

UNITED NATIONS PEACEKEEPING FORCE OPERATION IN ARMED CONFLICT: A LEGAL DUTY OR A CHOICE TO OBSERVE INTERNATIONAL HUMANITARIAN LAW?*

Abstract

Although for many years the United Nations has been reluctant to formerly recognize the applicability of international humanitarian law to United Nations peacekeeping operations, the changing role and nature of United Nations peacekeeping operations in the early 1990s made this recognition imperative. The objective of this paper is to examine if there is a legal obligation or not on the United Nations forces to observe rules of international humanitarian law when they engage in peacekeeping operations. Doctrinal method of research is used for this paper, and data for the paper is generated from secondary sources such as textbooks, journals, treaties, agreements and international humanitarian law conventions. After examining the legal debate on the international responsibility of United Nations Forces in armed conflict, the findings are that International Humanitarian law applies to United Nation Forces when they are actively engaged in military operations. For this, the paper recommends that United Nations forces engaged in armed conflict should be made to observe rules of International Humanitarian Law. But its applicability takes into consideration the nature and legal status of the United Nations Organization and its capacity to be bound by its provisions.

Keyword: *Conflict, Peacekeeping Operations, International Humanitarian Law*

1. Introduction

The United Nations initially did not concern itself with international humanitarian law. Given that the United Nations Charter outlawed war,¹ it was considered unnecessary or at least defeatist to consider law regulating war. It soon became clear, however, that this position was untenable. The relationship between the United Nations and the international humanitarian law came under scrutiny during the Korean War (1950-53) and the United Nations Operation in Congo (1960 - 64), when the question was raised whether the United Nations forces and forces authorized by the United Nations, such as the Korean conflict, were bound by international humanitarian law. The role of the United Nations in forces in ensuring compliance with, or even enforcing, that field of law was then not yet topical but started gaining attention shortly thereafter.

United Nations forces taking part in peace operations are placed under the organization's command and control. According to the United Nations, they form a subsidiary organ of the principal organ establishing them, usually the United Nations Security Council. As such, they are part of the United Nations, and part of the legal personality of the United Nations, and that organization's international rights obligations are applicable. Although the members of national contingents remain in their national service, their attachment to the United Nations takes precedence.² The United Nations is, however, not a party to any treaty of international humanitarian law, in particular the Geneva Conventions 1-IV of 1949. The possibility of it becoming a party to these conventions was not considered during the drafting process. The accession clause of the Conventions provides that accession is open to any Power. In practice, this term has been interpreted as excluding international organizations. Although the United Nations is not a party to any international humanitarian law treaties, there is broad support in literature for the view that it is bound by customary

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¹ Chapter 1, Article 4, United Nations Charter, San Francisco, 1945

² Z Marten, 'United Nations and International Human Rights Law' (2014), *Oxford Public International Law*, <http://opil.ouplaw.com/view/10.1093/law> accessed on June 2017

international law including customary international humanitarian law.³ The United Nations, itself for long time did not take a clear position on the applicability of international humanitarian law to forces under its command and control.

However, in due course of time and events, the United Nations wrote that the force under its command and control had been instructed to observe the ‘principles and spirit of the general international conventions concerning the behavior of military personnel’. These instructions were included in the Regulations for the United Nations Emergency Force issued by the United Nations Secretary-General. Similar instructions were issued to the United Nations Operations in the Congo in 1963 (Regulations for the United Nations Force in the Congo) and the United Nations Force in Cyprus in 1964 (Regulations for the United Nations Force in Cyprus).⁴ In the latter case, it was specified that the Conventions referred to the charter, inter alia, the Geneva Conventions and the Convention on the Protection of Cultural Property in the Event of Armed Conflict. However, the organization did not specify what was meant by the ‘principles and spirit’, in particular how this is related to the specific obligations in the Conventions relating to observance and respect for international humanitarian law while engaging in peacekeeping operations.

It is in view of these uncertainties this paper seeks to examine whether or not there is specific obligation on the United Nations forces engaged in peace operations to respect international humanitarian law. To do that, this paper is divided into five sections. Section one is the introduction while section two deals with the obligation of the United Nations forces to observe and respect international humanitarian law. Section three examines the applicability of international humanitarian law on the United Nations forces engaged in peace keeping operations. Section four deals with the enforcement of international humanitarian law while section five is the conclusion.

