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5. UN peace operations, international humanitarian law and international human rights law

*Marten Zwanenburg*¹

1. INTRODUCTION

United Nations (UN) peace operations have developed as an *ad hoc* response by the international community to crises and conflicts. The UN Charter does not envisage them, and as a consequence it does not set out a legal framework for such operations. Neither is there a separate treaty that regulates such operations. This has been the reason for many questions that have arisen concerning the law that applies to such operations.

In recent years, many of these questions have focused on the applicability and application of International Humanitarian Law (IHL) and International Human Rights Law (IHRL). There are several reasons for this.

One reason is that peace operations are nowadays in many cases deployed in volatile environments in which there is no peace to keep, and in which there is active fighting between the government and armed groups or between such groups. In 2017, two-thirds of all UN peacekeepers were deployed in environments of ongoing conflict and operated in increasingly complex, high-risk environments. Operations are given wide-ranging mandates which differ from the mandates of early peace operations.² The latter had the principal function of serving as a buffer between the parties so that a political solution could be found. Contemporary peace operations on the other hand often have wide-ranging mandates, which may include the protection of civilians from the threat of physical violence; facilitating the creation of a secure environment for the delivery of humanitarian assistance; support for the extension of State authority; security sector reform (SSR); disarmament, demobilization and reintegration (DDR); the promotion and protection of human rights and support for national and international justice.

In such environments, members of peace operations are themselves increasingly under threat. In 2017, 59 members of UN peace operations were killed by what the UN describes as ‘malicious acts’.³ Although in 2018 and 2019 this number was down to 27 and 29 respectively, it is unlikely that this downward trend will continue. The number can also not conceal that these ‘malicious acts’ constitute deliberate attacks on the life of members of peace operations.

¹ This chapter was written in a personal capacity and does not necessarily reflect the views of any body or institution the author is affiliated with. The references are up to date as of December 2020.

² United Nations, *Improving Security of United Nations Peacekeepers: We Need to Change the Way we Are Doing Business* (19 December 2017) Executive summary, 1; this report is also referred to as the ‘Dos Santos Cruz Report’, after the chairman of the panel who wrote it.

³ For more information, see https://peacekeeping.un.org/sites/default/files/statsbyyearmissioninincidenttype_5a_17.pdf.

In November 2018, for example, seven peacekeepers who were part of the UN operation in the Democratic Republic of the Congo (MONUSCO) were killed during fighting with the Allied Democratic Forces rebel group.⁴

This changing, and more challenging, operational environment is reflected in the authorizations to use force given to peace operations. There is a trend for peace operations to be authorized to use force if necessary to fulfil some or all of their tasks.⁵ Whereas members of early UN peace operations were only allowed to use force in self-defence, some operations now have much more robust mandates.

Commanders of UN peace operations do not always make use of the authorization they have been given. A report on improving the security of UN peacekeepers commissioned by the UN Secretary-General, published in December 2017, recommended that they do this more. According to the report, '[u]nfortunately, hostile forces do not understand a language other than force. To deter and repel attacks and to defeat attackers, the United Nations needs to be strong and not fear to use force when necessary'.⁶

The increasing use of force by, or at least against, UN peace operations may lead them to become a party to an armed conflict. This in turn raises questions concerning the application of IHL, which is the law that regulates armed conflict.

Another reason is related to the fact that the mandates of peace operations have become much broader than those of early operations. As mentioned above, early peace operations were mostly limited to forming a buffer between the parties. Since that time, peace operations have been given an increasing array of tasks. Many such new tasks, which would normally be carried out by the government of the host State, bring the operations into increasing contact with the inhabitants of that State. This raises the question whether the operations have obligations under IHRL towards those inhabitants, as would the host State when carrying out its functions.

Against this background, this contribution will examine the relationship between UN peace operations, IHL and IHRL. It will start by looking at the application of IHRL to such operations (section 2). It will then turn to the application of IHL (section 3). In both sections, the starting point of the discussion is that the conduct of a UN peace operation is in principle attributable to the UN. This is because such an operation is a subsidiary organ of the UN, more specifically the Security Council. Although so-called 'formed police units' and military contingents remain in their national service, the transfer of control by over them by the sending State to the UN creates a presumption that they are acting on behalf of the UN.⁷ Such a presumption may be rebutted, however, when the sending State exercises control over particular conduct of the contingent. As sections 2 and 3 will make clear, under certain circumstances both IHRL and IHL may apply to a peace operation. It is therefore necessary to analyse the interplay between the two branches of international law in the context of peace operations (section 4). The last

⁴ United Nations, Statement Attributable to the Spokesman for the Secretary-General on the Killing of Peacekeepers in the Democratic Republic of the Congo, (15 November 2018), <https://www.un.org/sg/en/content/sg/statement/2018-11-15/statement-attributable-spokesman-secretary-general-killing>.

⁵ Scott Sheeran, 'The Use of Force in United Nations Peacekeeping Operations' in Marc Weller (ed), *The Oxford Handbook of the Use of Force in International Law* (Oxford University Press, 2015) 348, 355.

⁶ Improving Security of United Nations Peacekeepers (n 2) executive summary, 2.

⁷ A 'formed police unit' consists of approximately 140 police officers and acts as a cohesive unit. See for more information <https://police.un.org/en/formed-police-units-fpus>.

part of this contribution will offer some conclusions on the relationship between UN peace operations, IHRL and IHL (section 5).

2. INTERNATIONAL HUMAN RIGHTS LAW

2.1 Application in Principle

There does not appear to be any doubt nowadays that UN peace operations are bound by human rights obligations. The UN Capstone doctrine states in this regard:

International human rights law is an integral part of the normative framework for United Nations peacekeeping operations. The Universal Declaration of Human Rights, which sets the cornerstone of international human rights standards, emphasizes that human rights and fundamental freedoms are universal and guaranteed to everybody. United Nations peacekeeping operations should be conducted in full respect of human rights and should seek to advance human rights through the implementation of their mandates.⁸

There is also language in mandating resolutions of UN peace operations that recognizes the applicability of human rights.⁹ There remains uncertainty regarding the legal basis underpinning peace operations' human rights obligations. Different theories have been put forward, which can broadly be divided into three categories.

The first category, which finds broad support, holds that UN peace operations are bound by human rights because the UN has human rights obligations. The starting point in this argument is that the UN is an international organization with an independent international legal personality.¹⁰ As a consequence, it is capable of having rights and obligations of its own under international law. It is bound by customary international law in as far as that law is relevant to the functions it carries out. That international organizations, including the UN, are bound by general international law was recognized by the International Court of Justice. In the *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt Advisory Opinion*, the ICJ held that international organizations are subjects of international law and, as such, are bound by any obligations incumbent upon them under general rules of international law.¹¹ Customary human rights law binds an international organization to the extent that it is acting in a field related to its purpose and functions. In other words, customary human rights

⁸ United Nations, *United Nations Peacekeeping Operations: Principles and Guidelines* (United Nations, 2008) 14; See also the OHCHR/DPKO/DPA/DFS Policy on Human Rights in United Nations Peace Operations and Political Missions (1 September 2011) <https://issat.dcaf.ch/download/127368/2601658>.

