans porter atteinte à *leur vie* ont augmenté les risques pour la vie de ceux qui se trouvaient à l'intérieur de la maison encerclée. En effet, lors de l'opération en question, les policiers ont exclusivement utilisé des armes à feu. Ils n'ont pas fait usage de *gaz lacrymogène* ou de grenades paralysantes', emphasis added).

<sup>290</sup> HRC, *Guerrero v. Colombia* (1982), *supra* note 74, para. 13.2, emphasis added.

<sup>291</sup> An argument could be made that under the exceptional circumstances of the case, such fighters would have been 'in the control' of the adversary and thus *hors de combat* (see p. 222). Moreover, their identification as active members of the armed group was apparently not supported by the facts of the case.

the height of the Second Intifada (2000-2005), for its targeted killing policy against Palestinian militants in the Occupied Territories:

While noting the [Israeli] delegation's observations about respect for the *principle of proportionality* in any response to terrorist activities against civilians and its affirmation that only persons taking *direct part in hostilities* have been targeted, the Committee remains concerned about the nature and extent of the IDF's responses to Palestinian terrorist attacks. ... All measures to *arrest a person suspected* of being in the course of committing acts of terror must be exhausted in order to *avoid resorting to the use of deadly force*.<sup>292</sup>

Here, the Committee openly referred to some humanitarian law targeting standards, but adds an arrest-rather-than-kill standard *vis-à-vis* the suspected militants (based on human rights law). Likewise, the Committee recently criticised the United States for its extensive drone programme, aimed at targeting members of Al-Qaeda and associated groups:

The Committee remains concerned about the State party's very broad approach to the definition and *geographical scope* of "armed conflict", including the end of hostilities, the unclear interpretation of what constitutes an "imminent threat", who is a combatant or a civilian taking direct part in hostilities, the unclear position on the *nexus* that should exist between any *particular use of lethal force* and any specific *theatre of hostilities*, as well as the precautionary measures taken to avoid civilian casualties in practice (arts. 2, 6 and 14).<sup>293</sup>

This means that the Committee clearly accepts lethal targeting based on status and conduct during times of armed conflict. What it is concerned about, however, are the spatial dimensions of this targeting option. As we have seen above, there is no obvious limitation to the geographic reach of humanitarian law. To be precise, it governs the conduct of hostilities between the parties to the conflict wherever they may take place. This does not, however, mean that human rights law has to stand idle and accept lethal targeting operations to be conducted against enemy forces in areas that are not affected by active fighting. What the Committee seems to be implying is that the balance between human rights and humanitarian law is not necessarily determined by the level of protection offered by each regime, but rather the situational circumstances under which the relevant force has been used.

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<sup>292</sup> HRC, Concluding Observations, Israel, 21 August 2003, UN Doc. CCPR/CO/78/ISR, para. 15, emphasis added.

<sup>293</sup> HRC, Concluding Observations on the Fourth Periodic Report of the USA, UN Doc. CCPR/C/USA/CO/4, 23 April 2014, para. 9, emphasis added.

## PARADIGM-BASED MODEL

The two previous sections revealed that neither the traditional *lex specialis* model nor the most-favourable-protection model are capable of fully explaining the use of humanitarian law by the relevant human rights bodies. This section tries to show that a third model – based on a distinction between two different legal paradigms – yields the best results in order to determine the interplay between humanitarian law and human rights in relation to the use of force. The first subsection will outline the main features of this paradigm-based model – including what it means for targeting decisions – and its existing foundation under positive international law. This will be followed by a critical discussion of the possible challenges that this model may pose to peace operations and other overseas military campaigns.

### Hostilities and Law-Enforcement

Humanitarian law has been playing an unclear role within the universal and regional human rights systems. While it is true that the respective courts and bodies have on some occasions referred to humanitarian law standards in their case-law and statements, this practice has been rather inconsistent. There are indeed cases in which these bodies seemed critical of state actions that were fully consistent with humanitarian law. What is more, some courts even cleared actions or gave recommendations that appear to be at odds with certain constraints under humanitarian law. While some may see in this clear evidence of the fact that the mandate and expertise of these bodies – unlike that of domestic courts – is simply limited to human rights law,<sup>294</sup> the issue seems far more complex. As a matter of fact, domestic courts and other state institutions have also taken largely similar decisions.<sup>295</sup> The most instructive cases come surprisingly from Israel and the United States, whose governments are generally associated with the traditional *lex specialis* position.

In the *Targeted Killings* case of 2006, the Supreme Court of Israel followed largely the position of the Human Rights Committee.<sup>296</sup> To be precise, while confirming the concept of continuous combat function under the applicable humanitarian law,<sup>297</sup> it subjected lethal targeting to additional constraints.

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<sup>294</sup> See the brief discussion on the so-called human rights approach, p. 264.

<sup>295</sup> The British case-law has already been examined above as part of the European human rights system.

<sup>296</sup> See above, p. 269.

<sup>297</sup> Supreme Court of Israel, *Public Committee Against Torture in Israel v. Government of Israel*, Judgement, 11 December 2006, HCJ 769/02, hereinafter: *Targeted Killings case*, para. 39.

[A] civilian should not be attacked at a time that he is taking a direct part in hostilities *if it is possible to act against him by means of a less harmful measure*. In our *internal law* this rule is derived from the *principle of proportionality*. Indeed, of the possible military measures one should choose the measure whose violation of the victim's human rights is the least. Therefore, if it is *possible to arrest*, interrogate and prosecute *a terrorist who is taking a direct part* in hostilities, these steps should be followed. A trial is preferable to the use of force. A country governed by the rule of law resorts to the use of trials *rather than the use of force*.<sup>298</sup>

This passage has led to intense debate as to the origin of this additional constraining element.<sup>299</sup> But it seems to have its origin in Israeli domestic law, which itself is largely influenced by international human rights law.<sup>300</sup> This is also supported by the fact that the Court refers explicitly to the *McCann* case in the lines that follow.<sup>301</sup> The US Department of Justice seems to have replicated this approach in its *White Paper on the Lawfulness of a Lethal Operation Directed Against U.S. Citizens* (2013), in which it sets out the conditions under which US citizens who are senior operational leaders of Al-Qaeda or an associated force may be killed outside the area of active hostilities:

[A] U.S. operation using *lethal force in a foreign country* against a U.S. citizen who is a senior operational leader of al-Qa'ida or an associated force would be lawful: (1) an informed; high level official of the U.S. government has determined that the targeted individual poses an *imminent threat of violent attack* against the United States; (2) *capture is infeasible*, and the United States continues to monitor whether capture becomes feasible; and (3) the operation would be conducted in a manner *consistent with applicable law of war principles*.<sup>302</sup>

To be clear, the imminent-threat and feasibility-of-capture tests function as additional constraints,<sup>303</sup> since they are not required by humanitarian law as such. Rather, they have their

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<sup>298</sup> Ibid, para. 40, emphasis added.

<sup>299</sup> Melzer, 'Targeted Killing or Less Harmful Means? – Israel's High Court Judgement on Targeted Killing and the Restrictive Function of Military Necessity', 9 YIHL (2009), 87-113 (seeing it as evidence for the less-harmful-means approach under IHL). For the opposite view: Milanović, 'Lessons for Human Rights and Humanitarian law in the War on Terror: Comparing Hamdan and the Israeli Targeted Killings Case', 89 IRRC (2007), 373-93, pp. 389-92 (holding that this is rather a reflection of HRL).

<sup>300</sup> Cohen and Shany, 'A Development of Modest Proportions: The Application of the Principle of Proportionality in the *Targeted Killings Case*', 5 (2) JICL (2007), 310-32, p. 313, (acknowledging the influence of human rights law on domestic constitutional and administrative law). Barak, 'International Humanitarian Law and the Israeli Supreme Court', 47 Israel Law Review (2014), 181-89, p. 188 (unfortunately somewhat unclear despite the fact that the Aharon Barak was the judge delivering the judgement).

<sup>301</sup> SCI, *Targeted Killings* (2006), *supra* note 297, para. 40.

<sup>302</sup> DoJ, *White Paper on the Lawfulness of a Lethal Operation Directed Against a U.S. Citizen Who Is a Senior Operational Leader of Al-Qa'ida or An Associated Force*, made available on 4 February 2013, p. 1. It makes clear that different standards apply in other scenarios ('including an operation against enemy forces *on a traditional battlefield* or an operation against a U.S. citizen *who is not a senior operational leader* of such forces', emphasis added).

<sup>303</sup> The exact formulation of these two standards (ibid, pp. 7-8) can certainly be criticised, but this is not the

origin in US constitutional law, which continues to limit the deprivation of citizens' lives even when humanitarian law is generally applicable.<sup>304</sup> These requirements are essentially the same as under international human rights law.<sup>305</sup>

Indeed, the requirement of necessity and proportionality under human rights law – as reflected in the arbitrariness test of most right-to-life provisions as well as Articles 2 and 15 of the European Convention – should be seen as a limiting factor against the potential over-application of humanitarian law. In other words, only where it is fully warranted by the circumstances, should the stricter rules of human rights law give way to the more flexible targeting standards under humanitarian law. This does not, however, mean that these two sets of rules have morphed into one 'unified use of force rule', as suggested by some authors.<sup>306</sup> The forgoing rather suggests the co-existence of two distinct paradigms in times of armed conflict:

1. Paradigm of hostilities, which is characterised by active combat and governed by humanitarian law,
2. Paradigm of law-enforcement, which covers all remaining situations and is based on the ordinary human rights standards.<sup>307</sup>

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focus here.