2. Compliance with International Humanitarian Law Rules by United Nations Force in Peace Operation

In 1999 the United Nations Secretary-General issued the Bulletin on Observance by United Nations Forces of International Humanitarian Law.⁵ This followed a request by the United Nations Special Committee on Peacekeeping Operations to elaborate a code of conduct for United Nations personnel taking part in peace operations, consistent with applicable international humanitarian law.⁶ The International Committee of the Red Cross played an important part in the drafting of the Bulletin, organizing two meetings of experts on the topic and participating in the subsequent review of the draft. Member States on the other hand were given limited opportunity to influence the document. The Bulletin entered into force on 12 August 1999, exactly 50 years after the adoption of the Geneva Conventions of 1949. The document is divided into 10 sections comprising 34 articles. Its preamble states that it was promulgated ‘for the purpose of setting out fundamental principles and rules of International Humanitarian Law applicable to United Nations forces conducting operations under United Nation command and control’. The use of the term ‘rules’ instead of ‘principles’ is particularly noteworthy. It suggests, as was confirmed by the United Nations Secretary-General in 2001, that the Bulletin signals formal recognition of the applicability of international humanitarian law to United Nations peace operations.

The choice of rules is related to the legal status of the Bulletin. It cab argued that it is a unilateral act of the United Nations comparable to unilateral acts of States in international law. In any event it is an administrative

³ F A Agwu, *United Nations System, State Practice and the Jurisprudence of the Use of Force*, (1st Ed. Lagos: Malthouse Press Limited, 2005), p.133.

⁴ F A Agwu, *World Peace through World Law: The Dilemma of the United Nations Security Council*, (1st Ed. Ibadan: University of Ibadan Press, 2007), pp. 11 & 20.

⁵ Secretary-General Bulletin, *Observance by United Nations forces of International Humanitarian Law* (06 August 1999)

⁶ S Bounoyannis-Vrails, ‘The Security Council of the United Nations and the Implementation of International Humanitarian Law’ (1992) 20, *University of Denver Journal of International Law and Politics*, pp. 335-55

issuance of the United Nations Secretary-General, a subsidiary instrument elaborating the staff rules issued by the United Nations Secretary-General as the highest administrative authority of the organization. The Bulletin is first and foremost a teaching tool, which serves to acquaint members of the United Nations peace operations with the principles and rules of international humanitarian law. Indeed, it appears that the United Nations cannot enforce respect by individuals for the Bulletin. Military personnel forming part of national contingents are not in the service of the United Nations, and the organization does not have disciplinary or criminal jurisdiction over them. For this reason, section 4 of the Bulletin states that in case of violations of international humanitarian law, members of the military personnel of the United Nations forces are subject to prosecution in their national courts. The fact that the Bulletin refers to enforcement by the domestic courts of the troop-contributing states raises the question of which standards those courts apply. Do they apply international law and domestic law? It appears to be generally accepted that these courts will apply domestic law, including the domestic law incorporating the international humanitarian law treaties to which the State is a party. Indeed, it appears to be accepted that in this way the obligations of the troop-contributing State continue to apply to members of a United Nations operation.

International humanitarian law by its own terms applies in situation of armed conflict. According to Unegbu 'while humanitarian law is applicable in cases of armed conflicts, human rights are operative in times of peace, and to a limited extent, during wars and armed conflicts'.⁷ There is no treaty-based definition of what constitutes an armed conflict. There is agreement that a determination whether there is an armed conflict or not must be made on the basis of factual criteria. The actual situation on the ground is decisive. As Wigwe stated: the 1949 Geneva Conventions as well as the Additional Protocols of 1977 do not offer any definition of the term 'armed conflict', however, according to the International Committee of the Red Cross Commentary⁸, any difference arising between two state and leading to the intervention of armed forces is an armed conflict within the meaning of Article 2, of the United Nations Charter 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.⁹ In literature there is widespread support that the view the same factual criteria that apply to States and armed groups also apply to United Nations forces.¹⁰ Section 1 of the Bulletin, which sets out its field of application, states: 'the fundamental rules and principles set out in this present Bulletin are applicable to United Nations forces when in situations of armed conflict they are actively engaged therein as combatants or in peacekeeping operations when the use of force is permitted in self-defence'. Although this wording leaves room for further interpretations, the better view is that it applies in cases of armed conflict in which the United Nations forces become involved as a party. This situation is to be distinguished from that where a United Nations force is present in situation of armed conflict between third parties but does not itself become a party to the conflict. The mere presence of such a force in a situation of armed conflict does not make international humanitarian law applicable to it. For that to happen, the force must actually become involved in that conflict.