⁹ See e.g., Resolution 2409 of 27 March 2018, UN Doc S/RES.2409, op 21:

Calls for joint operations by the FARDC and MONUSCO, that include joint planning and tactical cooperation, in accordance with MONUSCO's mandate and the United Nations HRDDP, to ensure all efforts possible are being made to neutralize armed groups and *stresses* the need to carry out operations in strict compliance with international law, including international humanitarian law and international human rights law, as applicable.

¹⁰ *Reparations for Injuries Suffered in the Service of the United Nations*, 1949 ICJ Reports 174, Advisory Opinion of 11 April 1949, 179.

¹¹ *Interpretation of the Agreement of 25 March between the WHO and Egypt*, 1980 ICJ Reports 4, Advisory Opinion of 20 December 1980, para 37.

law applies to those activities that are related to its purpose and functions *and* have an impact on human rights.¹² It is generally accepted that a broad range of human rights enjoy customary status.¹³ Consequently, the UN would be bound by these rights.

UN peace operations are subsidiary organs of the principal UN organ that establishes them, which in the case of recent operations is the Security Council. As such, they are an organ of the UN and form part of that organization. It follows from this that they also partake of the international obligations of the organization to the extent that they carry out activities that have an impact on human rights.¹⁴ This is typically the case for peace operations: they carry out operational activities that bring them into contact with individuals, generally in a relationship of unequal power.

Another argument that falls in this category is that the UN, and peace operations as organs of that organization, are bound by human rights as a consequence of the internal legal order of the UN. In particular, it is argued that since the UN Charter refers to human rights and the UN must be bound by its own constitutional document, it follows that the UN is bound by human rights.¹⁵ Specific articles that are referred to in this context are Article 1(3) and Article 55. Article 1(3) however is more of a programmatic article than one imposing substantive obligations on the organization. It requires the UN to promote respect for human rights by States: it does not refer to respect by the organization itself. The same can be said for Article 55.¹⁶ These articles therefore are better seen as being directed at States rather than imposing obligations on the UN.¹⁷ It has been argued that when read in historical context, the language on human rights in the Charter does impose obligations on the UN. The UN could be regarded as having violated its duty to promote respect for human rights if it disregards these rights itself.¹⁸ Such an argument however appears to stretch the tenets of treaty interpretation too far. Unlike the previous argument, it does not provide a sound legal basis for UN peace operations having obligations under human rights law.

The second category holds that UN peace operations are bound by human rights because the troop contributing States have human rights obligations.¹⁹ This view is reflected for example

¹² Noelle Quénivet, 'Binding the United Nations to Customary (Human Rights) Law' (2019) *International Organizations Law Review* 1, 22.

¹³ See e.g., Bruno Simma and Philip Alston, 'The Sources of Human Rights Law: Custom, Jus Cogens, and General Principles' (1988-1989) 12 *Australian Yearbook of International Law* 82, 84.

¹⁴ Frédéric Mégret and Florian Hoffman, 'The UN as a Human Rights Violator? Some Reflections on the United Nations Changing Human Rights Responsibilities' (2003) 25 *Human Rights Quarterly* 314, 316; Marten Zwanenburg, 'Compromise or Commitment: Human Rights and International Humanitarian Law Obligations for UN Peace Forces' (1998) 11 *Leiden Journal of International Law* 229, 234; Carla Bongiorno, 'A Culture of Impunity: Applying International Human Rights Law to the United Nations in East Timor' (2002) 33 *Columbia Human Rights Law Review* 623, 678.

¹⁵ See e.g., Terry Gill, 'Legal and Some Political Limitations on the Power of the UN Security Council to Exercise its Enforcement Powers under Chapter VII of the Charter' (1995) 33 *Netherlands Yearbook of International Law* 33, 77.

¹⁶ Art 55 provides, *inter alia*, that 'the United Nations shall promote respect for, and observance of, human rights and fundamental freedoms'.

¹⁷ Quénivet (n 12) 27.

¹⁸ August Reinisch, 'Developing Human Rights and Humanitarian Law Accountability of the Security Council for the Imposition of Economic Sanctions' (2001) 95 *American Journal of International Law* 851, 857.

¹⁹ Terry Gill, Dieter Fleck, Bill Boothby and Alfons Vanheusden (eds), *Leuven Manual on the International Law Applicable to Peace Operations* (Cambridge University Press, 2017) 77.

in General Comment 31 of the UN Human Rights Committee. This comment, concerning the interpretation to be given to Article 2 of the Covenant, states that the principle that the enjoyment of Covenant rights is not limited to citizens of States parties but must also be available to all individuals who may find themselves in the territory or subject to the jurisdiction of the State party. It continues by saying 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 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.²⁰

This view however does not sufficiently take into account that troops placed at the disposal of the UN by a troop contributing country become part of a subsidiary organ of the UN. Applying the human rights obligations of troop contributing States to that organ would ignore the fact that the organization has a distinct international legal personality from its member States. Because of this fact, the conduct of members of a UN peace operation will in most cases be attributable to the UN and consequently, it will be the human rights obligations of the UN that are relevant.

The third category of views also bases peace operations' human rights obligations on the fact that troop contributing countries are bound by human rights, but in a different way.²¹ The argument is that the UN has 'inherited' the human rights obligations of States. The basic idea underlying this theory, which encompasses several subtheories, is that member States should not be able to escape from their international obligations by establishing international organisations and acting through them.²² The main reason why this theory is not persuasive is that it does not sufficiently take into account that the UN is a distinct legal person from its member States.²³ The better view is therefore that it is necessary to look at the obligations of the UN rather than of its member States.

2.2 Extraterritorial Application of Human Rights

Some of the human rights treaties that are most relevant in the context of UN peace operations contain provisions on their scope of application, which make clear that that scope is primarily territorial. In other words, the starting point is that States parties to those treaties must respect, protect and fulfil the human rights laid down in those treaties in their own territory. For example, the International Covenant on Civil and Political Rights provides in Article 2 that 'Each State Party to the present Covenant undertakes to respect and to ensure to all individ-

²⁰ CCPR General Comment No 31 (The Nature of the General Legal Obligation Imposed on States Parties to the Covenant) CCPR/C/21/Rev 1/Add 13 (26 May 2004) para 10.

²¹ See e.g., Moritz Moelle, *The International Responsibility of International Organisations: Cooperation in Peacekeeping Operations* (Cambridge University Press, 2017) 273–276; Mégret and Hoffman (n 14) 318.

²² See e.g., Nigel D White, 'Towards a Strategy for Human Rights Protection in Post-Conflict Situations' in Nigel D White and Dirk Klaasen (eds), *The UN, Human Rights and Post-Conflict Situations* (Manchester University Press, 2006) 461, 464.