<sup>304</sup> Ibid, pp. 5-6. Indeed, the DoJ refers explicitly to the Fourth and Fifth Amendments of the US Constitution. Note also that the White Paper asserts that there is no geographic limitation to the application of IHL (ibid, p. 4).

<sup>305</sup> The small but important exception is that the US Constitution also protects US citizens while abroad (ibid, p. 5), as opposed to the ICCPR, whose extra-territorial reach the USA still denies. Nevertheless, as a matter of policy, the same test seems to guide the targeting of non-US nationals: HRC, Fourth Periodic Report of the United States of America, Summary Record of 3045th Meeting, 14 March 2014, June 2014, UN Doc. CCPR/C/SR.3045, para. 7 ('Outside of *war zones* the policy was to aim only at targets that represented a *constant threat* to the American people and to carry out the strikes only when there was *no other effective means* of neutralizing the threat', emphasis added).

<sup>306</sup> Martin, 'Using International Human Rights Law for Establishing a Unified Use of Force Rule in the Law of Armed Conflict', 64 (2) Saskatchewan Law Review (2001), 347-96. Alternatively, a mixed model has been suggested in relation to targeted killing, i.e. as a policy framework drawing from both IHL and HRL: Kretzmer, 'Targeted Killing of Suspected Terrorists: Extra-Judicial Executions or Legitimate Means of Defence?', 16 (2) EJIL (2005), 171-212, pp. 201-204. For a critical view on Kretzmer's mixed model: Bhuta, 'States of Exception: Regulating Targeted Killing in a "Global Civil War"', in: Alston and Macdonald (eds.), *Human Rights, Intervention, and the Use of Force* (OUP 2008), 243-74, pp. 270-73.

<sup>307</sup> Similar paradigms have been suggested by other authors, for instance: Melzer, 'Conceptual Distinction and Overlaps between Law Enforcement and the Conduct of Hostilities', in: Gill and Fleck (eds.), *The Handbook of the International Law of Military Operations* (OUP 2010), 33-49, pp. 43-45 (whose paradigms do, however, overlap and therefore fail to provide guidance on the different sets of rules); Fleck, 'Law Enforcement and the Conduct of Hostilities: Two Supplementing or Mutually Excluding Legal Paradigms', in: Fischer-Lescano et al. (eds.), *Peace in Liberty* (Nomos 2008), 391-407 (who seems to use the terms simply as synonyms for 'armed conflict' and 'peace time' and thus in a different way than suggested here); Sassòli and Olson (2008), *supra* note 46 (whose use of terminology and conceptual distinction of different situations – determined on the basis of which set of rules provides the more specific norm, i.e. the *lex specialis* – corresponds largely to the one adopted here); Doswald-Beck, 'The Right to Life in Armed Conflict: Does International Humanitarian Law Provide all the Answers?' 88 IRRC (2006), 881-904, p. 893 (distinguishing the 'law-enforcement model' from 'military hostilities'); Droegge, 'The Interplay between International

Under which paradigm a particular use of force falls is largely a question of facts.<sup>308</sup> An important factor in the assessment is whether the force is directed at military targets, i.e. persons (and objects) that are not protected against direct attack. An affirmative answer would normally suggest that the situation is part of the paradigm of hostilities. This changes of course once the person in question becomes *hors de combat* – for instance, due to injuries or capture – and thus gains protection from direct attack under humanitarian law. There are, however, other circumstances that may affect the final outcome.

A determining factor is indeed the degree of control over the situation as such. For instance, if the area in question is not in the middle of the battlefield but rather under the control of the operating forces (or their allies), the case comes very close to a domestic police operation in peacetime.<sup>309</sup> As a result, the use of force under these circumstances falls within the law-enforcement paradigm and is thus subject to the stricter human rights rules. Relevant scenarios for peace operations include riots even when individual fighters are intermingled as was the case with the violent protests throughout Afghanistan in April 2011 against Koran burnings.<sup>310</sup> A similar case exists where civilian demonstrators actively block roads and other means of transport to obstruct the movement of the peace operation's troops with the aim of shielding enemy forces in neighbouring areas. Even though this a clear case of direct participation in hostilities on the part under the test discussed above,<sup>311</sup> firm control over the relevant area and the overall situation provides the international forces and their allies with a wide range of risk-less options, which makes it a case of law-enforcement. Hence, in both scenarios graduated

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Humanitarian law and International Human Rights Law in Situations of Armed Conflict', 40 (2) *Israel Law Review* (2007), 310-55, p. 347.

<sup>308</sup> There are, however, strongly diverging views on the factors that delimit the conceptual boundary between both paradigms: ICRC, Expert Meeting on the Use of Force in Armed Conflicts – Interplay between the Conduct of Hostilities and Law Enforcement Paradigms, prepared and edited by Gloria Gaggioli, November 2013.

<sup>309</sup> There is wide support among scholars that this should be a key determinant for the assessment: Hampson and Lubell, Amicus Curiae Brief, *Georgia v. Russia (II)*, 38263/08, University of Essex, Human Rights Centre, 10 June 2014, para. 29; Sassòli and Olson (2008), *supra* note 46, p. 614; Doswald-Beck (2006), *supra* note 307, p. 897; Droege (2007), *supra* note 307, p. 347; UCIHL, Expert Meeting on the Right to Life in Armed Conflict and Situations of Occupation, Geneva, 1-2 September 2005, pp. 34-41. By contrast, the degree of control played a surprisingly limited role during the most recent expert discussion: ICRC, Expert Meeting on the Use of Force in Armed Conflicts (2013), *supra* note 308, pp. 19-42 (while discussing a number of pertinent scenarios, including sleeping fighters, riots, common crime, escape of captured fighters and checkpoints). See also: OHCHR, Outcome of the Expert Consultation on the Issue of Protecting the Human Rights of Civilians in Armed Conflict, 4 June 2009, A/HRC/11/31, paras. 14-15 (suggesting a sliding-scale, which would, however, result in a significant overlap between both paradigms, thus undermining the whole purpose of the paradigm-based approach).

<sup>310</sup> LA Times, 'Taliban Exploits Afghan Riots over Koran Burning', 4 April 2011, <http://articles.latimes.com/2011/apr/04/world/la-fg-afghan-koran-riots-20110404> ('Officials say insurgents have used the riots as cover for attacks against Western and government targets').

<sup>311</sup> See the subsection on direct participation in hostilities, from p. 236.

force must be used in line with human rights law, even though humanitarian law would allow for lethal targeting based on status and conduct.

The same conclusion applies to hostage-takings by rebel fighters, similar to the cases of the Japanese Embassy in Lima and the Moscow musical theatre mentioned above, which would only allow for lethal targeting in order to save the lives of the hostages and the rescue teams. A case in point is the recent attack by jihadist insurgents against the Radisson Blu Hotel in Bamako (Mali) in November 2015, where international forces (including French troops and UN peacekeepers) played an essential part in the counterattack and rescue of the hostages.<sup>312</sup>

International forces should also make use of traffic control equipment at checkpoints (including barricades, speed bumps or tire puncturing devices) and use an escalation-of-force procedure *vis-à-vis* approaching vehicles that fail to stop.<sup>313</sup> The case changes of course where a failed suicide car attack against a frontline checkpoint is followed by a full-blown assault by enemy forces – a situation clearly falling within the hostilities paradigm. The same applies to any other classic battlefield situation, including air operations.

The distinction between the paradigms of law-enforcement and hostilities plays typically an important role in non-international armed conflicts and calm occupations,<sup>314</sup> but may also be of great relevance during international armed conflicts, such as in rear areas not affected by active fighting; and similar situation-based distinctions have been suggested for peace operations and similar overseas military deployments.<sup>315</sup>

### **Legal Challenges in Relation to Specific Weapons and Methods**

If a situation falls within the law-enforcement paradigm, what set of weapons and techniques would be permissible? This question has received surprisingly little scholarly attention, despite the fact that it is of paramount importance where the overall situation is characterised as an

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<sup>312</sup> CNN, 'Deadly Mali Hotel Attack', 21 November, <http://edition.cnn.com/2015/11/20/africa/mali-shooting/index.html> ('Dozens of people were trapped in the building for hours, officials in the West African nation said, before Malian and U.N. security forces launched a counterattack and rushed guests away. Olivier Salgado, a spokesman for the United Nations peacekeeping mission in Mali, put the death toll at 21').

<sup>313</sup> Lack of positive identification is another indicator for the law-enforcement paradigm: Sassòli and Olson (2008), *supra* note 45, p. 614 ('law enforcement is by definition directed against suspects').