The Bulletin also provides that in cases of violations of international humanitarian law, military personal of the United Nation forces are subject to prosecution in their national courts. This is argued that this statement does not appear complete, because in case of war crimes other states than the state of nationality will also have jurisdiction which cannot be set aside by the Bulletin. In particular, it is generally recognized that every state may exercise universal jurisdiction over persons suspected of war crimes.¹¹ The undertaking by troop-contributing States to ensure that their contingents respect international humanitarian norms was included in the Model Agreement between the United Nations and the Member States Contributing Personnel and Equipment to United Nations Peacekeeping Operations (Model Agreement) submitted by the United Nations Secretary-General to the General Assembly in 1999.¹² The Model Agreement states in its Article 28 that the peace operation 'shall observe and respect the principles and spirit of the general international conventions

⁷ M O Unegbu, *From Nuremberg to Rome Statute: Judicial Enforcement of International Humanitarian Law* (1st Ed, Enugu: Snaap Press Ltd, 2015) P. 9.

⁸ Pictet, 'Commentary on the Geneva Conventions 1949' (2002) 4 *International Committee of the Red Cross Bulletin*, p. 20

⁹ C O Wigwe, *International Humanitarian Law* (1st Ed, Accra: Readwide Publishers, 2010) PP. 33-34.

¹⁰ R D Glick 'Lip Service to the Laws of War: Humanitarian Law and United Nations Armed Force' (1995) 17 *Michigan Journal of International Law*, PP.53-107

¹¹ Article 5(1) *Rome Statute of International Criminal Court* 1998.

¹² *Model Agreement on the Operations of United Nations Forces in the Field of Armed Conflict*, 1991

applicable to the conduct of military personnel’ and that the troop-contributing State ‘shall therefore ensure that the members of its national contingent serving with the United Nations Peacekeeping Operation be fully acquainted with the principles and spirit of the Convention’. The Model Agreement was designed to be used as a blue print for individual agreements with troop-contributing states, although formal agreement along the line of Model Agreement is not always concluded with these states.

3. Applicability of International Humanitarian Law in Armed Conflict

The first step towards enforcement of the law is the recognition that it is applicable. The United Nations General Assembly and the United Nations Security Council on a number of occasions have explicitly and implicitly stated that international humanitarian law was applicable to a particular conflict. The most prominent example is the Middle East conflict, in particular the military occupation by Israel of territories in Palestine. In 1967 the United Nations Security Council considered and confirmed a Resolution that Geneva Convention 111 should be complied with by the parties involved in the Six – Day War.¹³ United Nations Security Council Resolution adopted in response to arson that partly destroyed the Al-Aqsa Mosque in Jerusalem, recognized the application of the Geneva Conventions to occupied part of Jerusalem.¹⁴ This was reaffirmed by the United Nations Resolution 446 of 1970 and as such the application of Geneva Convention IV to Occupied Territories, including Jerusalem is no longer unclear in international humanitarian law.

The United General Assembly has also concerned itself with the Occupied Territories. In particular, it has devoted two special sessions to the question of Palestinian during which it has adopted a number of resolutions recognizing the applicability of Geneva Convention IV to those territories. The seventh emergency special session of the United Nations took place from 1980 until 1982 while the 10th emergency special session was convened in 1997 to 2009. As stated by Stoessinger, the principal reason for the convening of these sessions was the wish of some States for a more critical assessment of applicability of international humanitarian law to Israeli conduct in the Middle East conflict, which was not possible in the United Nations Security Council because of the threat of the United States veto.¹⁵ Recent examples of United Nations Resolutions recognizing the applicability of international humanitarian law in armed conflict involving United Nations forces include resolution 2206 of 2015 concerning Sudan and South Sudan and resolution 2227 of 29 June 2015 pertaining to Mali.