²³ Quéniwet (n 12) 11–13.

uals within its jurisdiction and subject to its jurisdiction the rights recognized in the present Covenant'.²⁴

Although it is generally recognized that the application of the ICCPR and other human rights treaties is primarily territorial, it is somewhat controversial to what extent they also apply extraterritorially, ie outside the territory of a State party. There is a handful of States that take a very restrictive approach to such extraterritorial application. The United States is a prominent example: it considers that the ICCPR only applies to persons within that State's territory, who must in addition be within its jurisdiction.²⁵

The United Nations Human Rights Committee on the other hand has taken a broad approach to the extraterritorial application of the Covenant.²⁶ The International Court of Justice has followed that approach in its Advisory Opinion on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territories and in its judgment in the Armed Activities case.²⁷

It appears that there is now broad, albeit not universal, acceptance that human rights treaties like the ICCPR in certain circumstances apply extraterritorially. Although the law has not fully crystallized, there appears to be much support for the view that those 'certain circumstances' encompass the case in which a State exercises control over territory outside its own territory, and the case in which a State's agents exercise control over an individual outside the State's territory.²⁸

As was discussed above, it is principally through customary international law that the UN, and consequently UN peace operations, is bound by human rights. This raises the question whether, like treaty-based human rights, customary human rights are also primarily applicable in a State's territory, and only in limited cases outside that territory. It is submitted that this is indeed the case. It seems unlikely that States would have accepted to be bound by a set of positive obligations that apply virtually all around the globe.²⁹

In the context of the application of customary human rights law to the UN, the question may also be asked what is the relevance of the territorial – extraterritorial dichotomy. The UN does not have territory, and therefore in a sense application of human rights to the UN can only be

²⁴ International Covenant on Civil and Political Rights, 999 UNTS 171 (adopted 16 December 1966, entered into force 23 March 1976).

²⁵ See Fourth Periodic Report of the United States to the Human Rights Committee, UN Doc CCPR/C/USA/4, 30 December 2011, paras 504–505; B van Schaack, 'The United States' Position on the Extraterritorial Application of Human Rights Obligations: Now is the Time for Change' (2014) 90 *International Law Studies* 20.

²⁶ Human Rights Committee (n 20).

²⁷ *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, 2004 ICJ Reports 136, Advisory Opinion of 9 July 2004, 136; *Case Concerning Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda)*, 2005 ICJ Reports 168, Judgment of 19 December 2005, 168; see generally Ralph Wilde, 'Human Rights Borders at the World Court: The Significance of the International Court of Justice's Jurisprudence on the Extraterritorial Application of International Human Rights Law Treaties' (2013) 12 *Chinese Journal of International Law* 639. <https://academic.oup.com/chinesejil/article/12/4/639/354321>.

²⁸ Leuven Manual (n 18) 80.

²⁹ Cornelius Wiesener, *The Application and Interplay of Humanitarian Law and Human Rights Law in Peace Operations, with a Particular Focus on the Use of Force* (European University Institute, 2015) 122.

extraterritorial.³⁰ It does not appear that anyone argues that because human rights primarily apply territorially, therefore the UN is not bound by human rights. This could reflect the view the acceptance of extraterritorial application of customary human rights law in general, or a view that the application of human rights to the UN in general and peace operations in particular must be *mutatis mutandis*.

3. INTERNATIONAL HUMANITARIAN LAW

3.1 Applicability of IHL in Principle

Whether IHL can apply to UN peace operations in the first place was controversial for a long time. In the early years of such operations, it was submitted that forces mandated or authorized by the UN could not be subject to the same rules as their opponents.³¹ Rather than being just another party to an armed conflict on the same footing as other parties, they should be considered as international policemen. And the same rules should not be applied to the policemen as to the criminals.

In the past, it has also been suggested that the UN was incapable of applying the 1949 Geneva Conventions, because it has territorial authority nor criminal or disciplinary jurisdiction. This was put forward by the representative of the UN Secretary-General during the drafting of the Additional Protocols of 1977.³²

Nowadays these views enjoy very little support. In 2017 the deputy Legal Counsel of the UN wrote that ‘the general question of whether IHL is applicable to UN peacekeeping operations could now be considered as a settled matter’.³³ This is clear from a wide variety of statements and documents of the UN and its member States. For example, the Guidelines on the Use of Force by Military Components in United Nations Peacekeeping Operations states that ‘The use of force in peacekeeping operations must comply with international laws, including applicable international humanitarian law’.³⁴ Perhaps the clearest indication was the promulgation in 1999 by the UN Secretary-General of the Secretary-General’s Bulletin on the Observance by United Nations Forces of International Humanitarian Law.³⁵ This Bulletin sets

³⁰ This could be seen as different in the case of a UN transitional administration, although in that case it can still be argued that the territory concerned is not the UN’s own territory but is merely administered by the UN.

³¹ See e.g., William Bivens, Josef Kunz, Leland Goodrich, Louis Sohn, Hans Kelsen and Clyde Eagleton, ‘Report of the Committee on the Study of the Legal Problems of the United Nations: Should the Laws of War Apply to United Nations Enforcement Action?’ (1952) 46 *American Society of International Law Proceedings* 216, 217.

³² International Committee of the Red Cross, Report of the Work of the Conference of Government Experts on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts (Geneva, 1971) 194, para 4.166.

³³ Stephen Mathias, ‘UN Peacekeeping: Legal Challenges and Uncertainties’ (2017) 18 *Melbourne Journal of International Law* 1, 5.

³⁴ United Nations Department of Peacekeeping Operations/Department of Field Support, Guidelines on the Use of Force by Military Components in United Nations Peacekeeping Operations (January 2017) 4, para 8.

³⁵ United Nations Secretary-General’s Bulletin on the Observance by United Nations Forces of International Humanitarian Law (1999) UN Doc ST/SGB/1999/13.

out fundamental principles and rules of IHL applicable to UN forces conducting operations under UN command and control.³⁶

The theoretical bases put forward for the UN being bound by IHL are largely similar to those concerning IHRL discussed in section 2 above. The prevailing view appears to be that the UN as an international legal person is bound by customary IHL because it undertakes activities – peace operations that use force – for which IHL is relevant.³⁷

3.2 When Does IHL Apply to a UN Peace Operation?

In contrast to the question whether IHL can apply in principle to a UN peace operation, which is now uncontroversial, there is discussion on when IHL applies to such an operation. Essentially, the question is whether the ‘normal’ test for determining whether IHL applies also applies to UN peace operations, or whether there is a different test for the latter.

The ‘normal’ test for the application of IHL to military forces is whether the State those forces represent has become a party to an armed conflict.

IHL instruments themselves do not define the term ‘armed conflict’. The definition set out by the International Criminal Tribunal for the former Yugoslavia (ICTY) in the *Tadić* case is generally considered as authoritative. The ICTY held that an armed conflict exists whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State.³⁸

IHL distinguishes between international (IAC) and non-international (NIAC) armed conflicts. In the above-mentioned ‘Tadić formula’, the ‘resort to armed force’, relates to IAC while the ‘protracted armed violence’ formulation relates to NIAC.³⁹

There is some debate whether any use of force between States triggers an IAC, or whether the violence needs to reach a minimum threshold. The updated ICRC commentary to the Geneva Conventions states that there is no such threshold.⁴⁰ Others argue that a minimum threshold of violence must be crossed before there is an IAC.⁴¹

³⁶ See e.g., Daphna Shrager, ‘UN Peacekeeping Operations: Applicability of International Humanitarian Law and Responsibility for Operation-Related Damage’ (2000) 94 *American Journal of International Law* 406.