<sup>314</sup> Watkin, 'Controlling the Use of Force: A Role for Human Rights Norms in Contemporary Armed Conflict', 98 (1) AJIL (2004), 1-34, pp. 30-34; Sassòli and Olson (2008), *supra* note 46, pp. 605-16; UCIHL, Expert Meeting on the Right to Life (2005), *supra* note 309, pp. 34-41.

<sup>315</sup> Kleffner (2010), *supra* note 37, p. 75; Naert (2010), *supra* note 37, pp. 618-24; Sassòli, 'The Role of Human Rights and International Humanitarian Law in New Types of Armed Conflicts', in: Ben-Naftali (2011), *supra* note 3, 34-94;

armed conflict and governed by humanitarian law.<sup>316</sup> As we have seen in an earlier part of this chapter, both legal regimes set very different standards on the use of weapons and methods. While human rights law is silent on the matter, humanitarian law contains very specific prohibitions and limitations. In particular, it bans the use of tear gas and similar non-lethal chemical agents, as well as expanding bullets and offensive operations with plain-clothed forces (qualifying as acts of perfidy). By contrast, all three are widely used in domestic law-enforcement situations and are often the most effective tool to deal with challenging scenarios.

It would appear artificial to give precedence to the more restrictive provisions under humanitarian law simply because they are more specific than under human rights law, which neither prohibits nor explicitly allows their use. To do so would lead to the absurd situation where international forces would have to act within the constraints of law-enforcement, while being deprived of some essential law-enforcement tools. But it seems equally wrong to disregard entirely – simply as a *matter of convenience* – the specific set of humanitarian law rules. Rather, one should consider possible avenues for a harmonious interpretation of the legal framework in order to overcome the potential norm conflicts.

The most obvious case is the use of riot control agents and similar non-lethal or less-than-lethal chemical agents, which are an effective tool for domestic law-enforcement and have reportedly also been used by peace operations during non-combat situations.<sup>317</sup> The Chemical Weapons Convention (1993) contains a general ban on the use of chemical weapons, covering any toxic chemicals and their precursors,<sup>318</sup> unless they are intended for permitted purposes, such as ‘law enforcement including domestic riot control purposes’.<sup>319</sup> In addition, the Convention contains an explicit prohibition on the use of ‘riot control agents as a method of warfare’.<sup>320</sup> Regrettably, the Convention fails to provide a clear definition of the terms ‘method of warfare’ and ‘law enforcement’, but their use and position in the Convention implies that both terms must be seen as mutually exclusive. The newly published Commentary to the Convention tries to fill that gap

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<sup>316</sup> For two very helpful analyses: Watkin, ‘Chemical Agents and Expanding Bullets: Limited Law Enforcement Exceptions or Unwarranted Handcuffs’, 36 IYHR (2006), 43-69; Melzer (2010), *supra* note 307, pp. 44-49. See also: Fleck (2008), *supra* note 307, pp. 394 (simply outlining the differences between both regimes, without, however, providing any solution for the potential norm conflict in law-enforcement situations during armed conflicts).

<sup>317</sup> Fry, ‘Gas Smells Awful. U.N. Forces, Riot Control Agents and the Chemical Weapons Convention’, 31 Michigan Journal of International Law (2010), 475-558, pp. 485-97 (providing an account of situations in which riot control agents have been used by personnel involved in UN-led and UN-authorized peace operations).

<sup>318</sup> Arts. I (b) and 2 (1), Chemical Weapons Convention (CWC).

<sup>319</sup> Art. II (9) CWC, (“Purposes Not Prohibited Under this Convention” means: ... (d) Law enforcement including domestic riot control purposes’).

<sup>320</sup> Art. 1 (5) CWC.

by defining the terms unambiguously,<sup>321</sup> but the outcome is rather disappointing. According to the authors, the term ‘as a method of warfare’ is simply a synonym for ‘use in armed conflict’,<sup>322</sup> which leads them to the vague and controversial conclusion that any use of riot control agents:

in war or other armed conflict does, of course, constitute a method of warfare, which is prohibited ... Such action cannot be misconstrued as law enforcement.<sup>323</sup>

Moreover, they even question the availability of the law-enforcement exception in most extra-territorial settings, especially in the course of peace operations.<sup>324</sup> This is, however, a serious misreading of both terms. As we have seen above, the meaning of law-enforcement is sufficiently broad to cover the actions of international forces involved in peace operations abroad. Moreover, law-enforcement even extends to times of armed conflict provided that the situation does not involve active combat, which falls within the hostilities paradigm and would exclude the use of riot control agents and similar chemical substances.<sup>325</sup>

This is precisely why the inclusion of chemical weapons in the list of war crimes of the ICC Statute proved so problematic. It was argued that it would be absurd if peacekeepers handling riots during armed conflict situations were allowed to use live bullets but not tear gas or other riot control agents.<sup>326</sup> These considerations had an impact on the formulation of the elements of the crime of employing asphyxiating, poisonous or other gases in international armed conflicts, which among others require that:

The gas, substance or device was such that it *causes death or serious damage* to health in the *ordinary course of events*, through its asphyxiating or toxic properties.<sup>327</sup>

This effect-based definition sets a particularly high threshold, which riot control agents and other non-lethal substances are unlikely to reach. Their use would therefore appear to fall outside the scope of the crime.<sup>328</sup> By focusing on the effects rather than on the context of the use,

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<sup>321</sup> Krutzsch et al, *The Chemical Weapons Convention. A Commentary* (OUP 2014), p. 94.

<sup>322</sup> *Ibid*, pp. 70 and 95.

<sup>323</sup> *Ibid*, p. 101.

<sup>324</sup> *Ibid*, pp. 101-102. In this regard, they adopt the rather extreme position of Fry (2010), *supra* note 317, p. 525 (admitting only a case of law-enforcement when the UN is acting ‘specifically as a domestic police force (and when authorized to act as such), and possibly within areas of their direct and complete control, such as at the U.N. Headquarters in New York’).

<sup>325</sup> Similarly: Fidler, ‘The Meaning of Moscow: “Non-lethal” Weapons and International Law in the Early 21<sup>st</sup> Century’, 87 *IRRC* (2005), 525-52, pp. 540-47.

<sup>326</sup> Cottier, ‘War Crimes, Article 8, para 2 a-f’, in: Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court* (2<sup>nd</sup> edn, Nomos 2008), p. 180.

<sup>327</sup> ICC, *Elements of Crimes*, 30 June 2000, UN Doc. PCNICC/2000/1/Add.2, Article 8 (2) (b) (xviii) of the ICC Statute, emphasis added.

<sup>328</sup> See also: Dörmann, *Elements of War Crimes under the Rome Statute of the International Criminal Court* (CUP 2003), pp. 285-87. Nevertheless, an accompanying footnote clarifies that the narrow definition of the

the drafters of the elements of the crimes avoided the arduous task of defining the terms ‘law-enforcement’ and ‘method of warfare’.

Amendment to Article 8, adopted at the Kampala Review Conference in 2010, makes it also a war crime in non-international armed conflicts to employ asphyxiating, poisonous or other gases as well as poison, poisoned weapons and prohibited bullets. Resolution 5 – through which the amendment to Article 8 and the relevant elements of the crimes were adopted – held that the requirement that the conduct took place in the context of an armed conflict confirmed ‘the exclusion from the Court’s jurisdiction of law enforcement situations’.<sup>329</sup> While this was certainly meant to highlight the distinction between both legal paradigms (hostilities versus law-enforcement) in relation to the use of prohibited weapons, the formulation chosen is clearly too broad, because many war crimes listed under Article 8 can indeed be committed during law-enforcement.<sup>330</sup>

To conclude, humanitarian law clearly provides for a built-in law-enforcement exception in relation to the use of tear gas and similar substances.<sup>331</sup> Hence, international forces involved in peace operations that have become a party to an armed conflict can still make active use of these weapons in situations other than active combat.<sup>332</sup> Only where riots and similar disturbances descend into full-blown combat against enemy fighters would international forces have to abstain from using such weapons.<sup>333</sup>

The case of expanding bullets is more challenging, because the prohibition on their use appears to be termed in a more absolute language.<sup>334</sup> Resolution 5, adopted at the Kampala Review Conference in 2010, brought some interesting developments.<sup>335</sup> In addition to the troublesome law-enforcement reference mentioned above, the preamble also explicitly refers to expanding bullets and stresses that the respective war crime:

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<sup>329</sup> crime by this element does in *no way affect* the rules of international law with regard to chemical weapons. Resolution RC/Res.5, Amendments to Article 8 of the Rome Statute, adopted on 10 June 2010 by consensus, unnumbered preambular para. 7.

<sup>330</sup> This is so at least for all war crimes that involve a quasi custodial situation, e.g. all grave breaches listed under Art. 8 (2) (b), Art. 8 (2) (b) (vi), (x), (xxi), (xxii) and (xxvi), Art. 8 (c) and (e) (v-viii) ICC Statute.

<sup>331</sup> In support of this: Watkin (2006), *supra* note 316, pp. 67-69; Hains (2007), *supra* note 186, p. 270;

<sup>332</sup> Quite logically, the same solution should be available to other non-lethal or less-than-lethal weapons that may be seen as inconsistent with IHL because of their indiscriminate effects. See more generally: Mayer, ‘Non-Lethal Weapons and Non-Combatant Immunity: Is It Permissible to Target Noncombatants’, 6 (3) *Journal of Military Ethics* (2007), 221-31.