The question whether the United Nations Security Council could derogate from the application of international humanitarian law in a resolution under Chapter VII United Nations Charter has aroused much debate, though there seem to be few instances in which such derogation has actually been claimed. One such instance is the occupation of Iraq after the invasion in 2003, during which some States relied on United Nations Security Council Resolutions to go beyond what was allowed by the law of occupation and others argued that they were not occupying powers in the first place. Some scholars such as Evan Luard maintain that there are no limits to the powers of the United Nations Security Council, that it is unbound by law and indeed international humanitarian law.¹⁶ In order to be able to effectively carry out its primary responsibility for the maintenance of international peace and security, it is argued, the United Nations Security Council must take measures it deems necessary including derogating from observance of and respect for international humanitarian law and human rights laws even though if this violates existing law. As evidence that this was the intention of its founding fathers, the United Nations Charter is put forward which provides that if the obligation of Member States under the United Nations Charter conflict with their obligations under another international agreement, those under the United Nations Charter prevail.¹⁷ It is widely accepted that the obligations under the Charter include obligations arising directly from provisions of the United Nations Charter as well as those arising from binding decisions of the United Nations Security Council. This was confirmed by the International Court of Justice in its order on provisional measures in the case *Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie*.¹⁸

¹³ *United Nations Security Council Resolution 237*, 14 June, 1967.

¹⁴ *United Nations Security Council Resolution 271*, 1969.

¹⁵ J G Stoessinger, *The United Nations and the Superpowers* (New York: Random House 1966) p.3.

¹⁶ E Luard, *The United Nations: How it Works and What it Does* (London: Macmillan Press 1979) P. 9.

¹⁷ *Article 103 United Nations Charter*, San Francisco, 1945

¹⁸ *Libyan Arab Jamahiriya v. United Kingdom* (1972) ICJ Rep. P.3.

Article 103 of the United Nations Charter refers only to treaty obligations. The United Nations is an international organization which is not signatory to Geneva Conventions 1-IV of 1949 neither has the organization acceded to the Conventions or formerly adopted them in a formal resolution by the General Assembly or the Security Council. This is not the case for Article 25 of the United Nations Charter, whereby Member States agree to accept and carry out the decisions of the United Nations Security Council in accordance with the Charter. Both Articles 25 and 103 of the United Nations Charter refer to the relationship between a decision of the United Nations Security Council and obligations of Member States under international law. An argument used in support of this theory which does relate directly to the United Nations' own obligations, is based on Article 24 and Article 1(1) of the United Nations Charter. Article 24(2) of the Charter provides that the 'United Nations Security Council, in discharging its primary responsibility for the maintenance of international peace and security, shall act in accordance with the Purposes and Principles of the United Nations'. The purposes of the organization are set out in Article 1 of the Charter where it provides that the one of the purposes of the organization is the maintenance of international peace and security. This article states that the United Nations Security Council must act in conformity with the principles of justice and international law in the adjustment or settlement of international disputes. However, there is no similar obligation when the United Nations Security Council is acting under Chapter VII of the United Charter. As a result, it is argued that this implies that the United Nations Security Council decisions under Chapter VII can derogate from applicable international law as well as observance and respect for international humanitarian law in peacekeeping operations. Therefore under Chapter VII of the United Nations Charter, it is a matter of choice and not a legal obligation for the United Nations peacekeeping force to observe and respect international humanitarian law when engaged in armed conflict.

However, Article 1(30) of the United Nations Charter provides that one of the purposes of the Organization is to achieve international co-operation in promoting and encouraging respect for human rights and for fundamental freedom for all without distinction as to race, sex, language, or religion. In this line of reasoning, the reference to human rights is taken as meaning that the United Nations Security Council cannot take decision that would violate human rights. The term 'human rights' in a United Nations context is often used in a broad sense which also includes international humanitarian law.

4. Enforcement of International Humanitarian Law

In recent decades the United Nations Security has increasingly become involved in the enforcement of international humanitarian law, as part of its increased activism more generally. Prominent examples are the establishment of International Criminal Tribunal for the Former Yugoslavia (ICTY) and International Criminal Tribunal for Rwanda (ICTR). Their creation under Chapter VII of the United Nations Charter is an innovative use of United Nations Security Council's powers. It is unlikely that the United Nations Security Council will establish new international tribunals in the near future due in part to the establishment of International Criminal Court (ICC) at The Hague, Netherland in 1998 which came into force in 2002. However, the criticisms leveled at the existing tribunals that relate to the costs associated with the instrument, lack of ownership of affected States and/or populations led to the creation of mixed international/domestic tribunals with the assistance of the United Nations in Sierra Leone, East Timor, and Cambodia (Mixed Criminal Tribunals) for enforcement of international humanitarian law.