³⁷ See e.g., Marten Zwanenburg, *Accountability of Peace Support Operations* (Martinus Nijhoff Publishers 2005) 151–158; Daphna Shrager, ‘The Applicability of the Laws of Armed Conflict to Peacekeeping Operations’ in Rain Liivoja and Tim McCormack (eds), *Routledge Handbook of the Law of Armed Conflict* (Routledge 2016) 420, 421.

³⁸ *Prosecutor v Duško Tadić* IT-94-1 (ICTY, 2 October 1995) [Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction] para 70.

³⁹ The criteria for the existence of a non-international armed conflict have subsequently been developed in further case-law, in particular of the ICTY and ICTR. This case-law also made clear that protractedness in the sense of duration is an element of the requirement of intensity of the armed confrontations. See International Committee of the Red Cross, *Commentary on the First Geneva Convention: Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field* (Cambridge University Press, 2016) 159.

⁴⁰ *Ibid.*, 85.

⁴¹ See for a detailed discussion Andrew Clapham, ‘The Concept of an International Armed Conflict’, in Andrew Clapham, Paola Gaeta and Marco Sassòli (eds), *The 1949 Geneva Conventions: A Commentary* (Oxford University Press, 2015) 3, 10–16.

As mentioned above, according to the ICTY the law of NIAC applies to situations of ‘protracted armed violence between governmental authorities and organized armed groups or between such groups within a State’. Two basic requirements flow from this definition of a NIAC: the armed violence must be of sufficient intensity and the parties must be sufficiently organized. The following are indicative factors in assessing whether the requirement of intensity is satisfied: the number, duration and intensity of individual confrontations; the type of weapons and other military equipment used; the number of persons and type of forces partaking in the fighting; the number of casualties; the extent of material destruction; and the number of civilians fleeing combat zones. As far as the requirement of organization is concerned, the following factors are relevant, with the understanding that State armed forces are presumed to be organized: the existence of a command structure and disciplinary rules and mechanism within the group; the existence of a headquarters; the fact that the group controls a certain territory; the ability of the group to gain access to weapons, other military equipment, recruits, and military training; its ability to plan, coordinate and carry out military operations, including troop movements and logistics; its ability to define a unified military strategy and use military tactics; and its ability to speak with one voice and negotiate and conclude agreements such as cease-fire or peace accords. The aforementioned factors must not be understood as an exhaustive checklist. Rather they are guidelines in distinguishing NIACs from situations in which violence occurs that does not go beyond internal disturbances and tensions such as riots, isolated and sporadic acts of violence, and other acts of a similar nature.

There appears to be no reason why the ‘normal’ test for determining whether a State has become a party to an armed conflict cannot be used also for UN peace operations. Indeed, this approach finds broad support in the literature.⁴²

The UN Secretary-General’s Bulletin on Observance by United Nations Forces of International Humanitarian Law is the only UN document which expresses itself on the threshold for the application of IHL to UN peace operations. The Bulletin applies ‘when in situations of armed conflict UN forces are engaged therein as combatants, to the extent and for the duration of their engagement.’ This provision does not provide much clarity, as it is somewhat circular, by referring to ‘armed conflict’ and ‘combatants’. The formulation can be read as being consistent with the ‘normal’ test for application of IHL discussed above.⁴³ It does raise questions concerning the application *ratione temporae* and *ratione personae*, however, which are discussed below.

3.3 Application Ratione Personae

The consequence of IHL becoming applicable is that members of armed forces of a State that is party to an armed conflict become legitimate targets under IHL for the duration of the conflict.⁴⁴ Applying this approach to UN peace forces would mean that all military personnel of

⁴² E.g., Leuven Manual (n 19) 93; Tristan Ferraro, ‘The Applicability and Application of International Humanitarian Law to Multinational Forces’ (2013) 95 *International Review of the Red Cross* 561, 582.

⁴³ See Mona Khalil, ‘Remarks’ (2014) 108 *American Society of International Law Proceedings* 152, 153; Katarina Grenfell, ‘Perspective on the Applicability and Application of International Humanitarian Law: The UN Context’ (2013) 95 *International Review of the Red Cross* 645, 650.

⁴⁴ With the exception of medical and religious personnel.

a mission could be targeted lawfully, wherever they are in the host State's territory, and even if they are located far away from the place where hostilities are taking place.

The UN Secretary-General's Bulletin suggests another approach, by stating that it applies 'when in situations of armed conflict UN forces are engaged therein as combatants, to the extent and for the duration of their engagement'. The words 'to the extent and for the duration' imply that only those members of the operation who take part in hostilities lose their protection from attack, and only for the time they engage in hostilities.⁴⁵ Under this approach, members of a UN operation are analogized to civilians taking a direct part in hostilities rather than to members of armed forces of a party to an armed conflict.

This approach also seems to have been followed by international courts and tribunals, specifically the International Criminal Tribunal for Rwanda, the Special Court for Sierra Leone and the International Criminal Court. In cases in which accused before these tribunals were prosecuted for attacking UN peacekeepers or taking them hostage, the tribunals inquired whether the peacekeepers were entitled to protection as civilians. To this end, they examined whether the peacekeepers were taking a direct part in hostilities at the time they were attacked or taken hostage. According to the tribunals, if that had been the case they would have become combatants⁴⁶ and as such legitimate targets for the extent of their participation in accordance with IHL.⁴⁷

An example is the the ICTY Trial Chamber in its judgment in the *Karadžić* case. In that case, the detention of personnel of UNPROFOR by the Bosnian Serbs was included in the indictment as hostage-taking. The defendant argued that the status of the UN personnel at the time of the alleged hostage taking was determinative for a finding on the existence of the crime. He argued that due to the NATO air strikes, the UN personnel were transformed into persons taking active part in the hostilities and were thus not entitled to the protections of common Article 3 to the Geneva Conventions.⁴⁸ The Trial Chamber held, as a preliminary matter, that the UN and its associated peacekeeping forces were not a party to the conflict.⁴⁹ It added that:

UNPROFOR was established and deployed pursuant to Security Council Resolution 743 as 'an interim arrangement to create the conditions of peace and security required for the negotiation of an overall settlement of the Yugoslav crisis'. While the details of its operations were enlarged and strengthened over the course of the conflict in order to preserve the security of its personnel and enable the implementation of its mandate, it remained a peacekeeping force. Accordingly, at the time the UN personnel were detained on 25 and 26 May 1995, they were persons taking no active part in the hostilities and, as such, were afforded the protection of Common Article 3. The NATO air strikes

⁴⁵ See Shraga (n 37) 423.

⁴⁶ The word 'combatant' is used here in a colloquial sense to reflect that they are individuals who have involved themselves in the hostilities, not to signify that they have combatant status as that notion is reflected, e.g., under Art 44 of Additional Protocol I.

⁴⁷ See *Prosecutor v Issa Hassan Sesay, Morris Kallon and Augustine Gbao* SCSL-04-15-T (SCSL, 2 March 2009) [Trial Chamber Judgement], para 234; *Prosecutor v Augustin Ndiindiliyimana, Augustin Bizimungu, François-Xavier Nzuwonemeye and Innocent Sagahutu* ICTR-00-56-T (ICTR, 17 May 2011) [Trial Chamber Judgment].

⁴⁸ *Prosecutor v Radovan Karadžić* IT-95-5/18-T (ICTY, 24 March 2016) [Trial Chamber Judgment] para 5942.