<sup>333</sup> Similarly: Melzer (2010), *supra* note 307, p. 45.

<sup>334</sup> See, for instance: Rule 77, CIHL Study (‘The use of bullets which expand or flatten easily in the human body is prohibited’).

<sup>335</sup> Vanheusden, Parks and Boothby, ‘The Use of Expanding Bullets in Military Operations: Examining the Kampala Consensus’, 50 *Military Law and the Law of War Review* (2011), 535-56.

is committed only if the perpetrator employs the bullets to *uselessly* aggravate suffering or the wounding effect upon the target of such bullets, as *reflected* in customary international law,<sup>336</sup>

Amnesty International pointed out that this resolution should have no bearing on the elements of the crime or on the ‘absolute character’ of the ban on expanding bullets under humanitarian law.<sup>337</sup> That is, however, a misrepresentation of the special context in which the resolution was adopted. The Review Conference was also attended by states not party to the Rome Statute (including China, India, Israel, Iran, Russia and the United States) as well as different UN bodies and regional organisations.<sup>338</sup> During the working group sessions, the delegates stressed that there was ‘no absolute prohibition’ on the use of expanding bullets, which was not challenged by any of the delegations.<sup>339</sup> This is also reflected by the fact that Resolution 5 was adopted by consensus. Hence, there is clear evidence of subsequent practice among states for a narrower scope of the prohibition on expanding bullets, restricted only to cases of *useless* and thus *unnecessary* suffering. Indeed, the ban was an early concretisation of the general prohibition of means and methods of warfare that cause superfluous injuries and cause unnecessary suffering.<sup>340</sup>

According to Christopher Greenwood, suffering caused by a certain weapon cannot be considered ‘unnecessary if it is inflicted for the purpose of protecting the civilian population’,<sup>341</sup> which may be relevant when individual enemy forces use civilians as hostages or human shields or

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<sup>336</sup> RC/Res.5, *supra* note 329, unnumbered preambular para. 9.

<sup>337</sup> Amnesty International, Public Statement, Comments regarding the language included in the resolution amending Article 8 of the Rome Statute, 11 June 2010, [www.iccnw.org/documents/AI\\_Public\\_Statement\\_on\\_Weapons\\_Amendment\\_20100611\\_SJ.pdf](http://www.iccnw.org/documents/AI_Public_Statement_on_Weapons_Amendment_20100611_SJ.pdf). For a similar view: Geiß, ‘Poison, Gas and Expanding Bullets: The Extension of the List of Prohibited Weapons at the Review Conference of the International Criminal Court in Kampala’, 13 YIHL (2010), 337-52, p. 347.

<sup>338</sup> See the list of delegations, re-issued 26 August 2010, RC/INF.1 (listing the delegates from 84 state parties, and 32 states not party to the ICC Statute as attending the Review Conference, as well as regional organisations, including the EU, the AU and the Arab League).

<sup>339</sup> Review Conference of the Rome Statute of the International Criminal Court, Kampala, 31 May - 11 June 2010, Report of the Working Group on Other Amendments, 10 June 2010, RC/6/Rev.1, para. 5 (‘There was *no absolute prohibition* on the weapons referred to in preambular paragraph 9, i.e. bullets which expand or flatten easily in the human body ... It was also stressed that law enforcement situations are excluded from the Court’s jurisdiction’, emphasis added).

<sup>340</sup> See, for instance, the wording suggested by the US delegate, with which all other delegates at the Hague Peace Conference in 1899 generally agreed: ‘The use of bullets inflicting wounds of *useless* cruelty, such as explosive bullets, and in general, every kind of bullets which exceeds the limit *necessary* for placing a man hors de combat’, emphasis added. Carnegie Endowment for International Peace, *The Proceedings of the Hague Peace Conferences. The Conference of 1899* (OUP 1920), p. 80. For the full discussion on the ban of expanding bullets: *ibid.*, pp. 79-88 and 276-357.

<sup>341</sup> Greenwood, Keynote Speech Delivered on the Occasion of the Third International Workshop on Wound Ballistics, held in Thun, Switzerland, on 28 and 29 March 2001, cited by: Vanheusden, Parks and Boothby (2011), *supra* note 335, pp. 541-42.

engage in suicide attacks. This leads to the conclusion that the ban on the use of expanding bullets under humanitarian law is subject to a built-in necessity test and thus much narrower than under the *Customary IHL Study* and the *Secretary-General's Bulletin*.<sup>342</sup> In other words, international forces involved in peace operations are clearly allowed to use expanding bullets and similar projectiles in exceptional law-enforcement situations – whenever human rights law would permit or even require the direct use of lethal force – including hostage-taking crises involving heavily-armed rebel fighters.

The use of undercover or plain-clothed operations presents yet another challenge. As we have seen above, they run the risk of qualifying as unlawful perfidy, even if the primary aim is to effect an arrest of suspected militants rather than to injure or kill them. To be precise, while relying on such tactics for the purpose of inoffensive intelligence gathering qualifies as a ruse of war, engaging enemy forces in such ways will usually be unlawful as it involves feigning civilian status with the intent to betray that confidence. A major challenge presents itself in the personal scope of those that the perfidy ban is meant to protect.

Article 37 of Additional Protocol I only mentions the ‘adversary’. The original ban contained in the Hague Regulations (1907), however, appears to protect a broader group of people: ‘individuals *belonging to the hostile nation* or army’.<sup>343</sup> The war crime of treachery in the Rome Statute is based on the same formulation,<sup>344</sup> at least in relation to international armed conflict.<sup>345</sup> According to the ICRC, the reference to the ‘individuals belonging to the hostile nation’ clearly covers civilians alongside combatants as possible victims of unlawful acts of perfidy.<sup>346</sup> In view of this, Nils Melzer cautions that any undercover arrest conducted in times of armed conflict runs the risk of amounting to perfidy.<sup>347</sup> This overlooks, however, the object and purpose of the relevant provisions. There is simply no reason why ordinary civilians should fall under the protection of the perfidy ban. As a matter of fact, they are *already* protected against direct attack for being civilians. Unlike in the case of regular combatants or civilians taking a direct part in

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<sup>342</sup> Rule 77, CIHL Study; Sect. 6.2, SG Bulletin.

<sup>343</sup> Art. 23 (b) of the Hague Regulations (1907), emphasis added.

<sup>344</sup> Art. 8 (2) (b) (xi) ICC Statute.

<sup>345</sup> Indeed, Art. 8 (2) (e) (ix) ICC Statute mentions only ‘combatant adversary’. For further guidance see: Dörmann (2003), *supra* note 328, p. 478 (‘This might lead to the conclusion that killing or wounding a civilian adversary (not taking an active/direct part in hostilities) by means of perfidy is not a war crime under Art. 8 (2) (e) (ix)’). Interestingly, the Elements of Crimes require in both types of armed conflict that the victim ‘belonged to an adverse party’ (pp. 240 and 476).

<sup>346</sup> Rule 65, CIHL Study, Commentary, p. 226. Also supported by: Melzer (2010), *supra* note 307, pp. 47-48

<sup>347</sup> Melzer (2010), *supra* note 307, p. 48.

hostilities, perfidious acts by enemy forces should have no bearing on the confidence and behaviour of ordinary civilians.<sup>348</sup> The exclusion of ordinary civilians is also supported by the drafting history of the prohibition of treachery, which goes back to the Brussels Declaration (1874).<sup>349</sup> The initial draft of the provision only protected members of the ‘hostile army’.<sup>350</sup> The ‘hostile nation’ phraseology was only added during the negotiations, but the records are unclear as to the reason for this amendment.<sup>351</sup> It appears, however, most plausible that the term ‘hostile nation’ was meant to refer only to the participants of a *levée en masse* – a concept internationally recognised for the first time by the Brussels Declaration – in addition to the *regular* army.<sup>352</sup> As a consequence, acts of perfidy can only be committed against combatants and civilians taking a direct part in hostilities.

In addition, the official ICRC Commentary makes clear that the prohibition of perfidy contained in Article 37 only covers ‘acts that take place in combat’,<sup>353</sup> which is supported by the fact that it is part of Section I ‘Methods and Means of Warfare’ of Protocol I. The same conclusion can be drawn from the systematic position of equivalent perfidy provisions in the text of other instruments.<sup>354</sup> In other words, the drafters of these instruments never intended to ban the use of covert operations outside active combat, including by police and other security forces.<sup>355</sup> This allows for a sufficiently broad law-enforcement exception for the use of undercover and plain-

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<sup>348</sup> Indeed, ordinary civilians have no reason to believe that they are ‘entitled to, or obliged to accord, protection’ *vis-à-vis* undercover forces, as required by Art. 37 (1) AP I.

<sup>349</sup> Art. 13 (b) prohibiting: ‘Murder by treachery of individuals belonging to the hostile nation or army’. Project of an International Declaration Concerning the Laws and Customs of War, Brussels, 27 August 1874, hereinafter: Brussels Declaration. The Brussels Declaration was initially unsuccessful but served as a blueprint for most rules contained in the subsequent Hague Regulations of 1899 and 1907.