Another enforcement instrument at the disposal of the United Nations Security Council is sanction. On a number of occasions it has imposed sanctions against individual involved in violations of international humanitarian law. Examples are sanctions imposed on Somalia obstructing the delivery of humanitarian assistance in Somalia,¹⁹ and against leaders in the Democratic Republic of Congo recruiting or using child soldiers or targeting children or women.²⁰ One other measure used by the United Nations Security Council to enforce international humanitarian law was its 'affirmation'. The United Nations Security Council in April 1991 affirmed that Iraq was liable for any direct loss, damage, including environmental damage and the depletion of natural resources, or injury to foreign governments, nationals and corporations as a result of

¹⁹ *United Nations Security Council Resolution 1844*, 20 November 2008; *Security Council Resolution 1*, August 2008-31 July 2009.

²⁰ *United Nations Security Council Resolution 1857*, 22 December 2008.

Iraq's invasion and occupation of Kuwait. The United Nations Security Council subsequently established the United Nations Compensation Commission (UNCC) to implement this responsibility using Iraq's oil resources for compensation. As Onyeaku pointed out in his work 'the most far-reaching measure the United Nations Security Council may take to address violations of international humanitarian law is to authorize the use of force when it has determined that there is armed attack or threat to peace. The resolution authorizing the use of force is based on Chapter VII of the United Nations Charter when it has determined that the situation in a particular territory constitutes a threat to peace and security'.²¹ Again, the United Nations Security Council uses an instrument of 'Uniting for Peace Resolution' to enforce international humanitarian law.²² This measure is used by the Security Council relying on Article 53 of the United Nations Charter and when there is a deadlock at the United Nations Security Council over a particular situation. Uniting for Peace Resolution was used to deal with the situation in Korea in 1953 and in Congo in 1960. The closest connection between violations of international humanitarian law and the authorization to use force was the United Nations Resolution 1974 of 2011 which authorized the use of force to protect civilians and civilian populated areas under threat of attack in Libya. Paragraph 3 ad 4 of the resolution state:

3 Demand that the Libyan authorities comply with their obligations under international law, including international humanitarian law, human rights and refugee law and take all measures to protect civilians and meet their basic needs, and to ensure the rapid and unimpeded passage of humanitarian assistance;

4 Authorizes Member States that have notified the Secretary-General, acting nationally or through regional organizations or arrangements, and acting in cooperation with the Secretary-General, to take all necessary measures, notwithstanding paragraph 9 of resolution 1970 (2011), to protect civilians and civilian populated areas under threat of attack in the Libyan Arab Jamahiriya including Benghazi.....²³

5. Conclusion

No doubt, various organs of the United Nations, notably the United Nations Security Council, the United Nations General Assembly, and the Human Rights Council concern themselves with making States and armed groups comply with international humanitarian law. Notwithstanding this partial compliance, much is needed to ensure that Article 89 Protocol 1 of the Geneva Conventions 1947 is strictly complied with by States and armed groups. However, the United Nations Security has taken measures in the field under Chapter VII of the United Nations Charter, to enforce compliance with the rules and norms international Humanitarian law, it are argued that these efforts have been uneven. This is particularly so since the United Nations Security Council exercises discretion over which situation the forces under the command and control of the United Nations should be made to observe rules of international humanitarian law.

Therefore by this discretionary power of the Security Council coupled with recognition in principle will not resolve a number of questions concerning the practical application of obligations to comply with the Geneva Conventions and it Additional Protocols. As long as the United Nations and States remain reluctant in concrete situations to recognize that United Nation's force is a party to an armed conflict, the situation is unlikely to change for better. A way forward for this problem is for the General Assembly and the Security Council of the United Nations pass resolutions mandating the UN forces as party to armed conflict to strictly comply with the rules and regulations of international humanitarian law. To ensure compliancy by the forces in the field including force contributing States, tighter penalty should be provided in the resolutions for compliance.

²¹ C E Onyeaku, *The United Nations and the Challenge of Third World Development* (Lagos: Soft Associate Publishers 2008) PP.207-208.

²² B Ghali, *Basic Facts about the United Nations* (Department of Public Information: New York 1984) p.11.13

²³ *United Nations Council Resolution 1973*, adopted by the Security Council at its 6498th meeting, on 17 March 2011.