⁴⁹ *Ibid.*, para 5943.

of 25 and 26 May did not transform the status of all of the UN personnel in BiH into that of persons taking active part in hostilities.⁵⁰

The Trial Chamber appears to have equated UNPROFOR becoming a party to the conflict with peacekeepers taking an active part in hostilities.

Karadžić repeated his argument concerning the status of UN personnel on appeal. The Appeals Chamber of the Residual Mechanism for Criminal Tribunals (MICT) took the same approach as the Trial Chamber in equating the UN and its peacekeeping forces not being a party to the conflict with UN personnel not taking an active part in hostilities.⁵¹ Unlike the Trial Chamber however, it did not discuss whether the UN personnel had taken active part in hostilities. It did not find this necessary since even if they had been taking active part in hostilities, their detention would have rendered them hors de combat, triggering the protections of Common Article 3 including the prohibition on their use as hostages.⁵²

The International Criminal Court extended this approach to military personnel in a peace operation led by the African Union. The Pre-Trial Chamber concluded that personnel involved in peacekeeping missions enjoy protection from attack unless and for such time as they take a direct part in hostilities or in combat-related activities.⁵³ On the basis of the above, the international tribunals have concluded that personnel participating in a peace operation enjoy the protection afforded to civilians. If such personnel take a direct part in the hostilities when the peace operation is not itself a party to the armed conflict, they lose their protection from attack for such time as they do so.

The approach suggested in the UN Secretary-General's Bulletin and by international courts and tribunals in effect is an application by analogy of the rule that civilians who take a direct part in hostilities lose protection from attack. This rule, set forth in common Article 3 of the Geneva Convention and Article 51(3) of Additional Protocol I, provides that civilians enjoy protection from attack unless and for such time as they take a direct part in hostilities. Once they stop doing so, they regain protection. By applying this rule by analogy to peacekeepers, such peacekeepers are seen as equivalent to civilians.

The better view, it is submitted, is to see peacekeepers as equivalent to members of armed forces. Doing so is an acknowledgment of the fact that members of armed forces placed at the disposal of a UN peace operation remain in their national service. This approach is also more realistic than the one apparently taken in the UN Secretary-General's Bulletin and international courts and tribunals, for several reasons. First, it is much more logical to analogize UN peacekeepers with armed forces than with civilians. Like armed forces of a State, peacekeepers wear a uniform, are part of a chain of command and are authorized to carry and use arms. Second, it is clearer for all concerned. From the moment the peace operation becomes a party to an armed conflict, the status of the military members of the military component of the operation is equivalent to that of members of State armed forces in an armed conflict. Their status

⁵⁰ Ibid.

⁵¹ *Prosecutor v Radovan Karadžić* MICT-13-55-A (MICT, 20 March 2019) [Appeals Chamber Judgment] para 655.

⁵² Ibid., para 659.

⁵³ *Prosecutor v Bahar Idriss Abu Garda* ICC-02/05-02/09 (ICC, 8 February 2010) [Decision on the Confirmation of Charges] and *Prosecutor v Abdallah Banda Abakaer Nourain (Banda) and Saleh Mohammed Jerbo Jamus (Jerbo)* ICC-02/05-03/09 (ICC, 7 March 2011) [Corrigendum of the 'Decision on the Confirmation of Charges' Public Redacted Version].

does not change depending on whether or not at a particular moment they are taking a direct part in hostilities. It thereby avoids the need to determine when peacekeepers are taking a direct part in hostilities, which may be difficult because of the controversy surrounding the precise content of notion of taking a direct part in hostilities. Finally, it is quite unlikely that the opponent of a UN peace operation would accept a ‘revolving door’ approach to the protection of peacekeepers, under which under IHL it would be legal to attack them one moment but not the next. The sad fact is that this is illustrated by recent attacks on UN peacekeepers, in most cases in circumstances in which they were not taking a direct part in hostilities.

4. INTERRELATIONSHIP IHL AND IHRL IN PEACE OPERATIONS

4.1 Simultaneous Application of IHL and IHRL in UN Peace Operations

From the previous sections, it is clear that there may be situations in which a peace operation will be bound by both IHL and IHRL. This would be the case when the operation has become a party to an armed conflict, and when the operation exercises control over territory or over individuals. In the introduction it was posited that the increasing use of force by, or at least against, UN peace operations may lead them to become a party to an armed conflict. Although this means that there is a greater likelihood that contemporary UN peace operations may become a party to an armed conflict than many earlier operations, this should not be understood to mean that most or even many of them actually do. The suggestion that it is a ‘likely scenario’ during peace operations that human rights law and humanitarian law apply to the same situation, at this point in time appears to be an exaggeration.⁵⁴ For this, the fundamental principles of peace operations, the application of which point an operation in the direction of avoiding becoming a party to an armed conflict, appear to (still) play too important a role. There may nevertheless be situations in which a peace operation does become party to an armed conflict. In such situations, the question arises of the interplay between norms of IHL and of IHRL in a peace operation. The debate over the convergence of IHL and IHRL in peacekeeping operations has begun only recently.⁵⁵

4.2 Derogation

The interplay between IHL and IHR is envisaged to a certain extent in human rights treaties. These contain the possibility to derogate from certain, but not all, provisions in those treaties under certain circumstances.

The fact that the legal source of the UN’s human rights obligations is customary international law raises an interesting question in this regard: is it possible to derogate from customary international human rights law? It has been argued that this question is unsettled.⁵⁶ It has

⁵⁴ Wiesener (n 29) 264.

⁵⁵ Shraga (n 37) 429.

⁵⁶ Leuven Manual (n 19) 88.

also been posited that States cannot derogate from customary international human rights.⁵⁷ If that were the case, it is difficult to see how an international organization would be allowed to derogate.

It is difficult to transpose the trigger for derogations as laid down in human rights treaties to peace operations. Article 4 ICCPR requires that there be a ‘time of public emergency which threatens the life of the nation’. It can hardly be said that the circumstances in a peace operation are capable of threatening the life of the UN.⁵⁸ It has been persuasively argued however that the logic underlying the possibility of derogation in human rights treaties is similar to that in peace operations:

the arguments for requiring derogation at this international, transnational, or multinational level are arguably similar to those for the concept of derogation in human rights treaties, which derives from constitutional and political theory. In times of emergency, human rights may be derogated to protect the continuation of organized public power and, therefore, the ability to protect human rights more generally. The substantive purpose of derogation is similar, even if the same procedural mechanisms are not available.⁵⁹

Customary IHRL does not provide a mechanism for derogating from human rights that the UN can use. Rather, the legal means by which such substantive derogation occurs is a Security Council resolution under Chapter VII of the UN Charter.⁶⁰ How such a resolution can achieve this raises a number of questions, analysis of which is beyond the framework of this chapter.⁶¹

4.3 The Interplay Between IHL and IHRL in General⁶²

Broadly speaking, in case a situation is covered by a norm of IHL as well as a norm of human rights, there are three possible situations.⁶³ The first situation is one in which a norm from IHL and an overlapping norm of human rights can be applied without any difficulty.