<sup>350</sup> Ministère des Affaires Étrangères, Actes de la Conférence de Bruxelles de 1874 sur le Projet d’une Convention Internationale Concernant la Guerre : Protocoles des Séances Plénières, Protocoles de la Commission Déléguée par la Conférence, Annexes (Brussels 1874), p. 5 (‘Le meurtre par trahison des individus appartenant à l’armée ennemie’).

<sup>351</sup> *Ibid.*, p. 41 (‘Au litt. B, M. le général de Voigts-Rhetz propose de dire : « appartenant à la nation ou à l’armée ennemie ». L’assemblée admet cette addition’).

<sup>352</sup> Art. 10, Brussels Declaration (‘The population of a territory which has not been occupied, who, on the approach of the enemy, spontaneously take up arms to resist the invading troops ...’). For the nearly identical provision eventually adopted, see Art. 2, Hague Regulations.

<sup>353</sup> Sandoz et al., Commentary to the Additional Protocols, Article 37, para. 1484, p. 430. See also para. 1494, p. 433 (‘Article 37 is devoted essentially to combat ... it is aimed at regulating one of the problems of combat’) and para. 1524, p. 444 (‘The rule prohibits acts performed in combat: killing, injuring and capturing by resort to perfidy’).

<sup>354</sup> See in particular: Art. 23 (b) Hague Regulations (1907), part of ‘Section II – On Hostilities’; Rule 65, CIHL Study (part of ‘Specific Methods of Warfare’); Sect. 2.3.6 Perfidy, Sanremo NIAC Manual, p. 43-44 (placed under the heading ‘Methods of Combat’, as part of the broader chapter ‘Conduct of Military Operations’).

<sup>355</sup> Similarly: Melzer (2010), *supra* note 307, p. 48.

clothed personnel in peace operations.<sup>356</sup> This includes not only attempts to arrest civilians, but also applies to commando raids to capture individual enemy forces or suspected militants who find themselves in the territory under the firm control of the peace operation or associated forces.<sup>357</sup>

In conclusion, the specific humanitarian rules on certain weapons and methods – namely on tear gas and similar chemical agents, expanding bullets and the offensive use of plain-clothed personnel – provide for a sufficiently broad law-enforcement exception. This means that they can also be used in times of armed conflict, even against legitimate targets, provided that the situation falls under the law-enforcement paradigm. As we have seen above, the use of force in such situations would be subject to the stricter rules under the human rights law, which requires a graduated use of force and allows killings only in order to save. By reverse logic, situations of active and intensive combat fall under the hostilities paradigm and are primarily governed by humanitarian law, including its detailed rules on certain weapons and methods of warfare. This means that the peace mission has to abstain from using tear gas and similar chemical agents, expanding bullets and plain-clothed personnel during combat operations.

### **Remaining Challenges**

The military may have serious objections against this approach for being operationally unfeasible and exposing its soldiers to undue risks and legal uncertainty. This criticism may, however, be countered by reference to the rules of engagement applicable in various overseas operations. Indeed, they are often restricted, containing a built-in necessity standard and requiring a gradual escalation of force,<sup>358</sup> even though this is reportedly due to policy rather than legal considerations.<sup>359</sup> This has also been confirmed by Richard Gross – former Chief Legal Advisor for ISAF in Afghanistan – who stresses that capture is the preferred options, because it may

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<sup>356</sup> It is unlikely that the ICC or other tribunals with jurisdiction over the war crime of treacherous killing or injury (contained in the ICC Statute) will ever have to deal with relevant cases due to the limited scope of the crime. But in view of Resolution 5, adopted at the Kampala Review Conference, we can expect that they would confirm the law-enforcement exception suggested here.

<sup>357</sup> Similarly: Melzer (2010), *supra* note 307, p. 48. This includes calm areas under military occupation: Giladi, 'Out of Context: 'Undercover' Operations and IHL Advocacy in the Occupied Palestinian Territories', 14 (3) *Journal of Conflict and Security Law* (2009), 393-439, pp. 428-31

<sup>358</sup> Solis, *The Law of Armed Conflict* (CUP 2010), pp. 502-505.

<sup>359</sup> Schmitt, 'The Principle of Distinction and Weapon Systems on the Contemporary Battlefield', 7 (1) *The Quarterly Journal* (2008), 46-56, p. 53.

yield valuable intelligence through interrogation.<sup>360</sup> In addition, it may support the general counter-insurgency objective to ‘win hearts and minds’.<sup>361</sup>

The role as law-enforcement agent, however, may lead to a loss of combat readiness among troops, as a high portion of the training will focus on evidence gathering and similar techniques rather than combat skills.<sup>362</sup> Furthermore, the distinction between two regimes appears to require more sophisticated rules of engagement in order to capture the full operational matrix. The *Colombian Operational Law Manual* (2009) provides an illustrative example on how this challenge can be addressed. Its rules of engagement are based on two sets of cards: ‘blue cards’ are for law-enforcement and based on human rights law, while ‘red cards’ apply to areas of hostilities and are governed by humanitarian law. The labels for different areas are constantly updated to reflect recent activities and changes in strength of the enemy forces.<sup>363</sup> The obvious advantage is that it provides a simple and clear system for mission-planning and briefing of troops prior to the deployment. Moreover, peace operations can also make use of specialised types of forces, including police-style gendarmerie and special forces,<sup>364</sup> and seek the assistance from police units of the host state in order to cover the full spectrum of possible scenarios. In addition, the peace operation’s personnel need to be provided with a wide, highly diversified equipment (including crowd-control gear e.g. shields, truncheons, water cannons and rubber bullets) and need to be given training and mission-specific instructions prior to each deployment, in particular, on the use of tear gas and similar chemical agents, expanding bullets and the offensive use of plain-clothed personnel.<sup>365</sup>

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<sup>360</sup> Gross, ‘The Use of Force in the Different Phases of the Conflict in Afghanistan’, Presentation Summary, Appendix 5, in: ICRC, Expert Meeting on the Use of Force in Armed Conflicts (2013), *supra* note 308, 85-87, p. 87 (‘there is no specific written ISAF policy, but in practice operational commanders will prefer the capture of someone rather than his killing. The reason for this preference is one of policy: a captured person can be interrogated and will possibly provide useful intelligence. Even though under international humanitarian law (IHL) a legitimate target may be killed, in practice his capture will be preferred’).

<sup>361</sup> ICRC, Expert Meeting on the Use of Force in Armed Conflicts (2013), *supra* note 308, p. 23.

<sup>362</sup> Lewis, ‘Battlefield Perspectives on the Laws of War’, in: Corn et al. (eds.), *The War on Terror and Laws of War. A Military Perspective* (OUP 2009), 209-34, pp. 228-33.

<sup>363</sup> Gómez Ramírez, ‘Reflections on the Colombian Operational Law Manual (2009)’, Presentation Summary, Appendix 4, in: ICRC, Expert Meeting on the Use of Force in Armed Conflicts (2013), *supra* note 308, pp. 81-83.

<sup>364</sup> Also suggested by some experts: ICRC, Expert Meeting on the Use of Force in Armed Conflicts (2013), *supra* note 308, p. 47.

<sup>365</sup> Adequate training and specific instructions prior to each deployment is especially relevant for these weapons and methods because their illegal use in armed conflict (i.e. during active combat) does not only engage the international responsibility of the states/organisations under IHL as such, but may also give rise to individual criminal liability. To be clear, the illegal use may result in the prosecution of the relevant soldiers for war crimes before national courts or the ICC.

Another challenge may exist when the adversary party to the conflict is a non-state armed group, as it remains a matter of serious debate whether and to what extent such groups are bound by human rights law. It seems most reasonable to conclude that they are not, unless they have firm control over territory allowing them to exercise public power in a state-like manner there.<sup>366</sup> This means that most armed groups are only bound by humanitarian law, which may seriously disadvantage their adversaries.<sup>367</sup> Unlike armed groups, peace operations and other state armed forces would indeed have to observe additional human rights constraints in certain situations throughout the conflict, which runs the risk of seriously undermining the long-established principle of reciprocity between belligerent parties. This principle, however, only applies in relation to humanitarian law obligations, which are indeed the same for both parties to the armed conflict.<sup>368</sup> Ultimately, it is common for states as well as international organisations to have additional obligations under international law.

What needs to be stressed is that members of armed groups invariably violate domestic law when they participate directly in hostilities against government or international forces.<sup>369</sup> In other words, they can be prosecuted for any hostile act, even those that are fully compliant with humanitarian law, which means that they are by no means *less constrained* in comparison to government soldiers or international forces serving as part of a peace operation.<sup>370</sup>

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<sup>366</sup> Henckaerts and Wiesener, 'Human Rights Obligations of Non-State Armed Groups: A Possible Contribution from Customary International Law?', in: Kolb and Gaggioli (2013), *supra* note 3, 146-69 (who show that international practice so far confirms the existence of human rights obligations on the part of armed groups only in areas under their firm control). See also: ILA, Non-State Actors, Conference Report Washington 2014, pp. 5-11; Zegveld, *Accountability of Armed Opposition Groups in International Law* (CUP 2002), pp. 39-46. For a more expansive view: Clapham, 'Human Rights Obligations of Non-State Actors in Conflict Situations', 88 *IRRC* (2006), 491-523.

<sup>367</sup> Note, however, that some consider the paradigm of law-enforcement also to exist in a more rudimentary form under IHL: ICRC, Expert Meeting on the Use of Force in Armed Conflicts (2013), *supra* note 308, p. 11 (raised by several experts). Nonetheless, the exact contours of the IHL-based law-enforcement paradigm in relation to non-state armed groups and its limitations on the use of force remain extremely vague.

<sup>368</sup> Indeed, even our findings on specific weapons and methods (above, p. 276) does not affect the equality between belligerents under IHL, since the law-enforcement exceptions (implicit in these bans) are in principle also available to armed groups. However, outside areas under their firm territorial control the use of such weapons and methods would virtually always fall within the paradigm of hostilities.

<sup>369</sup> Doswald-Beck (2006), *supra* note 307, p. 890; Droege (2008), *supra* note 259, p. 537; UCIHL, Expert Meeting on the Right to Life (2005), *supra* note 309, pp. 40-41.

<sup>370</sup> Indeed, most acts of rebel fighters already fall under the ordinary criminal law provisions of states (e.g. physical assault, murder or other types of unlawful killing, abduction, theft, arson, and unlawful possession of weapons). The penalisation and prosecution of these acts is not only consistent with HRL but even required by it because of the positive HRL obligations of states *vis-à-vis* their own soldiers and security forces as well as civilians (e.g. right to life, right to liberty, right to property). In other words, members of non-state armed groups are *indirectly* bound by virtually the same HRL standards as state armed forces. Moreover, this parity is only marginally affected by the general duty under the law of NIAC to 'endeavour to grant the broadest possible amnesty' to former fighters at the end of hostilities (Art. 6 (5) AP II and Rule 159 CIHL Study).

## 5.5 CONCLUSION

This chapter examined the likely scenario during peace operations when human rights law and humanitarian law apply to the same situation – both in space and time. This may lead to potential conflicts between opposing rules, especially in relation to the use of (lethal) force. Both regimes provide for different requirements as to when and how force may be used. In a nutshell, human rights law generally requires a graduated use of force and only allows for direct lethal targeting as a measure of last resort in order to protect life from an imminent threat. By contrast, humanitarian law provides for lethal targeting based on status and conduct, even absent any threat to the life and limb of others. It does, however, contain stricter rules on the use of certain weapons and methods of warfare.

The outline of the practice revealed that neither the traditional *lex specialis* model nor the most-favourable-protection model are capable of fully explaining the use of humanitarian law by the relevant human rights bodies. The most suitable interaction model is instead based on the distinction between two mutually exclusive paradigms:

1. Paradigm of hostilities, which is characterised by active combat and governed by humanitarian law,
2. Paradigm of law-enforcement, which covers all remaining situations and is based on the ordinary human rights standards.

Whether a situation involving the use of force falls under the hostilities or law-enforcement paradigm largely depends on the degree of control over the situation as such. For instance, if the area in question is not in the middle of the battlefield but rather under the control of the peace operation's own forces or those of their allies (e.g. host state or others), the case comes very close to a police operation in peacetime. As a result, the use of force under these circumstances falls within the law-enforcement paradigm and is thus subject to the stricter human rights rules, including the graduated force approach. This is so even despite the presence of legitimate military targets, for instance, when fighters intermingle with rioters or are involved in hostage-takings, or when civilians commit hostile acts amounting to direct participation in hostilities in friendly territory. By contrast, more classic battlefield situations and air operations would typically fall under the hostilities paradigm.

What is more, the specific humanitarian rules on certain weapons and methods – namely on tear gas and similar chemical agents, expanding bullets and the offensive use of plain-clothed personnel – provide for a sufficiently broad law-enforcement exception. This means that they can also be used in times of armed conflict, even against legitimate targets, provided that the situation falls into the law-enforcement paradigm and that the stricter rules on the use of force

are adhered to. By contrast, in situations of active and intensive combat, which fall under the hostilities paradigm and are primarily governed by humanitarian law, including its detailed rules on certain weapons and methods of warfare, international forces have to abstain from using tear gas and similar chemical agents, expanding bullets and plain-clothed personnel.

Moreover, operational challenges resulting from this paradigm-based model do not pose unsolvable problems and are best addressed by careful planning of operations and real-time instructions as well as by diversifying the skills, functions and equipment of the forces involved in international military operations abroad.



# 6 GENERAL CONCLUSION

The traditional distinction between peacekeeping and peace-enforcement has become increasingly blurred. Today, almost all peace operations operate under a robust mandate based on a Security Council resolution adopted under Chapter VII of the UN Charter. This allows for significant levels of military force to be used, especially in support of the host states' authorities against members of non-state armed groups. The exercise of 'effective control' over specific acts and omissions is the appropriate yardstick for identifying areas of responsibility of states and international organisations involved in peace operations. The detailed command and control arrangements considered above will usually be of help in order to provide an answer to the critical question: who gave the direct order or instruction for the specific conduct. While dual or multiple attribution be excluded, it is rather the exception than the norm. Instead, a specific act or its different sub-elements will usually only be attributable to one entity. Taken together, however, the totality of all acts and omissions of the peace operation will typically engage the responsibility of a great number of actors, usually the international organisation in command as well as the different sending states.

States have undertaken very different treaty obligations under human rights and humanitarian law. While some multilateral agreements – like the four Geneva Conventions (1949) and the International Covenant on Civil and Political Rights (1966) – enjoy (nearly) universal ratification, there is great disparity between states when it comes to other, more specific treaties, including a number of different arms control conventions and regional human rights treaties. However, these differences are to a large extent levelled out by the fact that many of the substantive treaty provisions form also part of general international law, binding on all states. General international law, which covers both customary law and general principles, is also the primary source of obligations for international organisations, as they have largely abstained from becoming parties to human rights and humanitarian law treaties. Hence, despite the fragmented ratification record under treaty law, states and international organisations share a wide range of similar obligations in the field of human rights and humanitarian law. Even though the mandates have been adopted under Chapter VII of the UN Charter, they do not obstruct the application of human rights and humanitarian law, either as a whole or of some of their specific rules. Whether the obligations of the states and the organisations actually apply in the context of a peace operation depends on their specific actions and whether they meet the threshold requirements set by the regimes themselves for their application.

This thesis rejects the calls for a special treatment of peace operations compared to other belligerents, inspired by their special mandates or international status. Rather, the modalities for a peace operation to become a party to an armed conflict has to be based on the ordinary test: When its forces engage in fighting with state armed forces, however sporadic and short-lived this may be, there will be an international armed conflict. By contrast, violence with non-state armed groups – the far more likely scenario for peace operations – qualifies as a non-international armed conflict, provided that it reaches a high level of intensity and that the group in question is sufficiently organised. Moreover, the special protection regime that has evolved in the last two decades is not capable of raising the threshold of violence required for triggering an armed conflict. It rather shows the need for a participation-based test – in addition to the ordinary threshold of armed conflict – in order to ascertain whether and when a peace operation becomes a party to the pre-existing armed conflict. Hence, where the personnel engage in acts amounting to direct participation in hostilities, the entire peace operation will most likely become a party to the conflict. This test is of particular relevance in situations in which the peace operation has not yet (or only sporadically) been involved in fighting and whose activities are mainly focused on supporting the host state authorities. The same test can also be used for qualifying the interaction between the different actors involved in the peace operation itself. To be precise, it proves particularly helpful –in addition to the ordinary threshold requirement – for assessing as to which sending states can be considered a party to the armed conflict.

Where the peace operation has become a party to an armed conflict, the temporal and geographical scope of application is of particular relevance. The thesis concludes that humanitarian law continues to apply for as long as the armed conflict lasts or as long as the peace operation participates in it by committing acts amounting to direct participation in hostilities. Although this analysis is essentially based on an objective test, the conclusion of formal agreements between the parties may be evidence of the intentions of the parties to bring the conflict to an end. In the meantime, humanitarian law does not only apply in areas directly affected by hostilities, but governs also the actions of the international forces in other areas. It may even apply outside the mission area to the extent that there exists a nexus with the armed conflict in question, including spill-over scenarios.

This thesis also considers the case of military occupations absent hostilities as a self-standing ground for the application of humanitarian law in peace operations. It concludes that mandate-based considerations do not matter and that the assessment rests entirely on a factual test. Hence, whenever international forces involved in a peace operation are deployed to an area over which they exercise sufficient control without the explicit and genuine consent of the host state, they assume the role of an occupying power. This test is further complemented by a participation-based test so as to cover also cases in which international forces render direct support

to the military occupation of another entity. The law of occupation remains applicable in the territory in question until the military occupation comes to an end, for instance, when the troops are withdrawn or their presence has received the genuine consent of the host state. The law of occupation is also the primary candidate for the approach of applying humanitarian law by analogy. However, while states and international organisations are generally free to commit themselves to higher standards, they cannot invoke such standards to justify measures that are at odds with otherwise applicable obligations under international law.