The second situation is where an IHL and a human rights norm appear to conflict, but can be reconciled through interpretation of one of them. Such a complementary reading will often

⁵⁷ See e.g., Martin Scheinin and Mathias Vermeulen, ‘Unilateral Exceptions to International Law: Systematic Legal Analysis and Critique of Doctrines that Seek to Deny or Reduce the Applicability of Human Rights Norms in the Fight against Terrorism’ in Menno Kamminga (ed), *Challenges in International Human Rights Law Vol III* (Ashgate, 2014).

⁵⁸ Scott Sheeran, ‘Human Rights and Derogation in Peacekeeping: Addressing a Legal Vacuum within the State of Exception’ in Evan Criddle (ed) *Human Rights in Emergencies* (Cambridge University Press, 2016) 205, 223.

⁵⁹ *Ibid.*, 227.

⁶⁰ *Ibid.*, 237.

⁶¹ Questions include whether a resolution may implicitly derogate or only explicitly, and whether there are rights from which the Security Council cannot derogate and if so, which; see for a discussion, *inter alia*, Kjetil Mujezinović Larsen, *The Human Rights Treaty Obligations of Peacekeepers* (Cambridge University Press, 2012) 314–333.

⁶² See Marten Zwanenburg, ‘The Interplay of International Humanitarian Law and International Human Rights in Peace Operations’ in Erika de Wet and Jann Kleffner (eds), *Convergence and Conflicts of Human Rights and International Humanitarian Law in Military Operations* (Pretoria University Law Press, 2014) 121.

⁶³ See generally Jann Kleffner ‘Human Rights and International Humanitarian Law: General Issues’ in Terry Gill and Dieter Fleck (eds), *The Handbook of the International Law of Military Operations* (Oxford University Press, 2010) 51.

require that one of the two norms must be ‘read down’ from what its ordinary meaning would initially suggest or from how it is ordinarily applied.⁶⁴ In the case of an apparent conflict between norms of IHL and human rights, it is submitted that the norm that must be read down will usually be the human rights norm. This is necessary for the human rights norm to be capable of realistic application in time of armed conflict. A good example is the obligation to investigate in case of a death. This procedural obligation has been found by the Human Rights Committee and the ECtHR as implied by the substantive right to life.⁶⁵ The ECtHR in particular has further developed this procedural obligation in its case-law.⁶⁶ The Court has held that the procedural obligation under Article 2 continues to apply in difficult security conditions, including in a context of armed conflict.⁶⁷ It is clear however that not all of the requirements developed by the Court for peacetime situations can be implemented during an armed conflict in all circumstances.⁶⁸ The Court has accepted this. In its judgment in the *Al-Skeini* case it stated that:

It is clear that where the death to be investigated under Article 2 occurs in circumstances of generalised violence, armed conflict or insurgency, obstacles may be placed in the way of investigators and, as the United Nations Special Rapporteur has also observed, concrete constraints may compel the use of less effective measures of investigation or may cause an investigation to be delayed. Nonetheless, the obligation under Article 2 to safeguard life entails that, even in difficult security conditions, all reasonable steps must be taken to ensure that an effective, independent investigation is conducted into alleged breaches of the right to life.⁶⁹

In its judgment in *Varnava v Turkey*, the ECtHR appears to have interpreted the obligation to conduct an effective investigation in the light of IHL, in this way reconciling IHL and IHRL. The Court stated that:

Article 2 must be interpreted in so far as possible in 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. The Court therefore concurs with the reasoning of the Chamber in holding that in a zone of international conflict Contracting States are under obligation to protect the lives of those not, or no longer, engaged in hostilities. This would also extend to the provision of medical assistance to the wounded; where combatants have died, or succumbed to wounds, the need for accountability would necessitate proper disposal of remains and require the authorities to collect and provide information about the identity and fate of those concerned, or permit bodies such as the ICRC to do so.⁷⁰

⁶⁴ Marko Milanović, ‘Norm Conflicts, International Humanitarian Law and Human Rights Law’ in Orna Ben-Naftali (ed), *International Humanitarian Law and International Human Rights Law* (Oxford University Press, 2011) 95, 106.

⁶⁵ *McCann and Others v The United Kingdom* (1995) 21 EHRR 97, para 161.

⁶⁶ See Juliet Chevalier-Watts ‘Effective Investigations Under Article 2 of the European Convention on Human Rights: Securing the Right to Life or Onerous Burden on a State?’ (2010) 21 *European Journal of International Law* 701.

⁶⁷ *Al-Skeini and Others v The United Kingdom* App no 55721/07 (ECHR, 7 July 2011) para 16.

⁶⁸ See e.g., Kenneth Watkin ‘Controlling the Use of Force: A Role for Human Rights Norms in Contemporary Armed Conflict’ (2004) 98 *American Journal of International Law* 1, 33.

⁶⁹ *Al-Skeini and Others v The United Kingdom* App no 55721/07 (ECHR, 7 July 2011), para 164 (internal references omitted).

⁷⁰ *Varnava v Turkey* App no 16064/90, 16065/90, 16066/90, 16068/90, 16069/90, 16070/90, 16071/90, 16072/90 and 16073/90 (ECHR, 18 September 2009) para 185.

The ECtHR went even further in its judgment in *Hassan v UK*.⁷¹ This case concerned a person who was detained as a security detainee by the UK in Iraq, a situation in which the UK had not derogated from its obligations under the ECHR. Article 5 ECHR does not provide for security detention as a lawful ground of detention. The respondent government argued that Article 5 of the ECHR was displaced by IHL as *lex specialis*, or modified so as to incorporate or allow for the capture and detention of actual or suspected combatants in accordance with the Third and/or Fourth Geneva Convention. The ECtHR rejected the first argument but accepted the second. It relied on Article 31(b) and (c) of the Vienna Convention on the Law of Treaties (VCLT), which provide for taking into account subsequent practice of States parties and any relevant rules of international law applicable in the relations between the parties in interpreting a treaty provision. The ECtHR took into account that the practice of High Contracting Parties is not to derogate from their obligations under Article 5 in order to detain persons on the basis of the Third and Fourth Geneva Convention. It also held that Article 5 ECHR should be interpreted in so far as possible in the light of the general principles of international law, including IHL. The Court considered that:

even in situations of international armed conflict, the safeguards of the Convention continue to apply, albeit interpreted against the background of the provisions of international humanitarian law. By reason of the co-existence of the safeguards provided by international humanitarian law and by the Convention in time of armed conflict, the grounds of permitted deprivation of liberty set out in subparagraphs (a) to (f) [of Article 5] 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.⁷²

The Court applied the same approach to Article 5(4) ECHR, which is concerned with review of detention. It went quite far in accommodating IHL, to such an extent that it was prepared to read things into Article 5 that are not in the text of that Article. Although the wording of Article 5(4) quite clearly requires review of detention by a court, the ECtHR held that in the course of an international armed conflict this might not be practicable and that review by a ‘competent body’ as provided for by Articles 43 and 78 of the Fourth Geneva Convention suffices.

The third situation is where an IHL and an IHRL norm conflict, without there being any reasonable interpretation to avoid this conflict. Where courts are willing to go very far in interpreting human rights to take into account provisions of IHL which might seem a priori to conflict, as the ECtHR did in *Hassan v UK*, this situation will be exceptional. Where it does occur, however, a widely held view is that the maxim *lex specialis derogat legi generali* can help resolve the norm conflict. This maxim provides a standard for deciding which norm must be given precedence.