The approach of applying humanitarian law by analogy is partly driven by the misconception that human rights law is not applicable in the mission area and not tailored to the challenging security situation prevailing there. The thesis shows that human rights law is clearly applicable to the actions of states and international organisations involved in a peace operation. Neither the spatial or personal models, nor the public powers model provide sufficient justification for limiting the geographical scope of human rights law. There is indeed strong evidence for a convergence in the practice of human rights institutions towards a gradual model for the extra-territorial application of human rights law. Accordingly, negative human rights obligations apply everywhere at all times, while the scope of positive obligations is highly context-specific. Certain duties apply as they are inherently linked to the interference with the negative rights. The other models discussed above provide important additional grounds for positive obligations: (1) *personal model*, requiring control over persons through arrest or detention; (2) *spatial model*, requiring quasi exclusive control over territory, and (3) *public powers model*, requiring delegation of far-reaching powers under the mandate or other explicit authorisations.

Even though human rights law applies directly to the actions of states and international organisations involved in a peace operation, it shows a high degree of flexibility in addressing security concerns. In fact, in addition to the broad range of permissible limitations already available, human rights treaties provide for the possibility of derogations from a large number of rights, subject to certain requirements and additional safeguards. In order to overcome the apparent strictures of the derogation clauses in extra-territorial settings, the thesis suggests the ‘host nation’ model as the best solution for derogations in response to emergency situations in the mission area. Under this model, international forces are also part of the *host nation* and threats against them are crucial for the overall assessment, in addition to the security situation of the local population. Derogations and similar acts by the host state authorities are not necessarily required, nor are they enough to cover the actions of military forces from different sending states. But they may support the claim that there is indeed an emergency in full swing and that ordinary measures are no longer adequate. Only if the peace operation becomes involved in an international armed conflict with state armed forces would the derogation basis shift towards the war-based model, which provides a self-standing ground for derogations.

The fact alone that no derogation notice has been issued is not enough to deny states the right to invoke their derogation powers during legal proceedings. What is essential is that those affected by the emergency measures are duly informed. The factual circumstances of armed conflicts or military occupations and the special rules of humanitarian law whose application they trigger should be seen as sufficiently clear, so that no further notice would be required. Moreover, Security Council resolutions and related documents could be used proactively for specifying emergency measures. This would allow the derogation issue to be dealt with in one package, relevant both for the United Nations, the regional organisations and sending states involved as well as the host states. Nonetheless, even in case of a genuine emergency the scope of the measures is clearly restricted by the set of non-derogable rights, other international legal obligations (including humanitarian law and the mandate) and the necessity and proportionality requirement.

The last chapter of the thesis examined the likely scenario during peace operations when human rights law and humanitarian law apply to the same situation – both in space and time. This may lead to potential conflicts between the different use-of-force rules. Indeed, both regimes do provide for different requirements under which (lethal) force may be used. In a nutshell, human rights law generally requires a graduated use of force and only allows for direct lethal targeting as a measure of last resort in order to protect life from an imminent threat. By contrast, humanitarian law provides for lethal targeting based on status and conduct, even absent any threat to the life and limb of others. It does, however, contain seemingly stricter rules on the use of certain weapons and methods of warfare. Charles Garraway once likened the legal regimes of human rights and humanitarian law to two tectonic plates and cautioned that:

If the pressure is not released in some way and the plates are allowed to continue to push up against each other, there will sooner or later be the equivalent of an earthquake ... The cost would inevitably be paid by the victims of conflict and violence, the very people that both systems seek to protect.<sup>1</sup>

This is perhaps an unnecessary over-dramatisation; but it is illustrative of the legal uncertainty caused by what Martti Koskenniemi once described as the ‘struggle’ between opposing groups of experts and institutions.<sup>2</sup> Indeed, by confirming their competence to review acts of states abroad as well as measures taken during times of armed conflict, human rights bodies have incrementally extended their mandate, but also the reach of human rights law itself.<sup>3</sup> Likewise,

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<sup>1</sup> Garraway, “‘To Kill or Not To Kill?’ Dilemmas on the Use of Force’, 14 JCSL (2009), 499-510, p. 510.

<sup>2</sup> Koskenniemi, ‘The Politics of International Law – 20 Years Later’, 20 (1) EJIL (2009), 7-19, pp. 10-12.

<sup>3</sup> This is, of course, without prejudice to the strong textual, historical and teleological support for both developments under the relevant human rights instruments.

and inspired by the same quest for effective protection and accountability, the reach of humanitarian law has been extended far beyond the traditional battlefield of inter-state wars to cover also asymmetrical conflict scenarios and areas not affected by active fighting.<sup>4</sup> That is why the relevant scopes of application of both legal regimes are no longer able to avoid the impending norm conflicts. Also the traditional *lex specialis* doctrine and the most-favourable-protection principle are not in a position to govern the interaction between both legal regimes in a satisfactory and principled manner. There is, however, support in recent practice for a more suitable interaction model based on the distinction between two mutually exclusive paradigms: the *paradigm of hostilities*, characterised by active combat and governed by humanitarian law, and the *paradigm of law-enforcement*, covering all remaining situations and based on the ordinary human rights standards.

Whether a situation involving the use of force falls under the hostilities or law-enforcement paradigms largely depends on the degree of control over the situation as such. For instance, if the area in question is not in the middle of the battlefield but rather under the control of the operating forces (or their allies), the case comes very close to a police operation in peacetime. As a result, the use of force under these circumstances falls within the law-enforcement paradigm and is thus subject to the stricter human rights rules, including the graduated force approach. This is so despite the presence of legitimate military targets, for instance, when fighters intermingle with rioters or are involved in hostage-takings, or when civilians commit hostile acts amounting to direct participation in hostilities in friendly territory. By contrast, more classic battlefield situations and air operations would typically fall under the hostilities paradigm. What is more, the specific humanitarian rules on certain weapons and methods – namely on tear gas and similar chemical agents, expanding bullets and the offensive use of plain-clothed personnel – provide for a sufficiently broad law-enforcement exception. This means that they can also be used in times of armed conflict, even against legitimate targets, provided that the situation falls under the law-enforcement paradigm and that the stricter rules on the use of force are observed. This makes it even more necessary for commanders to provide careful planning and real-time instructions in order to fully operationalise the suggested distinction between the two paradigms.

This approach is not only relevant in modern peace operations, but also in more traditional (internal) non-international armed conflicts as well as other forms of overseas military deployments and future combat scenarios.<sup>5</sup> However, the following caveat must be made: This thesis

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<sup>4</sup> This is to a large extent a result of the efforts by the ICRC, various international criminal tribunals, but also a great number of like-minded states.

<sup>5</sup> A case in point is the military campaign by an international coalition against the self-proclaimed Islamic State in Iraq and Syria.

was able to avoid the impact of the *jus ad bellum* on the interplay between human rights and humanitarian law because peace operations usually have a sufficiently broad mandate. Certainly, there is a strict and long-held distinction between the *jus ad bellum* and the *jus in bello*. Nevertheless, there is no reason why the same reasoning should apply in relation to human rights law. Indeed, the drafters of the Covenant made it clear that derogations in times of armed conflict should only be allowed for measures that are consistent with the UN Charter. Likewise, many states, including the United States, called for the need of consistency with the *jus ad bellum* during the *Nuclear Weapons* proceedings.<sup>6</sup> Hence, human rights courts and similar bodies should perhaps consider to what extent (flagrant) violations of the *jus ad bellum* may affect the careful balance between human rights and humanitarian law suggested here.<sup>7</sup>

Moreover, some of the positions taken here should be seen in the broader context of technological development. There is indeed a strong potential for more effective non-lethal or less-lethal weapons that could possibly make the reliance on live ammunition as well as riot control agents and expanding bullets less pressing. A similar effect can be expected from the increasing role of robotics in defence technologies. Nevertheless, while drones, robots and similar devices may help to observe human rights and humanitarian law obligations more effectively in future military operations, they do raise complex legal and moral questions beyond the scope of this study.<sup>8</sup>

Future research on the interplay between human rights law and humanitarian law should engage more closely with non-state armed groups, as they are nowadays the adversary *par excellence* in most armed conflicts. Especially their role in the process of norm-creation of human rights and humanitarian law should be examined in more detail,<sup>9</sup> as this may in the long run also affect

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<sup>6</sup> Milanović, 'The Lost Origins of Lex Specialis: Rethinking the Relationship between Human Rights and International Humanitarian Law', in: Ohlin (ed.), *Theoretical Boundaries of Armed Conflicts and Human Rights* (CUP forthcoming 2016, [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2463957](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2463957)), p. 37 (who is, however, himself undecided as to whether this is indeed the right approach).

<sup>7</sup> Schabas, 'Lex specialis? Belt and Suspenders?: The Parallel Operation of Human Rights Law and the Law of Armed Conflict, and the Conundrum of Jus ad Bellum', 40 (2) *Israel Law Review* (2007), 592-613, p. 612 (arguing that human rights bodies should apply a strict human rights approach to those cases of war inconsistent with the principle of non-use of force, in order to safeguard the rights of combatants and those affected by collateral damage); Jinks (2014), *supra* note, p. 668. For a more cautious view: Lubell (2010), *supra* note, p. 240 (pointing at the risk of undermining IHL).

<sup>8</sup> See, for instance: Bhuta et al. (eds.), *Autonomous Weapons Systems: Law, Ethics, Policy* (CUP 2015); Liu, *Legal Responses to Autonomous Weapons Systems* (Hart Publishing, forthcoming 2016); Sassòli, 'Autonomous Weapons and International Humanitarian Law: Advantages, Open Technical Questions and Legal Issues to Be Clarified', 90 *International Law Studies* (2014), 308-40; Anderson et al., 'Adapting the Law of Armed Conflict to Autonomous Weapon Systems', 90 *International Law Studies* (2014), 386-411; Nasu and McLaughlin (eds.), *New Technologies and the Law of Armed Conflict* (Asser Press 2014).

<sup>9</sup> For instance, more than fifty armed groups have made unilateral commitments, so-called 'deeds of com-

the scopes of application of both regimes as well as the interaction between their respective sets of rules. Eventually, it may also be necessary to reconsider the approach of declaring armed groups to be bound by humanitarian law (and increasingly by human rights law) without offering them any real incentive for compliance.<sup>10</sup>

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mitment', under the auspices of Geneva Call, an NGO dedicated to engaging non-state groups armed compliance with IHL and HRL. For more information: [www.genevacall.org](http://www.genevacall.org). See, however: CIHL Study, Introduction, p. xlii ('The practice of armed opposition groups, such as codes of conduct, commitments ... and other statements, does not constitute State practice as such. While such practice may contain evidence of the acceptance of certain rules in non-international armed conflicts, its *legal significance is unclear*', emphasis added).

<sup>10</sup> In fact, under IHL, an incentive only exists by reverse logic: while those that comply with strict IHL standards can at least hope for some form of amnesty, this option is in principle not available for war crimes and other IHL violations. For an extreme position on how this problem should be addressed: Crawford, *The Treatment of Combatants and Insurgents under the Law of Armed Conflict* (OUP 2010), pp. 153-69 (calling for a 'universal combatant status', applicable in IAC and NIAC, to incentivise better compliance with IHL).



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# 8 ABBREVIATIONS

## 8.1 GENERAL LIST

|        |  |
|--------|--|
| ACHPR  | African Charter on Human and Peoples' Rights         |
| ACHR   | American Convention on Human Rights                  |
| ACmHR  | African Commission on Human and Peoples' Rights      |
| ACtHR  | African Court on Human and Peoples' Rights           |
| ADRDM  | American Declaration of the Rights and Duties of Man |
| AU     | African Union  |
| CA1    | Common Article 1, GC I-V                             |
| CA2    | Common Article 2, GC I-V                             |
| CA3    | Common Article 3, GC I-V                             |
| CIS    | Commonwealth of Independent States                   |
| CRC    | Convention on the Rights of the Child                |
| DoJ    | US Department of Justice                             |
| DRC    | Democratic Republic of the Congo                     |
| ECHR   | European Convention on Human Rights                  |
| ECmHR  | European Commission of Human Rights                  |
| ECOWAS | Economic Community Of West African States            |
| EWHC   | England and Wales High Court (UK)                    |
| ECtHR  | European Court of Human Rights                       |
| EU     | European Union                                       |
| GA     | General Assembly                                     |
| HRC    | Human Rights Committee                               |
| HRL    | Human rights law                                     |

|        |   |
|--------|---|
| IAC    | International armed conflict                              |
| IACmHR | Inter-American Commission on Human Rights                 |
| IACtHR | Inter-American Court of Human Rights                      |
| ICC    | International Criminal Court                              |
| ICCPR  | International Covenant on Civil and Political Rights      |
| ICJ    | International Court of Justice                            |
| ICRC   | International Committee of the Red Cross                  |
| ICTR   | International Criminal Tribunal for Rwanda                |
| ICTY   | International Criminal Tribunal for the Former Yugoslavia |
| IHL    | International humanitarian law                            |
| IIHL   | International Institute of Humanitarian Law               |
| ILA    | International Law Association                             |
| ILC    | International Law Commission                              |
| IMT    | International Military Tribunal                           |
| IRRC   | International Review of the Red Cross                     |
| ITA    | International territorial administration                  |
| IUHEI  | Institut Universitaire de Hautes Études Internationales   |
| Mn     | Margin number   |
| NATO   | North Atlantic Treaty Organisation                        |
| NGO    | Non-governmental organisation                             |
| NIAC   | Non-international armed conflict                          |
| OEF    | Operation Enduring Freedom                                |
| OHCHR  | Office of the High Commissioner for Human Rights          |
| p      | Page  |
| pp     | Pages   |
| para   | Paragraph   |
| POW    | Prisoner of War   |

|        |  |
|--------|--|
| Res    | Resolution   |
| RUF    | Revolutionary United Front                                       |
| SC     | Security Council   |
| SCI    | Supreme Court of Israel  |
| SCSL   | Special Court for Sierra Leone                                   |
| Sect.  | Section  |
| SG     | Secretary-General  |
| SNA    | Somali National Alliance   |
| SOFA   | Status of Force Agreement  |
| UCIHL  | University Centre for International Humanitarian Law             |
| UDHR   | Universal Declaration of Human Rights                            |
| UK     | United Kingdom of Great Britain and Northern Ireland             |
| UKHL   | House of Lords (UK)  |
| UKSC   | UK Supreme Court   |
| UN     | United Nations   |
| UNCLOS | United Nations Convention on the Laws of the Sea                 |
| UNDPKO | United Nations Department for Peacekeeping Operations            |
| UNESCO | United Nations Educational, Scientific and Cultural Organization |
| US     | United States  |
| WHO    | World Health Organisation  |
| WWII   | World War II   |

## 8.2 PEACE OPERATIONS

|        |   |
|--------|---|
| AFISMA | African-led International Support Mission to Mali |
| AMIS   | African Union Mission in Sudan                    |

|          |   |
|----------|---|
| AMISOM   | African Union Mission in Somalia  |
| ECOMOG   | ECOWAS Monitoring Group (Liberia)   |
| EUFOR    | European Union Force  |
| IFOR     | Implementation Force (Bosnia)   |
| INTERFET | International Force for East Timor  |
| ISAF     | International Security Assistance Force (Afghanistan)                                 |
| KFOR     | Kosovo Force  |
| MINURCAT | UN Mission in the Central African Republic and Chad                                   |
| MINUSCA  | UN Multidimensional Integrated Stabilization Mission in the Central African Republic  |
| MINUSMA  | UN Multidimensional Integrated Stabilization Mission in Mali                          |
| MINUSTAH | UN Stabilization Mission in Haiti   |
| MISCA    | International Support Mission to the Central African Republic                         |
| MONUA    | Mission d'Observation des Nations Unies en Angola                                     |
| MONUC    | Mission de l'Organisation des Nations Unies en République Démocratique du Congo (DRC) |
| MONUSCO  | UN Organization Stabilization Mission in the Democratic Republic of the Congo         |
| ONUC     | Opération des Nations Unies au Congo  |
| SFOR     | Stabilisation Force (Bosnia)  |
| UNAMID   | United Nations – African Union Mission in Darfur (Sudan)                              |
| UNAMIR   | UN Assistance Mission for Rwanda  |
| UNAMSIL  | UN Mission in Sierra Leone  |
| UNAVEM   | UN Angola Verification Mission  |
| UNDOF    | UN Disengagement Observer Force   |
| UNEF     | UN Emergency Force (Egypt)  |
| UNFICYP  | UN Peacekeeping Force in Cyprus   |

|          |   |
|----------|---|
| UNIFIL   | UN Interim Force in Lebanon                 |
| UNISFA   | UN Interim Security Mission in Abyei        |
| UNITAF   | Unified Task Force (Somalia)                |
| UNMIK    | UN Interim Administration Mission in Kosovo |
| UNMIL    | UN Mission in Liberia                       |
| UNMIS    | UN Mission in Sudan                         |
| UNMOT    | UN Mission of Observers in Tajikistan       |
| UNOCI    | UN Operation in Côte d'Ivoire               |
| UNOMIG   | UN Observer Mission in Georgia              |
| UNOSOM   | UN Operation in Somalia                     |
| UNPROFOR | UN Protection Force (Bosnia and Croatia)    |
| UNTAC    | UN Transitional Authority in Cambodia       |

### 8.3 JOURNALS AND YEARBOOKS

|       |  |
|-------|--|
| AJIL  | American Journal of International Law                  |
| BYIL  | British Yearbook of International Law                  |
| EJIL  | European Journal of International Law                  |
| HRLR  | Human Rights Law Review                                |
| HYIL  | Hague Yearbook of International Law                    |
| ICLQ  | International and Comparative Law Quarterly            |
| ICLR  | International Community Law Review                     |
| IRRC  | International Review                                   |
| JCSL  | Journal of Conflict and Security Law                   |
| LJIL  | Leiden Journal of International Law                    |
| RCADI | Recueil des Cours de l'Académie de Droit International |
| YIHL  | Yearbook of International Humanitarian Law             |