⁷¹ *Hassan v The United Kingdom* App no 29750/09 (ECHR, 16 September 2014).

⁷² *Ibid.*, para 104.

4.4 *Lex Specialis*⁷³

Lex specialis can be seen in terms of legal regimes or in terms of specific legal norms. A number of States have argued that the former is the case.⁷⁴ The better view however appears to be that the principle must be seen in terms of specific norms.⁷⁵ International courts have in general applied the maxim to the conflict of two specific norms and not as a general guideline for the relations between two specialized regimes.⁷⁶ In addition, the principle of *lex specialis* has a ‘contextual character’: it is applied to a particular set of facts. As a rule of precedence, it only comes into play when in a particular situation two norms that conflict are applicable: IHL and human rights as legal regimes cannot *a priori* be said to conflict. It is in relation to the specific facts of that situation that a determination needs to be made which norm is more specific.⁷⁷

It is much easier to state the *lex specialis* principle than to apply it in practice. The main question is which criteria must be applied to determine whether one norm is more specific than the other. It has been submitted that in general, the *lex specialis* is the rule which is more to the point, or approaches more closely the subject in hand, than a general one, and it regulates the matter more effectively than general rules do.⁷⁸ This is a quite general statement and not easy to apply to specific facts. A number of factors have been suggested that aid in determining which norm is more relevant to a given situation.⁷⁹

One of these is the wording and content of norms. When the norm uses terms that make it uniquely relevant to the conduct at hand, that rule may become the *lex specialis*. Examples are norms in IHL that refer to prisoners of war. The category of prisoner of war only exists in IHL and is narrower than ‘detention’ or ‘deprivation of liberty’ as used in IHRL.

⁷³ This section is based on Marten Zwanenburg, ‘The Interplay of International Humanitarian Law and International Human Rights in Peace Operations’ in Erika de Wet and Jann Kleffner (eds), *Convergence and Conflicts of Human Rights and International Humanitarian Law in Military Operations* (Pretoria University Law Press, 2014).

⁷⁴ E.g., Colombia; see Inter-American Commission on Human Rights ‘Report No 112/10: Inter-State petition IP-02: Admissibility: Franklin Guillermo Aisalla Molina, Ecuador – Colombia’ OAS Doc OEA/Ser.L/V/II.140, para 114; Russia has argued that international human rights law is of extremely limited application in periods of armed conflict and of no application at all in a situation of international armed conflict; *Georgia v Russia* App no 38263/08 (ECHR, 13 December 2011) [Decision] para 69.

⁷⁵ Martti Koskeniemi, ‘Fragmentation of international law: Difficulties arising from the diversification and expansion of international law’, Report of the Study Group of the International Law Commission (2006) UN Doc A/CN.4/L.682, para 112; Heike Krieger, ‘A Conflict of Norms: The Relationship between Humanitarian Law and Human Rights Law in the ICRC Customary Law Study’ (2006) 11 *Journal of Conflict & Security Law* 265, 269.

⁷⁶ Krieger. *ibid.*

⁷⁷ See e.g., Conor McCarthy ‘Legal Conclusion or Interpretative Process? *Lex Specialis* and the Applicability of International Human Rights’ in Roberta Arnold and Noelle Quéniévet (eds), *International Humanitarian Law and Human Rights Law: Towards a New Merger in International Law* (Martinus Nijhoff, 2008) 101, 109–110.

⁷⁸ Martii Koskeniemi, ‘Study on the function and scope of the *lex specialis* and the question of self-contained regimes’ (7 March 2004) UN Doc ILC(LVI)/SG/FIL/CRD.1, 4.

⁷⁹ See also Oona Hathaway, Rebbac Crootof, Philip Levitz, Haley Nix, Williams Perdue, Chelsea Purvis and Julia Spiegel, ‘Which Law Governs During Armed Conflict? The Relationship between International Humanitarian Law and Human Rights Law’ (2012) 96 *Minnesota Law Review* 1883, 1917–1923.

Another is the level of control exercised by the State. Human rights norms have developed largely based on a presumption that a State exercises effective control in its own territory. The demands that human rights place on a State presuppose that that State exercises a minimum level of control. This is reflected in the fact that being in effective control of an area or individual is seen as a requirement for the extraterritorial application of human rights. In contrast, IHL takes into account the limited control that States can exercise in the midst of hostilities. The exigencies of armed conflict expand the scope of permissible action while chaos, fear and timing limit the capacity of States to meet obligations reasonably expected of them in other contexts. This suggests that the greater the control a State exercises in a particular situation, the stronger the argument that the IHRL norm is the *lex specialis*.

A third factor is State practice. This factor reflects the fact that States are still the principal lawmakers in the field of international law. States' understanding of the relationship between their international obligations is an important factor to be taken into account. This argument is buttressed by the fact that Article 31(3) (b) of the VCLT provides that in treaty interpretation 'any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation is to be taken into account'.⁸⁰ The principle of *lex specialis*, although not expressly codified in the VCLT, is another principle of treaty interpretation. These different principles are not isolated, and must be read together with the other principles. In accordance with Article 31(3)(b) of the VCLT, subsequent State practice may imply that the States parties to a treaty regard a particular norm as *lex specialis* in relation to another. This aspect appears to be rarely, if ever, part of the operative use made by courts and tribunals of the *lex specialis* principle.⁸¹

The above approach to applying *lex specialis* in peace operations requires comparing specific norms of IHL and IHRL in specific situations.

Another approach that has been suggested takes as a starting point the existence of two paradigms. One is the law enforcement paradigm. The rules and principles of international law governing the conduct of law enforcement activities form the legal paradigm of law enforcement.⁸² These rules and principles largely consist of IHRL. The rules and principles of international law governing conduct of hostilities form the legal paradigm of hostilities.⁸³ These rules and principles largely consist of IHL. The question then becomes which paradigm applies in which circumstances, rather than whether a particular norm of IHL or IHRL takes precedence when they conflict.

The paradigm approach is intellectually and operationally attractive because it requires a determination at a more aggregated level. It lends itself much better for application in the planning of actions by peace operations, whereas the 'strict' *lex specialis* approach appears more appropriate for application *ex post facto* by a court to a specific situation.

⁸⁰ Vienna Convention on the Law of Treaties, 1155 UNTS 331 (adopted 22 May 1969, entered into force 27 January 1980).

⁸¹ With the exception of the ECtHR judgment in *Hassan v The United Kingdom* (n 69).

⁸² Nils Melzer and Gloria Gaggioli, 'Conceptual Distinction and Overlaps between Law Enforcement and the Conduct of Hostilities' in Terry Gill and Dieter Fleck (eds), *The Handbook of the International Law of Military Operations* (2nd edn, Oxford University Press 2015) 63.

⁸³ *Ibid.*, 70.

The paradigm approach raises two vexing questions however. First, it may be asked how this approach is grounded in the law. What is the legal basis for generalizing the application of specific rules of IHL and IHRL, which is what those legal regimes consist of, into paradigms?

Second, a challenge related to the paradigm approach is how to determine which paradigm to apply in a given situation. International law does not provide a clear-cut answer to this question, and different criteria have been suggested.⁸⁴ According to Wiesener, who applies the paradigm approach specifically to peace operations:

Under which paradigm a particular use of force falls is largely a question of facts. 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.⁸⁵

4.5 Interplay in Peace Operations – Specific Aspects

It may be noted first that UN doctrine for peace operations does not appear to address the interplay between IHL and IHRL. It is thus unclear if there is an institutional UN position on such interplay. It is highly likely that thought is given to this question when Rules of Engagement are drafted and approved for a UN force, but this is not made explicit and in any event such ROE are classified. It is also possible that such interplay is addressed in other mission-specific documents such as the Concept of Operations and specific Operational Orders, but these documents are also classified. It is highly desirable that the UN make its position clear on the interplay, if it has one. If it does not, it is highly desirable that it develop one. This will provide clarity both for troop contributing countries, as well as for the local population which may be confronted with the conduct of the operation.

Apart from IHRL and IHL, the mandate of a peace operation is another important part of the legal framework that applies to UN peace operations. This mandate is laid down in a mandating resolution of the Security Council. This resolution sets out, among other things, the tasks of the operation and whether it may use force beyond self-defence to achieve these tasks. It may also refer to the need for the operation to respect applicable IHL and IHRL, although, as discussed above, the legal basis for the application of that law can be found in customary international law.⁸⁶ Therefore, if the mandating resolution does not refer to IHRL or IHL, this does not mean that these legal regimes do not apply. Importantly, many mandating resolutions also reaffirm the so-called ‘basic principles’ of peacekeeping: consent of the parties, impartiality, and the non-use of force except in self-defence and defence of the mandate.⁸⁷ To a certain extent, the reference to these principles in the context of some operations appears to be a ritual incantation, in as much as they are very difficult to reconcile with certain elements

⁸⁴ *Ibid.*, 79.

⁸⁵ Wiesener (n 29) 248.

⁸⁶ See e.g., UN Security Council Resolution 2409 of 27 March 2018, op 21; UN Security Council Resolution 2448 of 13 December 2018, UN Doc S/RES/2448, op 53.

⁸⁷ See e.g., UN Security Council Resolution 2409, *ibid.*, p 2; UN Security Council Resolution 2448, *ibid.*, p 3.

of the mandate of those contemporary operations. For example, such operations frequently are authorized to use force beyond self-defence to achieve certain or all of their tasks, so that a reference to the principle of non-use of force except in self-defence is incongruous. At the same time, these principles still play an important role in the mind-set of (the leadership in) peace operations. The principles of consent of the parties, impartiality and non-use of force except in self-defence were key in the development of UN peace operations, and are still regarded as a central feature of such operations. They can be regarded as having become part of the DNA of UN peacekeeping, even if there may be tension between elements of the mandate of specific operations and these principles.⁸⁸ The principles instill an outlook which restricts the range of actions a UN peace operation can take, in particular when it comes to the use of force. This means that operations often take a more restrictive approach than required by the applicable law, in particular when it comes to the use of force. The 2017 report on the security of UN peacekeepers criticizes this from an operational perspective:

The United Nations should provide an updated interpretation of the basic principles for peacekeeping. Troops should not see the principles as restrictions on the initiative and the use of force. The principles should clarify that in high-risk areas featuring high-intensity conflicts (ambushes, for instance), troops should use overwhelming force and be proactive and preemptive. In battles and in fights, the United Nations needs to win, or troops, police and civilian personnel will die.⁸⁹

From a legal perspective, this approach means that the operation will in many cases act in conformity with the regime that is more strict in a particular situation, usually human rights law.⁹⁰ As a consequence, questions of the interplay between IHRL and IHL may be avoided in practice.

5. CONCLUSION

It is widely accepted that UN peace operations are bound by IHRL, and that they can also be bound by IHL in certain circumstances. The precise legal basis for, and modalities of, the application of these legal regimes is still surrounded by a greater or lesser degree of uncertainty. Regarding the legal basis, this chapter has argued that because peace operations are organs of the UN, such basis must be looked for in the international obligations of the UN rather than in those of the troop contributing States. Taking a different approach does not do justice to the fact that the UN has a separate international legal personality from States.

The acceptance that IHRL and IHL may apply to a peace operation opens up the possibility that the two regimes apply simultaneously to a UN peace operation. At the moment, this situation is not likely to arise frequently. This is because the factual criteria for the applica-

⁸⁸ See on this tension Scott Sheeran, 'The Use of Force in United Nations Peacekeeping Operations' in Marc Weller (ed), *The Oxford Handbook of the Use of Force in International Law* (Oxford University Press 2015) 348, 357–359.

⁸⁹ Improving Security of United Nations Peacekeepers (n 2), executive summary, 2.

⁹⁰ See e.g., Nigel White, 'Security Council Mandates and the Use of Lethal Force by Peacekeepers: What Place for the Laws of War?' in Nigel White, Caroline Harvey and James Summers (ed), *Contemporary Challenges to the Laws of War: Essays in Honour of Professor Peter Rowe* (Cambridge University Press 2014).

bility of IHL will usually not be met. The majority of peace operations simply do not become involved in protracted hostilities with a non-State armed group, let alone resort to armed force against a State. The so-called ‘basic principles’ of peace operations reinforce this situation, by instilling an outlook which restricts the range of actions a UN peace operation can take, in particular when it comes to the use of force.⁹¹ As a consequence, the only clear example of a UN operation having become a party to an armed conflict is through the actions of the Force Intervention Brigade of the UN operation in the DRC (MONUSCO).⁹²

Whether the applicability of IHL to peace operations will remain the exception depends to a large extent on the outcome of the ongoing debate concerning how robust UN peace operations should be. The more heavily armed operations become and the more they are given tasks and powers that are likely to bring them into conflict with non-state armed groups, the more likely it is that IHL will become applicable. In that case, the question of the convergence of IHL and IHRL in peace operations takes on increased importance. The debate on this convergence in peace operations has only begun recently.⁹³ At the moment, there are more questions than answers, some of which were discussed in this chapter.

For this reason, it is important for the UN to make clear its institutional position on the interplay between IHRL and IHL in peace operations. This will provide clarity both for troop contributing countries, as well as for the local population which may be confronted with the conduct of the operation.

A first step could be the promulgation of a Secretary-General’s Bulletin on the observance by UN operations of human rights, which would clarify first of all how the UN considers human rights law to apply to its peace operations. This could include the ‘trigger point’ for the applicability of IHRL to peacekeepers.⁹⁴ Such a Bulletin or other document could also provide guidance on the interplay between IHRL and IHL in case a peace operation becomes a party to an armed conflict. For this, the organization could make use of the experience that has been gained in the simultaneous application of the two legal regimes to MONUSCO.

⁹¹ Sheeran (n 5) 35.

⁹² See e.g., Devon Whittle, ‘The Intervention Brigade, MONUSCO, and the Application of International Humanitarian Law to United Nations Forces’ (2015) 46 *Georgetown Journal of International Law* 837; Khalil (n 43); it may be noted that, arguably, other operations such as MINUSMA in Mali and UNOCI in the Côte d’Ivoire have also become parties to an armed conflict.

⁹³ Shraga (n 37) 429.

⁹⁴ *Ibid.*